Louisiana Law Review

Volume 43 | Number 2
Developments in the Law, 1981-1982: A Symposium
November 1982

Evidence

George W. Pugh

James R. McClelland

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George W. Pugh and James R. McClelland***

RELEVANCY—OTHER CRIME EVIDENCE

Other Crime Evidence to Show Intent

Under what circumstances is it permissible to introduce other crime evidence to show that a person charged with the instant crime had the requisite intent? In the two-decade period immediately prior to *State v. Prieur*,[1] the court often took a very relaxed attitude towards the admissibility of other crime evidence.[2] *Prieur* reflected a firm rejection of this approach and an adoption of much more rigorous standards.

The holding of the court in the 1978 decision of *State v. Morris*[3] is a good example of the stricter post-*Prieur* approach. The defendant in *Morris* was charged with the murder of her child, and the prosecution sought to introduce evidence of certain prior child beatings by the same defendant. The majority of the court, speaking through Justice Tate, phrased the question presented as follows:

> [D]oes the circumstance that twice before the accused had beaten two of her other children, on occasions respectively six and three years prior to the present offense, tend to prove that she had beaten the present child with the specific intent to kill or seriously injure him? And, if so, does the probative value of this other-

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* Professor of Law, Louisiana State University. The writers express appreciation to Dana Bourgeois, Hope Stephens, and Donald Trahan for their very able assistance in the preparation of this article.

** Member, Louisiana Bar Association.

1. 277 So. 2d 126 (La. 1973). For a general discussion of the issue of other crime evidence, see G. PUGH, LOUISIANA EVIDENCE LAW 30-51 (1974) & 73-113 (Supp. 1978).

2. For a discussion of the pre-*Prieur* cases, see the excellent Comment, *Other Crimes Evidence in Louisiana—To Show Knowledge, Intent, System, Etc., in the Case in Chief*, 33 LA. L. REV. 614 (1973), *reprinted in* G. PUGH, *supra* note 1, at 30 (1974).

An outstanding example of such a relaxed attitude was State v. Morris, 245 La. 475, 157 So. 2d 728 (1963), where to show the defendant had the required specific intent to kill the victim in a barroom confrontation, the court upheld the admissibility of a guilty plea by the defendant to the murder of another barroom patron in another city seven years before.

3. 362 So. 2d 1379 (La. 1978), *discussed in* Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Evidence*, 40 LA. L. REV. 779, 781 (1980) [hereinafter cited as *1978-79 Term*].

> crime evidence in proving such specific intent outweigh its prejudicial effect, in that the jury may because of the prior incidents (and the defect of character thus exhibited) find such specific intent for the present beating, whatever its circumstance (no matter how light the blow may have been, for example)?[4]

Answering in the negative, the majority said it entertained doubt as to the relevancy of the other crimes. In its holding, the court stated, "Ultimately, we conclude that, whether or not so probative, its prejudicial effect far outweighs whatever probative value it might have in such respect, especially if the state (as it indicates) intends to go into extensive detail as to the circumstances of the previous offenses."[5]

It seems to these writers that the approach suggested in the recent case of *State v. McKeever*[6] is strikingly dissimilar from that taken by the court in the *Morris* case. The defendant in *McKeever* was charged with the shotgun murder of her "common law" husband. Apparently not denying that she had shot the victim, the defendant set up intoxication and insanity as a defense. The court, speaking through Justice ad hoc Kliebert, found that no error had been committed by the trial court in permitting the prosecution, on cross-examination of the defendant, to adduce evidence that the defendant had been convicted (apparently several years previously) of the negligent homicide of another "common law" husband under similar circumstances.[7] Although holding that the prosecutorial action was proper impeachment evidence under *State v. Jackson*,[8] the court in *McKeever* went on to state that the evidence would have been admissible apart from the impeachment purpose to show the intent required for murder. In the opinion of the writers, this language in *McKeever* seems to be contrary to the holding in *State v. Morris* and is subject to serious criticism, particularly so when it is considered that as to the earlier crime, McKeever had not been charged with murder, but only with manslaughter. Pursuant to a plea bargain in that case, she had been convicted of negligent homicide.[9] There is no suggestion that McKeever had a diabolical plan or system to liquidate lovers, and the fact that some time previously she may have shot and killed another "common

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4. 362 So. 2d at 1382.

5. *Id.*

6. 407 So. 2d 662 (La. 1981).

7. The negligent homicide conviction, it appears, had resulted from a plea bargain arranged in response to a manslaughter charge. The trial court precluded the prosecution from bringing this circumstance to the attention of the jury.

8. 307 So. 2d 604 (La. 1975). See text at notes 54-63, *infra*, for a discussion of this case.

9. See note 7, *supra*.

law" husband under similar circumstances has insufficient relevance, it is believed, to be admissible as tending to show that she specifically intended to kill the instant "common law" husband.

Other Crime Evidence to Show Identity

State v. Humphrey[10] is a very disturbing case. In the post-*Prieur*, pre-*Humphrey* decisions, the court took great pains to spell out the circumstances under which other crime evidence is admissible to show identity. The identity exception to the other crime exclusionary rule is one of the most challenging categories to delineate and one of the most dangerous. Despite the inherent difficulty involved, the court, by persistent efforts, carefully traced the contours of the exception and, in the process, narrowly limited its scope.[11] In the opinion of the writers, this approach is sound, for otherwise there is great danger that trial courts may relapse into the relaxed pre-*Prieur* approach to other crime evidence.[12]

When the facts of *State v. Humphrey*[13] were considered by the court the third time, the majority seemed to abandon the effort to delineate clearly the contours of the identity exception and instead seemed to take a noncategorical general balancing approach, *i.e.*, the court seemed to hold that where evidence is highly relevant to show identity of the malefactor, the trial court is to consider the particular facts and circumstances of each case and determine whether, in context, the probative value of the evidence outweighs the risk of undue prejudice.

The facts in *Humphrey* were challenging indeed. Two small illegitimate children were battered to death, and the prime suspects were their natural parents. In the case against the father for manslaughter of the children, the supreme court upheld the admissibility of evidence indicating that about four days prior to their death, their father had slapped and beaten them about the face and head.[14]

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10. 412 So. 2d 507 (La. 1982).

11. *See* State v. Hatcher, 372 So. 2d 1024 (La. 1979), *discussed in* Pugh & McClelland, *Developments in the Law, 1979-1980—Evidence*, 41 LA. L. REV. 595, 598 (1981) [hereinafter cited as *1979-80 Developments*]; State v. Lewis, 358 So. 2d 1285 (La. 1978), *discussed in* Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Evidence*, 39 LA. L. REV. 955, 962 (1979) [hereinafter cited as *1977-78 Term*]; State v. Frentz, 354 So. 2d 1007 (La. 1978), *discussed in 1977-78 Term, supra*, at 961; State v. Lee, 340 So. 2d 1339, 1345 (La. 1976) (Dennis, J., concurring).

12. *See* Comment, *supra* note 2, at 614.

13. 412 So. 2d 507, 519 (La. 1982) (on rehearing). Earlier the case was before the court on the same issue via writ of certiorari in State v. Humphrey, 381 So. 2d 813 (La. 1980).

14. For a case involving analogous but stronger facts supporting admissibility, see State v. Lafleur, 398 So. 2d 1074 (La. 1981).

Since the majority of the court concluded that evidence of the prior beatings of the same children by the defendant a few days previously was so relevant that it should have been admissible to show that he committed the instant crimes, it seems to these writers that rather than adopt a general balancing approach, it would have been preferable to expand the already recognized categorical exception relative to the admissibility, under certain circumstances, of other sex offenses with the same party.[15] It is to be hoped that in the future, the *Humphrey* approach, if not abandoned, will be narrowly limited to cases involving analogous facts.

