

The Guardian

The Newsletter of the Alabama Criminal Defense Lawyers Association

September/October 2005

Defense Attorney's Guide To Alabama's Testimonial Privilege And The Impact On Domestic Violence Cases

By Bill C. Messick, Mobile, AL

INTRODUCTION

In this article, "*Witness-spouse*" means the Defendant's spouse. Since the husband is the one most frequently arrested in Domestic Violence cases, the Defendant is referred to herein as "*he*" or "*him*" and the Defendant's spouse as "*she*" or "*her*". However, the law applies equally – regardless of gender.

Alabama's Testimonial Privilege is often misunderstood and confused with the Confidential Communications Privilege. To complicate matters, some members of the bar have the mistaken belief that a Witness-spouse's statement to law enforcement at the scene can be introduced at the Defendant's trial if she exercises her privilege not to testify. This article will clarify and distinguish these two privileges, dispel those mistaken beliefs and put the applicable statutes, rules and case law at your fingertips.

It should be noted that, even if the Witness-spouse successfully invokes her Testimonial Privilege not to testify, the Defendant's voluntary statement to law enforcement at or near the time of his arrest could still be admissible as an admission by a party opponent; (See: *Rule 801(d)(2) Alabama Rules of Evidence (A.R.E.)*).

YOU HAVE JUST BEEN RETAINED TO DEFEND A DOMESTIC VIOLENCE CASE AND THE WIFE DOES NOT WANT TO TESTIFY

Local law enforcement gets a domestic disturbance call. Upon arrival, officers interview both spouses and (*typically*) decide to arrest the husband for Domestic Violence 3rd Degree (See: *§13A-6-132 Code of Alabama (C.O.A.)*).

Sometime between arrest and trial, the Defendant calls your office. At the initial appointment, he tells you that, for whatever reason, his Witness-spouse does not want to testify against him. The Witness-Spouse might even accompany the Defendant to the appointment to confirm this fact.

Both spouses have the natural, but unrealistic, belief that the charges will be summarily dismissed if you will just tell the prosecutor that the Witness-spouse does not want to testify. You know, based on your experience in such cases, it is

not that simple. You explain to your client and his spouse that if the case gets dismissed at all, it will happen only after you have thoroughly prepared the case and filed the appropriate pleadings.

SPOUSAL PRIVILEGES

There are two, distinct spousal privileges in Alabama; the "*Testimonial Privilege*" and the "*Confidential Communications Privilege*". The Testimonial Privilege rests with the testifying spouse and the Confidential Communications Privilege rests with the Defendant. If the Witness-spouse elects not to testify against the Defendant, the Testimonial Privilege will be the most important to you when defending a Domestic Violence case. However, you must also understand the Confidential Communications Privilege and its exceptions to successfully assert the Testimonial Privilege.

TESTIMONIAL PRIVILEGE

Under Alabama common law, there were two marital witness rules; the marital incompetency rule and the confidential communications rule. (*The marital incompetency rule was sometimes referred to as the "spousal" incompetency rule*).

Under the marital incompetency rule, spouses were declared absolutely incompetent to be witnesses for or against each other in a criminal case; **Woods v. State**, 76 Ala. 35 (1885) and **Birge v. State**, 78 Ala. 435 (1885). See also **State v. Hussey**, 87 Ala. 121, 6 So. 420, 425 (1889). Even back then, a person was considered competent to testify against their spouse if it related to an assault upon that person by the spouse; **Williams v. State**, 149 Ala. 4, 43 So. 720 (1907) (*Wife assaulted Husband*); **McGee v. State**, 4 Ala.App. 54, 58 So. 1008 (1912) (*Husband assaulted Wife*). In that instance, the victim could be compelled to testify against their spouse; **Johnson v. State**, 94 Ala. 53, 10 So. 427 (1892). For a good discussion of the marital incompetency rule and its interaction with the Testimonial Privilege and Confidential Communications Privilege, see **Arnold v. State**, 353 So.2d 524 (Ala. 1977).

Alabama gradually moved away from grounds of absolute marital incompetency. In 1915, the Alabama Legislature abolished the rule of marital

incompetency when it codified **§12-21-227 Code of Alabama (C.O.A.)** (*the Testimonial Privilege*). It states, in its entirety, as follows: "*The husband and wife may testify either for or against each other in criminal cases, but shall not be compelled so to do*".

This trend away from absolute marital incompetency was continued in 1996, when the Alabama Rules of Evidence went into effect. Currently, every person is competent to testify except as otherwise specified in the rules; see **Rule 601** of the Alabama Rules of Evidence (**A.R.E**) which states: "*Every person is competent to be a witness except as otherwise provided in these*

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FOUR CORNERS SEMINARS

4 Free CLEs!

DECEMBER 2:

Anniston, Florence and Tuscaloosa

DECEMBER 9:

Enterprise, Mobile and Montgomery

See inside for registration details or log on to www.acdla.org or call 1-334-272-0064

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President's Column

By Joseph Van Heest, Montgomery, AL



*ACDLA President
Joe Van Heest*

Overhead these days is still not dead. For example, if you practice law in the 22nd Judicial Circuit (Covington County) you are getting paid your office overhead. This is because of a lawsuit filed by former member Mark John Christensen in 2002. Remarkably, as all of you I am sure are aware, the Comptroller, relying upon Attorney General Troy King's errant February 1, 2005 Opinion (2005-063), has withheld overhead to lawyers practicing in the other 66 counties.

