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BURDEN OF DETERMINING ADMISSIBILITY OF CONFESSIONS [FEDERAL]

Courts and leading legal writers seem to have little trouble in accepting the theory that extrajudicial confessions voluntarily made may be introduced into court as evidence while involuntary confessions made outside the court room should be excluded.[1] The confusion has centered around the problem of determining what is voluntary and what is not, who should decide this issue, and the procedural process to be used in introducing a confession into court as evidence.

This confusion was recently typified in the case of *White v. State*.[2] In this case the United States Supreme Court reviewed, by writ of certiorari, the opinion of the Court of Criminal Appeals of Texas[3] in its treatment of the question of a confession involved in the trial of the petitioner. He had been convicted of rape and sentenced to death by the District Court of Montgomery County, Texas. The Criminal Appeals court affirmed the decision by denying a rehearing. The evidence, as brought out by the trial court, indicated that the petitioner was an illiterate farmhand and that he, with fifteen or sixteen other negroes, were taken into custody to be questioned shortly after the attack. He was held for six or seven days without a warrant for his arrest or filing of charges. On several successive nights armed Texas Rangers took him handcuffed from the jail "up in the woods somewhere," whipped him, and sought to obtain a confession. At this time he had no lawyer and was out of touch with friends or relatives. On the night that the confession in question was obtained he was questioned from about eleven in the evening till three in the morning, at which time the state obtained what it considered a confession.

The procedure in the Texas courts is to submit the question of voluntariness to the jury.[4] In accordance with this usual method the Texas Appeal Court affirmed the procedure of the trial court in permitting the whole question of voluntariness to go to the jury with the stipulation that it was not to consider the confession in awarding the verdict unless they believed that the confession had been voluntarily obtained. Ordinarily an appellate court will review the facts in a case only to determine whether the accused has been denied due process. Since the confession was used in the trial of this case, the Supreme Court concluded that it had the right to review the record to determine whether the trial fell short of the procedural due process guaranteed by the Constitution in the Fourteenth Amendment.[5] They held that the confession was improperly admitted into evidence and reversed the conviction.

Generally before a confession may be admitted into trial its admissibility must be ruled upon by the trial judge.[6] It is this procedural point which seems to trouble numerous courts and seems to have

[1] Wharton, Criminal Evidence (11th ed., 1935) §591; Wigmore, Evidence (3rd ed., 1940) §815; Bram. v. United States, 168 U. S. 532 (1897).

[2] White v. State, 310 U. S. 530 (1940).

[3] White v. State, 1370 Tex. Crim. 116, 128 S. W. (2d) 51 (1940).

[4] Annotation, 102 A. L. R. 605, 608.

[5] This decision was based largely on the holdings of two prior decisions decided within the same year involving much the same questions. Chambers v. Florida, 309 U. S. 227; Canty v. Alabama, 308 U. S. 612. In each case the court held that there was a denial of procedural due process. In Chambers v. Florida the Court deals at length with the reasons for holding that there was a denial. In the case under discussion the Court simply holds that there was a denial of due process without giving any reasons, referring to the above two cases.

[6] Wigmore, Evidence §861.

been the source of trouble in the above case. The question arises: Should the judge alone rule on the admissibility of the confession as evidence, or should he obtain the aid of the jury? If he does he is denying himself one of his ordinary functions; yet if he decides the issue oft times it must be on the basis of conflicting testimony. Most courts, however, seem to agree that the entire question should not be dumped into the lap of the jury, that there should be some preliminary investigation by the judge before the question of voluntariness is submitted to the jury.[7] Even the Texas courts do not admit that the question of voluntariness of a confession should be submitted to the jury without first passing on its admissibility.[8] There should be some preliminary investigation outside the presence of the jury. The courts are not clear as of what this investigation should consist, but it is indicated that questions proper to be considered include the sex, age, character, disposition, education, previous training, mental qualities, physical health, and the surroundings of the accused.[9] As indicated above, whether the judge should go on to decide as a matter of law, having considered the facts, the voluntariness of the confession, has left the courts in confusion. Where the evidence is conflicting and contradictory, failing to show conclusively whether the confession was rendered under voluntary circumstances or not, it is easy for the judge to push the whole burden upon the jury.

There seem to be two reasons against submitting the whole issue to the jury. Mr. Wigmore has stated, and this seems to be confirmed by the courts, that "the principle upon which a confession is treated as sometimes inadmissible is that under certain conditions it becomes untrustworthy as testimony."[10] Although there is this conflict and dispute as to the validity of confessions it should not be suggested that they be discarded in the best interests of obtaining justice and avoiding confusion in the courts. If this were done the defendant would be tried on the surrounding facts alone, and this controversial piece of evidence would never enter the trial. However, as pointed out by Wharton, the "aim of the confession rule is to exclude self-incriminating statements which are false."[11] Confessions when properly obtained are the best pieces of evidence which a prosecutor may use. An accused person is not apt to admit his guilt voluntarily unless he has truly committed the crime. Hence it would seem that confessions should not be discarded but should be made to function properly.