Prieur Safeguards—Necessity for Limiting Instruction for Res Gestae Crimes

One of the safeguards as to other crime evidence listed in *State v. Prieur*[16] is that in the court's final charge to the jury, it shall be instructed as to the limited purpose of the other crime evidence. Is this safeguard applicable where the other crime evidence in question is admissible as part of the res gestae? *State v. Donahue*[17] holds in the negative. Although such an automatic instruction is not required, presumably the defendant is entitled to an instruction if he requests it.

Prieur Safeguards—Necessity for Advance Written Notice Where Other Crime Evidence is Admissible to Show Motive

State v. Prieur[18] did not list motive as one of the exceptions to the other crime exclusionary rule, but later cases have so recognized it.[19] Is the written notice requirement of *State v. Prieur* applicable to crimes admissible under this motive exception? In a very persuasive opinion in *State v. Goza*,[20] the court holds in the affirmative. The authors fully agree. All of the reasons underlying the notice requirement in *Prieur* are equally applicable to this situation.[21]

15. *See* State v. Acliese, 403 So. 2d 665 (La. 1981), including a forceful dissenting opinion by Chief Justice Dixon.

There is a close analogy between sex crimes and child beating. *See* State v. Comeaux, 319 So. 2d 897 (La. 1975), *discussed in* Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 609 (1977) [hereinafter cited as *1975-76 Term*], *reprinted in* G. PUGH, *supra* note 1, at 546 (Supp. 1978).

16. 277 So. 2d 126 (La. 1973).

17. 408 So. 2d 1262 (La. 1982).

18. 277 So. 2d 126 (La. 1973).

19. See the foundation case of State v. Abercrombie, 375 So. 2d 1170 (La. 1979), *discussed in 1979-80 Developments, supra* note 11, at 599.

20. 408 So. 2d 1349 (La. 1982).

21. As to which crimes are properly classified as fitting under the res gestae exception to *Prieur*, see State v. Schwartz, 354 So. 2d 1332 (La. 1978), *discussed in 1977-78 Term, supra* note 11, at 961.

Prieur Safeguards—Whether Necessary When Other Crime Evidence Used for Impeachment

In *State v. Feeback*,[22] a drug case, the defendant's witness on direct examination stated that in the twelve years she had known the defendant, he "had never distributed drugs to her."[23] Thereafter, on rebuttal, over the defendant's protest, the prosecution adduced testimony that the rebuttal witness had seen the defendant distribute drugs to the defense witness. The court held that the failure of the prosecution to have given a *Prieur* notice was of no moment because "[n]o notice is required to be given defendant of evidence offered to impeach the credibility of a witness."[24] Such broad language seems to run counter to the earlier case of *State v. Ghoram*.[25]

In the opinion of the writers, under the circumstances presented in *Feeback*, it may well have been proper for the prosecution, without having given notice, to introduce the rebuttal evidence in question. The defendant had "opened the door," and fairness seems to dictate that in this situation the prosecution should have been permitted to meet the testimony.[26] On the other hand, if the matter first had been inquired into by the prosecution, it is believed that an opposite result should have followed, as it did in *State v. Ghoram*.[27] In *Ghoram* the court stated, "We hold that the rules applicable to the introduction of prior offenses under R.S. 15:445 and 15:446 apply at every stage of the trial, including the State's cross-examination or rebuttal."[28]

RELEVANCY—CHARACTER EVIDENCE

Character of the Victim

Character of the victim is a difficult, recurring problem,[29] and *State v. Bryan*[30] is an interesting case concerning it. The defendant was convicted of murdering a deputy sheriff when the latter came to take

22. 414 So. 2d 1229 (La. 1982).

23. *Id.* at 1236.

24. *Id.* at 1237.

25. 290 So. 2d 850 (La. 1974), *discussed in* Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 527 (1975) [hereinafter cited as *1973-74 Term*], *reprinted in* G. PUGH, *supra* note 1, at 99 (Supp. 1978).

26. *See* State v. Betancourt, 351 So. 2d 1187 (La. 1977), *discussed in 1977-78 Term*, *supra* note 11, at 965.

27. 290 So. 2d 850 (La. 1974). *See also* State v. Smith, 401 So. 2d 1179 (La. 1981).

28. 290 So. 2d at 853.

29. *See* State v. Lee, 331 So. 2d 455 (La. 1976); Note, *Character and Prior Conduct of the Victim in Support of a Plea of Self Defense*, 37 LA. L. REV. 1166 (1977), *reprinted in* G. PUGH, *supra* note 1, at 62 (Supp. 1978).

30. 398 So. 2d 1019 (La. 1981).

him into custody. The defendant's defense was based on a contention that he had killed the deputy in self-defense and, alternatively, that the killing was "committed in a 'heat of passion' provoked by [the deputy sheriff's] misconduct."[31] In his case in chief, the defendant adduced evidence tending to show that the deputy sheriff had acted in a brutal fashion, using excessive force in making the arrest. In a per curiam decision on original hearing, the court stated that by this action the defendant "indirectly placed" the victim's character at issue.

With deference, it is submitted that the defendant's evidence tending to show that the victim used brutal and excessive force at the time of the alleged crime in question should not have been considered as placing the victim's character in issue,[32]—directly or indirectly—and this was recognized by a majority of the court in its opinion on rehearing, authored by Justice Lemmon.[33] As the phrase "putting character in issue" is generally used in this and similar contexts,[34] it means attempting to establish conduct on a particular occasion by showing the *kind of person* the actor is or, phrased differently, the character he possesses. Merely depicting the conduct of the deputy sheriff on the occasion in question as brutal and excessive is not this kind of evidence, although, of course, it may have had the incidental effect of implying that the victim was not a nice person.

In the opinion of the writers, since the defendant's action should not have been regarded, in a technical sense, as placing the victim's character in issue, it is questionable indeed as to whether the prosecution, in rebuttal, had the right to initiate inquiry into the character of the victim by offering evidence by the sheriff as to the victim's character.[35] In any event, even if the prosecution had been authorized

31. *Id.* at 1021 n.2.

32. *See* LA. R.S. 15:482 (1950).

33. In this connection, Justice Lemmon stated, "The state had initially placed at issue the question of [the deputy sheriff's] general reputation in this regard, and the evidence sought to be presented at the hearing on the motion for a new trial could have impeached the sheriff's testimony." 398 So. 2d at 1022.

34. *See* LA. R.S. 15:479-483 (1950); FED. R. EVID. 404; C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 187, at 443 (2d ed. 1972).

35. Unlike Federal Rules of Evidence 404(a)(2), no statute in Louisiana expressly authorizes the prosecution to initiate an inquiry into character under such circumstances, and an implication may be drawn from LA. R.S. 15:479-483 that the prosecution may not properly do so. (For a possible inference to this effect, see State v. Lejeune, 116 La. 193, 40 So. 632 (1906)). Despite criticism, *see* C. MCCORMICK, *supra* note 34, § 193; 1 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 63 n.2 (3d ed. 1940), it appears that prior to the Federal Rules of Evidence, a majority of American jurisdictions precluded such an inquiry. *See* 1 J. WIGMORE, *supra*, § 63 n.2; 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 404[06], at 404-43 (1981); Annot., 34 A.L.R.2d 451 (1954). In the opinion of the writers, a very forceful argument can be made in favor of the traditional American approach.

under the circumstances to go into the victim's character, the sheriff's testimony, by going much beyond general reputation, seemed to these writers to have gone far beyond the permissible ambit of acceptable testimony.[36] Instead of being restricted to general reputation, it went into the witness's personal opinion of the victim's character and the absence of complaints of similar instances in the past. The evidence in this connection was very damaging indeed to the defendant.[37] On rehearing, the court stated that "the sheriff's testimony probably had a devastating effect on the credibility of defendant's assertions of violent and aggressive behavior by [the deputy sheriff] . . . ."[38] No objection, however, appears to have been made by the defense with respect to the sheriff's testimony, and the supreme court therefore was not called upon to hold one way or the other as to the propriety of the prosecution's action.

