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Evidence

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EVIDENCE

I. The Admissibility of Evidence of Other Crimes for the Purpose of Attacking the Credibility of a Witness

Although "[e]vidence of other crimes is not admissible to prove the character of a person in order to show that he acted in conformity therewith,"[1] it may be used for the purpose of impeachment.[2] Initially, South Carolina courts admitted, for impeachment purposes, only evidence of "a conviction of a felony for the crimen falsi,"[3] which, at common law, included such offenses as forgery, perjury, and subornation of perjury.[4] This standard evolved to allow evidence of impeaching crimes of "moral delinquency"[5] that are "not too remote."[6] "Moral delin-

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1. *E.g.*, State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1925). *See* C. McCormick, McCormick's Handbook of the Law of Evidence § 188 (2d ed. 1972). Character evidence may be circumstantially relevant to suggest that a person with a particular propensity or trait acted in conformity with that trait on the occasion in question. While the use of character in this way has unquestionable probative value and relevance, its use is generally proscribed. *Id.*; *see* 1 J. Wigmore, Treatise on Evidence, §§ 52, 57 (3d ed. 1940).

The policy of exclusion is premised on the belief that cases should not be decided on facts other than those directly relevant to the immediate suit. Udall, *Character Proof in the Law of Evidence—A Summary*, 18 U. Cin. L. Rev. 283, 296-97 (1949). Justice Cardozo summarized the bias against such evidence in terms of an awareness of "peril to the innocent if character is accepted as probative of crime." People v. Zackowitz, 254 N.Y. 192, 194, 172 N.E. 466, 468 (1930). In essence, although character evidence may be probative and relevant, it is excluded because it unduly prejudices the party against whom it is used. 1 J. Wigmore, *supra* § 29a at 412. *See also id.* at §§ 1171, 1906.

2. *See* Liberty Mut. Ins. Co. v. Gould, 266 S.C. 521, 224 S.E.2d 715 (1976). *See generally* 3A J. Wigmore, *supra* note 1, §§ 926, 987. Evidence of other crimes may also be admissible for certain substantive purposes. 125 S.C. at 416, 118 S.E. at 807.

3. Anonymous, 19 S.C.L. (1 Hill) 251, 257 (1833).

4. Black's Law Dictionary 335 (5th ed. 1979).

5. Gantt v. Columbia Coca-Cola Bottling Co., 204 S.C. 374, 379, 29 S.E.2d 488, 489-90 (1944).

6. *Id.* South Carolina apparently has no clear cut standard for remoteness in time. The courts usually follow the general rule disallowing admission when the conviction is more than ten years old. *See* State v. Hill, 268 S.C. 390, 234 S.E.2d 219 (1977) (1966 conviction of tampering with an automobile was not admissible because of remoteness in 1977 prosecution). Fed. R. Evid. 609(b) provides that:

> [e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the pro-

quency" has since been characterized as "moral turpitude."[7] In *State v. LaBarge*,[8] the South Carolina Supreme Court reaffirmed the standard of moral turpitude and rejected a proposed alternate standard of "social irresponsibility."[9] In *State v. Bailey*,[10] the court ruled that the trial court may determine whether an impeaching crime is one of moral turpitude by examining its legal definition and, in certain circumstances, the particulars of the indictment.[11]

In *LaBarge*, defendant was charged with murder and armed robbery. At trial, the victim's daughter, who had previously admitted participation in the crimes and pleaded guilty, served as the prosecution's chief witness. Defendant sought to impeach this witness' credibility by admitting evidence of her prior convictions, asserting that the evidence was admissible because the crimes constituted acts of social irresponsibility.[12] The trial court refused to admit the evidence, and defendant was convicted. He appealed the convictions on several grounds, including the trial court's refusal to admit the impeaching evidence. The supreme court reversed the conviction on other grounds but reaffirmed the established moral turpitude standard, setting forth the traditional definition of moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or society in general, contrary to the accepted and customary right and duty between man and man."[13] The court then explained that, although all crimes indicate some degree of social irresponsibility, not every crime is one of moral turpitude. Further, the court expressly re-

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bative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

While the South Carolina rule appears to follow the time frame of the federal rule, like that rule, it is subject to exception.

