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Evidence

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EVIDENCE

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RELEVANCY

Sentencing Phase of Capital Case—Punishment Accorded Co-Defendant

State v. Brogdon[1] presented a tough relevancy problem which, not surprisingly, seems to have troubled the Louisiana Supreme Court. The problem was whether, in the sentencing phase of a capital case, the accused should be able to adduce evidence before the jury that his severed co-defendant, as the result of a separate trial, received a sentence of life imprisonment without benefit of parole, probation, or suspension of sentence? The court, speaking through Justice Dennis, after frankly recognizing the difficulties of the problem, concluded that the trial court did not commit error in excluding the evidence. Without drawing a distinction between a trial of the severed co-defendant and those of other homicide offenders, the court found that:

> There can be little doubt that a comparison of defendant's case to similar first degree murder cases would provide a meaningful basis for determining whether the case is one of the relatively few in which the death penalty is to be imposed or one of the many in which it is not. Such a comparison also could reveal to the sentencer other relevant mitigating circumstances not listed in the statute.[2]

Further, the court conceded that "[a] detailed comparison of the individual aspects of a defendant's case with those of similar cases is certainly relevant to the ultimate goal of our system." Despite the foregoing recognition of the relevancy of the evidence, the court con-

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1. 457 So. 2d 616 (La. 1984).
2. Id. at 626.

cluded that the Legislature had not sought "a detailed comparative analysis of the other first degree murder cases and sentences by the *jury* in a capital sentence hearing." "The presentation and consideration of such comparative information to a jury . . . would be excessively time consuming, and probably confusing and distracting." The court emphasized that under the mandate of the Legislature, the supreme court had established supreme court review procedures and that under the constitution and its Rule of Court, it has "the duty of performing a detailed comparative proportionality review as a safeguard."[3]

With concern, the writers agree that no error was committed by the trial court in the instant case in refusing to receive the testimony in question. In the punishment phase of the co-defendant's trial, the jury in that case had been unable to reach unanimous agreement, and as a result, the judge in that case, pursuant to statute, had sentenced the co-defendant to life imprisonment without benefit of parole, probation, or suspension of sentence. It would have been difficult, if not impossible, for defendant's jury to ascertain why co-defendant's jury had been unable to reach agreement. The jury deliberations in that other case are, of course, cloaked in secrecy.[4] The naked testimony that the jury deadlocked in the sentencing phase of the co-defendant's case would not have been very helpful. The writers agree that under the circumstances it was more appropriate for the evidence as to the result of the jury deliberations in the co-defendant's case to be considered only by the supreme court in its overall review of defendant's death sentence. On the other hand, if the decision as to the sentence accorded the co-defendant had been reached by a plea agreement with the prosecutorial authority, a different result might well have been appropriate, for under the latter circumstances, the agreement as to sentencing would have been reached with the accord of governmental authority and the reasons therefor could presumably have been quickly elucidated by authoritative testimony.

Other Crime Evidence—Unsolicited Response by Police Officer Referring to Inadmissible Other Crime Evidence

In *State v. Wingo*,[5] a capital murder case, the arresting police officer, on direct examination by the prosecution, was asked whether he had obtained anything from the accused at the time of the arrest. To this proper question, the police officer expansively replied, "I obtained a pair of gloves that he said he always used when he committed a crime because he did not . . . ," at which point defense counsel interposed an objection and demanded a mistrial. The supreme court upheld the

3. Id.
4. La. R.S. 15:470-471 (1981).
5. 457 So. 2d 1159 (La. 1984).

trial court's denial of defendant's motion for mistrial. Citing precedent,[6] it held that a police officer is not a "court official" within the meaning of Code of Criminal Procedure article 770 which provides that the accused is entitled to a mistrial where "the judge, district attorney, or a court official" in the presence of the jury refers to inadmissible evidence of other crimes committed by the accused. It further found that under the circumstances presented in this case, a mistrial was not "necessary to assure a fair trial"—the test set forth in Code of Criminal Procedure article 771.

