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SUPREME COURT OF LOUISIANA

No. 02-KK-2849

STATE OF LOUISIANA

VERSUS

JOE GALLIANO

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FIFTH CIRCUIT, PARISH OF JEFFERSON

CALOGERO, Chief Justice, dissents.

I respectfully dissent from the majority's decision to summarily reverse the court of appeal decision with a *Per Curiam* disposition. I believe the issue in this case is sufficiently close that this court should grant the writ and invite the parties to brief and argue the case, followed by an authored opinion.

The majority employs a "doctrine of chances," which was used in *State v. Monroe*, 364 So. 2d 570 (La. 1980), to find that the likelihood that the defendant was required to kill twice in self defense on successive nights at the same location was so remote that the evidence of the other killing was admissible to negate self defense and lack of intent. The majority concludes that the "doctrine of chances" likewise applies to this case because the likelihood that the defendant would accidentally cause injury to the same child on two separate occasions is also remote. However, I believe that the application of the doctrine to the instant case is much more equivocal than its application in *Monroe*.

In the instant case, the defendant admitted that the child previously suffered a spiral fracture to his leg when the defendant tried to extricate him from a car seat. The defendant has now been charged with second degree cruelty to a juvenile

because, while in the defendant's care, the same child suffered brain damage consistent with shaken child syndrome. Unlike the two acts at issue in *Monroe* (killing two assailants allegedly in self defense), the prior event in this case (spiral leg fracture to the child or infant), is not similar to the injury in question (brain damage consistent with shaken child syndrome). Moreover, there is no evidence indicating that the defendant had a particular animus toward the child or that the defendant regularly abused the child. In the absence of such evidence, I do not believe that the "doctrine of chances" necessarily supports an assumption that the defendant intentionally harmed the child when he shook him simply because he had previously been involved in an event which caused harm to the child under different facts. The evidence in this case as easily supports a suggestion that the defendant is a crude ruffian when handling children, as it supports a suggestion that the defendant intended to harm the child on two disparate occasions.

The issue in this case is sufficiently close to warrant a grant in order to allow the parties to brief and argue their positions. However, to reverse summarily results in a somewhat high handed removal of a ruling of the court of appeal in favor of the defendant.

More and more frequently, this court has been performing the function of district court judges, making interlocutory rulings that govern forthcoming trials. Such rulings are more likely than not issued by a court majority perhaps not as informed as the trial judge, certainly not as informed as the trial judge regarding the facts, even if equally well-informed regarding the applicable law.

To my mind, this is a distortion of the customary procedure in connection with appellate review. This practice of summary disposition, as opposed to hearing argument and issuing an authored opinion, seems more and more prevalent in recent

years. Consider, for example, some recent interlocutory rulings of this court: *State v. Lavigne*, 821 So. 2d 488 (La. 7/25/02); *State ex rel. Thibodeaux v. State*, 01-2510 (La. 3/8/02), 811 So.2d 875; *State v. Fedison*, 01-2736 (La. 2/8/02), 807 So.2d 834; *Yarnell v. Crews*, 01-2523 (La. 12/14/01), 803 So.2d 979; *Norbert v. Loucks*, 01-1229 (La. 6/29/01), 791 So.2d 1283; *State v. Johnson*, 00-2406 (La. 1/12/01), 778 So.2d 546.

It is, of course, not beyond the jurisdictional authority of this court, which has supervisory authority over all of the other courts under La. Const. Art. 5, § 5(A), to substitute our judgment for that of a trial judge. *State v. Wimberly*, 414 So.2d 666, 670 (La. 1982). "The constitutional grant of supervisory authority to this court is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court." *Id.* Nonetheless, micro-managing the district court by use of our supervisory authority is a practice that should infrequently, or rarely, be utilized.[1]

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[1] In *Wimberly*, we recognized that our supervisory authority should be exercised in limited instances:

> In practice, however, certain limitations upon the use of this power are recognized by this court out of respect for the independence of other courts in the determination of questions confided to their judicial discretion, and to avoid usurping merely appellate jurisdiction not conferred upon us by the constitution. [Tate, Supervisory Powers of the Louisiana Courts of Appeal, 38 Tul.L.Rev. 429 (1964); Comment, *Supervisory Powers of the Supreme Court of Louisiana over Inferior Courts*, 34 Tul.L.Rev. 165 (1959).] We have generally restricted the use of supervisory jurisdiction to those cases "where there is a clear usurpation of power not confided by law, or a refusal to perform some duty plainly imposed by law, and which [the lower courts] have no discretion to refuse, and when there is an entire absence of other adequate remedy." State ex rel. City of New Orleans v. The Judge of the Sixth District Court, 32 La.Ann. 549 (1880).

414 So.2d at 670.