The basis of the confession is that the accused has given a true and accurate picture of the events leading up to the crime, the incidents surrounding the crime, and his role in the crime. The confession is then introduced as testimony by the State for the court to consider along with other facts. But, if the question is submitted to the jury to decide on its voluntariness and the confession is not sufficiently imbued with the element of trustworthiness, the jury is apt to decide the question on false issues or statements. By this method the defendant is not accorded a fair trial. Cases should not be decided on false statements and they should not reach the ears of the jurors.

Most courts, which leave the question of voluntariness to the juries, instruct them that if they find the confession to be involuntary to disregard it.[12] However, it would appear hard for juries which have heard an involuntary confession and the witnesses who testified to it, to totally ignore it, especially when some, if not all, the statements in the involuntary confession are true. If nothing more it is apt to be a subconscious influence.[13] In support of this Wharton says, "When the proposing counsel knows that the confession's admission will be disputed, and therefore a ruling of the trial judge will be required before the evidence is properly admissible a careful regard for orderly procedure demands that the details of the offer should not be stated in the hearing of the jury. This caution in no way impugns the intelligence or impar-

[7] Wilson v. United States, 162 U. S. 613 (1895); United States v. Stone, 8 F. 232 (W. D. Tenn., 1881).

[8] Bingham v. State, 97 Tex. Crim. 594, 262 S. W. 747 (1924).

[9] State v. Johnson, 95 Utah 572, 83 P. (2d) 1010 (1938); People v. Klyczek, 307 Ill. 150, 138 N. E. 275 (1923).

[10] Wigmore, Evidence §822.

See Note (1940), 33 J. Crim. Law 457.

[11] Wharton, Criminal Evidence §603.

[12] Annotation, 85 A. L. R. 870.

[13] People v. Farmer, 194 N. Y. 251, 87 N. E. 457 (1909).

tially of the jurors, but only seeks to safeguard the accused against the trial of the charge upon irrelevant testimony. The jurors, lacking the experience and training necessary to distinguish between relevant and irrelevant evidence, may take as true and relevant the evidence sought to be offered, even though it should be excluded by the judge."[14]

The other reason that the jury should not determine the admissibility, which is of a mechanical nature, is that in many states the testimony and evidence has to be presented twice. First the evidence has to be submitted to the judge to enable him to pass on the admissibility of the confession into the trial. If it is admitted and the jury is to pass on its voluntariness, the same and additional evidence must be presented to enable the jury to reach its determination. This is time consuming to courts already over docketed, and expensive to taxpayers.[15]

The Missouri courts have waivered from one side of the issue to the other. In a recent case[16] an attempt was made to combine the two positions by holding that one should be granted a preliminary inquiry out of the presence of the jury. "When there is substantial conflicting evidence and the question is close it is better to refer the issue to the jury than to exclude the confession, since there is less chance of a miscarriage of justice by leaving the question open to a second determination before the jury on a rehearing of the evidence under proper instructions than by foreclosing the inquiry. The court, then, can still exclude the confession if it finds from all the evidence including that introduced at the preliminary hearing that the same was involuntary."[17] This position would still seem to bear the stigma that if the confession is withdrawn the jury has still heard the confession and may be unduly influenced. Likewise it is time consuming in that the evidence must be presented twice.

Of the two methods that are now in use, it would seem that those states which have adopted the procedure that the judge should pass on all questions as to the admissibility of confessions, including the question of voluntariness, have the better solution. If the confession is withheld, it cannot be considered in further proceedings and hence cannot be a source of appeal to a higher court. This conclusion is supported by Mr. Wigmore who states, "The admissibility of the confession . . . is a question for the judge, on elementary principles defining the functions of judge and jury."[18] Seemingly the states are, numerically, fairly evenly divided on the issue of voluntariness, with some remaining doubtful. The author of an annotated note in the A. L. R.[19] on the subject after discussing the cases on both sides reaches the conclusion that the question should be solely the judge.[20]

A solution, which it is felt might greatly aid the courts in the determination of this troublesome question, would be for the judge to make a final determination of the admissibility of the confession. However, in reaching this conclusion, if the evidence were conflicting, he would call upon the jury to determine the facts, without having the confession itself submitted to them for consideration. Thus if the confession was found to be involuntarily obtained and hence not admissible as evidence, the case would proceed without the confession and the material in the confession would never have reached the ears of the jurors.

WILLIAM D. GOOD

[14] Wharton, Criminal Evidence §593.

[15] A reason sometimes introduced is that once an involuntary confession is introduced as evidence the accused is forced to give testimony against himself. It has been thought that this is a violation of a constitutional inhibition and should not be tolerated. However, this theory has been generally discredited. Wharton, Criminal Evidence §603.