On his unsuccessful motion in the trial court for a new trial, the defendant "alleged prior threats against defendant, along with several specific instances of police brutality on the part of [the deputy sheriff] or complaints to the Sheriff concerning this deputy"[39] and sought

> to present several witnesses who would testify that they had complained to the sheriff about [the deputy sheriff's] brutality in the course of arrests on prior occasions. He also sought to present another witness who allegedly overheard [the deputy sheriff] say that "he would get the defendant, Roger Bryan, one way or another."[40]

The supreme court remanded the case to the trial court for an evidentiary hearing to determine whether, under the circumstances, a new trial should be ordered.

In the opinion of the writers, since the prosecution had initiated the inquiry into the victim's character, the defendant should have been able to meet the matter head on had he offered counter evidence at the time.[41] Aside from this, as recognized by the court in its opinion

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36. *See* LA. R.S. 15:479 (1950). Character, whether good or bad, depends upon the general reputation that a man has among his neighbors, not upon what particular persons think of him. *See also* LA. R.S. 15:482 (1950); LA. R.S. 15:491 (1950) (relative to an analogous inquiry); FED. R. EVID. 404.

37. The sheriff testified that the deputy sheriff in question "was a just and temperate man who had never, to the witness' knowledge, mistreated arrestees." 398 So. 2d at 1020 (original hearing). The sheriff also testified that "during [the deputy sheriff's] five years with the department he had never received any complaints about abuse or mistreatment by [the deputy sheriff] or about [the deputy sheriff's] excessive use of force in making an arrest." *Id.* at 1021 (rehearing).

38. *Id.* at 1021.

39. *Id.* at 1020 (original hearing).

40. *Id.* at 1021-22.

41. *See* Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the*

on rehearing, the evidence was relevant to impeach the sheriff's testimony and, in the opinion of the writers, should have been admissible at least on that issue.[42] The matter is particularly disturbing in light of the fact that in oral argument on rehearing, the prosecution conceded that the sheriff "was erroneous in his testimony that he had never received any complaint about [the deputy sheriff's] conduct."[43]

COMPETENCY OF WITNESSES

Attorney as Witness

The fact that a person is an attorney in a case does not cause him to be incompetent as a witness therein.[44] Nevertheless, from the standpoints of both ethics and the administration of justice, serious problems may be presented if a person seeks or is called upon to serve both as an attorney in the case and as a witness.[45] It has been held that if a prosecuting attorney is to be a witness for the state in a criminal case, the prosecution of the case should be left to someone else.[46] What procedure is to be followed if defense counsel seeks to call the prosecuting attorney to the stand as a witness and the prosecuting attorney maintains that he is possessed of no relevant testimony?[47]

In *State v. Tuesno*,[48] defense counsel subpoenaed as a witness a prosecuting attorney—presumably one other than the one prosecuting the instant case—and the prosecution moved to have the subpoena quashed on the grounds that the testimony sought to be elicited was "hearsay, irrelevant, or a part of the District Attorney's work product."[49] Holding a hearing outside the presence of the jury, the trial judge examined the prosecuting attorney, held his testimony ir-

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1974-1975 Term—Evidence, 36 LA. L. REV. 651, 661 (1976) [hereinafter cited as *1974-75 Term*], *reprinted in* G. PUGH, *supra* note 1, at 159 (Supp. 1978).

42. *See 1977-78 Term*, *supra* note 11, at 964; *see also* C. MCCORMICK, *supra* note 34, § 57, at 131 ("Inadmissible Evidence as Opening the Door"); 1 J. WIGMORE, *supra* note 35, § 15.

43. 398 So. 2d at 1024 (Blanche, J., dissenting).

44. LA. CIV. CODE art. 2283; *see* State v. McCord, 340 So. 2d 317 (La. 1976).

45. *See* Gutierrez v. Travelers Ins. Co., 358 So. 2d 349 (La. App. 4th Cir. 1978), and authorities cited therein.

46. *See* State v. Franks, 363 So. 2d 518 (La. 1978); State v. McCord, 340 So. 2d 317 (La. 1976).

47. *See* State v. Franks, 363 So. 2d 518 (La. 1978) (the defendant has the right to call the district attorney as a witness where the district attorney is possessed of relevant information).

48. 408 So. 2d 1269 (La. 1982).

49. *Id.* at 1271.

relevant, and excused him from testifying. The action taken by the trial judge and the procedure he followed was upheld on appeal.

The procedure followed by the trial court in *Tuesno* seems to be an appropriate one, fairly and efficiently reconciling the conflicting interests involved, and within the court's inherent power.[50] It seems to these writers that it likewise is an appropriate procedure if the attorney subpoenaed is the one charged with prosecuting the case.[51]

EXAMINATION AND CROSS-EXAMINATION OF WITNESSES

Expert Witnesses—Right of Cross-Examination as to Qualifications

Brown v. Avondale Shipyards, Inc.[52] is an interesting case underlining the fact that if a party tenders a witness as an expert, the opposing party is entitled to a reasonable opportunity to cross-examine the witness as to the "extent of his qualifications and experience, his partiality or interest in the case, and other relevant matters that may effect [sic] the value that can be placed upon his opinions."[53] Because the trial judge had stated he had accepted the witness as an expert in a prior case and would accept him as such in the instant proceeding and refused to accord the opposing party an opportunity to cross-examine the witness along the lines indicated, the Fourth Circuit Court of Appeal granted writs, reversed the trial court's action, and authorized the requested cross-examination.

ATTACKING CREDIBILITY OF WITNESSES

Prior Convictions—Details of the Crime

In the controversial case of *State v. Jackson*,[54] it was held that in attacking the credibility of a witness, the cross-examiner could properly inquire into "the true nature of the offense" underlying a conviction. In *State v. Oliver*,[55] the court made clear that *Jackson* "must be

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50. *See* LA. CODE CRIM. P. art. 17.

51. The California legislature has adopted an analagous procedure to use when one of the litigants seeks to call the judge in the case as a witness. CAL. EVID. CODE § 703 (West 1966).

52. 413 So. 2d 183 (La. 1982).

53. *Id.* at 184.

54. 307 So. 2d 604 (La. 1975), *discussed in* Pugh & McClelland, *Developments in the Law, 1980-1981—Evidence*, 42 LA. L. REV. 659, 665 (1982) [hereinafter cited at *1980-81 Developments*]; Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence*, 38 LA. L. REV. 567, 578 (1978) [hereinafter cited as *1976-77 Term*]; *1974-75 Term, supra* note 41, at 662, *reprinted in* G. PUGH, *supra* note 1, at 171 (Supp. 1978).

