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State v. Hatcher: The Continued Misunderstanding of the Recent Sexual Assault Complaint Exception to the Hearsay Rule

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State v. Hatcher: THE CONTINUED MISUNDERSTANDING OF THE RECENT SEXUAL ASSAULT COMPLAINT EXCEPTION TO THE HEARSAY RULE

The defendant was charged with forcible rape[1] and aggravated crime against nature.[2] In a jury trial, he was found guilty of aggravated crime against nature[3] and sentenced to serve ten years at hard labor. The defendant appealed and, as one of fifteen assignments of error, maintained that the trial judge erred in overruling his objections to certain testimony of the victim's sister on the grounds that the testimony constituted inadmissible hearsay. The trial court allowed the victim's sister to relate the details of the alleged attack as told to her by the victim approximately one-half to one hour after her arrival home following the occurrence of the crimes charged. The Louisiana Supreme Court *held* that the

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1. Forcible rape is defined as sexual intercourse "without the lawful consent of the victim because the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape." LA. R.S. 14:42.1 (Supp. 1978). The crime is punishable by imprisonment "for not less than two nor more than forty years." *Id.* For an excellent discussion of the constitutionality of mandatory sentences, *see* Note, *Appellate Review of Sentences*, 39 LA. L. REV. 1172 (1979).

2. Crime against nature is defined as "the unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal." LA. R. S. 14:89 (1950). Aggravated crime against nature is defined as crime against nature committed under any one or more of the following circumstances:

(1) Where the victim resists the act to the utmost, but such resistance is overcome by force;

(2) Where the victim is prevented from resisting the act by threats of great and immediate bodily harm accompanied by apparent power of execution;

(3) Where through idiocy, imbecility or any unsoundness of mind, either temporary or permanent, the victim is incapable of giving consent and the offender knew or should have known of such incapacity;

(4) Where the victim is incapable of resisting or of understanding the nature of the act, by reason of stupor or abnormal condition of mind produced by a narcotic or anesthetic agent, administered by or with the privity of the offender; or when he has such incapacity, by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of such incapacity; or

(5) Where the victim is under the age of seventeen years and the offender is at least three years older than the victim.

LA. R.S. 14:89.1 (Supp. 1962). While it is not clear from the opinion exactly which provision the defendant was charged with violating, it was probably either subsection (2) or (5).

Aggravated crime against nature at the time of the crime was punishable by imprisonment at hard labor for not more than fifteen years. *Id.* A 1979 amendment has imposed a minimum sentence of three years. 1979 La. Acts, No. 125, *amending* LA. R.S. 14:89.1 (Supp. 1962).

3. The jury was unable to agree on a verdict as to the charge of forcible rape. State v. Hatcher, 372 So. 2d 1024, 1026 (La. 1979) (on original hearing).

fourteen-year-old victim's description of the occurrence as related to her sister was properly admitted under the recognized exception to the hearsay rule allowing admission of the early complaints of rape victims. *State v. Hatcher*, 372 So. 2d 1024 (La. 1979) (on original hearing).

The admissibility of hearsay evidence[4] in Louisiana is governed by Revised Statutes 15:434, which establishes the general rule that "[h]earsay evidence is inadmissible, unless as otherwise provided in this Code." Nevertheless, hearsay evidence and many exceptions to the hearsay rule are not defined in the Louisiana Revised Statutes.[5] Consequently, the definition of hearsay and the establishment of exceptions to the rule are largely a matter of judicial practice and interpretation.[6]

The hearsay exception of recent sexual assault complaints has apparently found favor with the Louisiana courts. However, a thorough analysis of the Louisiana cases on this subject reveals that the Louisiana courts' treatment of this topic has not been analytically consistent with the history of the exception, its admissibility requirements, and the underlying rationale for its existence.

The origin of admissibility of recent sexual assault complaints can be traced to the old English law of "hue and cry,"[7] according to which, in all charges of violence, the accuser had to show that "he made hue and cry, alarming the neighborhood freshly after the occurrence."[8] Wigmore illustrates the application of this doctrine to rape charges with the following passage from Bracton:

> When therefore a virgin has been so deflowered and overpowered, against the peace of the lord the king, forthwith and while the act is fresh she ought to repair with hue and cry to the neighboring vills and there display to honest men the injury

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4. "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." C. MCCORMICK, EVIDENCE § 246, at 584 (Cleary ed. 1972). *See also* 5 J. WIGMORE, EVIDENCE § 1361 (Chadbourn rev. 1974).

