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Criminal Trial and Post Conviction Procedure

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CRIMINAL TRIAL AND POST CONVICTION PROCEDURE

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UNPUBLISHED JUDICIAL OPINIONS

The proliferation of appellate opinions in criminal cases which merely apply settled principles of law to typical fact patterns has led Louisiana appellate courts to adopt three approaches to reduce the amount of published jurisprudence. The first is the summary docket in which the appellate court merely affirms or reverses the conviction in the lower court without assigning reasons. The second is the unpublished opinion which affords written treatment to the issues in a case, but is not published in the official report of opinions. The third approach is to separate those issues in a case which are significant enough to warrant extensive, written analysis from the assigned errors which merely apply settled principles to commonly recurring fact patterns; while all assignments are afforded written treatment, the latter issues are treated as part of an unpublished appendix. Each of these methods of reducing the amount of published jurisprudence has its own strengths and weaknesses.

The summary docket is clearly the most efficient but probably the least appropriate method. A decisionmaking process which forces a court to articulate its justification for reaching a result helps to assure clear, precise, and consistent judicial analysis. There is some danger that too little thought will go into making a decision which, in effect, requires no articulated explanation of the reasoning underlying the result. There is also the danger that difficult issues will not really "surface" unless a judge must reason through to his result in written form. Furthermore, there is at least the potential danger that a well meaning appellate court will "bury" a difficult problem because no clear rationale emerges despite the satisfaction of a substantial majority as to the result. Furthermore, if a conviction is affirmed despite trial error because the error was

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"harmless," the trial court is not alerted to avoid such rulings in future cases.[1]

Another criticism which can be leveled at the use of a summary docket procedure is that it blurs the distinction between the appellate and supervisory review by the appellate court.[2] In a criminal case, the summary affirmation is very much like the denial of a writ of review in a non-appealable case. In denying the writ to review the alleged errors, the appellate court is presumably saying "we've considered your arguments—and we don't feel that they have enough merit to warrant full consideration." A denial of writs is not an adjudication on the merits; it simply reflects satisfaction with the result below.[3] A per curiam affirmation is presumably a statement to the effect that "we've fully considered your arguments and you lose." In cases of criminal convictions (the vast majority of cases seeking relief from lower court rulings), both the writ denial and the summary affirmation result in the trial court's conviction and sentence being left intact without explanation from the appellate court. The obvious benefit from use of a summary docket is the speed and efficiency with which an overwhelmingly large number of criminal cases facing appellate courts can be processed.

Prior to the changes in Louisiana's Constitution which switched appellate jurisdiction from the supreme court to the courts of appeal,[4] the Louisiana Supreme Court was forced to utilize a summary calendar procedure in order to manage its unwieldly criminal docket.[5] Further, as is outlined in *State v. Duhon*,[6] the supreme court used a very careful process for screening and setting summary calendar cases for oral argument, with a rule that only two justices' votes were required to remove a case from the summary docket (as opposed to the four votes required to grant a writ). Further, if a lawyer's oral argument convinced the court that the case was significant enough for written treatment, then the case could be removed and assigned to a justice for written treatment.

Even though the supreme court successfully used a summary calendar to control its huge backlog of cases, the courts of appeal should be applauded for not adopting such a procedure at this point. The unpublished opinion and the unpublished appendix can effectively achieve the same ends as the summary docket, but without as great a sacrifice.

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1. Obviously the summary calendar approach cannot effectively be utilized to reverse a conviction when a defendant has raised multiple issues and when the result of reversal is a remand for a new trial. The trial court must know how to avoid the error or errors upon which the reversal is predicated in the event of a new trial.

2. See La. Const. art. V, §§ 5, 10.

3. See Rhodes v. Chrysanthou, 191 La. 774, 186 So. 333 (1939).

4. See La. Const. art. V, §§ 5, 10, as amended by 1980, La. Acts, No. 843, § 1.

5. State v. Duhon, 340 So. 2d 151 (La. 1976).

6. Id.

The unpublished opinion and the unpublished appendix have the advantage of providing a written opinion which the other judges can consider prior to voting and which reveals the decision's rationale to the lower court and to the parties. Any faults with the application of the law to the facts in the record can be exposed by the other members of the appellate panel in dissent or concurrence, or by the parties in a rehearing application.

The publication of an appellate court's treatment of legal issues serves several purposes. One is to provide a "catalogue of results" as common fact patterns are evaluated in the jurisprudence. This would at least reveal whether or not courts of appeals are consistent in the way they apply law to facts. However, because slight variations in the facts can yield different results (and because so few cases are factually identical), little utility would be gained from the availability of such information. If these cases were published, electronic research devices could possibly retrieve them and show a "jurisprudence of facts," so that a litigant could show that given a designated set of facts (and a settled legal theory) a particular result will follow in a large number of cases.