[16] State v. Gibilterra, 342 Mo. 577, 116 S. W. (2d) 88 (1938). This case contains a comprehensive list of the holdings of the Missouri Supreme Court on both sides of the issue.

[17] Id. 585.

[18] Wigmore, Evidence §861.

[19] Annotation, 85 A. L. R. 870. The author of this note lists 12 states as supporting the proposition that the question of voluntariness is solely for the court; 16 states and the District of Columbia as handling the issue to the jury: and the rest as not having committed themselves to a conclusive decision.

[20] Since the jury, even in those states which hold that the judge must pass on the admissibility of a confession, can and do hear the facts surrounding the confession to determine the competency and weight to be given it, they are in many respects given a final determination of the question. It would seem, therefore, unnecessary for them to have any part in the determination of the admissibility or voluntariness of the confession.

UNNECESSARY KILLING BY THE OVER ZEALOUS PEACE OFFICER [KENTUCKY]

The appellant, in the case of *Woods v. Commonwealth*,[1] had served as a deputy sheriff or a deputy jailor for ten years. In the words of the court, he had proved himself a "faithful and fearless officer." On the day of the killing, the appellant was sitting with his two sons and several friends in the county court house observing the Sunday activities of some of the town residents outside. Erroneously believing two of the town citizens were "staggering drunk," he verbally deputized his son and, with the aid of the son, attempted to arrest them. Two friends of those being arrested ran up with pistols and in the melee that ensued, one of these friends shot at the appellant and was thereupon shot and killed by the son. The case at bar is not concerned with this killing,[2] but rather with the killing by the appellant himself of a new party who, unarmed, rushed up to find out what was going on and who, according to the testimony of several witnesses (but denied by others[3]) had his hands up and was begging for mercy when he was shot. The appellant was tried and convicted of murder and the conviction was affirmed by the Kentucky Court of Appeals.

As a general rule, in the case of a misdemeanor, an officer has no right, except in self-defense, to shoot or kill the offender in attempting to arrest him, or prevent his escape.[4] And it is said that the taking of the misdemeanant's life will ordinarily be found to be reasonable only where the officer was in reasonable apprehension of immediate death or great bodily injury;[5] as where the deceased after being arrested for drunken disorder attacked the town marshal and was in the act of clubbing a newly deputized helper when he was fatally stabbed by that helper.[6] The view uniformally taken by the Kentucky Court has been that it is the duty of an officer to make an arrest and in carrying out this duty he may defend himself; if resisted, even to the taking of life.[7] As to the rights of an officer to kill a peacemaker or intervener where the law-breaker is in custody, the officer will be protected in the use of force that is necessary to make such an arrest[8]—if the jury find that he is acting in good faith and without malice.[9] The books are replete with instances where an officer has resorted to killing to effect the capture of a misde-

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[1] 139 S. W. (2d) 439, 282 Ky. 596 (1940).

[2] The son and the father were jointly indicted for murder. On the motion of the Commonwealth, the court permitted separate trials. Although the discretion of the court in granting the severance was relied on as one of the basis for reversal, it was held to be a valid exercise of the court's discretion under §237 of the Criminal Code of Practice of Kentucky:

"If two or more defendants be jointly indicted for a felony, any defendant is entitled to a separate trial."

The section has been construed as mandatory, and in the leading case of *Jenkins v. Commonwealth*, 167 Ky. 544; 180 S. W. 961 (1915), has been held to be grantable in the court's discretion at the behest of the state.

[3] The testimony of the appellant was that he saw Morgan (the deceased) approaching; that Morgan kept grabbing at him, appellant telling him to keep back. That Morgan kept coming and grabbing with one hand, the other down by his side. The court remarks that this testimony is corroborated by the son of the appellant and to some extent by eye witneses to some if not all of the occurrences. This would seem to indicate that the evidence is by no means one-sided.

[4] 4 Amer Juris 54 §78; Annotations, 3 A. L. R. 1170; 42 A. L. R. 1200; 67 L. R. A. 298 (1905); 2 L. R. A. (N. S.) 76 (1906); 30 C. J. 41 §196; 26 Am. Jur. 315 §§231, 233; Thomas v. Kinkead, 55 Ark. 502, 18 S, W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68 (1891); United States v. Kaplan, 286 F 963 (S. D. Ga., 1923); State v. Dunning, 177 N. C. 559, 98 S. E. 530, 3 A. L. R. 1166 (1919); Smith v. State, 59 Ark. 132, 26 S. W. 712 (1894).

[5] Smith v. State, 59 Ark. 132, 26 S. W. 712 (1894). See also Note, 12 Minn. L. Rev. 539 (1928); Commonwealth v. Marcum, 135 Ky. 1, 122 S. W. 215 (1909); Thomas v. Kinkead, 55 Ark. 502 (1892), 18 S. W. 854.

[6] Smith v. State, 59 Ark. 132, 26 S. W. 712 (1894).

[7] Note (1929), 17 Ky. L. J. 403. Reasonable fear of great bodily harm will justify an officer in shooting.