55. 387 So. 2d 1154 (La. 1980), *discussed in 1980-81 Developments, supra* note 54, at 665.

narrowly, rather than broadly, construed."[56] Now, in *State v. Martin*,[57] the court on rehearing, in an opinion by Justice Dennis, makes clear that even under *Jackson* a witness is not to be examined about "counts of the indictment upon which he was not convicted."[58] The court said that "although a careful prosecuting attorney will refrain"[59] from adverting to the indictment charging the offense underlying the prior conviction, "prejudicial error does not occur under La. R.S. 15:495 upon mere reference to an indictment count upon which the defendant was convicted."[60] More significant, perhaps, is the court's unanimous pronouncement that

> [a]s Professor McCormick observes, the more reasonable practice, minimizing prejudice and distraction from the issues, is the generally prevailing one that beyond the name of the crime, the time and place of conviction and the punishment, further details such as the name of the victim and the aggravating circumstances may not be inquired into.[61]

In the later case of *State v. Connor*,[62] the court said that "[m]inor details of far ranging and irrelevant matters such as conditions of probation, alleged but uncharged offenses and charges dropped in response to a guilty plea may not be used to cast doubt on a defendant's credibility."[63] It found, however, that under the circumstances of this case, inquiry concerning dropped charges did not constitute reversible error. In the opinion of the writers, *Jackson* is the source of introduction of much inappropriate evidence and it is to be hoped that in the not too distant future its unorthodox doctrine will be overruled.

Access to "Rap Sheets" of Prosecution Witnesses

In two very interesting cases, there were important pronouncements concerning a criminal defendant's pretrial access to the "rap sheets" of state witnesses. In a memorandum decision in *State v. Huffman*,[64] the court, relying on *State v. Harvey*,[65] granted defendant's writ application and without qualification, laconically stated, "The defendant is entitled to receive copies of 'rap sheets' of state

56. 387 So. 2d at 1156.
57. 400 So. 2d 1063 (La. 1981).
58. *Id.* at 1075.
59. *Id.*
60. *Id.*
61. *Id. See* C. MCCORMICK, *supra* note 34, § 43 at 88.
62. 403 So. 2d 678 (La. 1981).
63. *Id.* at 680.
64. 401 So. 2d 1187 (La. 1981).
65. 358 So. 2d 1224 (La. 1978).

witnesses."[66] Further, in a concurring opinion in *State v. Washington*,[67] Justice Calogero significantly opined that *Brady v. Maryland*[68] requires that if a defendant makes an appropriate pretrial request, the prosecution should "make an affirmative effort to obtain the requested materials on essential witnesses, if they are otherwise inaccessible to the defense."[69]

Reputation Testimony—"Neighborhood" Limitation

Where the veracity of a witness is sought to be attacked by showing that "his general reputation for truth or for moral character is bad,"[70] the inquiry as to such reputation traditionally was limited to his reputation in the community in which he lived.[71] In an analogous context—where the reputation evidence is offered to show commission or noncommission of the charged criminal act—Louisiana law speaks in terms of the reputation the person has "among his neighbors."[72] In the latter context, emphasizing changed living patterns, the court in *State v. Walker*[73] gave the word "neighbors" an expanded interpretation. This approach was continued in *State v. Clark*,[74] where the court, in light of modern trends and authorities, took the position that

> proof may be made not only of the reputation of the person where he lives, but also of his repute, as long as it is "general" and established, in any substantial community of people among whom he is well known, such as the group with whom he works, does business or goes to school.[75]

Character Witnesses—Awareness of Report of Defendant's Unconstitutionally Obtained Convictions

It is now well established that a witness may not be impeached by an unconstitutionally obtained conviction.[76] It has also been held that to attack a character witness's knowledge and standard of reputation, a witness may be asked whether he has heard about the defendant's arrest for a pertinent crime, where the proper safeguards have

66. 401 So. 2d at 1187.
67. 407 So. 2d 1138 (La. 1981).
68. 373 U.S. 83 (1963).
69. 407 So. 2d at 1150.
70. LA. R.S. 15:490 (1950).
71. *See* C. MCCORMICK, *supra* note 34, § 191 at 456.
72. LA. R.S. 15:479 (1950).
73. 334 So. 2d 205 (La. 1976), *discussed in 1976-77 Term, supra* note 54, at 571-72.
74. 402 So. 2d 684 (La. 1981).
75. *Id.* at 687.
76. Loper v. Beto, 405 U.S. 473 (1972); State v. Bernard, 326 So. 2d 332 (La. 1976).

been followed.[77] Should it also be held that a character witness may be asked whether he has heard that the defendant has been convicted of another crime where in fact that conviction had been obtained in violation of the defendant's right to counsel? The problem is an intriguing one and can be forcefully argued either way.

In *State v. Williams*,[78] in an opinion authored by Justice ad hoc Jones, the court, reasoning analogically from the cases dealing with reports of prior arrests, held that, assuming proper safeguards are complied with, a character witness may be asked whether he had heard about an unconstitutionally obtained conviction. In the opinion of the writers, it would have been preferable for the Louisiana court to have precluded such a question.[79] To let this testimony in is to twice scar the defendant by the unconstitutional conviction earlier obtained by the state. Rather than thus reap the benefits of an unconstitutional conviction, the prosecution, it is believed, should have been forced to content itself with asking the character witness whether he had heard of the presumably constitutional arrest and should not have been permitted to ask about the unconstitutionally obtained conviction.

Prior Inconsistent Statements—Foundation Requirement

Louisiana Revised Statutes 15:493 provides that before a witness's credibility may be attacked by extrinsic evidence of a prior inconsistent statement, the witness "must first be asked whether he has made such statement, and his attention must be called to the time, place and circumstances, and to the person to whom the alleged statement was made." *State v. Lafleur*[80] seems to these writers to represent an excessively strict application of the rule.

Both the defendant and the woman with whom he was living had been charged in connection with the death of the woman's child, and the woman testified on behalf of the prosecution at the trial of the defendant. Apparently, her testimony was extremely damaging to the defendant. On cross-examination by defense counsel, the woman conceded that she had pleaded guilty to manslaughter and was asked whether she remembered, while in the parish jail, "telling an inmate there that [the defendant] had absolutely nothing to do with the killing."[81] She answered in the negative and persisted in her denial,

77. State v. Johnson, 389 So. 2d 372 (La. 1980), *discussed in 1980-81 Developments, supra* note 54, at 659-60.

78. 410 So. 2d 217 (La. 1982).

79. Other jurisdictions have taken this position. *See* Houser v. State, 234 Ga. 209, 214 S.E.2d 893 (1975); Taylor v. State, 273 Md. 150, 360 A.2d 430 (1976).

80. 398 So. 2d 1074 (La. 1981).

81. *Id.* at 1078.

despite firm warnings by defense counsel that he would "produce witnesses who will say that you told them that [the defendant] had absolutely nothing to do with it."[82] Further, the witness denied that she had implicated the defendant in the crime because he had mistreated her while they were living together. Holding that defense counsel had not laid a proper foundation, the trial court precluded the defendant from adducing the testimony of the impeaching witness. The defendant was convicted of first degree murder and appealed. Affirming the conviction, the supreme court agreed with the trial court that the defendant had failed to lay the requisite foundation. The court specified that defense counsel had not called the witness's attention to the time and place[83] of the alleged statement, the person to whom the remark was made, or the circumstances under which the statement was uttered. Further, the supreme court noted that although defense counsel had spoken of witnesses, only one witness was involved.