5. *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 543-44 (1975) [hereinafter cited as *Evidence*]; Comment, *Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661, 661 (1969) [hereinafter cited as *Excited Utterances*]; Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611, 611 (1954) [hereinafter cited as *Hearsay and Non-Hearsay*].

6. *Evidence, supra* note 5, at 543-44; *Hearsay and Non-Hearsay, supra* note 5, at 612.

7. 4 J. WIGMORE, EVIDENCE § 1135, at 298 (Chadbourn rev. 1972).

8. 6 J. WIGMORE, EVIDENCE § 1760, at 240 (Chadbourn rev. 1976).

> done to her, the blood and her dress stained with blood, and the tearing of her dress; and she ought to go to the provost of the hundred and to the serjeant of the lord the king and to the coroners and to the viscount and make her appeal to the first county court.[9]

Thus, the recent sexual assault complaint was originally admitted merely to satisfy the fresh complaint requirement, and, as Wigmore explains, it was a "matter of old tradition and practice, with little or no thought of any principles to support it."[10] However, in the early 1800's the English courts felt a need to explain the underlying principles of this "inherited and hitherto unquestioned practice" of admitting this type of evidence.[11] Consequently, there developed two principles of admissibility: (1) to forestall the inference that unless the prosecutrix complained immediately after the incident, when it was assumed natural that she would do so, no outrage had in fact occurred and (2) to corroborate the prosecutrix's testimony after it has been attacked.[12]

In England in the early 1800's the recent sexual assault complaint was not a hearsay exception, *i.e.*, it was admitted to prove the *fact* of complaint and not the truth of the matter asserted.[13] The United States courts originally adopted the same approach;[14] but, as early as 1904, some United States courts began to receive the evidence "testimonially on the case in chief, to prove the facts asserted,"[15] either under the exception of res gestae[16] or as a spontaneous utterance.[17] It was at this point that the recent sexual assault complaint achieved the status of a hearsay exception,[18] and today most jurisdictions recognize the exception in this fashion.[19]

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9. *Id.*, *quoting* H. DE BRACTON, DE LEGIBUS ANGLIAE, f.147 (ca. 1250).

10. J. WIGMORE, *supra* note 7, § 1135, at 298.

11. *Id.*

12. *See id.*, and authorities cited therein. When used for these purposes, the evidence is considered non-hearsay because the value of the utterances and writings does not depend on the veracity of the out-of-court asserter. *See generally* C. MCCORMICK, *supra* note 4, at § 249; J. WIGMORE, *supra* note 8, at § 1766.

13. See note 12, *supra*.

14. *See* J. WIGMORE, *supra* note 8, § 1761, at 242, and authorities cited therein.

15. *Id.*

16. *Id.* at 242-43. For an explanation of the term res gestae, see note 20, *infra*.

17. J. WIGMORE, *supra* note 8, at § 1761. For an explanation of the term spontaneous utterance, see note 21, *infra*.

18. J. WIGMORE, *supra* note 8, at § 1761.

19. *Id.* at 243 n.2. *See, e.g.*, State v. Finley, 338 P.2d 790 (Ariz. 1959) (statements made thirty minutes after the incident admissible as res gestae/spontaneous utterance); State v. Swanson, 228 N.W.2d 101 (Iowa 1975) (the test for admission of such evidence is spontaneity and such closeness of connection with the transaction as to preclude any presumption of fabrication; if it meets this test it is admissible as res