[8] It is not the purpose of this note to attempt a rationale of such cases in which a homicide has been committed by a law enforcing officer in the course of an arrest, or in the prevention of the escape of an arrested law-breaker. For an adequate rationale of such cases see Notes, 12 Minn. L. Rev. 539 (1928); 28 Mich. Law Rev. 957 (1930); 13 Tenn. L. Rev. 195 (1935); 17 Ky. Law J. 402 (1929); 24 Va. Law Rev. (N. S. 4) 624 (1919); 4 So. African Law Times 7 (1935).

[9] State v. Rollins, 113 N. C. 722, 18 S. E. 394 (1893); Pinder v. State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75 (1891).

meanant[10] or has met with interference by a third party, and has killed the interloper,[11] and in a large percentage of these cases convictions have been reversed.

There is, however, a noticeable lack of authorities "on all fours" with the present fact situation. The deceased in the *Woods* case was not a misdemeanant. Nor did he, according to part of the evidence, interfere with the appellant's proposed arrests or aid the actual misdemeanants resist arrest.[12] It is this fact that the court seems to rely on mainly to distinguish the present case from the majority of decisions concerned with the rights of an officer to use force—even to the taking of human life—in the arrest or in the prevention of escape of a misdemeanant. And it is probably the adoption of this distinction that led the court to uphold a conviction of murder.[13] It is well to note that the court believed that the trial of the appellant was more favorable than prejudicial in that it gave the officer the benefit of an instruction on the rights of officers to kill to effect an arrest when all the court felt the jailor was entitled to was an instruction on his rights of self-defense.[14]

It is evident that if the court in the *Woods* case had resolved their decision on the basis of a killing of a misdemeanant by a law-enforcing officer during the course of an arrest, a conviction of murder would have been not only contrary to the majority of cases recognized today in American courts in general and in the Kentucky courts in particular, but also very unusual. Most of the reported cases, if they convict the officer of homicide at all, go no further than a conviction of manslaughter.[15] It may

[10] Reed v. Commonwealth, 30 Ky. L. Rep. 1212, 100 S. W. 856 (1907); Commonwealth v. Rhoades, 23 Pa. Super. Ct. 512 (1903); State v. Whittle, 59 S. C. 297, 37 S. E. 923 (1901); Thomas v. Kincaid, 55 Ark. 502, 29 Am. St. Rep. 68 (1891); Handley v. State, 96 Ala. 48, 11 So. 322 (1892); Shelton v. Commonwealth, 226 Ky. 460, 11 S. W. (2d) 125 (1928); Stephens v. Commonwealth, 20 Ky. L. Rep. 544, 47 S. W. 229 (1898); Smith v. State, 59 Ark. 132, 26 S. W. 712 (1894). See note 15 post.

[11] 30 C. J. 42 §199; State v. Rollins, 113 N. C. 722, 18 S. E. 394 (1893); State v. Smith, 127 Iowa 534, 103 N. W. 944 (1905); State v. Dierberger, 96 Mo. 666, 10 S. W. 168 (1888); State v. Bland, 97 N. C. 438, 2 S. E. 460 (1887); Campbell v. People, 55 Colo. 302, 133 P. 1043 (1913); Smith v. Commonwealth, 176 Ky. 466, 195 S. W. 811 (1917).

[12] The case of *Smith v. Commonwealth*, 176 Ky. 466, 195 S. W. 811 (1917) is perhaps as nearly analogous as any other case might be. Since it is from the same jurisdiction and the decision is in apparent direct conflict, it might be well to note. In that case, the defendant was appointed deputy marshal on the day before the circus came to town. The defendant arrested A; B and C came down the street, according to the state's testimony, and asked about A. As B and C turned, the defendant knocked B down. When C tried to help B up, the defendant shot C, killing him. The defendant said that B reached for a gun so that he (the defendant) shot in self-defense whereupon C jumped him, and the defendant then killed C. The lower court convicted the defendant of manslaughter. This court reversed saying that "While it is true that an officer in arresting one guilty of a misdemeanor is never justified in killing merely to effect the arrest or to prevent his escape by flight, yet if the misdemeanant be under arrest and attempts by force and violence to overcome the officer and effect his escape, the officer's right to kill is not limited to the single ground of self-defense, but he may use such force as is necessary, but no more, to overcome the forcible resistance of the prisoner; and if under these circumstances he shoots and kills the prisoner; the killing will be excusable if the officer could not, or it reasonably appeared to him that he could not otherwise overcome such forcible resistance . . . there is every reason why the same rule should apply to a third person who is attempting by force or violence to rescue the prisoner."

[13] ". . . it is to be remembered that the object of the law is to prevent human life being endangered or taken. . . As the purpose is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the law requires them at their peril to know the teachings of common experience, just as it requires them to know the law. . ." Oliver Wendell Holmes, The Common Law, pp. 56-7 (1881). After all, we know that the law has laid a price on human life. Where a life is taken with the approval (or at least the suffrance) of society, it is a homicide "excusable" or "justifiable." On the other hand, when a killing is wrongful, the law terms it "murder" or "manslaughter," and we expect the penalty to be exacted.

