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POSTCONVICTION PROCEDURE

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CAPITAL SENTENCING HEARINGS—PLAIN ERROR

Louisiana has never legislatively adopted the plain error doctrine¹ of Rule 52 of the Federal Rules of Criminal Procedure. The contemporaneous objection rule² has historically barred complaints about most trial errors unless objected to at the time of occurrence. With few exceptions, the legislative scheme places the burden on the defendant to "speak now or forever hold your peace."³

In a sense the rule is a dictate of fairness to the state and the trial judge insofar as it requires defense counsel to alert the court and thereby to afford an opportunity to avoid the error. The rule also embodies the notion that complaints not timely asserted constitute a waiver of the right to assert the complaint.⁴

In *State v. Cox*,⁵ the supreme court declined to apply the contemporaneous objection rule to bar a complaint regarding the length of a sentence. The court reasoned that article 841 of the Louisiana Code of Criminal Procedure was by its own terms limited to pre-verdict errors. Since the imposition of sentence occurs after the verdict, the court did not perceive that defendant's failure to object at the time of sentence barred assigning the error for appeal.

In *State v. Sonnier*,⁶ the court had occasion to apply a plain error approach in reversing a death sentence and in remanding for a new penalty trial. The jury in *Sonnier* was erroneously instructed concerning the availability of work release for persons convicted of

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1. FED. R. CRIM. P. 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they are not brought to the attention of the court."

2. LA. CODE CRIM. P. art. 841.

3. Professor Dale Bennett, one of the reporters for the Code of Criminal Procedure, described the purpose of the article in the comments as disallowing an "anchor to windward."

4. The present language of LA. CODE CRIM. P. art. 841 does not contain the "waiver" language of article 841 as it was originally enacted. The 1974 amendment deleted the formerly required reservation of a bill of exceptions and conformed the language of article 841 to the companion provision of the Code of Civil Procedure and to Rule 51 of the Federal Rules of Criminal Procedure. See comment (c), LA. CODE CRIM. P. art. 841 as amended by 1974 La. Act, No. 207.

5. 369 So. 2d 118 (La. 1979).

6. 379 So. 2d 1336 (La. 1980).

first degree murder.⁷ Although defense counsel was consulted prior to the instruction and made no complaint, the supreme court remanded the matter for a new sentence hearing because the instruction was erroneous.

The implications of *Sonnier* are both fair and far-reaching. They are fair in the sense that the limitation imposed by article 841 is statutorily related to pre-verdict complaints. The last amendment to article 841 was enacted prior to the advent of capital sentencing hearings.⁸ The draftsmen of original article 841 and article 841 as amended⁹ probably did not foresee the prompt arrival of either appellate review of sentence¹⁰ or of bifurcated capital trials.¹¹ There is no reason to believe that the legislature intended article 841 to bar complaints about post-verdict procedures which had not yet been created.

The plain error approach is also fair for the reasons so well stated in *Sonnier* by Justice Calogero on rehearing: "[T]his Court is charged with the responsibility of reviewing the jury's recommendation to determine whether the sentence was influenced by passion, prejudice or any arbitrary factor. The Court must consequently conduct an independent review, regardless of the failure of defense counsel to object to possible error, to determine whether any of these factors contributed to the jury's recommendation"¹² Thus, it is clearly envisioned by the Louisiana statutory scheme (which embodies the constitutional requirements) that the supreme court is to perform an independent review of the record to determine the appropriateness of the death penalty.¹³ Plainly prejudicial error, whether objected to or not, should be noticed, because the matter is literally one of life or death for the accused.

The *Sonnier* decision is far-reaching in that it introduces in Louisiana, at least in the area of capital sentencing, the familiar plain er-

7. The instructions implied that the defendant would be eligible to participate in certain work release programs when, in fact, under Department of Corrections regulations, he would not have been eligible.

8. See 1974 La. Acts, No. 207.

9. The writer was reporter for the Louisiana Law Institute Advisory Committee which proposed 1974 La. Acts, No. 207. While the writer prefers to consider himself endowed with prescience and perspicacity, he did not, nor did any member of the Law Institute, nor any member of the legislative committee hearing and favorably reporting the bill amending LA. CODE CRIM. P. art. 841 raise the issue presented in *Sonnier*.