In the opinion of the writers, the reasons underlying the foundation requirement were substantially satisfied, *i.e.*, the information imparted to the witness was sufficiently precise to remind her of the alleged statement, to give her an opportunity to admit it, and to prevent her and the prosecution from being "sand-bagged" by surprise production.[84] Perhaps the law is justified in requiring the strictest foundation as to a chance remark of a less material character—one that might easily be forgotten if not very specifically called to the witness's attention—and this is especially so where the remark is about a peripheral matter in the case. In the instant case, however, it is unthinkable to these writers that in the face of such a foundation, the witness would not recall the statement if she had made it—unless she had made so many like statements that she was unable to recall and identify the precise one referred to by defense counsel. The witness to be impeached was a critical one for the prosecution, and refusing to let defense counsel adduce the testimony in question seems particularly inappropriate when it is recalled that this was a murder case and that the prosecution witness in question was highly

82. *Id.*

83. The impeaching witness was a trustee in the jail and had broader access than most to places in the jail.

84. *See* C. MCCORMICK, *supra* note 34, § 37. It is interesting that the Federal Rules of Evidence have adopted a much more relaxed approach to this problem. *See* FED. R. EVID. 613(b) & advisory committee note. Rule 613(b) provides: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require." For a discussion of the federal approach, see 3 J. WEINSTEIN & M. BERGER, *supra* note 35, § 613[04].

suspect in light of the fact that she had apparently pleaded guilty to manslaughter of the very same victim, presumably in consequence of a plea bargain. The defendant maintained that the impeaching witness was his most important witness and implied that the prosecution witness bore animosity toward the defendant. Under the circumstances, to deny the defendant the opportunity to attack the witness's credibility by adducing the very damaging and highly relevant prior inconsistent statement raised serious questions as to whether the defendant was denied his constitutional rights of confrontation and compulsory process.[85]

Prior Inconsistent Statement—Right to Judicial In Camera Inspection of Prosecution Witnesses' Prior Statements

A long line of cases have dealt with efforts by defense counsel in criminal cases to gain access to pretrial statements by prosecution witnesses for use in cross-examination of such witnesses.[86] Of great importance in this development was Justice Tate's concurring opinion in *State v. Babin*.[87] In *State v. Davenport*,[88] an opinion authored by Justice ad hoc Swift (one justice dissenting), the court makes it clear that a defendant who makes a timely specific request has a broad right to a judicial *in camera* inspection of written or recorded statements obtained by the state from prosecution witnesses. The *in camera* inspection is to be used to determine materiality of the statements and possible "inconsistencies with . . . trial testimony or other evidence favorable to the accused."[89]

SUPPORTING CREDIBILITY OF WITNESSES

Rehabilitation of Witnesses—Prior Consistent Statements

Louisiana Revised Statutes 15:496[90] provides that if a witness's testimony has been "assailed," prior consistent statements made at an unsuspicious time are admissible to corroborate the witness's

85. *See* Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973).

86. *See* State v. Babin, 319 So. 2d 367 (La. 1975); G. PUGH, *supra* note 1, at 681-91 (1974) & 628 (Supp. 1978).

87. 319 So. 2d 367, 372 (La. 1975), *discussed in 1979-80 Developments, supra* note 11, at 603; *1975-76 Term, supra* note 15, at 592, *reprinted in* G. PUGH, *supra* note 1, at 628 (Supp. 1978).

88. 399 So. 2d 201 (La. 1981). *See also* State v. English, 400 So. 2d 1389 (La. 1981).

89. 399 So. 2d at 204.

90. LA. R.S. 15:496 provides: "When the testimony of a witness has been assailed as to a particular fact stated by him, similar prior statements, made at an unsuspicious time, may be received to corroborate his testimony."

testimony. Importantly, however, the very next article, 15:497,[91] appears to limit the broad applicability of 15:496 by specifying that where a witness has been impeached by a prior inconsistent statement, a prior consistent statement is admissible only if there has been a claim of recent fabrication or "improper or interested motive," in which case the prior consistent statements, to be admissible, must have been made prior to the occasion giving rise to the alleged motive to falsify.[92]

Relying on Louisiana Revised Statutes 15:496 and *State v. St. Amand*,[93] and not mentioning 15:497,[94] the Third Circuit Court of Appeal, in *Baltzar v. Missouri Pacific Railroad*,[95] stated that a prior

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91. LA. R.S. 15:497 provides:

> Evidence of former consistent statements is inadmissible to sustain a witness who has been impeached by proof of former inconsistent statements, unless his testimony be charged to have been given under the influence of some improper or interested motive, or to be a recent fabrication, in which case, in order to repel such imputation, it is proper to show that the witness made a similar statement at a time when the supposed motive did not exist and the effect of such statement could not be foreseen. But when a witness has been impeached by evidence of declarations inconsistent with his testimony, he can not be corroborated by statements made subsequent to such declarations.

92. For a discussion of the impact of the improper motive-recent fabrication claim, see C. MCCORMICK, *supra* note 34, § 49. *See also* FED. R. EVID. 801(d)(1) & advisory committee notes. For a critical analysis of LA. R.S. 15:496-497, see Note, *Rehabilitation of Witnesses in Louisiana*, 12 TUL. L. REV. 286 (1938).

93. 274 So. 2d 179 (La. 1973).

94. *State v. St. Amand* had also failed to mention LA. R.S. 15:497. Instead, the court relied on State v. Waggoner, 39 La. Ann. 919, 3 So. 119 (1887) and State v. Fontenot, 48 La. Ann. 283, 19 So. 113 (1896).

In *Waggoner*, in upholding the prosecution's efforts to introduce a prior corroborative statement, the court noted that

> [t]he object of the defense was to impair the force and effect of the boy's testimony by showing that he had previously denied any knowledge of the homicide, and that his statements on the trial were the result either of corrupt influences or motives or of malice towards the accused.

39 La. Ann at 922, 3 So. at 120. The court relied in part on Wharton's *Criminal Evidence* and noted that "On the other hand, where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence be rebutted." 39 La. Ann. at 922, 3 So. at 121 (quoting F. WHARTON, EVIDENCE IN CRIMINAL CASES § 492).

In *Fontenot*, although the court did not clarify exactly under what circumstances a prior consistent statement should be admissible to corroborate, the court emphasized the importance of the consistent statement having been made prior to the alleged prior inconsistent statement. The court stated: "We think that, where evidence has been offered tending to show bias, improper motive, or recent fabrication on the part of a witness, statements accounting for the testimony given, made prior to the contradition proved on the other side, is [sic] admissible." 48 La. Ann. at 285, 19 So. at 114.

95. 406 So. 2d 324 (La. App. 3d Cir. 1981).

consistent statement is admissible to support a witness's credibility where the same has been "assailed" by a prior inconsistent statement. The court placed no limitation whatsoever upon the reception of prior consistent statements of a witness whose testimony had been "assailed"—not even specifying, as does 15:496, that the prior consistent statement, to be admissible, must have been given at an unsuspicious time. Although the prior consistent statement in question was presumably given prior to the time of the alleged inconsistent statement (a statement made during the course of a deposition), it does not appear to have been given at an unsuspicious time. It was made two days after the accident by one who, it appears, was employed by the railroad, and the statement was self-serving in character. It appears to these writers that the earlier *St. Amand* case was overly broad in its general statement and the holding in *Baltzar* that the prior consistent statement was admissible is questionable.