The distinction between the terms "*res gestae*"[20] and "*spontaneous utterance*"[21] is more apparent than real. Originally, res gestae evidence was defined as words "which accompanied the principle [*sic*] litigated fact."[22] Gradually, however, the term was used to "embody the notion that evidence of any concededly relevant fact or condition might bring in likewise the words which accompanied it."[23] However, as Wigmore points out, spontaneity is recognized as the source of special trustworthiness of this type of res gestae evidence.[24] In recognition of the vague and amorphous nature of the

gestae); State v. Caster, 225 N.W.2d 420 (Neb. 1975) (such evidence to be admissible as part of the res gestae must be a spontaneous, unpremeditated statement closely connected with the act); State v. Martineau, 324 A.2d 718 (N.H. 1974) (statements of the victim who was subsequently murdered made two or three hours after the rape admissible because of the continued attempts by defendant's agents to remove the victim from the bar during this period with threats of violence and exclamations of fear, based upon a finding that the entire incident in the room was a continuation of the terrorizing events the victim hysterically complained of); State v. Wilson, 532 P.2d 825 (Or. App. 1975) (details of the incident uttered up to one hour later admissible as spontaneous exclamations due to intervening acts of flight and fear of victim that the attacker was pursuing her).

20. "The exposition of this exception might well be approached with a feeling akin to despair. There has been such a confounding of ideas, and such a profuse and indiscriminate use of the shibboleth res gestae, that it is difficult to disentangle the real basis of the principle involved." J. WIGMORE, *supra* note 8, § 1745, at 191-92.

As Wigmore points out, the term embodies "two distinct and legitimate principles, one establishing a real exception to the hearsay rule and the other merely [defining] those classes of utterances to which the [hearsay] rule is in its nature not applicable." *Id.* at 192.

The present discussion is concerned with the hearsay exception of res gestae. Typically, this type of evidence is a "statement or exclamation by a participant immediately after an injury, declaring the circumstances of the injury, or by a person present at an affray . . . or other exciting occasion, asserting the circumstances of it as observed by him." *Id.* § 1746, at 194.

Louisiana defines res gestae evidence in Revised Statutes 15:447-48, the texts of which appear at notes 40-41, *infra*.

21. "[U]nder certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the *utterance* which then occurs is a *spontaneous* and sincere response to the actual sensations and perceptions already produced by the external shock." J. WIGMORE, *supra* note 8, § 1747, at 195 (emphasis added).

22. C. MCCORMICK, *supra* note 4, § 288, at 686.

23. *Id.*

24.

> [Underlying all hearsay exceptions is the principle] that the statement must have been made under circumstances calculated to give some special trustworthiness to it, and thus to justify us in exempting it from the ordinary test of cross-examination on the stand . . . . This circumstantial guarantee here consists of the consideration . . . that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief. The utterance, it is commonly said, must be "spontaneous."

J. WIGMORE, *supra* note 8, § 1749, at 199.

term res gestae, many writers advocate that the term be jettisoned in favor of other more precise categories, such as "spontaneous declaration."[25] The Federal Rules of Evidence adopt this treatment.[26]

In any event, in order for the recent sexual assault complaint to be admissible either under res gestae or under a spontaneous declaration exception, writers generally agree that certain requirements must be met: (1) there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) there must be an absence of time to fabricate; and (3) the statement must relate to the circumstances of the occurrence.[27]

That these requirements are essential becomes obvious when the rationale for admission of hearsay evidence in general is examined. There are basically two principles that underlie every hearsay exception.[28] First, the principle of necessity[29] requires that

25. C. MCCORMICK, *supra* note 4, § 246, at 687 nn. 5-6; J. WIGMORE, *supra* note 8, § 1745, at 191-92; *Excited Utterances*, *supra* note 5, at 663-79.

26. *The Federal Rules of Evidence: Symposium*, 36 LA. L. REV. 59, 163 (1975).

27. Since the recent sexual assault complaint exception is actually a special form of the res gestae or spontaneous declaration exception to the hearsay rule, J. WIGMORE, *supra* note 8, at § 1760, it follows, a fortiori, that the complaint to be admissible must meet the requirements of admissibility of the broad, general class. *Id.* at § 1750.

For a case *specifically* applying these general requirements to the special form of the exception, *see* People v. Damen, 28 Ill. 2d 464, 193 N.E.2d 25 (1963).

28. Wigmore explains:

> The theory of the hearsay rule is that many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment—for example, by reason of the death of the declarant so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape.