[14] The instruction told the jury that if it was believed that "the deceased Morgan did by force or violence attempt to prevent the arrest or to rescue Oma Mattingly from the custody of Defendant, and if you shall believe from the evidence that the defendant believed in the exercise of a reasonable judgment that it was necessary to shoot, wound or kill Morgan in order to repel and overcome the force or violence offered him, then you will find for the defendant." 139 S. W. (2) 439, 445-6.

[15] In cases where a law enforcing officer has killed a misdemeanant during the course of an arrest, and the officer is clearly at fault, the usual conviction goes no further than manslaughter. This has been noticeable particularly in Kentucky, the jurisdiction of the Woods case: Doolin v. Commonwealth, 95 Ky. 29, 23 S. W. 663 (1893)

well be that the court in the present case was a bit too harsh on the appellant. After all, a conviction of murder usually is based on the presence of express or implied malice.[16] And it is to be noted that though the testimony of the prosecution is given a greater degree of credence, the appellant has stated that: "He [the deceased] dropped his hand down to his side, and I thought he might have a pistol in his hand. . . . I was afraid he had a pistol. . . . I shot him and was afraid not to shoot him; afraid he would kill me."[17] Considering the fact that the deputy jailor had a praiseworthy record for ten years, a conviction of no more than manslaughter might have served the purpose just as well. It would have adequately chastised the hair-triggered officer without unduly hampering the work of the conscientious law enforcer.

It might be suggested that perhaps the present case is but an unfortunate example of an instance where a jury, adequately instructed under the existing and accepted law, came to the most harsh of several possible decisions; it is altogether possible that neither the trial nor the appellate court felt that it was able to refute the jury verdict, founded, as it was, simply on the narrowest notion of the rights of an arresting officer.

It thus appears that our problem is not strictly one of criticism. It is as much a task in indicating the conflicts in policy that must be recognized, and in weighing the considerations that must determine the results of those conflicts.

On the one hand if an officer is to be too much restricted in the performance of his duty to make arrests, crime will be encouraged. It has been said that all criminals fear the law—it is something that they can neither stab nor choke to death. What they do not fear is the administration of the law if there is a laxity in that administration.[18]

On the other hand, our government, at least theoretically, guarantees every man his life, his liberty, and his property. It would be indeed shocking to the good order of government if we were to cheapen human life by the protection of a gratuitous killing of a misdemeanant or the killing of one who innocently ventures on the scene of an arrest.

The problem reduced to its ultimate form seems to be simply: How far should the cloak of protection of peace officers in the arrest of misdemeanants be spread; should the officer or a jury be made the arbiter of the amount of force necessary to effect the duty of law enforcement?[19] Is it necessary for the purpose of law enforce-

(Indictment and conviction of a constable for murder of a misdemeanant reversed on wrong jury instruction; Bowman v. Commonwealth, 96 Ky. 8, 27 S. W. 870 (1894) (Indictment and conviction of deputy marshal for murder remanded); Stevens v. Commonwealth, 124 Ky. 32, 98 S. W. 284 (1906) (Indictment of marshal for murder, conviction for voluntary manslaughter); Kammerer v. Commonwealth, 140 Ky. 626, 131 S. W. 486 (1910) (Indictment of constable for murder, conviction of manslaughter reversed); Clem v. Commonwealth, 198 Ky. 486, 248 S. W. 1036 (1923) (Indictment of deputy sheriff for murder, conviction of manslaughter. Manslaughter conviction reversed and remanded in 213 Ky. 265, 280 S. W. 1104 (1926)); Gipson v. Commonwealth, 215 Ky. 710, 286 S. W. 1069 (1926) (Conviction of peace officer for manslaughter reversed); Miller and Gabbard v. Commonwealth, 215 Ky. 819, 287 S. W. 6 (1926) (Manslaughter conviction reversed and remanded); Mullins v. Commonwealth, 219 Ky. 60, 292 S. W. 471 (1927) (Indictment for murder. Conviction of manslaughter reversed and remanded); Shelton v. Commonwealth, 226 Ky. 460, 11 S. W. (2d) 125 (1928) (Indictment for murder. Conviction of manslaughter reversed); Neal v. Commonwealth, 229 Ky. 832, 18 S. W. (2d) 314 (1929) (Indictment for murder. Conviction of manslaughter reversed and remanded); Maggard v. Commonwealth, 232 Ky. 10, 22 S. W. (2d) 298 (1929) (Deputy sheriff indicted for murder. Conviction of manslaughter reversed); Johnson v. Commonwealth, 268 Ky. 555, 105 S. W. (2d) 641 (1937) (Deputy constable indicted for murder. Conviction of manslaughter reversed); Siler v. Commonwealth, 280 Ky. 830, 134 S. W. (2d) 945 (1939) (Indictment of deputy Sheriff for voluntary manslaughter, conviction of manslaughter reversed).