Another argument in favor of publication of all opinions is that the judge is not really capable of knowing the future significance of a particular case when the decision is handed down—and that a decision not to publish could relegate what might have been an important jurisprudential development to a state of obscurity from which it could never be retrieved.[7]

A somewhat related argument is that courts of appeal may choose to "bury" a case which *does* involve an odd or unusual application of law to facts because the court does not want to have the case serve as precedent. Because unpublished opinions "shall not be cited, quoted, or referred to,"[8] the availability of the unpublished opinion may serve as an inducement to courts of appeal to ignore settled principles of law in order to reach a "just" result under the facts of a particular case. However, the author has confidence in the intellectual integrity of our judiciary and doubts that the long range effect of an unpublished docket will be a cynical flouting of precedent in criminal cases.

The use of the above mentioned devices is to be commended insofar as they stem the increasing volume of published appellate opinions. Many reported cases have very little impact on the legal system other than to require more shelf space in law libraries. However, the writer has several suggestions to offer in response to legitimate concerns about

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7. Under the rules, unpublished opinions can not be cited as authority. Unif. R. Ct. App. 2-16.3.

8. Id.

procedures which obscure from view (except to the parties) a large volume of appellate decisions.

The appellate courts ought to carefully follow the uniform written guidelines applicable to all circuits[9] in deciding which written opinions to publish, and those guidelines should be amended to allow an appellate court to decide which assignments of error shall be included in the published portion of the opinion. Under the present rule, the decision to publish is an "all or nothing" decision for the court of appeal. The supreme court, on the other hand, follows a practice of utilizing an unpublished appendix for unexceptional assignments even if some assignments deserve publication.[10]

Under the present guidelines the decision whether to publish is made by the panel rather than by the author of the opinion. Rule 2-16.2 of the Uniform Rules for the Court of Appeal sets forth excellent standards for publication:

> An opinion of a Court of Appeal shall not be designated for publication unless a majority of the panel decides it should be published under the following standards:
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> (a) the opinion establishes a new rule of law or alters or modifies an existing rule;
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> (b) the opinion involves a legal issue of continuing public interest;
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> (c) the opinion criticizes existing law;
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> (d) the opinion resolves an apparent conflict of authority; or
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> (e) the opinion will serve as a useful reference, such as one reviewing case law or legislative history.

The writer suggests that the courts of appeal should establish a review procedure covering all circuits to monitor uniformity of application of the standards. The writer has noted in reading the unpublished opinions of courts of appeal that there is a remarkable lack of consistency among panels concerning the selection of opinions for publication. Some panels still publish opinions which merely affirm on the basis of very settled principles and in which there are absolutely uncomplicated and non-unique factual situations.[11] Other panels designate as "Not for Publication" some rather interesting cases. The writer's impression is that the overall tendency is clearly to err on the side of publishing and that generally too much is being published. Too many judges are too inclined

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9. Id.
10. See, e.g., State v. Fuller, 454 So. 2d 119, 120 n.1 (La. 1984).
11. See, e.g., State v. Herried, 476 So. 2d 587 (La. App. 3d Cir. 1985).

to publish, and to publish all of the assignments if the opinion has any issue which merits publication.[12]

RIGHT TO JURY TRIAL—JOINDER AND CONSOLIDATION OF MULTIPLE MISDEMEANOR OFFENSES

In 1983, the Legislature amended the Code of Criminal Procedure in an effort to avoid jury trials for defendants charged in a single bill of information with multiple misdemeanors punishable by an aggregate penalty exceeding $500.00 or six months in jail.[13] The supreme court had earlier decided in *State v. McCarroll*[14] that the aggregate penalty would be determinative of the right to a jury trial because multiple counts joined in a single indictment must be treated as a single "case" under the Louisiana Constitution.[15] The Constitution requires a jury trial in any "case" in which the maximum penalty exceeds six months imprisonment.[16] The Code of Criminal Procedure also provides for a right to trial by jury if the "case" is one in which a fine exceeding $500.00 could be imposed.[17] Subsequently, in *State v. Grimble*,[18] the supreme court rejected the contention that the trial judge's self-imposed limit of $500.00 and six months could eliminate the right to a jury trial if the legislatively sanctioned maximum aggregate penalty exposure exceeded those limits. The court reasoned that the penalty exposure and not the actual penalty imposed determined the right to a jury trial. The 1983 enactment of Code of Criminal Procedure article 493.1 legislatively imposed limits on the maximum penalty in cases of joined misdemeanors.[19]

Article 493.1 provides: "Whenever two or more misdemeanors are joined in accordance with Article 493 in the same indictment or information, the maximum aggregate penalty that may be imposed for the misdemeanors shall not exceed imprisonment for more than six months or a fine of more than five hundred dollars, or both."

A parallel statute, Louisiana Revised Statutes (La. R.S.) 13:2501.1(J), was enacted for the Traffic Court of New Orleans and has almost identical provisions. In *State v. Odell*,[20] the defendant was charged in

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12. Unfortunately, the Uniform Rules for the Courts of Appeal do not provide for an "unpublished appendix."