Another capital murder case involving the same question and reaching the same result was *State v. Brogdon*.[7] In *Brogdon*, the prosecution asked its police officer witness whether the defendant had understood the Miranda warnings, to which question the officer replied: "He indicated he understood. He told me he had been arrested before and that he . . . ."[8] Not surprisingly, at this point defense counsel objected and demanded a mistrial. The trial court's denial of the defendant's motion for mistrial was upheld by the supreme court for the reasons set forth above in the *Wingo* case.

Although consistent with prior decisions, *Wingo* and *Brogdon* are very disturbing. The problem is a recurring one,[9] and it would seem that police officers, as public employees belonging to a cadre of law enforcement personnel, could be successfully trained and persuaded to avoid such gratuitous references to very damaging other crime evidence. The legal system rightly considers such references highly improper and clearly antithetical to the right of each citizen to be accorded a fair trial. Contempt is an inappropriate remedy unless the officer was aware of the impropriety, and the granting of a mistrial is a very harsh, costly measure. However, in light of the damaging effect on the accused's rights to a fair trial, perhaps it would be advisable for the Legislature to amend Code of Criminal Procedure article 770 to include police officers, along with court officials, as those for whose actions the system

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6. State v. Perry, 420 So. 2d 139, 146 (La. 1982).

7. 457 So. 2d 616 (La. 1984).

8. Id. at 624.

9. See, e.g., State v. Nuccio, 454 So. 2d 93 (La. 1984); State v. Perry, 420 So. 2d 139 (La. 1982); State v. Douglas, 389 So. 2d 1263 (La. 1980); State v. Schwartz, 354 So. 2d 1332 (La. 1978), discussed in Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Evidence, 39 La. L. Rev. 955, 963 (1979); and cases collected in Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1975-1976—Evidence, 37 La. L. Rev. 575, 580 (1977), reprinted in Pugh, Louisiana Evidence Law 115 (Supp. 1978); Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence, 36 La. L. Rev. 651, 657 (1976), reprinted in Pugh, Louisiana Evidence Law 148 (Supp. 1978); Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence, 35 La. L. Rev. 525, 527 (1975), reprinted in Pugh, Louisiana Evidence Law 111 (Supp. 1978).

accepts responsibility and consequently mandates mistrial for such clearly improper, very prejudicial remarks.

Admissibility of Testimony re Polygraph Test Where Passing Test Was a Condition of Prosecution's Granting Immunity to Witness

In *State v. Hocum*,[10] the supreme court demonstrated its continued strict adherence to the principle laid down in *State v. Catanese*[11]—that it is "the judicial policy of Louisiana to exclude for any purpose polygraph evidence in criminal trials."[12] In *Hocum*, the state presented a witness who testified that he had been engaged by the defendant to kidnap the defendant's child with a view to sharing the ransom money with the defendant. On cross-examination, defense counsel vigorously attacked the witness's testimony, bringing out that the witness had been promised immunity by the prosecution in return for his testimony. To meet this attack, the prosecution called as a witness, a supervisor with the district attorney's office who, over objection, was permitted to testify to the terms of the immunity agreement—that it, *inter alia*, contained a condition that the witness take and successfully pass a polygraph test. Relying on prior jurisprudence and the strong policy statement in *Catanese*, the court found it reversible error to admit the testimony.

Although it is possible under the circumstances to argue that by attacking the credibility of the witness because of the immunity grant, defense counsel "opened the door" to the subsequent contested rehabilitation, it is believed that the court was correct in adhering to the strong policy enunciated in *Catanese*. There is great danger, as stated in *Catanese*, that the jury will give conclusive weight to the results of polygraph tests. Further, to hold otherwise would unduly discourage defense counsel from bringing out the fact of the immunity agreement.

