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Appellate Review of Sentences: A New Standard in Louisiana

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is willing to disregard its questionable concern with foreseeability and concentrate upon the nature of the public interest in alimony, Louisiana could join the states which have reached this more desirable result.

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APPELLATE REVIEW OF SENTENCES: A NEW STANDARD IN LOUISIANA

The defendant, an eighteen-year-old male, had sexual intercourse with a consenting fifteen and one-half-year-old female and was convicted of carnal knowledge of a juvenile.[1] The trial judge sentenced him to serve three years and six months at hard labor. On the first appeal, the Louisiana Supreme Court affirmed the conviction but remanded the case to the trial court for resentencing because the judge had failed to apply the sentencing guidelines of article 894.1 of the Louisiana Code of Criminal Procedure.[2] On the second appeal, after the

1. LA. R.S. 14:80 (1950 & Supp. 1977) provided in pertinent part: "Carnal knowledge of a juvenile is committed when anyone over the age of seventeen has sexual intercourse, with her consent, with any unmarried female person of the age of twelve years or over, but under the age of seventeen years, where there is an age difference of greater than two years between the two persons."

Although the defendant was actually convicted for a violation of the 1950 version of Revised Statutes 14:80, the Louisiana Supreme Court in its analysis referred to the 1977 version of this statute. Act 539 of 1977 simply added the additional requirement that there be a two-year age difference between the defendant and the victim. 1977 La. Acts, No. 539. Revised Statutes 14:80 was again amended in 1978 to afford equal protection to male victims. 1978 La. Acts, No. 757.

2. LA. CODE CRIM. P. art. 894.1 provides:

> A. When a defendant has been convicted of a felony or misdemeanor, the court should impose a sentence of imprisonment if:
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> (1) There is an undue risk that during the period of a suspended sentence or probation the defendant will commit another crime;
>
> (2) The defendant is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution; or
>
> (3) A lesser sentence will deprecate the seriousness of the defendant's crime.
>
> B. The following grounds, while not controlling the discretion of the court, shall be accorded weight in its determination of suspension of sentence or probation:
>
> (1) The defendant's criminal conduct neither caused nor threatened serious harm;

trial judge reimposed the three and one-half-year sentence, the court again affirmed the conviction and vacated the sentence, *holding* that the sentence was unconstitutional because it was "excessive" in violation of article 1, section 20 of the Louisiana Constitution of 1974.[3] *State v. Sepulvado,* 367 So. 2d 762 (La. 1979).

Laws imposing cruel and unusual punishment have always been subject to appellate review under the eighth amendment to the United States Constitution.[4] However, a void in constitutional protection has existed in the instance where the criminal statute imposing sentence has been constitutional and the sentence imposed has fallen within the specific statutory guidelines, yet the sentence has been clearly disproportionate to the crime. Hence, if the sentence has been excessive, although the punishment imposed by statute was not cruel and unusual, the defendant has been afforded no constitutional right of judicial review of his sentence.

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(2) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(3) The defendant acted under strong provocation;

(4) There [were] substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(5) The victim of the defendant's criminal conduct induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the instant crime;

(8) The defendant's criminal conduct was the result of circumstances unlikely to recur;

(9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(10) The defendant is particularly likely to respond affirmatively to probationary treatment; and

(11) The imprisonment of the defendant would entail excessive hardship to himself or his dependents.

C. The court shall state for the record the considerations taken into account and the factual basis therefore in imposing sentence.

3. LA. CONST. art. 1, § 20 provides: "No law shall subject any person to euthanasia, to torture, or to cruel, *excessive,* or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense." (Emphasis added.)

4. U.S. CONST. amend VIII states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

At least twenty-six states have sought to remedy this situation[5] by creating either legislatively or judicially a right to review excessive sentences falling within prescribed statutory limits. The federal courts, however, have no statutory authority to review a sentence that falls within the statutory limits for the crime.[6] The United States Supreme Court re-enforced this view in *Dorszynski v. United States.*[7] In dicta the Court maintained that "once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end."[8] In the same opinion, however, the Court conceded that limited review is available if it appears that the trial judge failed to exercise *any* sentencing discretion.[9] The First Circuit Court of Appeals reiterated this point in *United States v. Foss,*[10] where the court noted that appellate courts have vacated sentences which reflect a "preconceived policy" to impose automatically the maximum penalty for a certain crime.[11]

Prior to the enactment of the Louisiana Constitution of 1974, the Louisiana Supreme Court took an unwavering stand on appellate review of sentences: if a sentence fell within the statutory limits prescribed for that particular offense, it was not reviewable.[12] Under Louisiana Code of Criminal Procedure

5. *See* Comment, *Appellate Review of Sentences: A Survey,* 17 ST. LOUIS U.L.J. 221 (1972). *See generally* Labbe, *Appellate Review of Sentences: Penology on the Judicial Doorstep,* 68 J. CRIM. L. 122 (1977).