13. La. Code Crim. P. art. 493.1 (added by 1983 La. Acts No. 149, § 1).

14. 337 So. 2d 475 (La. 1976).

15. La. Const. art. I, § 17 (requiring a jury trial in all "cases" punishable by imprisonment in excess of six months unless waived by the defendant).

16. La. Const. art. I, § 17.

17. La. Code Crim. P. art. 779.

18. 397 So. 2d 1254 (La. 1980).

19. 1983 La. Acts No. 149, § 1.

20. 458 So. 2d 1304 (La. 1984).

separate affidavits in the New Orleans Traffic Court with multiple traffic offenses. Defendant moved to consolidate for a single trial and his motion was granted. He then moved to quash on the grounds that the now consolidated charges entitled him to a jury trial because the aggregate penalty of the consolidated offenses exceeded six months. He argued that the traffic court lacked "jurisdiction" over the case because the statutes creating the traffic court explicitly provide that the court has no jurisdiction over a case requiring a trial by jury. Similarly, in *State v. Johnson*,[21] the district attorney joined in a single bill of information several misdemeanors whose separate penalties, if aggregated, would exceed the jury trial limit. Unlike *Odell*, where the counts were consolidated on motion of the defendant, *Johnson* involved a prosecutorial decision to join the counts. In both cases, the state relied on the applicable statute to contend that the maximum penalty exposure was legislatively limited to a maximum of six months and five hundred dollars. The district courts considering the two cases declared both La. R.S. 13:2501.1(J) and Louisiana Code of Criminal Procedure article 493.1 unconstitutional.[22] The state appealed.

The supreme court found that the two statutes were constitutional, rejecting the defense argument that the statutes unconstitutionally deprived a defendant of his jury trial right by reducing the penalty and reversed in *Johnson*. Nevertheless, the court affirmed the trial court's dismissal in *Odell*. The court reasoned in *Odell* that the statutes provided for the reduced penalty of exposure only in cases in which the prosecutor exercises discretion to join the counts in a single bill. The court pointed to the language of the statutes which explicitly provide that the reduced penalty applies only when multiple counts "are joined."[23] Thus, the effect of granting a defense motion to consolidate (as in *Odell*) is to provide for a disposition of all charges in a single proceeding without reducing the penalty exposure. Hence, under *McCarroll*, defendant was entitled to a jury trial. Under *Odell*, the effect of granting a defense motion to consolidate multiple misdemeanors is to require a jury trial (if the aggregate penalty exceeds the six month or $500 limit).

The next question to be resolved by the court is whether the trial court abuses its discretion in refusing to grant a motion to consolidate unless defendant will waive his right to a jury trial. Louisiana Code of Criminal Procedure article 706 provides that the court "may" grant a defense request for a consolidation for a single trial if the offenses initially could have been joined by the prosecution. Defendant has no

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21. Id. at 1301.

22. The district courts reasoned, obviously in error, that the statutes unconstitutionally limited defendant's jury trial rights.

23. La. Code Crim. P. art. 493.1.

statutory right to consolidation merely because the counts could have been joined. Nevertheless, in an analogous situation, the supreme court found that the trial court abused its discretion in granting a state motion to sever joined misdemeanor counts where the sole purpose in severing was to avoid a jury trial.[24] The same logic would seem to dictate that the trial court must justify its refusal to consolidate on some basis other than the jury trial requirement.

The view expressed by Justice Lemmon in dissent in *Odell* is preferable to that of the majority.[25] Under Justice Lemmon's view, the statutory reduction in penalty was intended to apply whether the charges were joined by the prosecutor or consolidated by the court on motion of the defendant. The code article does clearly provide that in cases consolidated for trial, "[t]he procedure thereafter shall be the same as if the prosecution were under a single indictment."[26] This would certainly support the view that the Legislature intended that the case be treated for purposes of procedure and penalty as though the charges were initially joined by the prosecutor. In this case, the issues of penalty and procedure are clearly tied together. Furthermore, fairness would seem to dictate that both sides should be able to take advantage of the penalty reduction feature unless the state can show a good reason for exposing the defendant to multiple penalties for a series of offenses arising from a common scheme or from a single episode.[27]

Reduction of Verdicts by Courts of Appeal

In 1980, in *State v. Byrd*,[28] the Louisiana Supreme Court dramatically altered its approach to appellate review of sufficiency of evidence in criminal cases by adopting the *Jackson*[29] standard and declared that a conviction on a lesser included responsive offense could be affirmed even if the evidence did not support the guilty verdict as to the greater offenses. In *Byrd*, the Court reasoned that it was merely affirming the adequately supported, implicit finding of the jury. The elements of the lesser offense were all included in the greater offense, and all elements of the lesser offense were adequately proven.