[16] "Malice or malice aforethought is the element which distinguishes murder at Common Law and, commonly, under the statute defining murder, from the other grades of homicide." 29 C. J. 1084 §60. 29 C. J. 1089 §§63-65; Express and implied malice in murder, 26 Am. Jur. 183 §§40, 41.

[17] 139 S. W. (2d) 439, 446.

[18] Franklin, When May a Police Officer Slay in Making an Arrest (1931), 17 A. B. A. J. 675.

[19] "The jury is, of course, the arbiter of the amount of force which could be properly used under the circumstances of the particular case." 4 Am. Jur. 53 §74. It is enough if the force used appears necessary to the officer if he has reasonable grounds for his belief; Gillispie v. State, 69 Ark. 573, 64 S. W. 947 (1901); State v. Rose, 142 Mo. 418, 44 S. W. (1898).

ment that officers be given a free hand in making such arrests? If by a mistake in judgment—reasonable or otherwise—an innocent bystander is killed, shall the officer be protected?[20] Or, is public policy furthered by requiring that the officer act at his own risk when only in the final analysis does it become evident that the deceased actually intended no interference with the officer's law enforcement activities?

The answer we read in *Woods v. Commonwealth* is simply that the law does not spread its protection so far; the Kentucky court has seized the stricter horn of the policy dilemma. The fact that the problem of the case so infrequently arises gives weight to the argument that it is enough if the force used appears necessary to the officer if he has reasonable grounds for his belief. Yet it would be presumptious indeed, on the basis of a record that presents so sharp a dicotomy in factual impressions and testimony, to accuse the court of an error in judgment.

It would be well for the courts to recognize that the cases cannot be decided on any categorical statement of a rule of law. The considerations of public policy must be brought to bear on the particular factual conditions. And it is that particular factual set-up that must determine which policy must dominate.

There is no one "true" rule. There is no single erudite principle that can be deduced from *Woods v. Commonwealth.* If there is any importance to the case, it can come only through the adumbrations it casts on the decisions in similar cases that may arise at some future time. And it is to be hoped that those later courts recognize the basis on which the *Woods* case stands, so that the decision is not blindly followed to an end that was never intended.[21]

STANLEY B. FROSH

[20] In addition to the cases enumerated in previous footnotes, consider the "negligent murder" cases, such as; Wiley v. State, 19 Ariz. 346, 170 P. 869 (1918); Banks v. State, 85 Tex. Cr. 165, 211 S. W. 217 (1919); Mayes v. People, 106 Ill. 306 (1883); and Note (1939) 28 Ky. L. J. 53.

[21] "The process of inclusion and exclusion so often applied in developing a rule cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law." Mr. Justice Brandeis, in Washington v. Dawson, 264 U. S. 219, 236 (1924).

ADMISSION INTO EVIDENCE OF PREJUDICIAL PHOTOGRAPHS [SOUTH CAROLINA]

In *State v. Edwards,*[1] a murder case, a photograph showing the maggot-covered body of the deceased was admitted into evidence, over the defense counsel's objection, as being relevant to the issue of the body's identification, even though prior to its introduction, witnesses had testified in detail to everything depicted by the photograph. Upon review, the majority of the court held the photograph relevant to the identification problem and that the admission of the photograph was not an abuse of the trial judge's discretion. The dissent argued that the gruesome photograph prejudiced the jury against the defendant, because there never was any real issue that the body was not that of Maggie McDaniels, and that the State did not have to use the photograph to identify the deceased, as the State did not rely upon it for the identification.

Where the State offers evidence that is of an inflammatory character, the court is faced with a serious dilemma—should it exclude the exhibit, it may injure the state's case, so that, as a result the accused may be acquitted, when he ought properly to have been convicted; should it admit the exhibit, its prejudicial character might so inflame the jurors, that, as an immediate result, the accused may be convicted.[2] Also, as an immediate result of introducing

[1] 10 S. E. (2d) 587, 194 S. C. 410 (1940).

[2] One being tried for an offense, especially one involving the possible forfeiture of his life, is entitled to a trial on competent evidence—tending to show his guilt or innocence—not on evidence having no bearing in that direction but

such an exhibit into evidence there is danger that the defendant might be convicted of a higher degree of a crime or be given a greater penalty by the jury, than had the photograph not been admitted.[3] Thus, it can be seen that the reviewing court must pick its way carefully lest its opinion should prove too harsh either on the state or the defendant.

Apparently, the underlying premise of the majority of the Court in this case is that since the state must show a preponderance of the evidence to obtain a conviction, it should be allowed to offer into evidence any and all matters that sustain the State's theory of the case, subject, of course, to limitations as to time materiality, etc. Also the majority seemingly believed that the trial court could better determine the relevency of the exhibit and that its determination should be set aside only when clearly unreasonable.