6. *See, e.g.,* Ormento v. United States, 328 F. Supp. 246 (S.D.N.Y. 1971); Crow v. Coiner, 323 F. Supp. 555 (N.D. W. Va. 1971); Benn v. Eyman, 298 F. Supp. 546 (D. Ariz.) *aff'd,* 409 F.2d 1358 (9th Cir. 1969).

7. 418 U.S. 424 (1974).

8. *Id.* at 431.

9. *Id.* at 443.

10. 501 F.2d 522 (1st Cir. 1974).

11. *Id.* at 527. The court in *Foss* went on to say that "[a] rigid policy involving even less than the maximum may be objectionable; any kind of mechanical sentencing that steadfastly ignores individual differences is to be avoided." *Id.*

12. *See, e.g.,* State v. Polk, 258 La. 738, 247 So. 2d 853 (1971); State v. Ames, 249 La. 685, 190 So. 2d 223 (1966); State v. Vittoria, 224 La. 258, 69 So. 2d 36 (1953); State v. Glennon, 165 La. 380, 115 So. 627 (1928); State v. Gomez, 153 La. 618, 96 So. 280 (1923); State v. Cook, 117 La. 114, 41 So. 434 (1906).

In *Polk,* the majority found that "[t]he determination of the sentence is the prerogative of the trial judge. As long as the sentence falls within the limits authorized by the Louisiana Criminal Code, this Court has no authority to review it." 258 La. at 752, 247 So. 2d at 858.

article 878, the court had no authority to review sentences unless the statute under which the sentence was imposed set forth a cruel or unusual punishment.[13] As Justice McCaleb pointed out in *State v. Vittoria,*[14] "[t]he fixing of penalties for criminal acts is a matter of legislative discretion with which the courts will not interfere save in extreme cases of palpable abuse."[15]

The passage of the 1974 constitution brought a significant change in the phraseology from the prior constitutional provision prohibiting cruel and unusual punishment.[16] The new provision precludes the imposition of *excessive* sentences as well as those that are cruel and unusual.[17] Some legal writers have expressed the opinion that such a word change allows appellate review of sentences.[18] Professor W. Lee Hargrave, coordinator of legal research for the constitutional convention, commented on the effect of such a change:

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13. LA. CODE CRIM. P. art. 878 states: "A sentence shall not be set aside on the ground that it inflicts cruel or unusual punishment unless the statute under which it is imposed is found unconstitutional."

Article 878 was promulgated to "preclude attacks on the nature and severity of sentences imposed unless the law upon which the conviction and sentence is based is found unconstitutional." LA. CODE CRIM. P. art. 878, Official Revision Comment (a).

14. 224 La. 258, 69 So. 2d 36 (1953).

15. *Id.* at 261, 69 So. 2d at 37. The Louisiana Supreme Court has historically viewed the setting of the statutory length of sentences as a function primarily of the legislative branch. *See, e.g.*, State v. Scott, 278 So. 2d 121 (La. 1973); State v. Howard, 262 La. 270, 263 So. 2d 32 (1972); State v. Glennon, 165 La. 380, 115 So. 627 (1928).

16. LA. CONST. art. I, § 12 (1921, repealed 1974) provided in pertinent part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Code of Criminal Procedure article 878 complements this section by prohibiting appellate review of sentences thought to be cruel or unusual unless the statute itself was unconstitutional. See note 13, *supra.*

17. For the text of the provision, see note 3, *supra.*

18. *See* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974,* 35 LA. L. REV. 1, 63 (1974); Jenkins, *The Declaration of Rights,* 21 LOY. L. REV. 9, 38 (1975).

State Representative Jenkins, a delegate to the constitutional convention, maintains the following:

> The prohibition against "excessive . . . punishment" makes a great change in the law and requires the courts to do justice in each case, regardless of any legislative assertion. This standard allows the courts to avoid strained interpretations of what is cruel and unusual punishment, in order to reach the sometimes more important question of *whether the punishment does,* in fact, *fit the crime.*

Jenkins, *supra* at 39 (emphasis added).

> The prohibition against cruel or unusual punishment is derived from the eighth amendment and Article 1, § 12 of the 1921 Constitution. The new section, however, adds that no law shall subject any person to "excessive punishment," broadening the prior prohibition against "excessive fines." This gives the courts, in the exercise of their judicial review power, a basis for determining that sentences, whether fine, imprisonment or otherwise, though not cruel or unusual, are too severe as punishment for certain conduct and thus unconstitutional. It is a basis for extending the court's control over the entire sentencing process.[19]

With the addition of the word *excessive,* the new constitution gives the court a justification for review of sentences in theory and presumably in fact, despite the statutory bar found in Louisiana Code of Criminal Procedure article 878.

The supreme court, however, initially hesitated to acknowledge this new responsibility. It continued to adhere to nonreviewability of sentences falling within the statutory limits.[20] The court considered that the addition of the word *excessive* effected no substantive change from the prior provision.[21]

From 1974 to 1978 a noticeable change could be perceived in the court's treatment of the issue. The court, while still

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19. Hargrave, *supra* note 18, at 63.