WITNESSES

Expert Witnesses—Ultimate Issue

May an expert give an opinion on an ultimate issue in the case? There has been much discussion in the cases concerning this matter, and a very helpful analysis of the problem is given in *State v. Birdsong*[13] concerning the admissibility of expert testimony as to whether the defendant in a criminal case knew the difference between right and wrong at the time of commission of the crime. In a scholarly opinion, Judge Price of the Louisiana Second Circuit Court of Appeal concluded that

10. 456 So. 2d 602 (La. 1984).
11. 368 So. 2d 975 (La. 1979).
12. 456 So. 2d at 604.
13. 452 So. 2d 1236 (La. App. 2d Cir. 1984).

such testimony is admissible, even though it involves an ultimate issue in the case. The court stated that *State v. Wheeler*,[14] a leading Louisiana Supreme Court decision with respect to the admissibility of opinion testimony, does not require a contrary result. The writers fully agree.

In *State v. Rushing*,[15] in the context of the sentencing phase of a capital case relative to the propriety of receiving testimony by witnesses as to whether in their opinion the crime involved was particularly heinous, the court took the position that lay witnesses may not testify as to an ultimate issue. In the opinion of the writers, the testimony in question (as well as other evidence at the hearing as to whether or not, under the circumstances of the case, the witnesses believed death to be the appropriate sentence), was properly held to be inadmissible evidence. As the court recognized, the testimony in question was tantamount to testimony as to the existence of an aggravating circumstance. On the other hand, the writers feel this testimony was inadmissible not because it went to an ultimate issue, but rather because its reception violated the principle underlying *State v. Wheeler*,[16] for the risk of prejudice from receiving the evidence far outweighed any helpfulness to the jury it might have had. Further, the writers agree with the dissenting justices that the reception of the evidence was not harmless error, and hence should have necessitated a new sentencing hearing.

Expert Witnesses—Calling Opponent's Expert as One's Own Witness

In *State Department of Transporation and Development v. Stumpf*,[17] the Louisana Supreme Court held that nothing precludes a landowner from calling as his own witness an expert appraiser retained, but not called as a witness, by the expropriating authority. In so holding, the court did not affect the authority of Louisiana cases[18] determining that one may not call, as a witness under cross-examination,[19] an appraiser retained by an opponent. Further, said the court, "[a]rticles 1425(2) and 1424, limiting the rights of an opposing party to compel disclosure by another's expert of his opinion or the facts on which his opinion is based, do not create a privilege against the use of the expert as a witness at trial by the opposing party."[20] The writers fully agree.

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14. 416 So. 2d 78 (La. 1982).
15. 464 So. 2d 268 (La. 1985).
16. See supra note 14.
17. 458 So. 2d 448 (La. 1984).
18. Humble Pipe Line Co. v. Roy Aucoin, Inc., 230 So. 2d 365 (La. App. 1st Cir. 1969); State Department of Highways v. Finkelstein, 340 So. 2d 1040 (La. App. 1st Cir. 1976).
19. La. Code Civ. P. art. 1634.
20. 458 So. 2d at 454, referring to La. Code Civ. P. arts. 1425 and 1424.

PRIVILEGE

Attorney-Client Privilege—Ambit of Privileged Information

The Louisiana Legislature by statute has provided an exceptionally broad attorney-client privilege for criminal cases. In sweeping language, Louisiana Revised Statutes (La. R.S.) 15:475[21] makes privileged "any information" acquired by an attorney in consequence of an attorney-client relationship. What are the implications of the Louisiana statutory language where the accused in a criminal case seeks to adduce testimony from another individual's attorney as to information garnered by that attorney from sources other than his client, or transactions had by such attorney with third persons on behalf of his client? An aspect of the problem was before the court in *State v. Rankin*.[22]

The defense in *Rankin* had sought to adduce testimony from an attorney who presumably had represented a prosecution witness in plea bargaining negotiations. The relevancy of the testimony, as recognized by the supreme court, was to develop a possible bias on behalf of the witness in favor of the prosecution, by showing that the prosecution perhaps had leverage over the witness. Contrary to langauge contained in the earlier case of *State v. Franks*,[23] the court took the position that although such testimony falls literally within the ambit of the Louisiana statutory privilege, it should not be held to fall within its scope.[24] In so concluding, the court relied heavily upon the reasons advanced by Professor Wigmore and what it considered to be the inappropriateness of an attorney-client privilege in this context.