Generally, photographs, and other like exhibits, which are introduced to help establish a necessary element in the crime, are held admissible even though they arouse the passions of the jury to the defendant's prejudice.[4] Consistent with this view, there is a line of cases holding such exhibits are inadmissible only when they do not illustrate or clarify a controverted issue and when they are of such a character as to prejudice or influence the jurors.[5] For example, it has been held that, after a sufficient foundation has been laid, clothing worn by the deceased is admissible, if it illustrates or clarifies a point in issue;[6] likewise, it has been held that a deceased's photograph should not be introduced in a murder prosecution, unless there is an issue as to identification.[7]

Some courts, however, are even more lenient with the introduction of inflammatory exhibits and do not exclude them even though it is doubtful whether or not they serve a proper purpose in the furtherance of the State's case.[8] *State v. Heathcoat*,[9] seemingly in point with the instant case,

which can only distract the jurors from the real issue to the gruesome exhibits, which may easily lead them to an incorrect conclusion. McKay v. State, 90 Neb. 63, 132 N. W. 741 (1911) (Coroner's testimony clearly showed deceased was murdered. Admission of bloody garments couldn't tend to identify accused as the murderer. Only purpose was to improperly excite the jury.) "A photograph, proved to be a true representation of the person, place, or thing which it purports to represent is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description." 16 C. J. p. 744, §1528.

[3] Miranda v. State, 42 Ariz. 358, 26 P. (2d) 241 (1933) (bloodstained bedstead and bedding held admissible to show malice.)

[4] People v. Davis, 106 Cal. App. 179, 289 P. 194 (1930) (to establish identity); People v. Lee Nam Chin, 166 Cal. 570, 137 P. 917 (1913) (to illustrate how deceased was killed); State v. Williams, 195 Iowa 785, 192 N. W. 901 (1923) (deceased murdered, body violated. Held admissible to show manner and motive); State v. Burrell, 112 N. J. L. 330, 170 A. 843 (1934) (offered to show bruises on victim's throat in support of State's theory that deceased was strangled); People v. Saenz, 50 Cal. App. 382, 195 P. 442 (1920) (to illustrate manner and form of assault; also some question of identity was involved); State v. Dong Sing et al, 208 P. 860, 35 Idaho 616 (1922) (Clothing admitted to bolster State's claim that the two defendants engaged in the shooting resulting in deceased's death); People v. Elmore, 167 Cal. 205 138 P. 989 (1914) (photo of deceased's severed windpipe with edges of the cut held apart by sticks held admissible to show character of the wound).

[5] Blazka v. State, 105 Neb. 13, 178 N. W. 832 (1920); Simmons v. State, 111 Neb. 644, 197 N. W. 398 (1924).

[6] Williams v. State, 61 Tex. Cr. 356, 136 S. W. 771 (1911); Egbert v. State, 113 Neb. 790, 205 N. W. 252 (1925); Flege v. State, 93 Neb. 610, 142 N. W. 276 (1913); McKay v. State, 90 Neb. 63, 132 N. W. 741 (1911); Cole v. State, 45 Tex. Cr. 225, 75 S. W. 527 (1903); Lucas v. State, 50 Tex. Cr. 219, 95 S. W. 1055 (1906).

[7] Avirett v. State, 128 Tex. Cr. 647, 84 S. W. (2d) 482 (1935); Vaughn v. State, 19 N. E. (2d) 239, 215 Ind. 142 (1939).

[8] People v. Santos, 134 Cal. App. 736, 26 P. (2d) 522 (1933) (uncontradicted testimony that accused inflicted fatal wound; on stand defendant admitted the stabbing and claimed self defense); People v. Burkhart, 211 Cal. 726, 297 P. 11 (1931) (issue involved the degree of homicide; photo showing body's position and condition held admissible, though court censured prosecutor for introducing such evidence); State v. Fine, 110 N. J. L. 67, 164 A. 433 (1933) (photo of decomposed body found in trunk admitted, though body was absolutely identified and there was no question but that death was caused by strangulation. Held admissible to prove identity and the corpus delicti. At trial defense counsel claimed photo was irrelevant and immaterial; on appeal, claimed photo wasn't "best evidence"—this objection wasn't raised in trial court). Cf. Garrett v. State, 171 Ark. 297, 284 S. W. 734 (1926) (photo held unnecessary but its admission into evidence was upheld on the ground that is was not prejudicial—as shown by the fact that accused was convicted of the lowest degree of homicide); Young v. State, 38 Ariz. 298, 299 P. 682 (1931) (photo of deceased's head coated with mercurochrome offered to show nature of wound, held admissible).