Contrary to the dissent's view in *Byrd*,[30] the majority was not substituting its judgment for that of the jury; it was merely striking the

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24. State v. Jones, 396 So. 2d 1272 (La. 1981).

25. 458 So. 2d 1304 (La. 1984).

26. La. Code Crim. P. art. 706.

27. Cases involving consecutive, as opposed to concurrent, sentences for offenses arising from the same episode, or a closely connected series of events, have emphasized that normally concurrent sentences should be imposed. See State v. Underwood, 353 So. 2d 1013 (La. 1977).

28. 385 So. 2d 248 (La. 1980).

29. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781 (1979).

30. Justice Watson accused the majority of acting as a "super jury."

unsupported element and affirming conviction for the lesser included offense composed of the adequately supported elements. The appellate court in a *Byrd* situation is not making an initial finding of the presence of an element based on its reading of the record. It is merely affirming a finding already made by the jury.

The theory of *Byrd* was codified by subsequent legislation enacting Louisiana Code of Criminal Procedure article 821.[31] The decision of the third circuit court of appeal in *State v. Bryan*[32] is an important extension of the Byrd theory. In Bryan, the defendant was convicted of second degree murder after killing a fellow shipmate in a brawl. Defendant claimed that he knifed his victim to repel the victim's assault. Although the court of appeal found that the state's proof adequately negated defendant's claim of self defense, it reduced the verdict to manslaughter.[33] The court found that the evidence established that "the defendant acted in sudden passion or heat of blood in the killing . . . and that no rational trier of fact could have concluded otherwise,"[34] and it fully accepted the theory that "heat of passion" is a mitigatory factor to be proven by the defendant, and, unlike self-defense, is not a factor which the state's case must negate.[35] The court concluded that the jury should have found that the evidence established the mitigating factor and should therefore have convicted only for manslaughter, not murder.

Unlike *Byrd*, the appellate court in *Bryan* was not merely setting aside unfounded elements—but rather was making a finding which, in their view, a rational jury should have made. In approaching the problem from this perspective the writer does not mean to criticize the court of appeal. Earlier, the first circuit court of appeal in *State v. Gerone*[36] held that the evidence so clearly established by a preponderance of evidence that Gerone was legally insane at the time of the offense that a rational jury should have returned a verdict of not guilty by reason of insanity. Thus, the court modified the verdict from guilty to not guilty by reason of insanity. This writer praised the first circuit's result as reasonable and just.[37]

However, the court may be criticized for its failure to explain the basis for its extension of the rule of *Byrd* and article 821. The appellate court is certainly within the spirit of *Jackson*, *Byrd*, and the statute.

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31. 1982 La. Acts No. 144, § 1.

32. 454 So. 2d 1297 (La. App. 3d Cir.), cert. denied, 458 So. 2d 128 (La. 1984).

33. Compare La. R.S. 14:30.1 (Supp. 1985) with La. R.S. 14:31 (1974).

34. 454 So. 2d 1297, 1301 (La. App. 3d Cir.), cert. denied, 458 So. 2d 128 (La. 1984).

35. See State v. McAllister, 366 So. 2d 1340 (La. 1978).

36. 435 So. 2d 1132 (La. App. 1st. Cir.), cert. denied, 440 So. 2d 763 (La. 1983).

37. See Joseph, Developments in the Law, 1982-1983—Postconviction Procedure, 44 La. L. Rev. 477, 482 (1983).

By positing what a rational fact finder should have found from the evidence, even when viewed in a light most favorable to the state, and by adding that "finding" to those already made (and adequately supported), the court modifies the verdict to accord with those findings. This is an eminently reasonable approach. Appellate courts must reject a jury verdict if the jury fails to make a finding which a reasonable jury must necessarily have made, just as the court must reject a verdict if the jury makes a finding which a reasonable jury would not make.

However, this approach is only appropriate when the appellate court is dealing with a situation in which a rational jury should have found that an affirmative defense had been established. The modification of a verdict should never reduce a judgment of conviction to a lesser responsive offense which is not a lesser included offense; that is, a lesser offense containing only elements also included in the greater offense.

An example of what the writer deems an inappropriate utilization of the *Byrd* theory appears in *State v. Papillion*.[38] In *Papillion*, the defendant was convicted for forcible rape. The state's evidence established that defendant had anal intercourse with a thirteen year old male.[39]

In reviewing the jury's verdict, the court of appeal found the evidence insufficient to support "the element of force required in the act of forcible rape."[40] However, the court remanded with instructions to enter a judgment convicting defendant of sexual battery. The court said: "Sexual battery, a lesser included offense, which does not require the same degree of force and involves no element of consent if the victim is under fifteen years of age and is at least three years younger than the offender, was necessarily found by the jury."[41]

With deference to the court of appeal's efforts to reach a "just" result (i.e., not allowing defendant to go "scot-free" when evidence of guilt of some offense is clear), the writer believes this to be a misapplication of the *Byrd* theory. Sexual battery is not a lesser included offense of forcible rape although it is a responsive offense under Louisiana Code of Criminal Procedure article 814. The elements of sexual battery describe some conduct which is outside the scope of forcible rape. For example, sexual battery includes consensual anal-genital sexual activity with victims under fifteen if a three year age difference exists. Thus, unlike *Byrd*, which involved armed and simple robbery, all ele-

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38. 467 So. 2d 136 (La. App. 3d Cir. 1985).