A suit was filed in Montgomery County by plaintiff Daniel W. Wright, and his Birmingham lawyer George Douglas, in June, 2005, seeking to reverse the comptroller's position and enforce the binding case law on behalf of himself and others similarly situated. The plaintiff filed a motion for summary judgment, relying heavily on the comptroller's inconsistent positions between the 22nd Judicial Circuit and the other forty circuits. Both ACDLA and the Alabama State Bar sought to file amicus briefs in support of Wright's motion. At oral argument on September 1, 2005, before Montgomery County Circuit Judge Truman M. Hobbs, Jr., both amici were permitted time to file such briefs and both amici filed briefs on Friday, September 9, 2005. I was encouraged by what I saw at the oral argument and the judge seemed responsive to the plaintiff's argument. I am hopeful for a quick and positive resolution at the circuit court level, and also hopeful the finance department will not waste ours as well as the state taxpayers' time and money appealing the issue.

The briefs have been uploaded to the ACDLA website. Remember to look there as well as the listserv for the latest news. The website address is acdla.org.

Meanwhile the long-term fix to the indigent defense funding issue is in full swing. Chief Justice Nabers' Indigent Defense Study Committee has been meeting to hammer out details to propose a bill to the legislature, perhaps as early as a special session in late October or early November. Because it is an election year next year, there are some who feel uncertain that any indigent defense bill might be able to secure passage in the regular session. Bill Blanchard is our appointee to the study group and I have been working closely with Bill to monitor the committee's progress. If the legislation is in fact proposed in the legislative session, it may impact on the timing and scope of our proposed Town Meetings that I mentioned in my last column. At this time, we are hoping to conduct Town Meetings in the

following locations throughout the fall and perhaps early winter: Montgomery, Tuscaloosa, Huntsville, Florence, Birmingham, Anniston, Mobile, Enterprise, Alexander City, Selma, and Fort Payne, and perhaps other locations as well. Once we announce a location, we will contact a person to be a site coordinator and to help set up a time and location, and assure a significant turnout (members and non-members who are potential members alike). The purposes of the Town Meetings are two-fold: (1) to hear your concerns and discuss the issues involving a unified Indigent Defense System (which does not mean one form of indigent defense for the entire state); and (2) to increase membership and visibility of this organization.

Our annual Four Corners Seminars will be coming up sooner than you think. As the college football season is now underway, and the autumn will disappear into winter as quickly as summer disappeared into autumn, we have scheduled six locations over two dates: Friday, December 2, 2005, and Friday, December 9, 2005. Look to the listserv and the website for information on the locations, topics and speakers for these dates.

Then, right around the corner at the end of January, 2006 we will again have our Death Penalty Seminar. Again, be watching for information on that seminar as well. Our death penalty committee, led by John Mays and Richard Jaffe, has done outstanding work putting together one of the premier death penalty conferences in the nation over the past several years and we look forward to another successful seminar.

On August 19, 2005, the Board and a number of other Association members met at Bill Blanchard's summer home on Ono Island, Alabama for its annual retreat. The retreat is a full day board meeting to discuss the agenda and priorities for the upcoming year. For those of you who might want to suggest that this is some type of board boondoggle, I can assure you its uncompensated work. Board members and non-members alike traveled from great distances (including Florence, Huntsville, Roanoke, Bessemer and Tuscaloosa) to attend the meeting. They are not paid and do not receive mileage reimbursements either. The only "compensation" received is a lunch which runs about \$15.00 per person. I can assure you that we got more than \$15.00 worth of time and work out of each who attended before the day was done. I'd like to report some of the things that came out of the retreat.

First off, we have discussed over the past several years the need to compensate Ann as a full-time executive director. Prior to that board retreat, Ann was technically a 20-hour per

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Guardian Deadlines

March 15, 2005
May 15, 2005
July 15, 2005
September 15, 2005
November 15, 2005

Send camera-ready copy with payment to the ACDLA office.

To order resources, send a note on your letterhead describing the specific item you would like to order with your check to:

ACDLA
PO Box 1147
Montgomery, AL 36101

Please notify the ACDLA office immediately of any changes in your contact information.

If you are not on the ACDLA email discussion group and you would like to be, please send your name and email address to
annscooper@bellsouth.net

FROM MY PERSPECTIVE

By Ann S. Cooper, Executive Director

INDIGENT DEFENSE UPDATE

The Chief Justices' Indigent Defense Study Committee will meet later this month to discuss a proposed indigent defense commission bill. ACDLA Legislative Chairman Bill Blanchard is our representative for this group and has done an excellent job of providing input. As of this writing it is uncertain if the committee will have the legislation ready for introduction by the special session, expected in late October. Please watch the ACDLA listserv for updates.