7. State v. Horton, 271 S.C. 413, 248 S.E.2d 263 (1978).

8. ___ S.C. ___, 268 S.E.2d 278 (1980).

9. *Id.* at ___, 268 S.E.2d at 280.

10. ___ S.C. ___, 272 S.E.2d 439 (1980).

11. *Id.* at ___, 272 S.E.2d at 440.

12. *See* Brief for Appellant at 33; Record, vol. II, at 121.

13. ___ S.C. at ___, 268 S.E.2d at 280 (quoting State v. Horton, 271 S.C. 413, 414, 248 S.E.2d 263, 263 (1978) (citing 58 C.J.S. *Moral* 1201 (1948)).

jected defendant's assertion that public drunkenness, breach of peace, disorderly conduct, driving without a license, and trespassing are crimes of moral turpitude.[14]

In *Bailey,* defendant was charged with disturbing a school and assault and battery of a high and aggravated nature. At trial, the prosecution sought to impeach defendant by offering evidence of a prior conviction of assault and battery of a high and aggravated nature. The trial court ruled the evidence admissible, and defendant was convicted.[15] Defendant appealed, and the supreme court reversed his conviction, stating that, because the impeaching crime is not invariably one of moral turpitude, the nature of the crime could be determined from the particulars of the indictment. The indictment for defendant's prior conviction, however, had not been available for review by the trial court, and the supreme court therefore remanded the case for a new trial.[16]

Although the South Carolina Supreme Court has adopted a definition of moral turpitude,[17] it has failed to develop clear guidelines for the application of the definition.[18] Consequently, a

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14. *Id.* at ___, 268 S.E.2d at 280.

15. Record at 60-62, 106-07.

16. ___ S.C. at ___, 272 S.E.2d at 440 (citing United States *ex rel.* Zaffarano v. Corsi, 63 F.2d 757 (2d Cir. 1933) (a decision determining whether moral turpitude was inherent in second-degree assault)).

17. See text accompanying note 13 *supra.*

18. Evidence admitted by the South Carolina courts for impeachment purposes includes evidence of convictions for housebreaking, State v. Van Williams, 212 S.C. 110, 46 S.E.2d 665 (1948); auto theft and receiving stolen goods, State v. Millings, 247 S.C. 18, 145 S.E.2d 422 (1965); larceny, State v. Reggen, 214 S.C. 370, 52 S.E.2d 708 (1949); hit and run, State v. Horton, 271 S.C. 413, 248 S.E.2d 263 (1978); and forgery, State v. Johnson, 271 S.C. 485, 248 S.E.2d 313 (1978). Courts have disallowed evidence of crimes of manslaughter, Liberty Mut. Ins. Co. v. Gould, 266 S.C. 521, 224 S.E.2d 715 (1976); possession of an unlawful weapon and escape, Taylor v. State, 258 S.C. 369, 188 S.E.2d 859 (1972); possession of drugs without a prescription, State v. Carriker, 269 S.C. 553, 238 S.E.2d 678 (1977); simple possession of marijuana, State v. Harvey, ___ S.C. ___, 268 S.E.2d 587 (1980); and public drunkenness, breach of peace, disorderly conduct, driving without a license, and trespassing, State v. LaBarge, ___ S.C. ___, 268 S.E.2d 278 (1980). A simple rendition of what has and has not been admitted does little to establish a conceptual basis for the rule.