39. Both the defendant (who was over seventeen) and the victim worked on a cleanup crew at the Opelousas City Courthouse. The defendant induced the victim to remove his trousers and undershorts and to lie, face down, on the floor. The defendant then proceeded to get on top of his prone victim and engage in anal intercourse.

40. 467 So. 2d at 139.

41. Id.

ments of the "lesser" offense were not necessarily found by the jury in convicting defendant of the "greater" offense.

STATE'S RIGHT TO APPEAL FROM TRIAL COURT JUDGMENT MODIFYING VERDICT

In *State v. Benton*,[42] for the first time since the enactment of article 821, the state successfully appealed a trial court judgment modifying a jury verdict. The defendant was charged with the possession of marijuana with intent to distribute. The jury convicted the defendant of attempted possession of marijuana with intent to distribute. On defendant's motion, the trial judge modified the verdict to possession of marijuana. The appellate court reversed the trial court and reinstated the jury's verdict of guilty of attempted possession with intent to distribute.

Clearly the trial court erred in modifying the verdict in a fashion which required a finding explicitly rejected by the jury. In convicting defendant of attempted possession with intent to distribute, the jury found (possibly illogically) that defendant did not actually possess the marijuana. Thus, the trial court had no authority to "reduce" the verdict to a lesser offense containing an additional element (possession versus attempted possession). Possession of marijuana, although a lesser offense, is not a lesser included offense of attempted possession with intent to distribute.

In reversing the trial court's modification of the verdict, the court of appeal also found that the evidence was sufficient to support a rational juror's finding that defendant had acted with a specific intent to distribute. Because the evidentiary support for the verdict was adequate under *Jackson*, the trial judge was not empowered by article 821 to substitute his own view of the evidence for that of the jury.

Benton clearly illustrates that the standard of review of sufficiency of evidence is identical for both trial and appellate courts under article 821. The judge or judges must defer to jury findings which are reasonably supported by the evidence.[43] *Benton* is also important because the case

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42. 464 So. 2d 960 (La. App. 4th Cir. 1985).

43. La. Code Crim. P. art. 821 (Supp. 1985) provides:

A. The defendant may move for a post verdict judgment of acquittal following the verdict. A motion for a post verdict judgment of acquittal must be made and disposed of before sentence.

B. A post verdict judgment of acquittal shall be granted only if the court finds that the evidence, viewed in a light most favorable to the state, does not reasonably permit a finding of guilty.

C. If the court finds that the evidence, viewed in a light most favorable to the state, supports only a conviction of a lesser included responsive offense, the court, in lieu of granting a post verdict judgment of acquittal, may modify the verdict and render a judgment of conviction on the lesser included responsive

illustrates that courts of appeal will grant relief to the state if a trial judge improperly sets aside a jury verdict. Prior to the enactment of the post verdict judgment of acquittal statute, when the trial judge acted on a motion for a "directed verdict" before submitting the issue to the jury, double jeopardy precluded relitigation even if the trial judge acted improperly in taking the case from the jury.[44] By requiring the case to first go to the jury, the Legislature protects the state's right to seek review of an erroneous trial court decision to remove a case from the jury's consideration.

PRETRIAL DISCLOSURE OF CRIME SCENE TECHNICIAN'S REPORT

Louisiana provides only limited discovery in criminal cases. When the Law Institute worked on proposed discovery legislation, it followed the federal rules of criminal procedure as a model. The 1976 Institute proposal failed to gain approval.[45] However, the House Committee on the Administration of Criminal Justice deferred action on the proposed discovery bill and conducted an interim study.[46] The following session, in 1977, a substantially modified (and in many ways a significantly expanded and improved) discovery bill was offered and approved by the House Committee. The proposal gained passage by the full House and Senate.[47]

The statute mandates disclosure of reports of physical examinations and scientific tests which are "made in connection with or material to the . . . case."[48] The statute also limits disclosure to those reports which are in the prosecutor's control *and* which are "intended for use at trial."[49]

In *State v. Lingle*,[50] two questions were presented: whether a crime scene technician's report falls within the scope of the statutory provision for disclosure of reports of "physical examination[s]" or "scientific

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offense.

D. If a post verdict judgment of acquittal is granted or if a verdict is modified, the state may seek review by invoking the supervisory jurisdiction of or by appealing to the appropriate appellate court.

E. If the appellate court finds that the evidence, viewed in a light most favorable to the state, supports only a conviction of a lesser included responsive offense, the court, in lieu of granting a post verdict judgment of acquittal, may modify the verdict and render a judgment of conviction on the lesser included responsive offense.