The writers agree that under the facts presented in *Rankin* the defendant should have been able, over a claimer of privilege, to adduce the information in question from the attorney for the prosecution witness. Further, it is well that the suggestion to the contrary in *State v. Franks* is disapproved. However, rather than holding that the matter fell outside

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21. La. R.S. 15:475 (1981) provides:

> No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication made to him as such legal adviser by or on behalf of his client, or any advice given by him to his client, or any information that he may have gotten by reason of his being such legal adviser.

22. 465 So. 2d 679 (La. 1985).

23. 363 So. 2d 518 (La. 1978).

24. For other cases giving a restricted scope to La. R.S. 15:475 (1981), see State v. Jones, 284 So. 2d 570 (La. 1973), discussed in Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1973-74 Term—Evidence, 35 La. L. Rev. 541 (1975), reprinted in Pugh, Louisiana Evidence Law 207 (Supp. 1978); State v. Hayes, 324 So. 2d 421 (La. 1976), discussed in Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence, 37 La. L. Rev. 575, 593 (1977), reprinted in Pugh, Louisiana Evidence Law 206 (Supp. 1978).

the scope of the privilege, in the writers' opinion it would have been preferable for the court to have held that, under the facts presented in the case, the privilege must yield to defendant's right to compulsory process.[25] The Legislature presumably intended a very broad attorney-client privilege for criminal cases; apparently, it wanted to avoid the unseemliness of an attorney's revealing, absent the consent of his client, information gathered during the representation of his client, regardless of where or from whom the attorney acquired the information. Where, however, the information in question is non-confidential in character and important to the defense of a criminally accused, it is surely proper that any privilege should yield to the accused's right to compulsory process.[26] A far more difficult question is presented, as the court in *Rankin* recognized, where the information sought to be revealed is a confidential communication between the attorney and the witness.

Husband-Wife Privilege—Confidential Communications

Is a confidential *written* communication between husband and wife subject to a valid confidential connubial communication privilege? Act 157 of 1916 made "private conversations" between husband and wife privileged. Four years later in *State v. Morgan*,[27] the Louisiana Supreme Court took the position that a letter between spouses is not privileged, for it concluded that a letter is not a "private conversation." Not surprisingly, this very literal interpretation was criticized.[28] Nevertheless, this language of the 1916 statute was repeated unchanged in the Code of Criminal Procedure of 1928[29] and in the Revised Statutes of 1950.[30]

Whether an interspousal letter should properly be regarded as a "private conversation" and accorded privileged status was again before the court this past term. The court in *State v. Fuller*[31] followed the interpretation given the language in question in *State v. Morgan*. Although noting that the case had been criticized, the court in *Fuller*

25. See Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105 (1974); Durr v. Cook, 589 F.2d 891 (5th Cir. 1979), discussed in Pugh & McClelland, Developments in the Law, 1979-1980—Evidence, 41 La. L. Rev. 595, 612 (1981); U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor . . ."; La. Const. art. I, § 16: "An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf."

26. See authorities cited supra, note 24.

27. 147 La. 205, 84 So. 589 (1920).