We are still waiting on a ruling by Montgomery County Circuit Judge Truman Hobbs on Wright v. Childree (overhead case). Once that ruling becomes known we will post it on the ACDLA listserv as well.

2006 DUES NOTICES

ACDLA dues statements will go into the mail on November 1. Please watch for your statement. The statements will feature a new section with an optional dues check-off to support our legislative efforts. We urge you to give this optional donation request serious consideration as we try to keep our legislative efforts alive in 2006.

FOUR FREE CLE HOURS

All 2006 dues paid ACDLA members are eligible for 4 FREE CLEs in December.

Don't forget to mark your calendars for ACDLA's Annual Four Corners Seminars set for December 2 and 9 around the state. Locations include Anniston, Florence and Tuscaloosa on December 2. On December 9, locations include Montgomery, Mobile and Enterprise. All sites will be county courthouses, except for Montgomery's event that will be held at the Alabama State Bar. Seminar times are 1:00 to 4:00 p.m. for all locations except Montgomery and Anniston. There times will be 12:30 to 4:30 p.m. Pre-registration is advised as materials and seating are limited. See registration details in this issue of *The Guardian*.

DEATH PENALTY SEMINAR SET

"Loosening the Death Belt," ACDLA's annual death penalty seminar is set for January 27 and 28 in Birmingham at the Embassy Suites Hotel. Please watch your mail and *The Guardian* for registration details. Pre-registration is advised. Cost to ACDLA members is \$300 by December 27 or \$350 for anyone after that date. Call 334-272-0064 for more details.

QUESTIONS?

For questions about ACDLA events and activities, please call 334-272-0064 or by email to: annscooper@bellsouth.net

RECENT ELEVENTH CIRCUIT RULING ON “REASONABLE SUSPICION” OCCURRING DURING TRAFFIC STOP

By Patricia Kemp, Research & Writing Attorney, Middle

District of Alabama Federal Defender Program, Inc. (Reprinted from September 2005 issue of “CJA News”).

In *United States v. Hernandez*, No. 04-11776, 2005 WL 1792229, decided on July 29, 2005, the Eleventh Circuit addressed what constitutes “reasonable suspicion” of criminal activity, sufficient to extend a traffic stop detention. The result is disappointing.

Mr. Hernandez and his passenger were stopped by a state trooper for speeding. Ms. Hernandez told the trooper she was speeding to find a rest room, due to an upset stomach. Apparently indifferent to her discomfort, the trooper detained both individuals for seventeen minutes while he questioned each on facts unrelated to the stop and checked their licenses through U.S. Customs. Following the detention, the trooper obtained consent from both individuals to search their vehicle. The search resulted in the seizure of cocaine.

Ms. Hernandez’ attorney moved to suppress the cocaine as the result of an unconstitutional detention and resulting unconstitutional search. Finding that the trooper’s questioning made the detention unconstitutional prior to the consent to search being obtained, the district court granted the appellant’s motion to suppress evidence and motion to dismiss. The government appealed.

Alas. The Eleventh Circuit held that the search and seizure did not violate the appellant’s Fourth Amendment rights because reasonable suspicion existed that the appellant was engaged in criminal activity. The trooper had testified that he found implausible the appellant’s excuse that she was speeding to get to a bathroom, when they had just passed an exit with bathrooms. Additionally, the trooper found suspicious both individuals’ nervousness, discrepancies in their stories regarding the purpose and length of the trip, and the presence of empty food containers and minimal luggage in the vehicle.

The Court of Appeals reasoned that the trooper’s suspicions constituted reasonable suspicion of criminal activity and therefore created sufficient basis to continue questioning the driver and passenger. The Court of Appeals further reasoned that once the individuals gave their consent to search, the “clock re-started for purposes of evaluating the reasonableness of the duration of the intrusion.”

Thus, the Court of Appeals held, the appellant was lawfully detained when she consented to the search. Therefore, both the detention and search were constitutional. The district court’s dismissal of the case was reversed and the case was returned to the district court for further proceedings.

As always, Fourth Amendment traffic stop cases will turn

on the unique combination of facts and circumstances present in each case. But in this case, the law enforcement officer was determined to have reasonable suspicion to both (1) prolong a routine traffic stop for continued road-side interrogation and (2) seek to search a vehicle, because he/she observed:

1. A vehicle with an out-of-state license plate traveling at three o’clock in the morning;
2. Food containers and small amounts of luggage inside the vehicle;
3. That under all known facts, the driver’s reason for the traffic violation seems unbelievable;
4. Contradictions between the driver and passenger’s explanation of the length, destination, and purpose of the trip;
5. Nervousness;
6. Nonstop travel at night in bad weather; and
7. Travel between states known for drug trafficking.

See *United States v. Hernandez*, 2005 WL 179229 at *2-4.