44. State v. Baskin, 301 So. 2d 313 (La.), cert. denied, 302 So. 2d 306 (1974).
45. See La. H.B. No. 548, Reg. Sess. (1976).
46. 1977 La. Acts No. 574, § 1.
47. Id.
48. La. Code Crim. P. art. 719.
49. Id.
50. 461 So. 2d 1046 (La. 1985).

tests," and whether the state has to intend to introduce the report into evidence for the report to qualify as "intended for use at trial." The court reasoned that the purpose of discovery is to "afford the defendant a chance to prepare adequately for trial and to eliminate unwarranted prejudice which could arise from surprise testimony."[51] Such crime scene reports record objectively the location of physical objects at the scene prior to it being dismantled and will greatly aid in defense preparation. Because disclosure cannot hamper the state, the court reasoned that a fair construction of the terms "physical examination" or "scientific tests" must include such reports.

The court also concluded that "intended for use at trial" cannot be limited to those reports which will be introduced in evidence; the term included reports made and utilized by witnesses who will testify at trial. The court reasoned that the state has a right to discover reports of tests conducted by defense witnesses under article 725, if the report relates to the witnesses' testimony at trial, and that principles of due process require a parallel approach. Thus, in effect, "intended for use at trial" has been construed to mean "intended to be used by a witness who will testify at trial."

Justice Watson's approach in *Lingle* is helpful and logical. The opinion gives good guidance to trial courts both concerning the types of reports which fall within the scope of discovery and concerning the meaning of "intended for use at trial." However, whether a majority will apply Justice Watson's logic in future cases is unclear. *Lingle* was signed only by Justices Watson and Dennis. Justices Lemmon and Dixon concurred in the result.[52] Justices Blanche and Marcus dissented.[53] Justice Calogero was recused.[54] The concurrences by Justices Lemmon and Dixon seem to rely primarily on the special need shown by the defendant for "crime scene" reports in murder cases based on circumstantial evidence, and not necessarily on Justice Watson's construction of the statutory language. Justices Blanche and Marcus rejected Justice Watson's inclusion of such a report within the category of "physical examination[s]" and "scientific tests." Justice Marcus also explicitly rejected the plurality's view of the meaning of "intended for use at trial."

APPLICATION OF MANDATORY SENTENCING PROVISION FOR COMMISSION OF FELONY WITH FIREARM

In *State v. Coleman*,[55] the defendant was convicted of attempted manslaughter in connection with a racially motivated incident in which

51. Id. at 1048.
52. Id. at 1050.
53. Id.
54. Id. at 1049.
55. 465 So. 2d 709 (La. 1985).

the victim was shot with a pistol. The trial court imposed a five year sentence of imprisonment at hard labor. The conviction and sentence were affirmed on appeal. Subsequently, the prosecutor moved to have the sentence amended under article 893.1 to provide that the sentence be served without benefit of parole and further that an additional two years be imposed without credit for "good time" under La. R.S. 14:95.2. The prosecutor argued, and the trial court agreed, that the original five year sentence was "illegal" because it failed to require that the sentence be served without parole and failed to add the extra two years. The trial court reasoned that the two firearm enhancement statutes[56] mandated those extra sanctions in cases of certain felonies committed with firearms. Attempted manslaughter was such an offense. The court of appeals agreed and affirmed the seven year sentence. The supreme court granted writs and reversed.

Probably the most important aspect of the supreme court's opinion in *Coleman* is the court's reliance on the prosecutorial prerogatives provided in the Louisiana Constitution.[57] The court treated the decision not to invoke the mandatory features of article 893.1 and La. R.S. 14:95.2 as analogous to the decision to institute prosecution. Because the initial five year sentence fell within the range of proper sentences set forth in the penalty provisions for the offense of attempted manslaughter, the sentence was a "legal" sentence and could not later be amended after commencement of its execution.

The supreme court's result is reasonable and just. If the prosecutor seeks enhancement under the mandatory provisions, the trial court must invoke them. If not, the trial court's action in sentencing under the penalty provision of the offense is not unlawful.

Coleman does not hold that the trial court is barred from utilizing the mandatory enhancement features unless the prosecutor invokes them. Indeed, as Judges Cole and Lanier of the first circuit point out in *State v. Collins*[58] and *State v. Wade*,[59] the upshot of *Coleman* is to leave the decision to invoke the mandatory features in the discretion of the trial court if the prosecutor is silent.

The results in *Coleman*, *Collins*, and *Wade* demonstrate the inability of the Legislature to devise a statutory scheme which will, without exception, result in a harsh, mandatory term of imprisonment for every offender who feloniously uses a firearm. An examination of the firearm enhancement statutes clearly reveals a desire to accomplish that purpose.

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56. La. R.S. 14:95.2 (Supp. 1985) and La. Code Crim. P. art. 493.1.