WITNESSES—RIGHT TO PREPARE FOR TRIAL

Pretrial Right to be Furnished Names of Witnesses

The Louisiana Code of Criminal Procedure provides that a defendant is not entitled to "statements made by the witnesses or prospective witnesses, other than the defendant, to the district attorney, or to agents of the state."[96] In addition to immunizing from discovery similar materials of the defense, article 728 expressly provides that the defendant shall not be required to furnish "the names of defense witnesses or prospective defense witnesses." Is it to be inferred that the trial court, under appropriate circumstances in advance of trial, may order the prosecution to furnish the names of persons it plans to call as witnesses or, even more broadly, the names of persons it has interviewed in connection with the case? The matter was before the court in *State v. Walters*.[97]

In *Walters*, the defendant, a police officer, had been charged with negligently shooting persons at a Mardi Gras parade in New Orleans. Not surprisingly, he foresaw great difficulty in securing the names of witnesses to the alleged incident and requested that the prosecutor provide him with "the names and addresses of all witnesses interviewed by the district attorney's office and/or any other state agency."[98] Analyzing the comparable provisions in the statutes, the court stated, "On the basis of simple statutory construction, the difference is obvious and there seems to be, therefore, an intentional

96. LA. CODE CRIM. P. art. 723.
97. 408 So. 2d 1337 (La. 1982).
98. *Id.* at 1338 n.1.

legislative disclaimer on the state's discovery of the *names* of witnesses which is not paralleled as relates to defense discovery."[99] In affirming the action of the trial judge, a divided court, noting the special circumstances of the case, relied upon the discretion of the trial court and stated, "It has long been a mainstay of concepts of fundamental fairness, due process and the constitutional right to counsel that a defendant and his attorney have the opportunity to prepare adequately for trial."[100]

In the later per curiam decision in *State v. Washington*,[101] the members of the court indicated that *State v. Walters* is to be given narrow scope. In reversing the judgment of the trial court ordering the prosecution to furnish the defense with the names, addresses, and telephone numbers of state witnesses, the majority of the *Washington* court stated:

> In the cases before us there was no determination that there exist peculiar and distinctive reasons why fundamental fairness dictates discovery. Nor does the record reflect any such showing by the defendant. Therefore we reverse the ruling of the trial judge and return the cases to the district court for re-trial of the discovery motions.[102]

From *Washington*, it follows that for the defendant to gain the right to such discovery, he will have to make a strong showing of need, as in *Walters*.

PRIVILEGE

Forcing Assertion Before Jury

If trial counsel knows that a person would assert a valid privilege not to testify if called as a witness by him, but believes that whether or not so permitted by law,[103] the jury, if it knows of the assertion of privilege, is likely to draw an inference therefrom favorable to his client, may counsel properly force the witness to assert the privilege in open court?

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99. *Id.* at 1340.

100. *Id.*

101. 411 So. 2d 451 (La. 1982).

102. *Id.* at 451.

103. *See* LA. CODE CRIM. P. arts. 770 & 771; State v. Bennett, 357 So. 2d 1136 (La. 1978); Note, *The Use of A Witness's Privilege for the Benefit of A Defendant*, 37 LA. L. REV. 1244, 1246 (1977), and cases and authorities cited therein. *See also* FED. R. EVID. 513, as promulgated by the United States Supreme Court but not adopted by Congress, 56 F.R.D. 183, 260 (1972).

State v. Day[104] concerns an aspect of this problem. In broad, emphatic language, the court in *Day* held that if the prosecutor knows that a criminal defendant's wife would assert her privilege not to testify against her husband,[105] he may not force her to assert the privilege before the jury, nor may he use the fact of such a claimer of privilege as the basis for arguing that adverse inferences should be drawn against the defendant. In so holding, the court relied on recent Louisiana cases[106] and on "minimum standards" adopted by the American Bar Association.[107] Language in the opinion indicates that the same rule would also apply to analogous action by defense counsel in a criminal case.

Although the writers fully agree with the holding in the instant case, they seriously question whether the same rule should inexorably apply against a defendant in a criminal case, who, because of privilege created by the state, is thwarted from adducing relevant reliable evidence in his defense. Under certain circumstances, to deny the defendant at least the benefit of an inference flowing from the assertion of privilege might violate his constitutional right to compulsory process.[108] Although by no means clear, there is arguably an indication in the later case of *State v. Johnson*[109] that a different rule might be adopted if the defendant in a criminal case is prevented from adducing relevant, material evidence by a prospective witness's valid claimer of a privilege against self-incrimination.

Another question of considerable interest is whether the court will adopt a similar rule in civil cases—whether a litigant will be barred from forcing privilege assertion in open court or arguing that adverse inferences may be drawn from a witness's claimer of privilege.[110] Further, what rules are to be applied when the person

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104. 400 So. 2d 622 (La. 1981). *See also* State v. Smith, 408 So. 2d 1110 (La. 1981); State v. Thomas, 406 So. 2d 1325 (La. 1981).

105. LA. R.S. 15:461(2) (1950).

106. State v. Bennett, 357 So. 2d 1136 (La. 1978), *discussed in 1977-78 Term, supra* note 11, at 978; State v. Berry, 324 So. 2d 822 (La. 1975), *discussed in 1975-76 Term, supra* note 15, at 598, *reprinted in* G. PUGH, *supra* note 1, at 237 (Supp. 1978); State v. Haynes, 291 So. 2d 771 (La. 1974), *discussed in 1973-74 Term, supra* note 25, at 542, *reprinted in* G. PUGH, *supra* note 1, at 214 (Supp. 1978).

107. NATIONAL JUDICIAL CONFERENCE ON STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE, STANDARD RELATING TO PROSECUTION FUNCTION § 5.7(c) & STANDARD RELATING TO DEFENSE FUNCTION § 7.6(c) (1972).

108. *See* Davis v. Alaska, 415 U.S. 308 (1974); *1975-76 Term, supra* note 15, at 586, *reprinted in* G. PUGH, *supra* note 1, at 165 (Supp. 1978); *1973-74 Term, supra* note 25, at 538, *reprinted in* G. PUGH, *supra* note 1, at 168 (Supp. 1978). Note, *supra* note 103, at 1250.

109. 404 So. 2d 239 (La. 1981).

110. *See generally* Baxter v. Palmigiano, 425 U.S. 308 (1976); Marine Midland Bank v. John E. Russo Produce Co., 50 N.Y.2d 31, 405 N.E.2d 205, 427 N.Y.S.2d 961 (1980);

asserting the privilege is himself a party litigant?[111]

Attorney-Client Privilege—Statements to Non-Lawyer Prison Inmate Legal Advisor

If a non-lawyer inmate in a public correctional facility is assigned to its law library to assist fellow inmates with their legal problems by "writing letters, preparing pleadings, and otherwise giving them whatever advice he could," are statements made to such a person to be clothed with the protection of the attorney-client privilege? This was the fascinating question presented to the court in *State v. Spell.*[112] Noting that the fellow inmate was not an attorney and that this fact was known to the defendant, the court denied the claim of privilege. In so holding, the court relied in part on *State v. Lassai,*[113] wherein a communication to a non-physician, non-social worker counsellor in a drug abuse center was held not to be privileged.

With deference, it is submitted that the communication in *Spell* should have been accorded privileged status. Unlike *State v. Lassai,* the privilege at issue was a common law privilege[114] which existed independently of statute and one that was entitled to very high protection indeed. Extending the attorney-client privilege slightly to cover this type communication would implement the reasons underlying the privilege. Although not licensed as an attorney, the inmate counsellor had been placed in the library by state authorities to serve a function otherwise performed by an attorney, and there was no indication in the opinion that the subject matter of the communication in question was not within the ambit of the duties assigned to him. Further, confidence is important to the relationship with an inmate counsellor, much as it is to the relationship with an attorney counsellor. If a state institution provides a non-lawyer inmate counsellor and has him do the sort of things a lawyer does,[115] should not the communications made to him be similarly privileged? If society is not to accord a privilege to such communications with an inmate counsellor, it may have to provide a licensed attorney for inmate consultation.

Nantz v. Employment Sec. Comm'n, 290 N.C. 473, 226 S.E.2d 340 (1976); 8 J. WIGMORE, *supra* note 35, § 2272 at 439 (rev. ed. 1961); FED. R. EVID. 513, as promulgated by the United States Supreme Court but not adopted by Congress, 56 F.R.D. 183, 260 (1972).

111. *See* Baxter v. Palmigiano, 425 U.S. 308 (1976); 8 J. WIGOMRE, *supra* note 35, § 2272 at 439 (rev. ed. 1961).