The Eleventh Circuit distinguished this case from *United States v. Perkins*, 348 F.3d 965 (11th Cir. 2003), by concluding that the officer in this case had more evidence establishing reasonable suspicion than the officer in Perkins, holding: “The implausibility that the truck was speeding because Defendant was suffering from diarrhea-after they had just passed a lighted exit with restroom facilities in rural Alabama at 3 a.m. (where rest stops were few and far between)-combined with the Trooper’s observation of the food containers and minimal luggage, creates a more suspicious set of circumstances than a mere demonstration of nervousness, use of an out-of-state license, or habit of repeating questions before answering. *United States v. Perkins*, 348 F.3d 965,970 (11th Cir. 2003)(concluding nervousness, repetition of questions, possession of out-of-state license, and inconsistent statements regarding destination alone insufficient for reasonable suspicion).” *United States v. Hernandez*, 2005 WL 179229 at *4.

Still, the outcome of the *Hernandez* case is surprising, in view of the almost universal nature of the “suspicious circumstances” relied upon by the trooper and upheld by the Eleventh Circuit. Better watch that fast food eating, night time driving, and non-stop bad weather driving!

PRESIDENT'S COLUMN

(Continued from page 2)

week part-time executive director. The truth is, however, she has worked full time consistently over the past several years. Anyone who contacts her with a question or comment usually receives a quick response, irrespective of whether it is day or night. A week prior to the Board Retreat, the Budget Committee met and discussed whether it would be financially feasible to pay Ann as a full-time employee. The Budget Committee recommended we do so, and on the 19th the Board voted to pay her as a full-time executive director.

Another topic that received substantial discussion was the approach we should now take to the indigent defense overhead situation. After considering several different possible strategies, the Board voted to work to file an amicus brief in support of the current litigation in *Wright v. Childree*, the Montgomery county case, rather than spread ourselves too thin with numerous suits throughout the state – all of which would likely be consolidated in Montgomery anyway.

We appointed several new committee chairs: Bill Blanchard and Melinda Morgan Austin have agreed to continue on as the Legislative and CLE chairs, respectively; John Beck is our new chair of the membership committee; and Kesa Johnston is our new publications committee chair.

I'd like to briefly address a few other topics that deserve mention at this time. First, as you are all aware, prior to the Roberts administration, we had been discussing the need to begin a legislative program. On February 8, 2005, just one week after the Attorney General's notorious overhead opinion was released, we formed a legislative program. We hired Amy Herring for both the regular session and the special session, and nearly had the overhead expenses issue settled legislatively. That costs money. In a few months, you will be getting your membership renewal notices for next year. Included in that membership renewal notice will be a provision where you can voluntarily donate additional money that would be specifically designated for our legislative program. Please donate or we will not be able to maintain this program. We currently have between four and five hundred members. If four hundred members could donate one hundred dollars apiece, we would have a fully funded legislative program. We need to keep active with this legislative program if we want to affect the indigent defense bill. But we also need to keep active with the legislative program because we are now a known quantity no Goat Hill. If we disappear now, we will lose all that we gained and more. We cannot afford to let that happen. It is absolutely essential that this organization maintain a presence on the Hill if only to maintain the status quo.

The second topic that deserves mention at this point is the listserv. There has been some discussion recently about creating

a listserv protocol – rules for using the listserv and potential penalties for those who misuse the service. While I am very much against censoring ideas posted on the listserv, there is undoubtedly some irrelevant noise on the listserv that has resulted in numerous complaints to Ann and myself over the past several months. The Board will likely be discussing a possible protocol to determine what can and cannot be censored and, if necessary, the suspension of use if it is being abused. The listserv is one of the great benefits for the organization's membership, and we want it to remain that way. I have already received suggestions from many people about what needs to be done. Please remember, however, that the listserv is a benefit to be shared by everyone and when it becomes too cumbersome to navigate, the value is diluted.

Additionally, we have 494 members in this Association and only 365 on the listserv. The fact is more than 25% of our membership is not on the listserv. For the most part, it is not because they do not know how to use it, but rather, many have asked to be removed from the listserv because it has become too cumbersome with political rants, 'attaboys, and personal attacks on one another. If the great thing about the listserv is the ability to pick the brains of the membership of this organization about any matter *related to why we exist* then we are missing out on 25% of that knowledge base. For those reasons, the Board will be discussing ways to keep the membership happy while keeping the listserv use at a maximum benefit to all members.

This problem resolves itself if people act responsibly. As member John Beck's self-test suggests, before posting ask yourself three questions: (1) Is what I'm requesting going to help me with a case or my practice? (2) Am I posting useful information that will help others with their cases or their criminal practice? (3) Is it something that is so damn funny I'm sure it will get a laugh? Other matters should be handled privately.

Our next scheduled Board Meeting is October 21, 2005, at 1:30 pm at the Capital City Club, in Montgomery. Notice appears at the bottom of every listserv posting. The Board meeting is not limited to Board members only. All association members are welcome, though we ask that if you are going to attend, you let Ann Cooper know at least one week before the meeting so that we will be able to accommodate you.