20. *See, e.g.,* State v. Gambino, 362 So. 2d 1107 (La. 1978); State v. Kemp, 359 So. 2d 978 (La. 1978); State v. Williams, 341 So. 2d 370 (La. 1976); State v. Hatter, 338 So. 2d 100 (La. 1976).

Justice Dixon stressed this view in *Hatter,* stating: "The determination of a sentence is within the sound discretion of the trial judge, and, if within the statutory and constitutional limits, is generally not subject to review." 338 So. 2d at 106 (citations omitted).

21. Justice Marcus echoed this sentiment in his concurrence in *State v. McClinton,* 329 So. 2d 676 (La. 1976), as follows: "I do not consider that the addition of the word 'excessive' in article 1, section 20 of the Louisiana Constitution of 1974 adds a 'new dimension' to the prohibition against 'cruel and unusual punishment' contained in article 1, section 12 of the Louisiana Constitution of 1921." *Id.* at 678 (Marcus, J., concurring).

This position was reiterated by former Chief Justice Sanders in *State v. Kemp,* 359 So. 2d 978 (La. 1978). He stated: "This Court *has not* held that it has the authority to review the excessiveness of a defendant's sentence within the statutory limits . . . ." 359 So. 2d at 980 (emphasis added).

maintaining its position against appellate review of sentences, began to give consideration to the *possibility* of such a power.[22] For example, in *State v. Whitehurst*[23] the majority in dicta conceded that "[t]he addition of the word 'excessive' may add a new dimension to the constitutional prohibition"[24] of cruel or unusual punishment. However, in no decision did the court decide to confront this issue directly, although Justice Tate, concurring in *State v. Bryant*[25] and *State v. Williams*,[26] mapped out a clear and specific strategy for implementation of appellate review of excessive sentences based on the new constitutional power.[27]

In his concurrence in *Williams*, Justice Tate laid the groundwork for the decision in *Sepulvado* by arguing that the Louisiana Constitution of 1974 granted the court the power to review sentences. He utilized a three point analysis in justifying such a radical break with past jurisprudence.

First, the inclusion of the word *excessive* in article 1, section 20 in itself justifies appellate review of sentences. The prior standard of appellate review of sentences as cruel and unusual is no longer a preclusion device.[28] Hence, a totally new dimen-

22. *See, e.g.*, State v. Victorian, 332 So. 2d 220 (La. 1976); State v. Walker, 328 So. 2d 87 (La. 1976); State v. McClinton, 329 So. 2d 676 (La. 1976); State v. Pierce, 321 So. 2d 523 (La. 1975); State v. Fisher, 321 So. 2d 519 (La. 1975); State v. Whitehurst, 319 So. 2d 907 (La. 1975).

23. 319 So. 2d 907 (La. 1975).

24. 319 So. 2d at 909. See text at notes 55-58, *infra*.

25. 325 So. 2d 255 (La. 1976).

26. 340 So. 2d 1382 (La. 1977).

27. In *Bryant*, the defendant was convicted of aggravated rape. In his concurring opinion, Justice Tate maintained that the death penalty imposed was "excessive under the facts of this case for the crime as proved." 325 So. 2d at 265 (Tate, J., concurring).

In *Williams*, the defendant, a fifteen-year-old boy, pleaded guilty to attempted aggravated rape and was sentenced to fifty years at hard labor. The defendant appealed solely on the ground that the sentence imposed was excessive in violation of article 1, section 20 of the Louisiana constitution. The court disposed of the case procedurally; the defendant had failed to object to the sentence at the time it was imposed, so the issue of excessiveness was not preserved for appellate review.

This outcome in *Williams* has been recently struck down by the Louisiana Supreme Court in *State v. Cox*, 369 So. 2d 118 (La. 1979). No technical objection is now required to preserve the issue for appellate review when it is raised by assignment of error to the supreme court.

28. Justice Tate argued the following:

> The Louisiana Constitution of 1921 merely prohibited "cruel and unusual

sion was added with the constitutional reform of 1974.

Second, Justice Tate analyzed the historical framework of section 20 in confronting the argument that if the *law* imposed a penalty that was constitutional and a judge's sentence fell within such limits, the sentence was constitutional. As originally introduced, section 20 read, "No *person* shall be subjected . . . ."[29] However, the words "no law shall subject" was substituted for the phrase "no person shall be subjected" for the single reason that the delegates sought to avoid the interpretation that this section proscribed euthanasia.[30] The clear intent of the delegates remained unchanged with regard to the excessiveness of sentences, *i.e.*, that no *person* should be subjected to *excessive* punishment. Furthermore, delegates to the constitutional convention had noted at the time of its drafting that this new provision would allow for judicial review of sentences.[31]

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punishment." Article I, Section 12. In a deliberate change of wording, the new Louisiana Constitution of 1974 broadened the constitutional provision (and the duty of our courts in review of sentences) by providing, Article I, Section 20: "No law shall subject any person . . . to cruel, *excessive*, or unusual punishment."