112. 399 So. 2d 551 (La. 1981).

113. 366 So. 2d 1389 (La. 1978).

114. *See* C. MCCORMICK, *supra* note 34, §§ 87 & 97.

115. *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Johnson v. Avery, 393 U.S. 483 (1969).

Informer Privilege—Identity of Informant

In a very interesting memorandum decision, *State v. Fischbein*,[116] the court, in response to a writ application, directed the trial judge to make an *in camera* inspection of "the file which was shown to the defense counsel and make a determination as to whether the informant was a participant in the crimes charged."[117] If the informant was found to have been such a participant and the state did not abandon its efforts to bring the defendant to trial, defense counsel was to be notified of the identity of the informant prior to trial. This problem is explored in depth in an able comment published earlier in this review.[118]

Privilege Against Self-Incrimination v. Right of a Criminally Accused to Adduce Evidence—Availability of Use Immunity

Use immunity is a device available to the prosecution to overcome a witness's claimer of the privilege against self-incrimination.[119] In light of a defendant's constitutional rights to compulsory process,[120] due process,[121] and presentation of a defense,[122] is a defendant, under appropriate circumstances, similarly entitled to have a witness granted use immunity? The matter has been the subject of recent consideration by state[123] and federal[124] courts and was again before the Louisiana Supreme Court in *State v. Mattheson*,[125] a murder case culminating in a death sentence. Although the court did not totally reject the possibility of granting use immunity at the behest of the defense, it stated that "a trial judge properly rejects a claim for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution."[126] This, of course, is the area in which the problem is most likely to arise, and it is noteworthy that the prosecution's facility to have a witness granted use immunity is not similarly limited. The question is dif-

116. 406 So. 2d 590 (La. 1981).

117. *Id.* at 590.

118. Comment, *Defendant's Right to a Confidential Informant's Identity*, 40 LA. L. REV. 147 (1979). *See also* Pugh, *Work of the Louisiana Appellate Courts, 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 313 (1973) [hereinafter cited as *1971-72 Term*], *reprinted in* G. PUGH, *supra* note 1, at 187 (1974).

119. *See* LA. CODE CRIM. P. art. 439.1; Kastigar v. United States, 406 U.S. 441 (1972).

120. *See* U.S. CONST. amend. VI; LA. CONST. art. I, § 16.

121. *See* U.S. CONST. amend. XIV, § 1; LA. CONST. art. I, § 2.

122. *See* Chambers v. Mississippi, 410 U.S. 284 (1973); LA. CONST. art. I, § 16.

123. See the cases cited in *1977-78 Term, supra* note 11, at 976 & 977 n.116.

124. *See* United States v. Herbst, 641 F.2d 1161 (5th Cir. 1981); Government of V.I. v. Smith, 615 F.2d 964 (3d Cir. 1980).

125. 407 So. 2d 1150 (La. 1981).

126. *Id.* at 1161.

ficult, challenging, and not yet resolved by the United States Supreme Court. It is the subject of a perceptive student note in an earlier issue of this review.[127]

In his dissent in *Mattheson*, Justice Calogero argued strongly that the case should have been remanded for the trial court to conduct an evidentiary hearing at which the witness, if available, would be granted use immunity. The trial court then would endeavor to ascertain whether "had the testimony of [the witness] been presented at defendant's trial there would have been created a reasonable doubt about defendant's guilt which did not otherwise exist."[128]

Secrecy of the Grand Jury—Defendant's Access to a Prosecution Witness's Grand Jury Testimony

Louisiana Code of Criminal Procedure article 434(A), in strong language, provides for secrecy of grand jury testimony, and in light of its provisions, it was held in *State v. Terrebonne*[129] that the prosecution may not impeach a witness with his allegedly inconsistent grand jury testimony. The statute and the decision in *Terrebonne* raise manifold questions relative to a defendant's right to prepare for trial[130] and his right to confront the witnesses arrayed against him.[131]

State v. Peters[132] presents important aspects of this problem. In application for writs to the Louisiana Supreme Court, defense counsel: (1) maintained that the state's only eye-witness, in interviews with him, stated that she had lied before the grand jury, (2) stated that the witness in question had given permission for the defendant to read her grand jury testimony, and (3) requested a pretrial inspection of the transcript of her testimony. Noting both Louisiana's statute providing for secrecy of grand jury[133] testimony and the cases interpreting it, but noting also the United States Supreme Court decisions[134] relative to the prosecution's obligation to disclose exculpatory evidence

127. Note, *Defense Witness Immunity—A "Fresh" Look at the Compulsory Process Clause*, 43 LA. L. REV. 239 (1982).

128. 407 So. 2d at 1174.

129. 256 La. 385, 236 So. 2d 773 (1970), *discussed in* Pugh, *Work of the Louisiana Appellate Courts, 1970-1971 Term—Evidence*, 32 LA. L. REV. 344, 347 (1973) [hereinafter cited as *1970-71 Term*], *reprinted in* G. PUGH, *supra* note 1, at 184 (1974).

130. *See* G. PUGH, *supra* note 1, at 614-28 (Supp. 1978).

131. *See* Davis v. Alaska, 415 U.S. 308 (1974), *discussed in 1973-74 Term, supra* note 25, at 538, *reprinted in* G. PUGH, *supra* note 1, at 168 (Supp. 1978).

132. 406 So. 2d 189 (La. 1981). *See also* State v. Griffon, 406 So. 2d 1351 (La. 1981) (mem.).

133. LA. CODE CRIM. P. art. 434(A).

134. *See* United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963).

(including prior inconsistent statements of certain witnesses), the court through Justice Marcus concluded that "[a]n accused's constitutional rights cannot be thwarted by state law."[135] To accommodate the state's interest in the secrecy of the grand jury proceedings and the defendant's rights of confrontation and due process, the trial court was ordered to conduct an *in camera* inspection to determine whether the witness's grand jury testimony was inconsistent with her statements to the police and at motion hearings and whether the same was material to the guilt or innocence of the defendant. The clear implication of this decision is that despite Louisiana Code of Criminal Procedure article 434(A) and *Terrebonne*, if the prescribed test were met, not only would the grand jury testimony be available to the defense as a matter of discovery, under appropriate circumstances, it also would be admissible at trial as a prior inconsistent statement.[136]

HEARSAY

State of Mind of the Victim

Another in the intriguing line of cases emanating from *State v. Raymond*[137] is the court's decision in *State v. Spell*,[138] an opinion authored by Justice ad hoc Jones. According to a confession introduced by the prosecution, the defendant had killed the victim in order to prevent him from telling the defendant's wife about the defendant's homosexual relationship with the victim. Over the defendant's objection, the prosecution was permitted to introduce testimony by the victim's half sister that approximately two weeks before the alleged murder, the victim had told her that he was "in love with defendant" and the defendant was "his homosexual lover."[139] The court, relying on *State v. Weedon*,[140] found that the statement involved was not admissible under *Raymond* to show the state of mind of the victim because the statement was not made a few hours before the killing as in *Raymond*, but two weeks before. The court concluded, however, that since another witness had testified that the defendant had confessed to him the murder and the motive, the improper admission of the evidence was "harmless error." The writers find it extremely

135. 406 So. 2d at 191.

136. LA. R.S. 15:493 (1950).

137. 258 La. 1, 245 So. 2d 335 (La. 1971), *discussed in 1970-71 Term, supra* note 129, at 353. *See also* State v. Doze, 384 So. 2d 351 (La. 1980), *discussed in 1980-81 Developments, supra* note 54, at 669; State v. Johnson, 381 So. 2d 436 (La. 1980), *discussed in 1979-80 Developments, supra* note 11, at 613; State v. Weedon, 342 So. 2d 642 (La. 1977), *discussed in 1976-77 Term, supra* note 54, at 584.