10. See *State v. Sepulvado*, 367 So. 2d 762 (La. 1979).

11. See 1976 La. Acts, No. 694 enacting Chapter 3, Sentencing in Capital Cases, of Title XXX of the Louisiana Code of Criminal Procedure.

12. 379 So. 2d at 1371.

13. See LA. CODE CRIM. P. art. 905.9 and Louisiana Supreme Court Rule 28.

ror doctrine. Presumably, the court will review the record and remand whenever fundamental error appears, whether objected to or not. Jury instructions and closing argument are fertile ground for plain error. However, the doctrine is encompassing enough to include any error in the trial of a sentence hearing. For example, a complaint about the admissibility of evidence could be raised for the first time on appeal. Further, a logical extension of *Sonnier* is the court's authority to notice fundamental error not called to its attention by the parties. This would imply that the assignment of errors procedure is likewise no limitation on the court's scope of review.

In capital cases, this approach serves the salutary purpose of imposing an independent obligation on trial courts and prosecutors to see that procedural and evidentiary rules are strictly adhered to in the sentencing trial.

APPLICATION OF SENTENCING GUIDELINES

During the several years since the sentencing guidelines statute¹⁴ was enacted, some trial courts apparently have not been able to grasp its essential import.¹⁵ The obvious purpose of the statute is twofold: first, to guide the trial court by directing attention toward the appropriate criteria and second, to require the trial court to set forth the factual basis for the sentence.

In *State v. Jones*,¹⁶ the sentencing judge merely recited in unilluminating fashion the language of the statutory aggravating circumstances. He then imposed a fifteen-year sentence for a pistol robbery of a food store cashier. Finding that Jones's sentence fell within the "lower range"¹⁷ of sentences which could have been imposed, the supreme court affirmed. The court stated that remand for failure to comply with the guidelines statute would only be in order when an "apparently severe"¹⁸ sentence was imposed.

The court's approach unquestionably links the guidelines to the appellate review of sentence. If a sentence is lenient and seems to be warranted based solely on the essential facts of the case, then guidelines compliance is unnecessary to assist in review for excessiveness. Trial courts are in effect warned that remands may follow in cases of "apparently severe" sentences unsupported by

14. LA. CODE CRIM. P. art. 894.1, as enacted by 1977 La. Acts, No. 635.

15. See, e.g., *State v. Watson*, 372 So. 2d 1205 (La. 1979); *State v. Touchet*, 372 So. 2d 1184 (La. 1979); *State v. Jacobs*, 371 So. 2d 727 (La. 1979); *State v. Gist*, 369 So. 2d 1339 (La. 1979); *State v. Jackson*, 360 So. 2d 842 (La. 1978).

16. 381 So. 2d 416 (La. 1980).

17. *Id.* at 418.

18. *Id.*

guideline compliance. However, as long as sentences are of a minimal nature when considered in light of the severity of the offense, review can be effected on the basis of the essential facts of the offense alone. By implication, the court in *Jones* seems to be saying that it will not find an abuse of discretion where a fifteen-year sentence is imposed for any pistol robbery of a convenience store clerk. In other words, all the court needs to know to determine that there was no clear abuse is that the defendant committed a robbery of a convenience store clerk while armed with a pistol. The fifteen-year sentence is, therefore, justified on those facts *alone*. A more "severe" sentence may require more of a factual justification to assure that the sentence was appropriately tailored to the offender as well as to the crime.

By using terms like "apparently severe" and "lower range" the supreme court has telegraphed a clear message to the trial judges. They must justify severe sentences, but not lenient ones.

The approach is reasonable but overlooks the fact that the statute ostensibly is designed to encourage judges to impose severe sentences where appropriate. The state has an interest in imprisonment of dangerous offenders.¹⁹ Possibly mandatory minimum sentences²⁰ and habitual offender statutes²¹ adequately protect society without resort to sentencing guidelines.

Nevertheless, the writer favors a statutory scheme by virtue of which either party may invoke review by the appellate court for either an excessive or an unduly lenient sentence. This scheme, although possibly impractical, seems far superior to legislatively imposed restrictions on the sentencing discretion of trial judges.

APPELLATE REVIEW—SUFFICIENCY OF EVIDENCE

In *State v. Peoples*²² the court, without extended discussion, permitted the defendant to raise the question of sufficiency of evidence for the first time on appeal by assignment of error without filing a motion in the trial court for judgment of acquittal.