By the new constitution's mandate, the People have made inapplicable the prior standards of judicial review of sentences as cruel and unusual established by prior jurisprudence interpreting the former state constitutional provision, as well as jurisprudence interpreting the federal constitution's Eighth Amendment prohibition against "cruel and unusual punishments."

340 So. 2d at 1384 (Tate, J., concurring) (emphasis in original).

29. 10 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: COMMITTEE DOCUMENTS, May 5, 1973 at 60 (emphasis added).

Delegates Vick and Roy, members of the Committee on the Bill of Rights and Elections (CBRE), submitted the following as Tentative Proposal No. 89: "No person shall be subjected to torture or to cruel, unusual, or excessive punishments or treatments, and full rights are restored by termination of state supervision for any offense against the state." *Id.*

30. Professor Hargrave explained the rationale for such a change:

An innovation [in Section 20] is the provision, "No law shall subject any person to euthanasia." The definition of euthanasia referred to during the debate was a common one—the act or practice of killing individuals that are hopelessly sick or injured, for reasons of mercy. As proposed by the committee, the language was, "No person shall be subjected to euthanasia," but it was feared that this language might be construed to prevent a physician from halting extraordinary life-continuation treatments of a dying patient. A clarifying amendment was thus adopted to make clear that the prohibition is limited to laws requiring persons to be subjected to euthanasia.

Hargrave, *supra* note 18, at 63.

31. The following dialogue took place between the delegates concerning this provision:

As his final line of analysis in *Williams,* Justice Tate surmounted the statutory bar to review of sentences that existed prior to the 1974 constitution. Article 878 of the Code of Criminal Procedure provided that a court could not review the severity of sentences unless the law imposing them was cruel or unusual.[32] According to Justice Tate, the new constitutional provision renders the statute ineffective; there is no statutory bar to review for "excessiveness."[33]

Thus, Justice Tate developed the rationale for appellate review of sentences in his concurrence in *Williams.* Although no other justice joined him, it was evident that he laid a solid foundation for appellate review of sentences. The court seized the opportunity to utilize this in *Sepulvado.*

In its initial hearing of *Sepulvado,* the supreme court remanded the case and instructed the trial court to apply article 894.1 of the Code of Criminal Procedure[34] in sentencing the defendant. On remand, the trial court reached the conclusion that its original sentence of three and one-half years was proper. In the opinion of the trial judge, the circumstances of this particular case dictated that imprisonment of the defendant was appropriate. He reasoned as follows, tracking the statutory considerations for imposing a prison sentence:

> 1. Probation would deprecate the seriousness of the crime.

Mr. Willis: My next question, you use the word "excessive punishments." Would that not allow me to appeal and have the judge review a sentence on the grounds that the sentence is excessive and so the punishment excessive?

Mr. Weiss: Yes, but it was not the intent of the committee to question this aspect, but rather "excessive punishments."

Mr. Willis: But the prospect is present, is it not?

Mr. Weiss: Yes, and here again an amendment is forthcoming in this regard.

7 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS, Sept. 8, 1973 at 1190. Such an amendment was never proposed.

32. For the text of Code of Criminal Procedure article 878, see note 13, *supra.*

33. Justice Tate maintained the following:

> Under the 1974 Constitution, the legislature has not attempted to expand the Article 878 clause to "excessive punishment." (Nor, if Section 20 mandates judicial review as to excessiveness of a sentence, may it constitutionally do so.)
>
> Thus, at the present time no statutory bar purports to forbid judicial review of the excessiveness of a particular sentence.

340 So. 2d at 1387 (Tate, J., concurring).

34. For the text of Code of Criminal Procedure article 894.1, see note 2, *supra.*

2. Sepulvado's past conduct indicated he might commit another crime.
3. The defendant was in need of correctional treatment.[35]

The trial court found that imprisonment was warranted by relying on an isolated incident of the defendant's past conduct. It was established by the trial court that the defendant had sexual intercourse with a girl other than the victim of the crime in question.[36] This is hardly a compelling basis for imprisonment, however, since that conduct was not shown to have been criminal.[37]

Having found that imprisonment was necessary under section (A) of article 894.1, the trial court was uninfluenced by the mitigating factors delineated in section (B).[38] The trial judge apparently felt that mitigating factors need not be considered if imprisonment were imposed. Justice Tate, writing for the majority, disagreed, asserting that section (B) should be read not only as determining if probation is required, but also as providing guidelines in determining the extent of any imprisonment imposed.[39]

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35. 367 So. 2d at 769.

36. *Id.* at 770.

37. In early 1976 the defendant had had sexual intercourse with a fifteen-year-old girl and fathered her child. The trial court implied that this was a criminal act; however, it appears that the defendant was not two years older than the girl and that he was under seventeen years of age at that time. Additionally, he subsequently married the mother of his child after the commission of the offense for which he was convicted. *Id.* at 770-71.

Justice Tate deemphasized the significance of these events as follows: "[T]he fact of his one former teenage romance, standing alone, does not justify an assessment of Frankie as an unusually likely recidivist, nor as a dangerous criminal." *Id.* at 771.