As always, my address, phone, fax, and email addresses are on the back of this issue. If you have questions or comments about the association, what it is doing or not doing (that you think it should be doing), and would like to discuss them, please do not hesitate to call, write, or email. I have heard from many of you and look forward to hearing from others.

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rules". However, the Advisory Committee's Notes to **Rule 601** acknowledges the continued viability of the Testimonial Privilege under **§12-21-227**.

INTERPRETING THE TESTIMONIAL PRIVILEGE

The Testimonial Privilege belongs to the Witness-spouse only and not the Defendant. Furthermore, the Testimonial Privilege may be waived. **Paulson v. State**, 455 So.2d 85 (Ala.Crim.App. 1984), certiorari quashed. See also: **Ziglar v. State**, 629 So.2d 43 (Ala.Crim.App.1993), certiorari denied, 629 So.2d 43 (Ala. 1993), **Wyatt v. State**, 35 Ala.App. 147, 46 So.2d 837 (Ala.App.1950), certiorari denied 254 Ala. 74, 46 So.2d 847 (1950), **Holyfield v. State**, 365 So.2d 109, 112 (Ala.Crim.App. 1978), certiorari denied 365 So.2d 112 (Ala. 1978).

This statutory codification of the privilege is sufficient to change the common law and allow the wife, if she so desires, to testify against her husband. **McCoy v. State**, 221 Ala. 466, 129 So. 21 (Ala.1930). Under this statute, the husband and wife are competent witnesses to testify for or against one another in criminal cases. **Jay v. State**, 15 Ala.App. 255, 73 So. 137 (Ala.App.1916), certiorari denied 198 Ala. 691, 73 So. 1000.

The Testimonial Privilege statute is drawn in such a way as to prevent the coercion by others which could directly or indirectly force the Witness-spouse into the witness box. **Holyfield v. State**, 365 So.2d 108 (Ala.Crim.App.1978), writ denied 365 So.2d 112. If for any reason the Witness-spouse declines to testify for or against the Defendant, that decision is final and the motives should not be questioned in a manner that would inure to the detriment of the Defendant. **Holyfield v. State**, *supra*. While the State can call a Defendant's spouse to the stand it cannot make her testify. **Billingsley v. State**, 402 So.2d 1052 (Ala.Crim.App.1980), reversed 402 So.2d 1060, on remand 402 So.2d 1062.

The prosecutor may not comment on the refusal of a Witness-spouse to testify. After the Defendant's Witness-spouse has elected not to testify, it is error to allow the prosecutor to draw an adverse inference from Defendant's failure to call her. **Ex parte Billingsley**, *supra*, **Ex parte Tomlin**, 540 So.2d 668 (Ala.1988), on remand **Tomlin v. State**, 540 So.2d 674 (Ala.Crim.App. 1989).

It is improper for the prosecution to call as a witness one it knows will certainly invoke the privilege against testifying as a witness, with the sole purpose of having the jury observe that invocation. **Terry v. State**, 540 So.2d 782 (Ala.Crim.App.1988), certiorari denied **Ex Parte Terry**, 540 So.2d 785 (Ala. 1989). A prosecutor commits reversible error by implying during cross-examination of a Defendant accused of murder that his Witness-spouse had exercised her spousal privilege against testifying in order to conceal evidence of the Defendant's guilt. **Oddo v. State**, 675 So.2d 58 (Ala.Crim.App.1995), rehearing denied, certiorari denied.

It is not error for the Judge to explain the Testimonial Privilege and question the Witness-spouse as to her desire to testify in the presence of the jury. **Wyatt v. State**, 35 Ala.App. 147, 46 So.2d 837 (Ala.App.1950), certiorari denied 254 Ala. 74, 46 So.2d 847. See also, **J.D.S. v. State**, 587 So.2d 1249 (Ala.Crim.App.1991). However, a trial court commits error in compelling the Witness-spouse to testify despite her invocation of the privilege not to testify if the Defendant objects. **Ziglar v. State**, 629 So.2d 43 (Ala.Crim.App.1993).

The Witness-spouse and the Defendant must be married at the

time testimony is sought before the Testimonial Privilege will apply. **Arnold v. State**, 353 So.2d 524 (Ala.1977); **Rogers v. State**, 417 So.2d 241 (Ala.Crim.App.1982). Whether the parties were married to each other at the time of the alleged offense is irrelevant to the application of the Testimonial Privilege under §12-21-227.

The Testimonial privilege status does not apply to persons who are divorced at the time of trial. **Ex parte Bankhead**, 585 So.2d 112 (Ala.1991), on remand 585 So.2d 133. Likewise, it is proper to admit a former Witness-spouse's testimony against the Defendant, **Thompson v. State**, 56 Ala.App. 145, 320 So.2d 79 (Ala.Crim.App.1975); **Naugher v. State**, 241 Ala. 91, 1 So.2d 294 (Ala.1941). It is immaterial as to whether they were married at the time of the alleged offense. **Crawford v. State**, *supra*.