19. LA. CODE CRIM. P. art 894.1A states that the trial judge "should impose a sentence of imprisonment" as opposed to granting probation under certain specified circumstances.

20. See, e.g., LA. R.S.14:64 (Supp. 1962 & 1966), which provides for a minimum five-year sentence.

21. LA. CODE CRIM. P. art. 893 presently denies to the trial court the authority to grant probation to second felony offenders except under limited circumstances. LA. R.S.15:529.1 (Supp. 1956 & 1958) provides for increased mandatory terms of imprisonment for habitual felony offenders.

22. 383 So. 2d 1006 (La. 1980).

This is an eminently reasonable approach. Without a doubt, the trial court's evaluation of the sufficiency of evidence would be perspicacious but is not essential to fair review of that issue. Because reviewing the record for sufficiency does not involve credibility choices, the trial court's evaluation of the record may be no more perspicacious than that of the appellate court. The question is whether the evidence, viewed in a light most favorable to the prosecution, was sufficient to convince a reasonable juror of guilt beyond a reasonable doubt.²³ The supreme court can evaluate readily the legal sufficiency of the state's proof without assistance from the trial court.

In performing this task the court may order transcription of whatever additional portions of the record are necessary, even though the portions are not designated by the parties.²⁴

The court's approach to raising sufficiency of evidence is reasonable for several reasons:

- (1) the issue is one of constitutional dimensions and may be raised in collateral proceedings;
- (2) the issue relates to the essential accuracy of the fact-finding process;
- (3) the issue is one which does not require the trial court's initial evaluation; and
- (4) requiring an objection to be raised in the trial court will not give the state or the trial judge an opportunity to avoid the error.

Thus, the supreme court was reasonable in not barring the defendant from raising an objection to sufficiency of evidence for the first time on appeal.

APPELLATE REVIEW—REDUCTION OF VERDICT

For a number of years the court has maintained a policy of reversing and remanding when the evidence does not adequately support the verdict. In *State v. Elzie*,²⁵ Justice Tate, as author of an opinion reversing a conviction for possession of controlled substances with intent to distribute, noted the double jeopardy problem posed by a subsequent prosecution for the lesser (and amply proved) crime of possession. Justice Dennis expressed concern in *State v.*

23. *Jackson v. Virginia*, 443 U.S. 307 (1979); *State v. Byrd*, 385 So. 2d 248 (La. 1980).

24. LA. CODE CRIM. P. art. 845.

25. 343 So. 2d 712 (La. 1977).

*Tillman*²⁶ that the system of remanding for a new trial on the amply proved lesser offense would not enhance judicial efficiency. However, until *State v. Byrd*,²⁷ the judicial policy in Louisiana was to order acquittal of the defendant if the evidence did not adequately support the verdict.²⁸

In *State v. Byrd*, the court finally confronted the problem in an interesting context: a toy pistol was used to perpetrate a robbery. The defendant in *Byrd* produced his toy pistol after a previously ordered piece of fried chicken was delivered at the counter of a fast food stand. The young man demanded that the clerk give him all of the money in the register. The clerk, with an apparently unruffled attitude, replied that there was no money, and walked away. This apparently confounded the robber, who took his piece of fried chicken and left. He was immediately apprehended by two police officers who observed the entire incident. They, fortunately for the defendant, seized the toy pistol to hold as evidence.

The court applied the *Jackson v. Virginia*²⁹ test to the Louisiana cases previously addressing the problem of the use of objects not inherently dangerous in the perpetration of a robbery. The court wisely concluded, under the facts presented, that the evidence did not adequately support the jury's conclusion that the toy pistol was used in a manner likely or calculated to cause death or great bodily harm. As the court noted, the "highly charged" atmosphere, which concerned the court earlier in *State v. Levi*³⁰ when dealing with the use of an unloaded pistol, simply was not produced.

Although an unloaded pistol is no more capable of immediately projecting a bullet through its muzzle than a toy pistol, the unloaded one differs in several respects. First, it can be loaded; second, it can be used as a bludgeon. Here, however, the court apparently was not dealing with a heavy metal object capable of inflicting an injurious wound if used to strike a victim. Also, sound policy reasons, which were expressed by the court, exist for making a distinction by drawing the line at toys. The dramatically severe penalty for armed robbery obviously was intended to be reserved for cases where there is a great potential for injury.³¹ That was not the case presented by the facts of *Byrd*.