38. *Id.* at 769.

39. Justice Tate maintained that by the inclusion of the word *shall* in section (B), the trial judge was obligated to apply this section despite having reached the conclusion that imprisonment was necessary. He stated:

> By the reason of the constitutional prohibition against excessive sentences provided by Article 1, Section 20, the sentencing judge does not possess unbridled discretion to impose a sentence within statutory limits, regardless of mitigating facts. Considering the nature and circumstances of this crime, as well as the youth and background of this offender, the present trial court abused its discretion by refusing to consider the numerous factors within the statutory criteria provided by La. C. Cr. P. art. 894.1 B . . . which strongly indicate that no imprisonment at all be imposed, even in the local parish jail (let alone three and one-half years in penitentiary confinement.)

Id. at 769-70.

Evidence of four significant mitigating factors was presented at the trial court's evidentiary hearing to determine sentence. The supreme court relied heavily on these factors in vacating the sentence of the defendant. The first was that the victim had facilitated the commission of the crime by asking the defendant "to go away" with her; by participating willingly in the defendant's crime; and, following the crime, by running away with the defendant to Texas for two weeks.[40]

A second mitigating factor was that the defendant had led a law-abiding life both prior to and after the commission of the crime.[41] He did not have a prior criminal record; and "[h]is conduct *after* the crime, in that he got married and obtained steady work,"[42] indicated that he was not in need of correctional treatment.

Thirdly, the court took notice of the fact that the defendant was the only support of his wife and child.[43] To incarcerate the defendant would cause an excessive hardship to his dependents.

Finally, the trial court failed to give weight to substantial reasons to excuse rationally, albeit not legally, the actions of the defendant. The supreme court emphasized sociological circumstances surrounding the defendant's conduct. "[W]ithout applauding the sexual permissiveness of the times," the court took judicial notice of the sexual promiscuity of young people in general in the United States.[44] It also examined a type of "community standard" and found that marriage at age sixteen was not uncommon in Sabine Parish, the place of the offense.[45] Furthermore, the majority stressed the closeness in age of the defendant and the victim. Had the defendant been four months

40. *Id.* at 771.

41. *Id.*

42. *Id.* (emphasis in original).

43. *Id.* See note 37, *supra.*

44. 367 So. 2d at 771.

45. *Id.* Although the court recognized that marriage at age sixteen was not unusual in Sabine Parish, it failed to indicate the significance of this fact. Should one infer that if marriage were common at age twelve in a particular parish, this also should be considered a significant mitigating factor in statutory rape?

younger, he would not have been subject to any criminal sanctions for his conduct.[46]

Justice Tate summarized the mitigating factors in the instant case, putting them into the following quaint, but proper, perspective:

> The context that emerges is of two young people, of marriageable age in the community, and at an age at which sexual experimentation is not uncommon, carrying on a relationship that was normal and predictable at least up to the night of the offense. They had known each other for four years, and the difference of about 2 years in their ages was not significant. At the trial there was testimony that they both believed they were in love.[47]

A major point of the court's analysis centered on the question of disparity of sentences imposed on different types of defendants for this crime. If Sepulvado, in light of all the mitigating factors, received a three and one-half year sentence, "[w]hat sentence then," the court asked, "is to be given to an irresponsible drifter with a prior record . . ., who is judged a likely recidivist? And suppose it is this irresponsible drifter who seduced a naive twelve-year-old girl?"[48]

Assuming arguendo that such a "drifter" would receive the maximum penalty of five years, the court concluded that this would be only negligibly longer than a three and one-half-year sentence.[49] With this in mind, the court included in its analysis a statistical study of sentences received by defendants convicted of carnal knowledge who were either confined or under probation. The statistics indicated that "*not one individual under the age of 20* had been sentenced to imprisonment with the Department of Corrections as of the date" the court's opinion in *Sepulvado* was written.[50]

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46. *Id.* at 772.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 773 (emphasis in original). The statistics to which the court referred indicated that there were sixty-five persons within either the institutional or probational custody of the Department of Corrections for violation of Revised Statutes 14:80. Of these sixty-five, only eight were in prison, the youngest being twenty years old. Of

The significance of *Sepulvado* is that it requires the punishment imposed by a trial court to be closely tailored to fit the crime; if it is not, the sentence will be vacated on appeal. In fact, the trial court is called upon to render a sentence based upon psychologically and sociologically enlightened attention to certain factors. *Sepulvado,* therefore, does not merely change the law; it is a tapestry designed to demonstrate that sentencing is to be a process sensitive to the individual and societal circumstances of each person convicted of criminal wrongdoing.

Appellate review of sentences has been gaining increasing support among legal scholars.[51] Generally, the following four objectives are said to be accomplished by such a procedure:

1. Correction of an excessive sentence, taking into consideration the nature of the offense, the character of the offender, and the protection of the public interest;
2. Rehabilitation of the offender;
3. Promotion of respect for the law due to the fairness of the sentencing process; and
4. Promotion of uniform criteria for sentencing.[52]

There are two traditional arguments against appellate review of sentences. The first is that it would simply increase the backlog of cases already found in the appellate courts. This fear, however, appears to be greatly exaggerated.[53]

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the remaining fifty-seven offenders, there were only twelve who were under twenty years of age. *Id.* at 772.