In Tennessee, where the standard and definition of moral turpitude is the same as in South Carolina, a similar pattern of confusion persists. Apparently, the state courts have been unable to apply the definition of moral turpitude to specific acts of criminal conduct. Although one Tennessee court has ruled that a conviction for driving while intoxicated does not constitute moral turpitude, Fee v. State, 497 S.W.2d 748 (Tenn. 1973), another has held that driving without a license and drunken driving are crimes of moral

trial court considering the admissibility of a prior crime for the purpose of impeachment may have difficulty determining whether the crime falls within the moral turpitude standard that the supreme court reaffirmed in *LaBarge*. In *Bailey*, the court again failed to formulate a clear test for determining whether a crime is one of moral turpitude, explaining instead that a trial court must examine "the inherent nature of the crime."[19] Because the court stated that the inherent nature of a crime is "defined by law," a trial court presumably must rely on earlier decisions for guidance.[20] When the impeaching crime is not invariably one of moral turpitude, a trial court also may review the indictment in a prior conviction for facts providing insight into the nature of the crime.[21] A trial court's inquiry, however, may not proceed beyond examination of the impeaching crime's "defin[ition] by law and [its] particulariz[ation] by the indictment," lest an "extensive hearing on collateral matters" ensue.[22]

The results of such a case by case determination are unpredictable, at best, as recognized by Acting Associate Justice Cox in his dissent to *State v. Harvey*.[23] Justice Cox expressly called for abrogation of the moral turpitude rule in favor of an approach consistent with that of the Federal Rules of Evidence.[24] Federal Rule 609[25] sets forth two standards pursuant to which

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turpitude, Davis v. Wicker, 206 Tenn. 403, 333 S.W.2d 921 (1960). Similarly, violating liquor laws has been held a crime of moral turpitude, Everhart v. State, 197 Tenn. 272, 250 S.W.2d 368 (1952), but bootlegging has not, Gray v. State, 191 Tenn. 526, 235 S.W.2d 20 (1950). A conviction for public drunkenness and malicious mischief was deemed admissible in one case, Thomas v. State, 465 S.W.2d 887 (Tenn. 1970), but in another case public drunkenness was found not to constitute moral turpitude and was not admitted for impeachment purposes, Bolin v. State, 472 S.W.2d 232 (Tenn. 1971).

19. ___ S.C. at ___, 272 S.E.2d at 440.

20. See note 18 *supra*.

21. ___ S.C. at ___, 272 S.E.2d at 440.

22. *Id.* at ___, 272 S.E.2d at 440.

23. ___ S.C. ___, 268 S.E.2d 587 (1980).

24. *Id.* at ___, 268 S.E.2d at 589.

25. FED. R. EVID. 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

evidence of a prior crime may be admitted for purposes of impeachment. First, the rule provides for the admissibility of a conviction of any prior crime statutorily "punishable by death or imprisonment in excess of one year [upon the court's determination] that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[26] Second, the rule provides for admissibility of evidence of a conviction of any prior crime "involv[ing] dishonesty or false statement, regardless of the punishment."[27] Under either standard, evidence is admissible for ten years from the date of the conviction or release from confinement, whichever is later. The trial court, however, has discretion, in certain circumstances, to exceed the ten year limitation if practical considerations of relevancy and fairness so require.[28] The South Carolina Supreme Court should give serious consideration to adopting this approach; it would reduce substantially the ambiguity surrounding the present moral turpitude standard and would provide a more objective test for determining the admissibility of prior crimes for the purpose of impeachment.

II. HEARSAY: THE ADMISSIBILITY OF PRIOR CONSISTENT STATEMENTS

The traditional interpretation of the hearsay rule in South Carolina and the majority of other American jurisdictions has excluded evidence of a witness' prior consistent statement when offered to prove the truth of the matter asserted.[29] In *State v.*

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26. *Id.*

27. *Id.*

28. FED. R. EVID. 609(b) provides:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

29. *See, e.g.*, Holt v. State, 347 So. 2d 536 (Ala. 1976); Pine v. Vigil, 28 Colo. App. 601, 480 P.2d 868 (1970); Grand Forks Bldg. & Dev. Co. v. Implement Dealers Mut. Fire Ins. Co., 75 N.D. 618, 31 N.W.2d 495 (1948); Commonwealth v. Calderbank, 161 Pa. Super. 492, 55 A.2d 422 (1947); State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973);

Plyler,[30] the South Carolina Supreme Court ruled that a witness' prior consistent statement was admissible to prove the truth of the matter asserted, despite the declarant's lack of first-hand knowledge or observation of the fact asserted, because the declarant was present at trial and available for cross-examination.[31] This ruling, places South Carolina in a very small minority of jurisdictions.