26. 356 So. 2d 1376, 1379 n.2 (La. 1978).

27. 385 So. 2d 248 (La. 1980).

28. See *State v. Peoples*, 383 So. 2d 1006 (La. 1980); *State v. Allien*, 366 So. 2d 1308 (La. 1978).

29. 443 U.S. 307 (1979).

30. 250 So. 2d 751 (La. 1971).

31. LA. R.S.14:64 (Supp. 1962 & 1966) provides for a time of imprisonment from five to ninety-nine years without benefit of probation of parole.

Nevertheless, the offender should not escape unpunished for his clearly proven attempt to steal money by use of "intimidation." The court therefore recognized its inherent authority to remand with instructions to resentence for the lesser included offense of simple robbery.

The court's rationale is sound. The jury's verdict was unsupported only insofar as it reflected a finding that the toy pistol was a dangerous weapon. In all other respects it was amply supported, and amply supported a verdict of guilty of the lesser included crime of simple robbery. In employing the *Byrd* approach the court merely applies the *Jackson* test to strike the unsupported, additional element. As Justice Lemmon, writing for the majority, said, the procedure does not "deprive defendant of the right to have a trial judge or jury decide on proof of the elements of the lesser and included offense, but rather recognizes that the trier of fact has already made that decision."³²

In *Byrd* the court did not merely substitute its judgment and remand because the evidence should have convinced a reasonable juror beyond a reasonable doubt that the offender was guilty of a lesser offense. The court obviously examined what findings were *implicit* in the verdict returned. Unsupported elements were stricken. A remand for sentencing was appropriate because a finding that all of the elements of the lesser offense were proven was inherent in the jury's verdict.

Presumably the court will adhere to the legislatively restricted responsive verdicts of article 814 of the Code of Criminal Procedure. In other words, if a verdict of a lesser included offense is supported by the evidence, but that offense was precluded from being responsive by legislative action in article 814, the court will not remand for resentence on that offense. Similarly, if a verdict is legislatively responsive but requires elements not inherently found in the verdict returned, the court will never reduce a verdict to order sentencing for that lesser offense.

Byrd obviously will present some interesting dilemmas for the court in the future. As pointed out by the dissent, the court's approach, although followed in many states, is unprecedented in Louisiana. Nevertheless, the path taken is the wise one, and the author is sure that no obstacles encountered in the future will prove insurmountable.

32. 385 So. 2d at 252.

ACT 492 OF 1980—POSTCONVICTION RELIEF

In 1976, an *ad hoc* committee was appointed by the Supreme Court of Louisiana to study the problem of habeas corpus in Louisiana.³³ Trial judges had expressed concern about repetitive applications, unnecessary hearings, and administrative difficulties surrounding production of prisoners.

Under the then-existing statutes and jurisprudence, if a prisoner serving a sentence alleged a ground for relief, a hearing was required.³⁴ The trial court was not authorized to defer holding a hearing or ordering that the prisoner be brought to court.

As a result of the *ad hoc* committee's study, legislation was adopted to curb repetitive writs³⁵ and to authorize the supreme court to promulgate rules providing for an alternative method of handling the disposition of writ applications for persons subsequent to conviction.³⁶

The supreme court rules (which became effective on January 1, 1977) were modeled on the American Bar Association Standards for Post Conviction Remedies and the proposed (since modified and adopted) federal rules governing postconviction applications by state prisoners under 28 U.S.C. § 2254.

Following the adoption of the supreme court rules, Chief Justice Dixon requested that the Louisiana Law Institute draft legislation incorporating the rules into a new title of the Code of Criminal Procedure exclusively dealing with post-appellate challenges to convictions.³⁷ Provisions found in the existing title on habeas corpus dealing with postconviction matters were removed.

Louisiana Act 429 of 1980 incorporated the Chief Justice's suggestions. Act 429 creates a clear delineation between preconviction challenges to custody (habeas corpus) and postconviction challenges (postconviction relief).