57. La. Const. art. V, § 26(B) provides in pertinent part: "Powers. Except as otherwise provided by this constitution, a district attorney, or his designated assistant, shall have charge of every criminal prosecution by the state in his district."

58. 470 So. 2d 549 (La. App. 1st Cir. 1985).

59. Id. at 562.

However, despite the "uniformity" of such a sentencing scheme, the inevitable exercise of discretion in charging will result in some disparity of treatment. Indeed, individual defendants will doubtlessly have varied backgrounds and character traits and deserve individualized sentencing consideration. In the writer's opinion, allowing the prosecutor and the trial judge the prerogative to invoke the mandatory features is a fair result. If neither the sentencing judge nor the prosecuting attorney feel that the individual case is a proper one for enhancement, enhancement should not be required.

AMENDMENT OF SENTENCE BY COURTS OF APPEAL

Despite the clear legislative restriction denying parole eligibility for certain offenses (such as armed robbery),[60] some trial judges fail to include the "without benefit of parole" limitation in the sentence imposed. In 1984, the supreme court in *State v. Jackson*[61] instructed courts of appeal not to amend sentences on appeal to provide that the sentence be served without benefit of parole. Absent proper objection or motion by the state in the trial court, amendment of such sentences on appeal is prohibited. The amendment would effectively increase the time of actual incarceration a significant degree by depriving the defendant of the benefit of early release on parole.

The writer previously speculated that the decision in *Jackson* was based on Louisiana constitutional principles.[62] The *Jackson* court alluded to the "chilling effect" such adverse amendments of sentence will have on the exercise of the right to seek review.

Whether the decision was based on constitutional principles, or on a construction of Louisiana Code of Criminal Procedure article 882, must eventually be decided by the supreme court. The 1984 Acts included an amendment to article 882 explicitly authorizing courts of appeal to correct an illegal sentence on appeal.[63] The article had formerly only referred to the trial court's authority to correct an "illegal" sentence

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60. La. R.S. 14:64(B) (Supp. 1985) requires that any sentence be imposed "without benefit of parole. . . ."

61. 452 So. 2d 682 (La. 1984).

62. See Joseph, Developments in the Law, 1983-1984—Postconviction Procedure, 45 La. L. Rev. 485, 493 (1984).

63. 1984 Acts No. 587, § 1 amended La. Code Crim. P. art. 882 to provide:

> A. An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review.
>
> B. A sentence may be reviewed as to its legality on the application of the defendant or of the state:
>
> (1) In an appealable case by appeal; or
>
> (2) In an unappealable case by writs of certiorari and prohibition.
>
> C. Nothing in this Article shall be construed to deprive any defendant of his right, in a proper case, to the writ of habeas corpus.

"at any time."[64] The legislation seemed clearly designed to approve the action of courts of appeal in enforcing mandatory provisions denying parole. Courts of appeal have divided in their views regarding the effect of the 1984 amendment on *Jackson*.

In *State v. Fraser*,[65] Judge Lanier, writing for the first circuit court of appeal sitting en banc, persuasively reasoned that no defendant is constitutionally entitled to an illegally lenient sentence. Judge Lanier distinguished several situations. In some cases, the trial court does not exercise discretion, such as those in which a life sentence without benefit of parole is mandated. In other cases, despite some mandatory features of the penalty provision, the trial judge must nevertheless exercise discretion. For example, the penalty for armed robbery provides a range of sentences between five and ninety-nine years although the sentence cannot be suspended and must be imposed without benefit of parole.

Judge Lanier reasoned that when the appellate court simply "complies with a nondiscretionary sentencing requirement," there can be no danger of retaliation or likelihood of vindictiveness in "correcting" an illegally lenient sentence.[66] That danger arises only in the case in which the "corrected" sentence imposed by the appellate court is harsher than that mandated by statute. For example, as in *Fraser*, if a trial court sentenced a convicted armed robber to twenty years imprisonment at hard labor and the court of appeals amended the sentence to require that it be served "without benefit of parole," the resultant sentence is longer than the sentence originally imposed. The sentence would also be longer than the minimum required legislative mandate of at least five years without benefit of parole. Thus, in such cases, the matter should be remanded to the trial judge for resentencing. The trial judge may wish to impose a shorter term without benefit of parole. Further, if appropriate, the trial court can establish the necessary justification for imposing a harsher sentence after the appeal.

The first circuit's approach has merit and affords the trial court an opportunity to reduce the length of the term when required to add the "without benefit" provision. *Fraser* also clearly requires the trial court to explain or justify the new sentence if it is harsher than the prior one.