28. See J. Wigmore, Evidence in Trials at Common Law § 2339 n. 3, at 669 (McNaughton rev. ed. 1961).

29. La. C. Cr. P. art. 461 (1928).

30. La. R.S. 15:461 (1950).

31. 454 So. 2d 119 (La. 1984).

emphasized that the statutory language in question had been twice reenacted. Further, it said that in privilege cases the court should ascertain whether the conversation in question is within the class of communications sought to be protected by the Legislature.[32] Discussing the factual context in which the privilege question was presented in the instant case, the court found the circumstances peculiarly unappealing. The court stated:

> When a husband on trial for the murder of his wife's mother attempts to place the blame on his wife, prior inconsistent written assertions to his wife ought to be admissible to challenge the credibility of the husband's trial testimony, even if the same statements arguably might be privileged under some other circumstances.[33]

In the opinion of the writers, the statute should be amended to make clear that interspousal written communications, as well as oral communications, are subject to a valid claimer of privilege. It seems to us that the interpretation given in *Morgan* to "private conversations" under the 1916 Act was unduly restrictive, and the spirit of the provision, even when reenacted, calls for a more liberal interpretation. Although the contextual facts in *Fuller* were not appealing, contrary to the suggestion made by the court, it seems to these writers that the letter fell into a class of communications, i.e., husband-wife confidential revelations, that the Legislature sought to protect. The fact that there is reason to believe that the husband may have been prevaricating when he wrote the letter to his wife, and that thereafter at the trial he attempted to shift the blame to his wife, should not remove it from the class of communications to be protected. Judicial inquiry as to in what context the Legislature would consider a particular communication deserving of societal protection would tend, it is believed, to make husband-wife communications the object of undue public inquiry and exposure.

HEARSAY

Confrontation—Unavailability as prerequisite to admissibility of out-of-court declaration

State v. Orlando,[34] a second circuit decision, concerns an extremely important problem: Under what circumstances do the confrontation

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32. See State v. Aucoin, 362 So. 2d 503 (La. 1978) (cited with approval in *Fuller*, 454 So. 2d at 122), discussed in Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Evidence, 40 La. L. Rev. 779, 794 (1980).

33. *Fuller*, 454 So. 2d at 122.

34. 456 So. 2d 1021 (La. App. 2d Cir. 1984), cert. denied, 460 So. 2d 1043 (La. 1985).

clauses in the state[35] and federal[36] constitutions require that, as a prerequisite to admissibility of an out-of-court declaration offered by the prosecution in a criminal case, the prosecution "produce" the declarant if he is "available" (or at least make a good faith effort to do so)?

Orlando involved the admissibility of a statement made by an alleged co-conspirator about two weeks prior to a homicide, inquiring about the victim's habits and expressing a desire to kill him. By the time the defendant's trial began, the alleged co-conspirator had been convicted of murder and sentenced to death. His conviction had been affirmed by the Louisiana Supreme Court, and he was seeking relief in the federal court system. Over defense counsel's objection, the trial court authorized the introduction of the alleged co-conspirator's statement, without requiring that the prosecution produce the alleged co-conspirator. Relying heavily upon very strong language in the United States Supreme Court decision in *Ohio v. Roberts*,[37] the Louisiana Second Circuit Court of Appeal held as a prerequisite to admissibility of the alleged co-conspirator's statements, the prosecution was obliged to make a good faith effort to produce the declarant, and that such a good faith effort to produce had not been shown.[38] The Louisiana Supreme Court, one justice dissenting, denied writs on the ground that the result reached was correct.

The matter is a very important one, having broad significance to the admissibility of hearsay evidence where the maker of the declaration offered by the prosecution in a criminal case, although available as a witness, is not produced by the prosecution. The United States Supreme Court has recently granted writs[39] to review a decision by the United States Third Circuit Court of Appeals,[40] which, placing like reliance on the important decision in *Ohio v. Roberts*, arrived at a result similar to that reached by the Louisiana Second Circuit Court of Appeal in *State v. Orlando*. Presumably the problem will soon be elucidated by the United States Supreme Court.

Declarations to Show State of Mind

State v. Martin[41] is the latest in a long line of rich cases concerning the admissibility of out-of-court declarations to show "state of mind."[42]

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35. La. Const. art. 1, § 16.