J. WIGMORE, *supra* note 4, § 1420, at 251. These two principles then are a circumstantial probability of trustworthiness and necessity for the evidence.

29.

> [This principle] implies that since we shall lose the benefit of evidence entirely unless we accept it untested, there is thus a greater or less necessity for receiving it. The reason we shall otherwise lose it may be one of two:
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> (1) The person whose assertion is offered may now be *dead*, or out of the jurisdiction, or insane, or *otherwise unavailable* for the purpose of testing [by cross-examination] . . . .
>
> (2) The assertion may be such that we cannot expect, again, or at this time, to get *evidence of the same value* from the same or other sources. This appears more or less fully in the exception for spontaneous declarations . . . . Here we are not threatened (as in the first case) with the entire loss of a person's evidence, but merely some valuable source of evidence. The necessity is not so great; perhaps

the evidence be accepted virtually untested in order to prevent the loss of its benefit. The potential loss of this testimony occurs primarily in two situations: (1) the asserter may be dead, absent from the jurisdiction, or otherwise unavailable to testify and (2) the proferred assertion is such that evidence from the same or another source will not be as valuable.[30] Secondly, there is the principle that the evidence possesses a circumstantial degree of trustworthiness giving it the "probability of accuracy which is substantially equivalent to the trustworthiness of statements whose accuracy is tested by cross-examination."[31] Consequently, res gestae statements and spontaneous declarations are viewed as meeting this dual test of necessity/trustworthiness.[32]

In light of the history of the recent sexual assault exception, the requirements of admissibility, and the underlying rationale for admitting this type of evidence, it appears that the Louisiana Supreme Court is inconsistent in its approach to the admissibility of certain complaints of recent sexual assault. In fact, the court seems to consider the first complaint of the victim automatically admissible, irrespective of the time or conditions under which it was made. A study of the Louisiana cases reveals the following: lack of analysis of the admissibility requirements in regard to the facts of each particular case, misapplication of the analysis to the facts, confusion of hearsay evidence with non-hearsay evidence (such as corroborative evidence), and citation of cases as controlling authority when in fact the cases do not stand for the cited proposition.

The first Louisiana case to make specific mention of the special exception to the hearsay rule was *State v. Pace*.[33] After noting

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hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.

Id. § 1422, at 253 (emphasis in original).

30. *Id.*

31. *Id.* Wigmore characterizes this second principle as "in the nature of a practicable substitute for the ordinary test of cross-examination . . . . [U]nder certain circumstances the probability of accuracy and trustworthiness is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner." *Id.*

He also states that there is "ample authority in judicial utterances for naming" as one of three classes one "where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed." *Id.* at 254. It is into this class that the recent sexual assault complaint falls. See text at note 27, *supra*.

32. J. WIGMORE, *supra* note 4, at § 1423.

33. 301 So. 2d 323 (La. 1974). In 1962, the defendant was convicted of attemped aggravated rape in violation of Revised Statutes 14:27 and 14:42. As a multiple offender he was sentenced to forty years in the Louisiana State Penitentiary. At the sentencing hearing the defendant's counsel gave notice of his intention to appeal; the appeal was never perfected. In 1972 the defendant was granted an out-of-time appeal in a habeas

writings and jurisprudence from other jurisdictions and recognizing the trend to extend rather than narrow the scope of the introduction of evidence as res gestae, the court held that the testimony of the mother of the six-year-old victim regarding the complaint made by the child "the same day as the offense" was "sufficiently related to the offense to form part of the res gestae."[34] The court found that the statements were the product of a "shocking episode" and that the time interval was not indicative of fabrication.[35] The approach taken by the court is entirely consistent with the requisites of admissibility of this type of evidence,[36] and the sanctioning of the use of the evidence as a hearsay exception is analytically sound.