The Testimonial Privilege applies equally to common law spouses. **Crawford v. State**, 629 So.2d 745 at 747-748 (Ala.Crim.App. 1993); see also **Montanez v. State**, 592 So.2d 650 at 652-653 (Ala.Crim.App. 1991). However, the Defendant claiming the spousal privilege has the burden of proving the existence of a common law marriage. **Crawford**, 629 So.2d at 748.

The pure assertion of one's privilege not to testify against her spouse is not sufficient, in and of itself, to prevent her **former** testimony from being introduced against the Defendant at a subsequent proceeding or trial **if** the former testimony was given under oath, the issues in the subsequent proceeding are substantially the same as in the former proceeding, **and** the party against whom the former testimony is offered was given an opportunity to cross-examine the witness during the former proceeding. **Crosslin v. State**, 446 So.2d 683 (Ala.Crim.App. 1983) certiorari denied 446 So.2d 675 (Ala. 1984) (*Where the Witness-spouse of a Defendant in murder prosecution voluntarily testified against him at preliminary examination, being uninformed of statutory privilege not to testify, which she claimed at trial, her prior testimony could be proved by others*); and, **Arnold v. State**, 52 Ala.App. 702, 296 So.2d 796 (Ala.Crim.App.1974) (*Testimony at a prior trial by a witness who later became the spouse of the Defendant and subsequently refused to testify in a later trial is admissible in that later trial because the Defendant was represented by counsel in first trial, the witness was cross-examined at that time, testimony was under oath and the issues and parties were substantially the same*). See also: **Wyatt v. State**, 35 Ala.App. 147, 46 So.2d 837 (Ala.App.1950), certiorari denied 254 Ala. 74, 46 So.2d 847.

CONFIDENTIAL COMMUNICATIONS PRIVILEGE

Under Alabama common law, each person had a privilege to prevent their spouse from disclosing confidential communications made to the other spouse, (*known as the "Inter-Spousal Privilege" or "Communications Privilege"*); **Sumner v. Cooke**, 51 Ala. 521 (1874); **Owen v. State**, 78 Ala. 425, 429 (1885).

In 1996, this Confidential Communications Privilege was incorporated into the Alabama Rules of Evidence (**A.R.E.**); (**Rule 504 A.R.E. – Husband-Wife Privilege**). However, this evidentiary privilege contains significant exceptions.

The Confidential Communications Privilege stands for the proposition that, in any criminal proceeding, a person has a privilege to refuse to testify, or to prevent any person from testifying, as to any confidential communication made by one spouse to the other during the marriage; **Rule 504(b) A.R.E.**

A communication is considered "**confidential**" if it is made during marriage privately by any person to that person's spouse and is not intended for disclosure to any other person; **Rule 504(a) A.R.E.** The language of **Rule 504** defines confidentiality in terms of the communicating spouse's intent. No privilege arises unless the communicating spouse intends the communication to be confidential. This is fully consistent with preexisting Alabama law. See, e.g., **Owen v. State**, 78 Ala. 425

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(1885); **Harris v. State**, 395 So.2d 1063 (Ala.Crim.App.1980), certiorari denied, 395 So.2d 1069 (Ala.1981); C. Gamble, McElroy's Alabama Evidence § 103.01(4) (4th ed. 1991).

The Confidential Communications Privilege may be claimed by either spouse, the lawyer for either spouse in that spouse's behalf, the guardian or conservator of either spouse, or the personal representative of a deceased spouse. The authority of those named to claim the privilege in the spouse's behalf is presumed in the absence of evidence to the contrary; **Rule 504(c) A.R.E.**

EXCEPTIONS TO THE CONFIDENTIAL COMMUNICATIONS PRIVILEGE

The Confidential Communications Privilege now has some notable exceptions; all geared toward criminal cases. There is no privilege under **Rule 504(d)(3) A.R.E** in a criminal action or proceeding in which one spouse is charged with a crime against the person or property of: (A) the other spouse, (B) a minor child of either, (C) a person residing in the household of either, or (D) a third person if the crime is committed in the course of committing a crime against any of the other persons named in this sentence. The exceptions contained in Rule 504(d)(3) remove the protection of the Confidential Communications Privilege when the Defendant is charged with a crime against their spouse (*ie. Domestic Violence*). In those instances, the Witness-spouse can be compelled to disclose confidential communications.

However, **Rule 504** is limited in its scope to confidential communications. It has no effect whatsoever on the Testimonial Privilege contained in **§12-21-227 C.O.A.** Nothing in Rule 504, or the exceptions contained in **Rule 504(d)(3)**, prevents a person from invoking their privilege not to testify against their spouse.