[9] 119 N. J. L. 33, 194 A. 252 (1937).

although not cited in it, concerned a prosecution for the murder of a woman with whom the accused lived. The body was discovered under a shed connected with their home and was not found until three months after the slaying, at which time the State took photographs of the body and the surroundings. Although the accused had already admitted killing the woman, the admission of the photographs into evidence was held proper by the reviewing court, which appeared to ignore the question of relevency to the issues involved and said only that there was nothing to suggest a change in the body or the premises except the ravages of time. In *Janovich v. State*,[10] the deceased's identity and the character of the wound was established by uncontroverted oral testimony; the State sought to introduce a photograph of the body into evidence arguing that (1) the State cannot be limited in its manner of proof, and (2) since the character of the wound might have a bearing on the crime's atrociousness, and since the penalty was the only point in issue, the State ought to be able to use the photograph to prove that the severer penalty was merited, when part of the jury's function in a case of first degree murder was to fix the penalty. The court held the State was not limited to oral testimony, but had a right to prove its contentions through the use of exhibits.[11]

A slight modification of the dissenting view is exemplified by *Commonwealth v. Ferry*,[12] wherein the court held the admission of exhibits is within the discretion of the trial judge, and that if he believes their effect may be to inflame the jury against the accused when their admission is unnecessary for the state to prove its case, they should be excluded. Should the exhibits be admitted by the trial court, a cautioning instruction should be given the jury not to let the exhibit arouse their emotions to the defendent's prejudice. The reviewing court following such a rule is apt to give greater weight to the discretion and belief of the trial judge than might be expected in those courts following the somewhat stricter doctrine, upheld by the dissent in the instant case, of excluding the exhibit, unless it plays a necessary role in establishing the controverted issue.[13]

Whereas, the selection of a proper course of procedure in such cases as *State v. Edwards*[14] is fraught with dangers, the view taken by the dissent seems preferable. To maintain is contention that an exhibit should be excluded because prejudicial and unnecessary although competent, it must subscribe to the view that, prior to the offer of the photograph into evidence, the jurors, were satisfied that the state's testimony clearly established the identification of the deceased. To do this, of necessity, the reviewing court must "second-guess" how the jury would have determined the point without the exhibit. This view tends to give the defense a trial *de novo* on the problem of admitting a particular damaging exhibit into evidence in order to support the state's contentions. Thus, if the apparent harm to the accused in allowing such an exhibit into evidence should seem to outweigh the apparent support that the exhibit lends to the state's case, the reviewing court should rule to exclude the harmful exhibit. Certainly, it is unfair to the defense to allow a shocking exhibit to bolster the state's case, when the exhibit is unnecessary or nonessential to the state. Where it is offered merely for corroboration, the court should be extremely zealous of the defendent's interests before ruling such evidence admissible.

Under the majority's view, by relying too heavily upon the ruling of the trial judge, there is a greater possibility of ignoring the hardship worked on the defense. To have a reversal under the majority doctrine, the judge in the trial court must clearly have abused his discretionary right.

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[10] 32 Ariz. 175, 256 P. 359 (1927).

[11] Unfortunately, the court begged the question by arguing that the defendant cannot complain of the ill effects caused by the photograph's introduction into evidence, as he had caused the condition.

[12] 326 Pa. 129, 191 A. 130 (1937); Commonwealth v. Peronace, 328 Pa. 86, 195 A. 57 (1937). Cf. Commonwealth v. Yeager, 329 Pa. 81, 196 A. 827 (1938).

[13] McKay v. State, 90 Neb. 63, 132 N. W. 741 (1911); Williams v. State, 61 Tex. Cr. 356, 136 S. W. 771 (1911).

[14] 10 S. E. (2d) 587, 194 S. C. 410 (1940).

If the introduction of the photograph in the instant case is not needless and prejudicial, it is difficult to conceive of such a situation where a reversal may be had. Primarily, though, this is an individual problem for each judge on the reviewing court to determine subjectively, just when the introduction of an exhibit is "too" prejudicial—that is, when is the good effects going to the State in admitting such evidence, clearly outweighed by the harmful effects borne by the accused as an immediate result of the exhibit's introduction into evidence. Therefore, the item which should receive the greatest protection from the court should be the accused's interests. When, however, the court considers the defendant's rights by using the formula that "so long as the trial judge is not abusing his discretion, his opinion will be sustained," it is apparently side-stepping the main issue; the real problem is not whether the trial judge acted improperly, but rather, was the accused fairly convicted. It is not to be expected that reviewing courts will be as prone to hold the trial judge acted arbitrarily, as they might hold the exhibit was "too" prejudicial. To rule that the trial judge arbitrarily allowed the harmful exhibit into evidence is to reprimand the trial judge's action and to slap his opinion of the matter. But to hold the matter was "too" prejudicial, the reviewing court need not worry about embarrasing the trial judge as the holding will only indicate a difference in opinion. Hence, for the above reasons, not only should the dissent's view of the case be adopted, but also their line of reasoning. This would aid the accused in the reviewing court, as he would not have to prove the trial judge acted arbitrarily, but would only have to show the needless use of the exhibit with its consequent harm to the defendant.

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