In a subsequent case, *State v. Brown*,[37] the court's analytical treatment of the recent sexual complaint evidence began to deteriorate. The court admitted the testimony of the sixteen-year-old victim's mother concerning the account of the attack made to her by the victim, finding that the "complaint was sufficiently related to the offense to form part of the res gestae."[38] Due to the circumstances of the case, however, the admissibility of the testimony as res gestae is questionable. The girl returned home "less than an hour" after the incident, wearing clothes different from those that she had worn to school that morning. She then "broke down" under the mother's questioning and told her of the rape, explaining her silence by saying that her life had been threatened and that her attackers had warned her not to say anything about the incident.[39] Based upon a reading of the codal definition of res gestae found in Revised Statutes 15:447[40] and

corpus proceeding. He objected to testimony of the victim's mother in which she was allowed to state that her six-year-old daughter returned home from babysitting crying. When questioned by the mother, the child stated that the defendant molested her.

34. 301 So. 2d at 326.

35. *Id.*

36. See text at note 27, *supra*. It must be noted that the child's age is an important factor in considering the admissibility of this type of evidence as res gestae evidence. Annot., 83 A.L.R.2d 1368, 1378 (1962).

37. 302 So. 2d 290 (La. 1974). The defendant was convicted of aggravated rape in violation of Revised Statutes 14:42 and was sentenced to life imprisonment. On appeal the defendant did not perfect a bill of exceptions; the court reviewed the record for errors patent on its face and, finding none, affirmed the conviction. However, in a subsequent habeas corpus proceeding, the United States district court ordered an out-of-time appeal.

38. 302 So. 2d at 293.

39. *Id.*

40. LA. R.S. 15:447 (1950) reads:

> Res gestae are events speaking for themselves under the immediate pressures of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events. What forms any part of the res gestae is always admissible in evidence.

15:448,[41] it is evident that the statements concerning the attack clearly did not constitute res gestae, as they were not "necessary incidents of the criminal act" or "immediate concomitants of it," nor did they "form in conjunction with it one continuous transaction."[42]

Also analytically troubling is the case of *State v. Noble*,[43] involving the brutal rape of a four-year-old child. The court upheld the admissibility of the testimony of the victim's grandmother regarding the child's first complaint, which occurred *two days* after the attack when the victim was in the hospital. To explain the considerable laspe of time between the attack and the first complaint, the court found that it was the first opportunity the child had to discuss the crime "with a person whom she loved and trusted outside the atmosphere of her home where the accused had been living with her mother for several months."[44] The grandmother's testimony, however, was restricted to the "nature of the crime and the identity of the offender."[45] The court specifically rejected admitting the testimony as res gestae and allowed it as a "product of the shocking episode,"[46] relying on similar language used in *Pace*. But the reliance was misplaced, because the court in *Pace* did admit the evidence as res gestae. It is suggested that, since the definition of hearsay and the hearsay exceptions are largely a matter of judicial discretion and interpretation, the court, in determining the admissibility of the evidence, should have conducted a necessity/trustworthiness[47] inquiry, *i.e.*, when the court is unable to find an appropriate "pigeonhole exception" for the evidence, if it is reliable and the circumstances necessitous, the court may admit it.

The court again indicated its willingness to admit hearsay testimony concerning the first complaint of rape without a sound analytical basis in *State v. Elzie*.[48] Appearing at the witness's house

41. LA. R.S. 15:448 (1950) reads: "To constitute res gestae the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction."

42. LA. R.S. 15:448 (1950).

43. 342 So. 2d 170 (La. 1977). Defendant was convicted of aggravated rape in violation of Revised Statutes 14:42 and sentenced to death. The court reviewed the conviction on direct appeal.

44. 342 So. 2d at 173.

45. *Id.*

46. *Id.*

47. See notes 28-32, *supra*, and accompanying text.

48. 351 So. 2d 1174 (La. 1977). The defendant was convicted of attempted aggravated rape and sentenced to thirty years imprisonment at hard labor. The court reviewed the conviction on direct appeal. The testimony objected to consisted of the following:

> And I kept asking her what was wrong. And she said, nothing, at first. And I just kept asking her. And she said: May I use your telephone? And I said: Well, what's

crying, the victim asked to use the phone and, at this time, identified the perpetrator of the rape; the witness was allowed to testify as to this identification. While there was in fact "no unexplained lapse of time between the rape and the victim's complaint," since it occurred immediately after the incident,[49] the court cited *Brown* and *State v. Hills*[50] as authority for invoking the recent sexual assault complaint exception. As noted previously, the *Brown* court admitted the testimony as res gestae and the correctness of the result in that case is questionable.[51] The reliance on *Hills* is totally misplaced in that the *Hills* court admitted the testimony as corroboration or non-hearsay res gestae evidence.[52] Furthermore, the stated purpose of the evidence was to show that "an outcry was immediately made after the rape and to corroborate the testimony of the prosecuting witness as to her physical appearance and condition."[53] There is no discussion in *Hills* concerning the special exception, and quoting *State v. Labat*,[54] the court admitted the evidence, "not as proof of

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wrong, [name of victim]. And then she told me. She said: *Robert raped me*. And I said—and I said: Well, yeah use the phone. So, she called her husband and the police.

Id. at 1175. After the incident, the victim dressed and walked to the witness's house to use the phone, as the victim did not have one of her own. She arrived at the witness's home "a very few minutes" after the rape occurred, frightened and hysterical. *Id.* at 1176.

49. See text at note 27, *supra*.

50. 241 La. 345, 129 So. 2d 12 (1961). The defendant was convicted of aggravated rape in violation of Revised Statutes 14:42, and sentenced to death. The court reviewed the conviction on direct appeal.

51. See text at notes 37-42, *supra*.

52. In *Hills*, the victim's landlord was allowed to testify that he heard a banging at the door and that when he opened it he saw that the victim was in an hysterical and scarcely audible condition. He testified that her mouth was "busted" and bleeding and her clothing disarranged and dirty. After about five minutes she calmed down and told him she had just been raped. Furthermore, he testified that she described her assailant and said that she would recognize him by his walk, his talk, and his face and that she would remember her attacker for the rest of her life. 241 La. at 353, 129 So. 2d at 20.

The court admitted the evidence to corroborate the testimony of the victim regarding the incidents and events of the rape and the identity of her assailant. By definition, this is a non-hearsay use of the testimony, *i.e.*, it is offered not as proof of the truth of the statement made.

53. *Id.* at 356, 129 So. 2d at 20.

54. 226 La. 201, 75 So. 2d 333 (1954). In this case, defendants Labat and Poret were convicted of aggravated rape in violation of Revised Statutes 14:42 and sentenced to death. The court reviewed the conviction on direct appeal. The victim's companion and a police officer who arrived on the scene shortly after the incident were allowed to testify regarding the victim's statements immediately after the incident. The companion testified: "She said it was terrible, that's all I remember her saying." 226 La. at 219, 75 So. 2d at 340. One police officer testified the victim said that "[s]he had been attacked in an alleyway taken there by two Negroes." *Id.* at 220, 75 So. 2d at 340.

the truth of the statement made but as part of the res gestae."[55] Thus, the evidence was not denominated as hearsay in *Hills*, and, therefore, that case offers no authority in deciding the admissibility of hearsay evidence.[56]

As the foregoing analysis indicates, the Louisiana Supreme Court, with the notable exception of *Pace*, has not conducted the relevant inquiry into how the facts of each case relate to the admissibility requirements for the recent sexual assault complaint exception. Instead, the court appears to be viewing the victim's first complaint and details of the incident as automatically admissible under the rubric of res gestae or spontaneous utterance, regardless of the particular circumstances. In addition, the court is failing to distinguish between hearsay and non-hearsay use of this type of evidence.

State v. Hatcher[57] is yet another indication that the Louisiana Supreme Court is continuing its practice of approaching the admissibility of early complaints of rape victims without attention to its history, its admissibililty requirements, and the underlying rationale for its existence. In that case, the record indicates that the victim was walking home from school when the defendant approached her and asked her name and age. Pretending to be a talent scout, he asked if she was interested in being in the movies. Expressing interest, the victim got into the defendant's car, and he transported her to his aunt's house. The defendant produced a job application and instructed the victim to falsify her age; although he knew she was only fourteen, he told her to say that she was twenty. She was told to remove her clothes, and in the face of threats from the defendant, she did as she was told. After taking nude

55. *Id.* at 221, 75 So. 2d at 340.