51. *See* Blake, *Appellate Review of Criminal Sentencing in the Federal Courts,* 24 KAN. L. REV. 279 (1976); Knowles, *Lawlessness in Our Criminal Law: Criminal Sentences and the Need for Appellate Review,* 35 ALA. LAW 450 (1974); Norris, *Appellate Review of Sentencing,* 53 MICH. ST. B.J. 344 (1974); Comment, *Appellate Review of Sentences and the Need for a Reviewable Record,* 1973 DUKE L.J. 1357; Comment, *Appellate Review of Sentences: A Survey,* 17 ST. LOUIS U.L.J. 221 (1972); Comment, *The Rule of Nonreview: A Critical Analysis of Appellate Scrutiny of Criminal Sentences,* 17 WM. & MARY L. REV. 184 (1975).

52. ABA STANDARDS, Appellate Review of Sentences]] 1.2 (1968).

53. A major argument made against sentence review is that it would add to the already swollen appellate dockets, since it would open to review those cases in which conviction rests on a guilty plea. But apprehensions over this are greatly exaggerated. In those cases in which review will be sought solely on the sentence, the lack of merit in the challenge often will be readily apparent to the reviewing court upon a brief examination of the crime for which conviction was

The second drawback to appellate review of sentences is contended to be the appellate judges' lack of opportunity to observe the defendant's demeanor; thus, their review of the "cold record" would be insufficient. This disadvantage, however, is minimized when it is taken into consideration that most criminal cases result in guilty pleas, with the *trial judge* having little opportunity to observe the defendant's demeanor.[54]

In addition to determining the propriety of appellate review of sentences, the *Sepulvado* holding raises questions concerning Louisiana criminal statutes that provide for mandatory punishment. Under such statutes, the trial judge must impose at least the minimum sentence specified regardless of any mitigating circumstances.

The Louisiana Supreme Court was confronted with this issue in *State v. Whitehurst.*[55] The jury convicted the defendant of distribution of heroin; and the judge sentenced him to life imprisonment, as was required by statute. He appealed on the ground that the sentence violated the eighth amendment "because the mandatory sentence requires the trial judge to impose the penalty without considering the age and background of the defendant or other mitigating circumstances which affect the gravity of the criminal conduct."[56] The court dismissed the defendant's contention and held that the sentence was not cruel or unusual. Justice Calogero, writing for the majority, looked at the defendant's claim in terms of "excessiveness" under article 1, section 20 of the constitution. Nevertheless, he concluded that "mandatory life imprisonment, subject to probation and parole opportunities, but imposed without judicial consideration of any attendant miti-

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obtained, the sentence, and the prior criminal record.

NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 117 (1973). *See* Norris, *supra* note 51, at 346.

54. ABA STANDARDS, Appellate Review of Sentences § 2.3, comment (b) (1968).

55. 319 So. 2d 907 (La. 1975).

56. *Id.* at 909. LA. R.S. 40:966 (Supp. 1972 & 1973) imposed a sentence of "life imprisonment at hard labor without benefit of probation, or suspension of sentence . . . ." This section has subsequently been amended by Act 631 of 1977. The new amendment deletes any reference to probation or suspension of sentence. 1977 La. Acts, No. 631.

gating circumstances, is neither excessive, nor cruel and unusual."[57]

The question that now surfaces is whether *Whitehurst* is still valid in the wake of *Sepulvado.* The same rationale employed by the majority in *Sepulvado* has been employed by Justice Tate in dissenting opinions in cases involving mandatory sentences.[58] One such case was *State v. Mallery.*[59]

In *Mallery,* the defendant, a twenty-five-year-old plumber, married and the father of three, was charged with distribution of heroin. Though a heroin addict, the defendant had neither a criminal record nor an arrest record. When solicited by an undercover police agent who pretended to be another addict in need of heroin, the defendant aided the agent in obtaining the drug and was convicted for distribution. However, the records of the case indicated that this was an isolated activity and that the defendant had never before participated in drug sales.[60] Despite these mitigating factors, he was sentenced to life imprisonment. Justice Tate deplored this result and suggested in his dissent that "a mandatory life sentence for a person for a single act of distribution of heroin, however small or insignificant the amount of the drug or the offender's participation, is excessive under accepted constitutional standards."[61]

As an aftermath of *Sepulvado,* it is suggested that all statutes imposing mandatory sentences should be *per se* unconstitutional. If the punishment meted out by the trial judge must closely fit the crime *and* the defendant, then any form of mandatory sentencing would clearly violate this precept. Federal courts have already called into question the constitutionality of mandatory sentences. In *Rummel v. Estelle,*[62] the Fifth Cir-

57. 319 So. 2d at 909. The defendant in *Whitehurst* never raised the issue of the constitutionality of Revised Statutes 40:966 in light of the state constitution. Justice Calogero, however, felt the need to consider this issue in addition to that raised with regard to the eighth amendment to the United States Constitution.