RULE 504 DOES NOT SUPERCEDE §12-21-227

The Advisory Committee's Notes to **Rule 504** expressly acknowledge the Testimonial Privilege under **§12-21-227** remains unaffected by the adoption of **Rule 504**, to wit: "*The only remaining vestige of this marital disqualification or incompetency is found in a statute that provides: 'The husband and wife may testify either for or against each other in criminal cases, but shall not be compelled so to do.'* *Ala. Code 1975, §12-21-227. This statute is interpreted to mean that a spouse may take the witness stand against an accused spouse if he or she decides to do so. Such a witness may be characterized as competent, but not compellable. This principle is sometimes described as providing the witness spouse a privilege to testify or not. Such a privilege, however, is not to be confused with the privilege set forth in Rule 504. ... The preexisting statutory and case law dealing with the marital disqualification or competency question stands unaffected by the adoption of Rule 504.* (citations omitted). (emphasis added).

OUT-OF-COURT STATEMENTS TO POLICE

Historically, a statement made by the Witness-spouse to law enforcement regarding a crime allegedly committed by the Defendant could be used at trial even if the Witness-spouse invoked the Testimonial Privilege; **Ex parte Bankhead**, 585 So.2d 112 (Ala.1991), on remand 585 So.2d 133 (*The spousal testimonial privilege does not apply to pretrial criminal investigations. ... §12-21-227, ... deals with a privilege to testify or not to testify.*) See also: **Ohio v Roberts**, 448 US 56 (1980). However, all of that changed in 2004 when the U.S. Supreme Court issued its opinion in **Crawford v. Washington**, 124 S.Ct. 1354, 541

U.S. 36 (March 08, 2004); overruling **Ohio v. Roberts**. Now, such statements are not admissible at trial because they violate the Defendant's constitutional right to confrontation. Although the Crawford opinion did not articulate a comprehensive definition of what constitutes a "**testimonial**" statement, it made clear that a statement given by a Witness-spouse about her husband during police interrogation would clearly be "**testimonial**".

ALABAMA'S REACTION TO CRAWFORD

The Alabama Court of Criminal Appeals does not appear to be overly impressed by **Crawford**. Despite the fact that more than one year has passed since the U.S. Supreme Court abrogated **Ohio v. Roberts**, the Court of Criminal Appeals has routinely declared Confrontation Clause violations to be harmless beyond a reasonable doubt; or, that out-of-court statements are not "**testimonial**".

See **Packer v. State**, 2005 WL 1252752 (Ala.Crim.App. 2005) (*Victim's statements to 911 operator, police and medical personnel were non-testimonial; thus, the requirements of Crawford are not implicated, and the admissibility of the statements is largely a matter of applying evidentiary rules regarding hearsay and various hearsay exceptions*); **T.P. v. State**, 2004 WL 2418045 (Ala.Crim.App. 2004) (*Child victim's out-of-court statements that Defendant touched victim's private parts were testimonial and, thus, inadmissible under Confrontation Clause in absence of prior opportunity by Defendant to cross-examine victim, given that victim was unavailable to testify; (but) any error in the trial court's admission of the victim's statements was harmless beyond a reasonable doubt*); **Smith v. State**, 898 So.2d 907 (Ala. Crim.App. 2004); (*Admission of autopsy evidence and autopsy report, without testimony of the medical examiner who performed autopsy, violated Defendant's Sixth Amendment right to confrontation in murder prosecution; but the Trial court's error, in violating Defendant's right to confrontation, was harmless*); **Perkins v. State**, 897 So.2d 457 (Ala. Crim.App. 2004) (*Admission of physician's autopsy report and supporting materials during murder trial without physician's testimony, even if error, was harmless beyond reasonable doubt. Violations of the confrontation clause are, like many other constitutional errors, subject to a harmless error analysis*).

Since **Crawford** was issued in 2004, neither the Alabama Court of Criminal Appeals nor the Alabama Supreme Court has had an opportunity to rule directly on a case where the Witness-spouse invoked her privilege not to testify against the Defendant. In determining whether such a Confrontation violation is harmless beyond a reasonable doubt, it is likely that the Courts would examine the factors set forth in **Delaware v. Van Arsdall**, 475 U.S. 673, 106 S.Ct. 1431 (1986). Those factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. 475 U.S. at 684, 106 S.Ct. 1431. See also: **Chapman v. California**, 386 U.S. 18, 87 S.Ct. 824 (1967).

CONCLUSION

According to Alabama's Testimonial Privilege contained in **§12-21-227**, a Witness-spouse cannot be compelled to testify against her husband. The Confidential Communications Privilege under **Rule 504** is inapplicable in such cases. Therefore, the exceptions to the Confidential Communications Privilege cannot force a spouse to take the witness stand if she invokes the Testimonial Privilege. Furthermore, the Witness-spouse's oral or written statements to law enforcement are inadmissible unless they can withstand the Confrontation Clause challenges as set forth in **Crawford v. Washington**.

I want to take this opportunity to thank ACDLA Member Domingo "Dom" Soto for his editing advice regarding this article.