In *Plyler*, defendant was charged with the murder of his former wife's sister. During the trial, defendant's former wife testified that she and the decedent were conversing by telephone when the decedent interrupted the conversation to answer a knock at the door. The witness then testified that she recognized her former husband's voice over the telephone, related the substance of his conversation with the decedent, and stated that she heard several gunshots that caused her to drop the receiver and exclaim, "Harry (referring to defendant) just shot Linda."[32] Defendant was convicted of murder[33] and appealed the verdict, contending that evidence of both the substance of his alleged conversation with the decedent and the witness' prior consistent statement, "Harry just shot Linda," were inadmissible as hearsay.[34]

The supreme court affirmed the conviction, explaining first that the witness' testimony to the substance of defendant's conversation with the decedent was not subject to hearsay objection because it was offered to place defendant at the scene of the crime rather than to prove the truth of the matter asserted.[35] The court then disposed of defendant's contention that the witness' prior consistent statement was inadmissible. Observing

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State v. Spadafore, 220 S.E.2d 655 (W. Va. 1975); C. MCCORMICK, *supra* note 1, § 245. In *Bottoms*, the South Carolina Supreme Court adopted the following statement of the rule:

> The general rule is almost universally recognized that evidence of extrajudicial statements made by a witness who is not a party and whose declarations are not binding as admissions is admissible only to impeach or discredit the witness, and is not competent as substantive evidence of the facts to which the statements relate.

260 S.C. at 193, 195 S.E.2d at 118 (quoting Annot., 133 A.L.R. 1454, 1455 (1941)).

30. ___ S.C. ___, 270 S.E.2d 126 (1980).

31. *Id.* at ___, 270 S.E.2d at 128.

32. Record, vol. 1, at 24-25. Defendants did not challenge the particular words used. *Id.*

33. *Id* at 2A.

34. Brief for Appellant at 1-8, 13-16.

35. ___ S.C. at ___, 270 S.E.2d at 127.

that "such an admission [was] technically in violation of the traditional hearsay rule," the court nevertheless held the evidence admissible and explained that

> [b]ecause the declarant of the out-of-court assertions testified, the truth of the statements were not dependent on the credibility of individuals not present in the courtroom. Since the declarant was subjected to cross-examination, which is the very objective of the hearsay rule, exclusion of relevant evidence serve[d] no purpose.[36]

To support this conclusion, the court cited its decision in *State v. Huggins*[37] and a decision by the Supreme Court of Indiana, *State v. Patterson.*[38] In *Huggins,* a police officer was permitted to testify to statements made by a confidential informant that had resulted in the defendant's arrest. According to the court, "[w]hether this testimony [was] hearsay or not [was] unimportant, since the informant later testified at trial."[39] In *Patterson,* prior sworn statements of two witnesses were admitted at trial for the purpose of impeachment, but the jury was not instructed to limit the use of the evidence to that purpose. Without considering the impeachment issue, the Indiana Supreme Court ruled that, in light of the relevance of the evidence and the availability of the witnesses for cross-examination at