56. In *Elzie* the court specifically stated: "The statement of which defendant complains is *certainly hearsay* because it is the out-of-court, unsworn statement of a third person offered for the *truth* of its content." 351 So. 2d at 1175 (emphasis added). However, as discussed in notes 52 & 54, *supra*, both *Hills* and *Labat* admitted the evidence as non-hearsay res gestae evidence and specifically ruled against the evidence being admitted for its truth value.

In *State v. McCloud*, 357 So. 2d 1132 (La. 1978), the court applied the same faulty reasoning as in *Elzie*. The defendant in *McCloud*, charged with aggravated rape, was convicted of forcible rape and sentenced to thirty years at hard labor. The court reviewed the conviction on direct appeal. The victim's mother was allowed to testify that less than twenty minutes after the incident, the victim, who was upset and nervous, told her she had been raped. The court, citing *Elzie*, held that the statement was properly admitted as it was made under pressure of the rape soon after its occurrence. Hence, since *Elzie* held the testimony admissible under a hearsay exception, presumably, although not stated, the evidence in this case was also considered admissible under a hearsay exception.

57. 372 So. 2d 1024 (La. 1979) (on original hearing).

photographs of the victim, the defendant raped her and forced her to perform an act of fellatio upon him. He accomplished these acts by threatening the victim with physical violence if she did not comply. After the incident, the victim rode a bus home. After her arrival, she bathed and then lay down for a short period of time. Although noticeably upset, the victim failed to respond to her mother's questioning. She then went to her sister's house, arriving crying and upset. The victim then related the details of the incident to her sister. Choosing as the relevant time frame the elapsed time from the victim's arrival home until the time the statements concerning the attack were made, the court held that the complaint of the fourteen-year-old victim of sex offenses to her sister "was spontaneous and made under the immediate pressure of the occurrence."[58]

There was no consideration by the court of how much time elapsed from the occurrence of the *incident* until the victim made her complaint. It is submitted that this is the relevant time frame rather than the time between the victim's arrival home by bus from the scene of the incident and the time the statements were made. Thus, the elapsed time from the incident to the victim's arrival home must be added to the "one-half to one hour" elapsed time from the arrival home to the statements. In order to be analytically consistent with *Pace*, the court should have excluded the proferred evidence.

The evidence admitted failed two of the three tests for admissibility of complaints of recent sexual assault.[59] The statements made by the victim to her sister were not spontaneous and unreflecting, and the elapsed time of well over one-half to one hour *from the incident* presents ample opportunity for fabrication. It is not suggested that the victim was less than truthful in her statements to her sister; rather, it is the apparent rubber stamp admissibility that is objectionable.

If the supreme court continues its current policy of sanctioning this type of evidence without any meaningful analysis of the purpose of the exception, and this lack of analysis is accompanied by a concomitant lack of inquiry into the necessity/trustworthiness of the testimony, substantial violations of a defendant's constitutional right of confrontation could result.[60] In *Hatcher*, the evidence against the

58. *Id.* at 1031.

59. See text at note 27, *supra*.

60. The right to confront and cross-examine one's accusers is embodied in the sixth amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the Witnesses against him."

"[T]he Sixth Amendment's right of an accused to confront the witnesses against him

defendant was overwhelming,[61] and any harm done by the objectionable evidence was probably minimal. But one can imagine a

. . . is a fundamental right . . . made obligatory on the states by the Fourteenth Amendment." Pointer v. Texas, 380 U.S. 400, 403 (1965). As the Court in *Pointer* explained:

> There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Id. at 405 (citations omitted). In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that an accused's right of confrontation secured by the sixth amendment is violated by the introduction at a joint trial of a confession by the codefendant inculpating the accused where the codefendant does not testify. The violation occurs notwithstanding jury instructions that the codefendant's confession must be disregarded in determining the guilt or innocence of the accused. The objection is that the confession of the codefendant is inadmissible hearsay, and without the codefendant's testimony, the bare, untested assertion is not subjected to cross-examination in order to reveal many possible deficiencies and sources of error and untrustworthiness. However, not every violation of the *Bruton* doctrine will result in a reversal; "[a] defendant is entitled to a fair trial, not a perfect one." *Id.* at 135. In many cases a jury can and will follow the trial judge's instructions to disregard the information.