58. *See, e.g.,* State v. Sykes, 364 So. 2d 1293 (La. 1978); State v. Terrebonne, 364 So. 2d 1290 (La. 1978); State v. Mallery, 364 So. 2d 1283 (La. 1978).

59. 364 So. 2d 1283 (La. 1978).

60. *Id.* at 1285-86.

61. *Id.* at 1286 (Tate, J., dissenting).

62. 568 F.2d 1193 (5th Cir. 1978).

cuit Court of Appeals vacated as unconstitutional a statutorily mandated life sentence imposed upon a multiple offender. It was found to be unconstitutional because it required the imposition of a mandatory life sentence regardless of the nature of the crimes.[63]

A greater area of concern perhaps should be focused on what effect *Sepulvado* will have on trial judges and the sentencing process in general. Due to the fact that sentences are reviewable, the trial judge must now closely follow the guidelines in article 894.1 in determining the length of sentences.[64] However, determination of a sentence in accordance with article 894.1 will be meaningless if the underlying data upon which the sentence is based are inaccurate. The need for accurate sentencing data becomes an issue of paramount importance to guarantee that an excessive sentence will not be imposed.

In Louisiana a main source of sentencing information is the pre-sentence report. In all criminal cases, with the exception of capital cases, the trial court has the discretion to order a pre-sentence investigation.[65] The reporter's comment which

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63. *Id.* at 1195.

64. Justice Summers stressed this in *State v. Gambino*, 362 So. 2d 1107 (La. 1978) as follows:

> Sentence was imposed by the trial judge in keeping with the guidelines set forth in Article 894.1 of the Code of Criminal Procedure. Compliance with that article averts the possibility of excessive or capricious sentences. It assures that the sentencing authority is given adequate information and guidance in sentencing and provides reviewable standards.

Id. at 1113.

65. LA. CODE CRIM. P. art. 875 provides in pertinent part: "If a defendant is convicted of an offense other than a capital offense, the court may order the Department of Corrections, division of probation and parole, to make a presentence investigation."

The official comment which followed LA. CODE CRIM. P. art. 875 noted that "[u]nder this article the court may, but is not required to, order a pre-sentence investigation." LA. CODE CRIM. P. art. 875, comment (d).

In the federal courts, a pre-sentence investigation is mandatory unless it is waived by the defendant or the court finds that there is sufficient information in the record "to enable the meaningful exercise of sentencing discretion . . . ." FED. R. CRIM. P. 32. It is suggested that a similar mandatory pre-sentence investigation for felonies should be adopted in Louisiana in the wake of *Sepulvado*. The only reason it is not required presently is the fear that, were the report mandatory, it would create undue delay in the sentencing process. *See* LA. CODE CRIM. P. art. 876, comment (a). This time factor must be balanced against the need for the "most reliable and scientific

accompanied Act 360 of 1960 maintained that "[t]he pre-sentence investigation is the most reliable and scientific device available for sound sentencing. It serves to protect the community and the defendant from the uncertainties of 'hunch sentencing' and 'community impression.'"[66] In light of the *Sepulvado* rule, the legislature should consider the need for mandatory pre-sentence reports.[67]

A pre-sentence report, however, becomes useless in the sentencing process if it contains substantially false information; thus, an adequate sentencing procedure must insure against this. To reach this aim, it becomes necessary that the defendant and his counsel have access to the pre-sentence report.[68] Louisiana, however, does not require disclosure of such reports. The trial court at its discretion may reveal the factual contents of the report to the defendant or his counsel, but it is under no obligation to do so.[69]

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device available for sound sentencing." See text at note 66, *infra*. Without an adequate factual basis for sentencing, a meaningful appellate review of sentences cannot exist.

66. RESEARCH AND ADVISORY STAFF, LEGAL COMMITTEE FOR REVOLUTION "2," SUPPLEMENT OF THE REPORT OF THE PAROLEE REHABITATION COMMITTEE, Jan. 4, 1960 at 53.

67. Since the Louisiana Supreme Court has now held that it has the authority to review the length of sentences, "the record on which . . . complaints are to be reviewed will become a serious problem." *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Postconviction Procedure*, 37 LA. L. REV. 568, 571 (1977).

It becomes an issue of paramount importance that a defendant's character and the circumstances of the crime be placed in the record. This is particularly true where no trial has been held, and the defendant has simply pled guilty. Such factual determination should be obtained through a pre-sentence report.

68. The trend among legal writers is to favor the disclosure of such reports. *See, e.g.*, ABA STANDARDS, Sentencing Alternatives and Procedures § 4.1 to .6 (1967); COUNCIL OF THE JUDGES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT § 4 (1972); Harkness, *Due Process in Sentencing: A Right to Rebut the Presentence Report?*, 2 HAST. CONST. L.Q. 1065 (1975).