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36. *Id.* at ___, 270 S.E.2d at 128 (citing Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975); State v. Huggins, ___ S.C. ___, 269 S.E.2d 334 (1980)). Although both defendant and the prosecution based their arguments concerning the admissibility of the prior statement on the *res gestae* exception to the hearsay rule, Brief of Appellant at 13-16; Brief for Respondent at 1-5, the court did not discuss this issue. "In order to qualify as part of the *res gestae,* a statement must be substantially contemporaneous with the litigated transaction and be the spontaneous utterance of the mind while under the active, immediate influence of the event." State v. Blackburn, 271 S.C. 324, 327, 247 S.E.2d 334, 336 (1978) (citations omitted). In Bagwell v. McLellan Stores Co., 216 S.C. 207, 57 S.E.2d 257 (1949), however, the court ruled that, to fall within the *res gestae* exception, a "declaration must explain, elucidate, or in some way characterize that event" and explained further that "the purpose of permitting the introduction of this class of evidence is to prove facts not opinions." 216 S.C. at 217, 57 S.E.2d at 262 (citations omitted). Because the prior statement in *Plyler* arguably is not a factual statement, it may not fall within the *res gestae* exception. The exception has been criticized, and the court's failure to discuss it may signal a retreat from the application of the exception. *See generally* Hutchins & Schlesinger, *Some Observations on the Law of Evidence,* 28 COLUM. L. REV. 342, 347 (1928). For further discussion of the criticism of the *res gestae* exception, see *Evidence, Annual Survey of South Carolina Law,* 31 S.C.L. REV. 73, 73 n.2 (1979).

37. ___ S.C. ___, 269 S.E.2d 334 (1980).

38. 263 Ind. 55, 324 N.E.2d 482 (1975).

39. ___ S.C. at ___, 269 S.E.2d at 335.

South Carolina Law Review, Vol. 33, Iss. 1 [1981], Art. 8
trial, "there was no reason to reject the [out of court] statements as substantive evidence, simply because they had been made at a time when witnesses were not subject to cross-examination."[40]

Plyler is troublesome both because of the authority on which the court relied and the potential scope of its holding. The court's reliance on *Huggins* seems misplaced. In *Huggins,* the court did not rule that a prior statement was admissible because the declarant testified at trial but merely ruled that a determination of whether or not the statement constituted hearsay was unimportant. The court further concluded that later testimony rendered admission of the prior statement harmless.[41] Implicit in *Huggins,* therefore, is the recognition that admission of the prior consistent statement may have been error, albeit harmless. *Patterson,* the only other authority cited in *Plyler* to justify the admissibility of the prior statement,[42] has been called into question in the state of its origin. Although Indiana has followed *Patterson* in subsequent decisions,[43] the Indiana Supreme Court recently stated that "the rule drawn from *Patterson* may well be in need of reconsideration."[44]

The hearsay rule ordinarily prohibits the admission of a witness' prior statements,[45] but two exceptions to the rule are recognized. First, a prior statement, inconsistent with testimony given by a witness in court, is admissible during cross-examination of the witness to attack his credibility.[46] Second, a prior statement, consistent with testimony given in court, is admissible during cross-examination of the witness to rehabilitate his credibility by rebutting a charge of recent fabrication.[47] In each

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40. 263 Ind. at 58, 324 N.E.2d at 484.

41. ___ S.C. at ___, 269 S.E.2d at 335.

42. See note 40 and accompanying text *supra.*

43. *E.g.,* Smith v. State, ___ Ind. ___, 386 N.E.2d 1137 (1980) (expressly refusing to overrule *Patterson*); Franklin v. State, ___ Ind. ___, 386 N.E.2d 668 (1979); Taggard v. State, ___ Ind. ___, 382 N.E.2d 916 (1978); Flewallen v. State, 276 Ind. 90, 368 N.E.2d 239 (1977).

44. Samuels v. State, 267 Ind. 676, 678, 372 N.E.2d 1186, 1187 (1978) (*Patterson* rule not intended to admit out-of-court statements that are mere substitutes for available in-court testimony).

45. See note 29 *supra.*

46. People v. Gant, 58 Ill. 2d 778, 317 N.E.2d 564 (1974); State v. Lane, 302 So. 2d 880 (La. 1974); State v. Hudson, 325 A.2d 56 (Me. 1974); State v. Marchand, 31 N.J. 223, 156 A.2d 245 (1959); Mays v. Mays, 267 S.C. 490, 229 S.E.2d 725 (1976). See *Evidence, Annual Survey of South Carolina Law,* 27 S.C.L. REV. 467, 470 (1975).