Subsequent Capital Sentencing Hearing—Effect of Jury's Failure to Find Aggravating Circumstances in Prior Hearing

In *State v. David*,[67] the defendant was convicted of first degree murder in connection with an intentional killing during the commission

64. See former La. Code Crim. P. art. 882.
65. 471 So. 2d 769 (La. App. 1st Cir.), cert. granted, 475 So. 2d 771 (La. 1985).
66. Id. at 776.
67. 468 So. 2d 1126 (La. 1984).

of an armed robbery. The jury recommended the death penalty. In doing so, the original jury relied on four aggravating circumstances. The jury found that defendant was engaged in an armed robbery, had a significant prior history of criminal activity, created a risk of death to more than one, and committed the killing in a particularly heinous manner. On appeal, the supreme court affirmed the conviction but reversed the death sentence due to an erroneous instruction during the penalty phase.[68]

When the penalty issue was retried, the second penalty jury also recommended the death penalty. However, that jury relied only on one aggravating circumstance—that the defendant had a significant prior history of criminal activity.[69]

On appeal, the supreme court found that the sole aggravating circumstance relied on by the jury was unconstitutionally vague and again set the death sentence aside, but did not address the issue of "whether the case could be remanded for another penalty hearing or whether such would be prohibited by . . . double jeopardy . . . ."[70] The court ordered that issue briefed and argued.

In a second opinion,[71] the court held that a new penalty hearing could be conducted at which the jury could consider aggravating circumstances not previously relied on by prior juries. The court rejected the theory that by relying solely on the "significant criminal history" provision the former penalty jury had impliedly "acquitted" the defendant of the other aggravating circumstances. The court noted that the jury was not called upon to pass on the sufficiency of evidence to support each aggravating circumstance but rather was instructed that it could consider recommending the death penalty as long as at least one aggravating circumstance was proven beyond a reasonable doubt. The case is easily distinguishable from those in which the prior jury has recommended a life sentence, or in which a life sentence followed from the jury's failure to reach unanimity. Thus, unlike a verdict of guilty of a lesser offense, the "failure to find" is not tantamount to a conclusion that the evidence was insufficient to prove the existence of the other aggravating circumstances.

The importance of *David* is obvious. At retrial of a penalty hearing the state can reurge all applicable aggravating circumstances, whether or not relied on by the first penalty jury.

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68. 425 So. 2d 1241 (La. 1983).

69. See former La. Code Crim. P. art. 905.4(c). The statute was amended in 1985 to delete the reference to the unconstitutional provision. 1985 La. Acts No. 748, § 1.

70. 468 So. 2d at 1134.

71. 468 So. 2d 1133 (La. 1985).

JURY INSTRUCTIONS ON EFFECT OF LACK OF UNANIMITY IN CAPITAL SENTENCING TRIALS

In *State v. Loyd*,[72] the supreme court reversed a capital sentence because the trial court refused to answer the jury's question during the penalty trial concerning the effect of their failure to reach a unanimous verdict. The jury had only deliberated for about an hour when the question was submitted. In refusing to answer the query, the trial judge relied on the concurring opinion in *State v. Williams*[73] which seemed to require that the jury be told of the effect of lack of unanimity only after a substantial period of deliberation had passed.

In reversing, the *Loyd* court seems to rely on the uniqueness of the situation presented by capital sentencing trials. The effect of a single juror's refusal to join the death penalty recommendation of his (or her) fellow jurors produces the same result as a unanimous recommendation for life imprisonment. In effect the legislature has decreed that twelve votes are required for a death sentence whereas only one vote is required for a life sentence. At least in those cases in which both the jury and defense counsel request an instruction of the effect of non-unanimity, the jury must be told. However, thus far, no such instruction is required at the outset.[74] Nevertheless, Justice Lemmon, in his concurring opinion, suggests that the trial judge opt to give the instruction if requested by defense counsel even in the absence of a jury request.[75]

Grudgingly, the writer agrees that the court's approach is reasonable. The seemingly anomalous situation of requiring unanimity for a recommendation of either death or life and providing for life in the event of non-unanimity was obviously designed to avoid the necessity to declare a "mistrial" at the penalty phase. The seemingly anomalous requirement of jury unanimity to recommend life is obviously designed to encourage the jury to deliberate assiduously and to try to reach unanimity if possible. Nevertheless the danger of possible confusion by the jury if a question concerning the effect of non-unanimity is raised and left unresolved certainly mitigates in favor of the result in *Loyd*. Furthermore, the state's interest in having the jury fairly deliberate the question of penalty is vindicated even if an instruction on non-unanimity is given at the outset. This is certainly true in view of the fact that the jury selection process eliminates those whose views on capital punishment are such that he or she cannot fairly consider imposing a death sentence.[76]

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72. 459 So. 2d 498 (La. 1984).

73. 392 So. 2d 619 (La. 1980).

74. In State v. Perry, 420 So. 2d 139 (La. 1982), the court rejected a defense argument that the trial court erred in failing to give an instruction on the lack of unanimity before the jury began to deliberate and without a defense or juror request for such an instruction.

75. 459 So. 2d at 509.

76. See Wainwright v. Witt, 105 S. Ct. 884 (1985).