69. LA. CODE CRIM. P. art. 877 provides in pertinent part: "Before imposing sentence the court *may* advise the defendant or his counsel of the factual contents and conclusions of any pre-sentence investigation report." (Emphasis added.)

In *State v. Underwood*, 353 So. 2d 1013 (La. 1978), the defendant was convicted by a jury of three counts of distribution of marijuana and sentenced to consecutive terms of imprisonment of seven, eight and ten years. The sentence was vacated for re-sentencing because information indicated that the sentences were possibly based on inaccurate information contained in the pre-sentence report. The supreme court held that, to avoid the imposition of an excessive sentence, the accused had a right to this report.

The principle that a defendant should have access to his pre-sentence report was reiterated in *State v. Berain*, 360 So. 2d 822 (La. 1978). As in *Underwood*, *Berain* again

Finally, if the defendant has access to pre-sentence reports through full disclosure, it becomes axiomatic that he have the right to refute the information contained therein. The issue then becomes one of what limitations should be placed upon the defendant at this stage of the sentencing proceeding. Justice Tate noted in *State v. Bosworth*[70] that "no full scale evidentiary trial is required at the sentencing hearing at which the defendant is given an opportunity to deny or explain adverse information which is prejudicially false or misleading."[71]

The legislature, however, should statutorily mandate a full-scale evidentiary trial. Since the facts in issue at the sentencing hearing will be used in determining sentence, it would be inherently unfair to decide such important questions without full-scale evidentiary hearings. Such a hearing should conceivably allow for the formal introduction of evidence, for the right of the defendant to subpoena and present witnesses, and for the right of confrontation of those who asserted the allegations found in the pre-sentence report.[72]

The implementation of mandatory pre-sentence reports, full disclosure, and evidentiary hearings will serve two functions. First, these procedures should preclude the imposition of such an excessive sentence as was imposed in *Sepulvado*. Second, should an excessive sentence be imposed, the supreme court would have an excellent sentencing record upon which to base its review.

In permitting appellate review of sentences, *Sepulvado* charts a new course in Louisiana jurisprudence. Its holding

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emphasized, however, that the defendant had no right to the report absent any showing whatsoever that the pre-sentence report contained false information prejudicial to the defendant. *See, e.g.*, State v. Boone, 364 So. 2d 978 (La. 1978).

It is the burden of the defendant, therefore, to allege with sufficient showing that the pre-sentence report contained inaccurate information; once this is accomplished, he will be given an opportunity to view the record and to rebut it. It begs the question, however, to require the defendant to make a sufficient showing that the pre-sentence report is false when he has no statutory right to see the report in the first instance.

70. 360 So. 2d 173 (La. 1978).

71. *Id.* at 176.

72. *See* Harkness, *supra* note 68, at 1087; Taparauskas, *An Argument for Confrontation at Sentencing: Bringing the Offender into the Sentencing Process*, 8 CUM. L. REV. 403, 422 (1977); Note, *Recent Developments in the Confidentiality of Pre-Sentence Reports*, 40 ALB. L. REV. 619 (1976).

should not be read as an isolated example with little future significance. While its impact certainly will be felt by sentencing judges, it also may alter the entire sentencing procedure. Additionally, *Sepulvado* calls for the supreme court to reassess its position on the constitutionality of mandatory sentences.

Barry L. LaCour

DRUG SMUGGLING AND THE PROTECTIVE PRINCIPLE: A JOURNEY INTO UNCHARTED WATERS

The defendant was indicted on charges of conspiring to import marijuana,[1] possession of marijuana with intent to distribute,[2] and attempting to import marijuana.[3] He filed a motion to dismiss the indictment, alleging lack of subject matter jurisdiction, since the acts in question occured on the high seas outside of United States territory. The United States District Court in Puerto Rico *held* (1) the defendant's planned invasion of United States customs territory was a sufficient basis for the invocation of subject matter jurisdiction under the protective theory, and (2) the defendant's vessel was subject to the special maritime jurisdiction of the United States. *United States v. Keller*, 451 F. Supp. 631 (D.P.R. 1978).[4]

The protective principle is one of the six bases recognized in international law for the exercise of criminal jurisdiction by a sovereign state.[5] According to this principle, a sovereign state

1. 21 U.S.C. § 952, 963 (1970).

2. 21 U.S.C. § 841(a)(1) (1970).

3. 21 U.S.C. § 952, 963 (1970).

4. This note will focus on the use of the protective principle to establish subject matter jurisdiction.

5. Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 437, 445 (1935) [hereinafter cited as Harvard Research]. *See also* United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1968); Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967).

The other five bases of jurisdiction are set out as follows: (1) The territorial principle is based on the absolute sovereignty of a state within its boundaries; it may prosecute all who commit a crime within its territory. (2) Jurisdiction over nationals rests on the allegiance due a state by its citizens and the inherent authority which it has over them. (3) The objective territorial principle allows a state to exercise jurisdiction over those who act outside of its territory so as to intentionally cause a criminal