47. *E.g.,* Rease v. United States, 403 A.2d 322 (D.C. App. 1979); Openshaw v. Ad-

case, the hearsay rule prevents use of the prior statement for substantive proof.[48] Although limitation of the use of prior statements has been criticized,[49] most attempts to modify the rule have focused on broadening the application of the two exceptions.[50] The Federal Rules of Evidence employ a different approach to substantive use of prior statements; the Rules do not categorize evidence within the two common-law exceptions as hearsay as long as certain formal requirements have been met.[51] Admissibility of prior statements on direct examination, which must be distinguished from the traditional exceptions for admissibility on cross-examination, appears limited to a small minority of jurisdictions.[52]

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ams, 92 Idaho 488, 445 P.2d 663 (1968); People v. Clark, 52 Ill. 2d 374, 288 N.E.2d 363 (1972); Commonwealth v. Zukowski, 370 Mass. 23, 345 N.E.2d 690 (1976); State v. King, 115 N.J. Super. 140, 278 A.2d 504 (1971); State v. Rhinehart, 70 Wash. 2d 649, 424 P.2d 906, *cert. denied*, 389 U.S. 832 (1967); Annot., 75 A.L.R.2d 909, 913 (1961). *See* McMillan v. Ridges, 229 S.C. 76, 91 S.E.2d 883 (1956).

48. See note 29 *supra*.

49. Dean Wigmore challenged the limitations of the orthodox hearsay rule as follows: "[T]he witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the hearsay rule has already been satisfied." 3A J. WIGMORE, *supra* note 1, § 1018 at 996 n.2.

50. The California Code of Evidence permits substantive use of prior consistent statements that are admissible for other purposes on cross-examination. CAL. EVID. CODE §§ 791, 1236 (West 1966).

51. FED. R. EVID. 801(d)(1) provides, in pertinent part, that a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him . . . .

52. Included with South Carolina in this small minority are Illinois, Indiana, Kansas, and North Carolina. 54 Ill. App. 3d 312, 368 N.E.2d 608 (1977); Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975); State v. Satterfield, 27 N.C. App. 270, 218 S.E.2d 504 (1975); KAN. STAT. ANN. § 60-460(a)(1976).

The Kansas Legislature has codified a hearsay exception similar to the common law rule in Indiana. KAN. STAT. ANN. § 60-460(a) (1976) provides that a previous statement is admissible if it is "[a] statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by a declarant while testifying as a witness." The statute substantially adopts MODEL CODE OF EVIDENCE rule 503(b) (1942). *See, e.g.*, State v. Clark, 222 Kan. 65, 563 P.2d 1028 (1977); State v. Taylor, 217 Kan. 706, 538 P.2d 1375 (1975). The now superseded 1953 version of the UNIFORM RULES OF EVIDENCE provided that evidence of a prior declaration, although hearsay, was admis-

A critic of the orthodox hearsay rule has characterized it as a rule against unreliable evidence rather than against evidence not susceptible of cross-examination.[53] The decision of the South Carolina Supreme Court in *Plyler* firmly supports this proposition. It is uncertain, however, whether the court fully intended to recast the hearsay rule as a rule that proscribes substantive use of out-of-court statements only when the declarant is not available for cross-examination. The Indiana experience suggests a need for further definition by the South Carolina Supreme Court of the scope of admissibility of a witness' prior statements.

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sible if the declarant was present at trial and subject to cross-examination. UNIFORM RULES OF EVIDENCE 63(1) (1953). This approach was abandoned by UNIFORM RULE OF EVIDENCE 801(d)(1)(1974), which closely parallels FED. R. EVID. 801(d)(1).

For a discussion of *Patterson*, see notes 40, 43 & 44 and accompanying text *supra*.

53. Younger, *Reflections on the Rule Against Hearsay*, 32 S.C.L. REV. 281, 291 (1980).