CAPITAL CORNER

By John E. Mays, Decatur, Alabama

Heinous, Atrocious and Cruel – The Indefensible Aggravating Circumstance

In Alabama, for the manner of homicide to meet the statutory definition of especially heinous, atrocious, or cruel the murder must be “unnecessarily torturous” to the victim. See: *Ex parte Kyzer* 339 So.2d 330, 334 (1981). *Gregg v. Georgia* 428 US 153 set for us a bright line rule as to aggravating circumstances in that a capital sentencing scheme must, in short, provide a:

... meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.

See also *Godfrey v. Georgia* 446 US 420, 428:

Part of the state’s responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates “standardless sentencing discretion”. It channels the sentencer’s discretion by “clear and objective standards” that provide “specific and detailed guidance” and that “make rationally reviewable the process for imposing a sentence of death.”

In *Godfrey v. Georgia* the state relied upon the aggravating circumstance of “especially heinous, atrocious or cruel” yet failed to specifically define it for the jury allowing jurors to possibly conclude that all murders were “especially heinous, atrocious or cruel”. This gave the jurors:

- (1) unbridled discretion, violating *Furman v. Georgia*;
- (2) failing to distinguish under the law between those murders which are deserving of death and those which are not, violating *Gregg v. Georgia* and *Profit v. Florida* 428 US 242;
- (3) the murder on trial certainly showed a “black hearted” intentional killing but the aggravating circumstance relied on by the state, and not defined for the jury, did not sufficiently distinguish that intentional murder from other non-capital which are intentional murders, in an objective way.

So, our US Supreme court has ruled that aggravating circumstances which are:

- (1) arbitrary;
- (2) vague;
- (3) not subject to objective definition;
- (4) do not rationally distinguish the intentional murder on trial from other intentional murders;

are clearly unconstitutional.

The recent case of *Blackmon v. State* 2005 WL 1845273 is troublesome in light of the above rules. This case involved the aggravating

circumstance of “especially heinous, atrocious or cruel”. In determining if this aggravating circumstance applied the court considered:

... whether the violence involved in the killing was beyond what was necessary to cause death, whether the victim experienced appreciable suffering after a swift assault, and whether there was psychological torture. See: *Norris v. State* 793 So.2d 847 (1999).

In *Blackmon v. State* a mother killed her infant daughter by beating her to the point that she died. In the penalty phase the evidence of “especially heinous, atrocious, or cruel” was presented by the state’s forensic pathologist who conducted the autopsy:

Dr. Alfredo Parades testified at the penalty phase hearing that Dominique had bruises all over her body and that a body will not normally bruise if the heart is not pumping. Parades said that all of the victim’s injuries would have been painful, that they were extensive more than necessary to cause death and he believed, based on the extent of the injuries, that Dominique was conscious initially and then lost consciousness at some point during the attack.

Evidence also showed that Dominique vomited during the beating. The paramedics testified that Dominique was covered in vomit. Dominique’s blood was also discovered in several areas of the trailer; she had no clothes but a diaper and socks on when she was discovered; and her socks were soaked in blood.

Brutal beatings that result in death meet the criteria for “especially heinous, atrocious or cruel”. See: *Brooks v. State* 695 So.2d 176 (1996). *Blackmon v. State* held:

Blackmon brutally bludgeoned to death a helpless two-year-old child using a pool cue and sometime during the beating stomped on her chest. By anyone’s standards the murder in this case was especially heinous, atrocious or cruel.

The defendant attempted to avoid the application of this aggravating circumstance by evidence to demonstrate that the child probably soon became unconscious and hence did not feel the remainder of the assault. They attempted to show that little or any suffering occurred due to the probable unconsciousness of the child soon after the beating began. This is how the state’s forensic pathologist dealt with this and beware:

“In Norris, the Court stated that the prosecution offered no evidence from which the Court could reasonably conclude that in that case [the victim] was conscious and aware after he was shot the first time. The only express mention of his state of consciousness was Henson’s testimony that, in his telephone conversation to Norris after Herbert’s funeral he told Norris that Herbert had never regained consciousness. The Court goes on to say, moreover, the prosecution presented no evidence that Herbert would have felt pain in the event he was unconscious. And then there’s a note, Compare *Brown v. State* 663 So.2d 1028, 1034 (AL Crim. App. 1995) in which the Court stated, especially heinous, atrocious, or cruel aggravating circumstance was supported by the medical examiner’s testimony that, ‘although the victim was unconsciousness he still would have been able to feel pain.’ Again, Dr. Parades testified to that in this situation. That there is some degree of feeling pain when one is comatose or unconscious. The blow to the skull causing death possible but not likely. Some injuries were inflicted while she was conscious. And that said injuries were painful.”

So, a beating administered after a victim has become unconscious can clearly constitute this aggravating circumstance.

True to form, every bad case leaves at least a ray of sunshine at the end of the tunnel. *Blackmon v. State* is no exception. In this case the appellate court approved the trial court’s finding of a mitigating factor present in all capital cases, no matter what the facts. The court approved as a mitigating circumstance that the defendant “is a human being”.

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