Bruton did not limit its discussion to just a confession by the codefendant but rather spoke in broader terms of inadmissible "hearsay." Since it is into this category that the recent sexual assault complaint falls when the admissibility requirements are not strictly adhered to, the argument of deprivation of the accused's sixth amendment rights has force. If the statement by the victim, who does not testify at trial concerning the details of the attack, is the only direct evidence against the accused, this writer believes that a conviction would be obtained in denial of the accused's right to a fair trial.

61. After the victim of the alleged crimes testified, three teenage victims of *prior* forcible rapes or aggravated crimes against nature allegedly committed by the defendant also testified. Their testimony regarding their experiences was essentially the same as that of the victim in the instant case. See text at note 58, *supra*. The court on rehearing sanctioned the use of this evidence presented by the victim of other sex crimes as it met the several tests for admissibility. These tests are:

> (1) there must be clear and convincing evidence of the commission of the other crimes and the defendant's connection therewith;
>
> (2) the modus operandi employed by the defendant in both the charged and the uncharged offenses must be so peculiarly distinctive that one must logically say they are the work of the same person;
>
> (3) the other crimes evidence must be substantially relevant for some other purpose than to show a probability that the defendant committed the crime on trial because he is a man of criminal character;
>
> (4) the other crimes evidence must tend to prove a material fact genuinely at issue;
>
> (5) the probative value of the extraneous crimes evidence must outweigh its prejudicial effect.

372 So. 2d at 1033 (on rehearing) (citations omitted).

It is important to note, as the court did, that in a prosecution for rape in which the

hypothetical case in which the only evidence amassed against the defendant is circumstantial[62] and the victim is unavailable to testify and, in fact, has never made a sworn statement on record. To allow a witness to testify as to what the absent victim told him, as much as several hours after the incident concerning the details of the attack, would be tantamount to trial of the defendant without furnishing him his constitutionally guaranteed right to confront and cross-examine his accusers. It is certainly not suggested that the supreme court would knowingly sanction such an obvious travesty of justice; however, it is submitted that to continue the sanctioning of the type of evidence offered in the *Hatcher* case without any meaningful inquiry into its necessity and trustworthiness is to set the stage for this hypothetical travesty of justice to become a reality.

Estelle Mahoney

GULF STATES UTILITIES, THE PUBLIC SERVICE COMMISSION, AND THE SUPREME COURT: ON RAISING THE ELECTRIC RATES

The Louisiana Public Service Commission denied a request by Gulf States Utilities for an increase in its electric rates.[1] On appeal from a district court judgment which had generally upheld the Commission's denial,[2] the Louisiana Supreme Court affirmed the

only issue is the consent of the victim *of that rape* evidence of other offenses is usually inadmissible. *Id.* at 1034 n.1. The defendant was not convicted of the forcible rape charge or of a lesser included offense, however, and the court viewed any prejudice that the defendant might have suffered in his defense to that prosecution as "inconsequential." *Id.* at 1034.

62. For a thorough discussion of circumstantial evidence (*i.e.*, all offered evidentiary facts not being assertions from which the truth of the matter asserted is desired to be inferred) as distinguished from testimonial evidence, *see* 1 J. WIGMORE, EVIDENCE § 25 (3d ed. 1940). *See also* C. MCCORMICK, *supra* note 4, at § 185.

1. Gulf States Utils. Co., 20 P.U.R. 4th 147 (La. P.S.C. 1977). The increase in rates would have produced additional revenues of $23,750,000.

2. The district court had, however, granted an attrition adjustment. Attrition is the tendency of a utility's rate of return to diminish because of rising expenses due to inflation. Central Main Power Co. v. Public Utils. Comm'n, 382 A.2d 302, 316 n.18 (Me. 1978). For a discussion of rate of return, see text at notes 3-7, *infra*. Utilities typically present their rate requests to regulatory agencies using their most recent figures for expenses, revenues, and valuation. *See, e.g.*, New England Tel. & Tel. Co. v. Department of Pub. Util., 354 N.E.2d 860, 865 (Mass. 1976). When the matter is finally concluded a year or two later, the rate relief granted will inevitably produce a smaller