36. U.S. Const. amend. VI.

37. 448 U.S. 56, 100 S. Ct. 2531 (1980). For a scholarly discussion of the significance of Ohio v. Roberts, see Lilly, Notes on the Confrontation Clause and Ohio v. Roberts, 36 Fla. L. Rev. 207 (1984).

38. One of the judges on the panel concurred in the judgment for reasons different from those stated in the majority opinion, and on application for rehearing another judge concurred in denial of rehearing for the reasons stated in the earlier concurring opinion.

39. 105 S.Ct. 2653 (1985).

40. United States v. Inadi, 748 F.2d 812 (3d Cir. 1984).

41. 458 So. 2d 454 (La. 1984).

42. For discussion of prior cases, see Pugh & McClelland, Developments in the Law,

In *Martin*, a homicide case, the defendant admitted shooting his wife after a heated domestic quarrel, but maintained that he shot her in self-defense. According to his version, he had taken the murder weapon from his wife after she had aimed it at him, and had shot her with it in self-defense after she had pulled another pistol (a .357 magnum) from her purse. Over a hearsay objection by the defendant, the prosecution was permitted to adduce testimony from a witness that the deceased wife had told the witness "that if she would ever try to leave James [the defendant] that he might kill her."[43] In upholding this decision of the trial court, the supreme court acknowledged that the out-of-court declaration was not admissible to prove that defendant had acted aggressively towards his wife, that the out-of-court declaration of the wife was inadmissible to show the conduct of the defendant. Nevertheless, it held that the wife's declaration was admissible to show her state of mind, to explain why she carried a .357 magnum.

With deference, the writers agree with the forceful dissenting opinion authored by Justice Lemmon. As contended by Justice Lemmon, it appears that the reason for the wife's possession of the .357 magnum was only peripheral in character and that there was great danger that the jury might ascribe inadmissible weight to the out-of-court declaration, i.e., use it as tending to show that he had killed her because she had tried to leave him. As Justice Lemmon stated:

> The problem with such evidence is that it appears to untrained jurors to prove something which it does not really tend to prove (defendant's conduct, as opposed to his wife's state of mind)
> . . . .
>
> When marginally relevant evidence has little or no probative value and has a substantial prejudicial effect, then the evidence must be excluded. Since the prejudicial effect of the wife's out-of-court statement (its appearance of proof that defendant killed without justification) greatly outweighed any slight probative value (any tendency to prove the wife's fearful state of mind), the evidence should have been excluded.[44]

1982-1983—Evidence, 44 La. L. Rev. 335, 348 (1983); Pugh & McClelland, Developments in the Law, 1981-1982—Evidence, 43 La. L. Rev. 413, 434 (1982); Pugh & McClelland, Developments in the Law, 1980-1981—Evidence, 42 La. L. Rev. 659, 669 (1982); Pugh & McClelland, Developments in the Law, 1979-1980—Evidence, 41 La. L. Rev. 595, 613 (1981); Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence, 38 La. L. Rev. 567, 584 (1978); Pugh, The Work of the Appellate Courts for the 1970-1971 Term—Evidence, 32 La. L. Rev. 344, 353 (1972), reprinted in Pugh, Louisiana Evidence Law 425 (1974).

43. 458 So. 2d at 460.

44. Id. at 463-64 (footnote omitted).

It is difficult to refute Justice Lemmon's persuasive pronouncement.

It is important to note that in taking the position that declarations tending to show the state of mind of the victim are inadmissible to show the actions of the defendant third person, both majority and dissenting opinions seem to reject the approach taken by the court in *State v. Tonubbee*.[45]

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45. 420 So. 2d 126 (La. 1982), discussed in Pugh & McClelland, Developments in the Law, 1982-1983—Evidence, 44 La. L. Rev. 335, 348 (1983). For an interesting case bearing on the issue, and an exhaustive analysis of the problem, see United States v. Brown, 490 F.2d 758 (D.C. Cir. 1974).