138. 399 So. 2d 551 (La. 1981).

139. *Id.* at 555.

140. 342 So. 2d 642 (La. 1977), *discussed in 1976-77 Term, supra* note 54, at 584.

difficult to regard the admission of the testimony as harmless. By providing independent corroboration of portions of the defendant's alleged confession, it was very damaging evidence indeed.[141]

Prior Inconsistent Statement and the Hearsay Rule

Louisiana has followed the traditional view that the prior inconsistent statement of a witness is not to be accorded substantive weight but under certain circumstances,[142] it may be used to neutralize the testimony given on the stand by the witness.[143] *In re Clark*[144] is a disturbing case bearing on this problem. In *Clark*, a child neglect case, the Fourth Circuit Court of Appeal, citing certain modern authorities outside Louisiana,[145] stated that statements taken by social workers from persons who had testified in the case "even if hearsay in nature, cannot be viewed as unreliable."[146] Although some of the statements may have been admissible as admissions, the court in *Clark* appears to be taking a very relaxed attitude indeed towards the hearsay rule, one contrary to traditional Louisiana Supreme Court holdings.[147]

Judicial Confession—Binding Effect of Pleadings

The Louisiana Supreme Court has been frequently called upon to determine the impact of Louisiana Civil Code article 2291 relative to the binding effect of a judicial confession.[148] If the plaintiff alleges in his petition that several persons—all named as defendants in the lawsuit—negligently caused the injuries he complains of and he, prior to trial, settles with some of the named defendants, is he, as to the remaining defendants, bound by his allegations? Phrased differently, when determining whether the remaining defendant is entitled to pro rata deduction as to his liability for the amount of the damages, may he (the remaining defendant) successfully invoke Civil Code article

141. *See 1979-80 Term, supra* note 11, at 622.

142. See LA. R.S. 15:493 (1950).

143. *See* State v. Kaufman, 304 So. 2d 300 (La. 1974), *discussed in 1974-75 Term, supra* note 41, at 665, *reprinted in* G. PUGH, *supra* note 1, at 162 (Supp. 1978); State v. Ray, 259 La. 105, 249 So. 2d 540 (1971), *discussed in 1971-72 Term, supra* note 118, at 311, *reprinted in* G. PUGH, *supra* note 1, at 104 (1974); C. MCCORMICK, *supra* note 34, at 601. See also FED. R. EVID. 801(d)(1)(A) for a slight variation on the traditional rule. As to the effect to be given in Louisiana to prior inconsistent statements, see State v. Martin, 356 So. 2d 1370 (La. 1978), *discussed in 1977-78 Term, supra* note 11, at 911; State v. Williams, 331 So. 2d 467 (La. 1976), *discussed in 1975-76 Term, supra* note 15, at 609.

144. 400 So. 2d 334 (La. App. 4th Cir. 1981).

145. *Id.* at 338.

146. *Id.*

147. *Compare In re* Clark, 400 So. 2d 334 (La. App. 4th Cir. 1981) *with* State v. Allien, 366 So. 2d 1308 (La. 1978).

148. *See* G. PUGH, *supra* note 1, at 437-44 (1974); *1978-79 Term, supra* note 3, at 802.

2291 to hold the plaintiff to his earlier allegations that the defendants were collectively responsible for his injuries?

In *Raley v. Carter*,[149] a unanimous court, speaking through Justice Blanche, held that the plaintiff was not so bound and stated that "[b]y its very nature, a plaintiff's petition places facts at issue. Only a defendant may conclusively admit those allegations in the petition which are adverse to his interest and, therefore, relieve the plaintiff of his obligation to prove those allegations at trial."[150]

Former Testimony—Identity of Issues

Is testimony that was given in a former possessory action by a now-deceased surveyor admissible in a subsequent petitory action concerning the same property and the same parties? In a valuable, well-reasoned opinion authored by Judge Hall of the Second Circuit Court of Appeal, collecting many of the authorities on the subject, the court answers in the affirmative in *Stutts v. Humphries*.[151] Substantial identity of the issues with respect to the testimony in question is the criterion, says the court; there need not be absolute identity.

Business Records—Computer Data

The admissibility of computer data as evidence has taken on increased significance. The specialized requirements for admissibility of such data were helpfully set out by the court in an opinion authored by Judge Norris of the Second Circuit Court of Appeal, *Vining v. State Farm Life Insurance Co.*[152]

Self-Authenticating Commercial Publications

In *State v. Scramuzza*,[153] the supreme court approved the action of the trial court in consulting a United States Post Office Zip Code Directory at a motion to suppress hearing as to whether other streets in the city of New Orleans bore the same or similar names as that

149. 412 So. 2d 1045 (La. 1982).

150. *Id.* at 1048. As to the effect of plaintiffs settling with codefendants after trial has begun, see Danks v. Maher, 177 So. 2d 412 (La. App. 4th Cir. 1965), *distinguished in* Raley v. Carter, 412 So. 2d 1045, 1047 (La. 1982).

151. 408 So. 2d 940 (La. App. 2d Cir. 1981). For an earlier discussion on this same subject, see Comment, *The Admissibility of Former Testimony in Civil and Criminal Trials*, 20 LA. L. REV. 146 (1959), *reprinted in* G. PUGH, *supra* note 1, at 448 (1974). *See also* G. PUGH, *supra* note 1, at 535-36 (Supp. 1978).

152. 409 So. 2d 1306 (La. App. 2d Cir. 1982). For a decision of the Louisiana Supreme Court authorizing the admission of a computer printout under certain circumstances, see State v. Hodgeson, 305 So. 2d 421 (La. 1974), *discussed in 1974-75 Term, supra* note 41, at 671, *reprinted in* G. PUGH, *supra* note 1, at 542 (Supp. 1978).

153. 408 So. 2d 1316 (La. 1982).

used in the search warrant. Relying on Federal Rules of Evidence 803(17) and 902(5), the court, in a significant passage in a footnote stated, "Moreover, the zip code directory is the sort of commercial publication which should be treated as a self-autheniticating document admissible as an exception to the hearsay rule."[154]

PAROLE EVIDENCE—LOUISIANA'S "DEAD MAN STATUTE"

Louisiana's so-called Dead Man Statute[155] provides that when, under its provisions, parole evidence is admissible to prove the "debt or liability" of a person deceased, the evidence must consist of "the testimony of at least one creditable witness other than the claimant, and other corroborating circumstances."[156] Who is the "claimant" for these purposes? Specifically, if two persons join in a suit against a succession, claiming that the decedent owed them certain monies, may each be regarded as a "creditable witness other than the claimant" in support of the demand of the other?

Savoie v. Estate of Rogers[157] clarifies this matter. The test, says the court, is whether the plaintiffs assert a joint interest in the claim or whether each has a separate claim. If they assert a joint claim, then each is a "claimant" within the meaning of the statute. On the other hand, if they assert separate claims against the decedent's estate and have merely joined in the suit for the sake of convenience, the fact that each, from a practical standpoint, is interested in establishing the facts mutually supporting their respective claims does not cause one to be disqualified from serving as a "creditable witness" as to the claim of the other.

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154. *Id.* at 1318 n.2.

155. LA. R.S. 13:3721-3722 (Supp. 1960). Louisiana's Dead Man Statute is narrower than many of those found elsewhere in the country. *See* C. MCCORMICK, *supra* note 34; § 65; Note, *Evidence—Applicability of Dead Man's Statute to Tort Action*, 22 LA. L. REV. 838 (1962).

156. LA. R.S. 13:3722.

157. 410 So. 2d 683 (La. 1981).