33. The author and Professor P. Raymond Lamonica of the LSU Law School served as reporters for the committee.

34. See *State ex rel. Cherry v. Cormier*, 281 So. 2d 99 (La. 1973).

35. See 1976 La. Acts, No. 382, amending LA. CODE CRIM. P. art. 353 to authorize the district court to dismiss a writ application for inexcusable failure to raise the grounds asserted in a prior application.

36. See 1976 La. Acts, No. 448, amending LA. CODE CRIM. P. art. 359 to authorize the Supreme Court of Louisiana to adopt rules relative to applications by convicted persons in custody.

37. The author serves as reporter for the Louisiana Law Institute Advisory Committee which proposed 1980 La. Acts, No. 429.

Persons Who May Petition

As under prior law, not all persons convicted and sentenced may avail themselves of postconviction relief. The procedures are available only to convicted persons "in custody," who have fully exhausted their right of appeal.³⁸ If a petitioner's appeal is pending or if a petitioner still has the right to appeal, he cannot avail himself of postconviction relief.³⁹ This limitation is clearly designed to prevent the use of postconviction relief as a substitute for the orderly process of appeal.

The term "custody" is broadly defined in article 924 of the Code of Criminal Procedure to include detention or confinement as well as probation or parole supervision. The definition merely codifies the jurisprudence, which has included such supervised release situations within the ambit of habeas corpus relief.⁴⁰ However, once the sentence is satisfied, postconviction relief is barred. The conviction can be challenged only if it is later used to enhance penalty (*e.g.*, under Louisiana Revised Statutes 15:429.1) or to serve as an element of a crime in a subsequent criminal prosecution (*e.g.*, Louisiana Revised Statutes 14:95.1).

Venue for Postconviction Relief

Because postconviction petitions challenge the proceedings leading to conviction, venue was logically retained in the parish wherein the conviction occurred.⁴¹ There the court most likely will find the record of the trial proceedings, the prosecutor, defense counsel, and other witnesses whose testimony might be relevant to factual issues.

The repealer clause of Act 429 of 1980 makes specific reference to a special venue provision for suits challenging the manner of computation of sentence.⁴² Such suits do not fall within the scope of postconviction relief, and venue for such actions lies in the 19th Judicial District Court for the Parish of East Baton Rouge. The 19th Judicial District Court has specially-appointed commissioners to handle such complaints.

Unlike preconviction habeas corpus, petitions for postconviction relief must be filed in the *district court* in the parish of proper

38. LA. CODE CRIM. P. art. 924.

39. LA. CODE CRIM. P. art. 924.1.

40. See *Carafas v. LaVallee*, 391 U.S. 234 (1968).

41. LA. CODE CRIM. P. art. 925. Former LA. CODE CRIM. P. art. 352 contained a similar provision for postconviction habeas corpus.

42. See LA. R.S.15:571.15 (Supp. 1979).

venue.⁴³ City and municipal courts have no authority to consider such applications, even in connection with convictions arising from those courts. After appeal is concluded, postconviction complaints concerning a city or municipal court conviction must be addressed to the district court for the parish in which the city or municipal court lies. For example, if a person is convicted and sentenced in city court based on his guilty plea and later wishes to contest the validity of the plea, the application is to be filed in district court for the parish in which the city lies.

The Petition

Following the lead of several other courts, the Louisiana Supreme Court adopted an approved form for applications for postconviction relief.⁴⁴ Copies of these forms should be available at the various institutions operated by the Louisiana Department of Corrections and also should be available in the offices of the clerks of the district courts. Louisiana Code of Criminal Procedure article 926D authorizes the district court to require use of the Uniform Application on penalty of dismissal. If a petition is filed which does not follow the Uniform Application, the district court may provide the petitioner with a copy of the Uniform Application and require that it be used.⁴⁵

The Uniform Application requires the petitioner to supply certain specific data and is designed to facilitate reviewing applications to dispose promptly of those which are frivolous or plainly reveal a lack of merit. One of the purposes of the 1980 legislation and the form is to assist district courts in the often tedious task of finding that "needle in a haystack"; that is, in finding which petitions have substance and arguable merit among the mass of frivolous or otherwise unmeritorious petitions which are filed.

Although Code of Criminal Procedure article 926 *requires* use of the Uniform Application, dismissal for failure to follow the form is discretionary. The trial court thus may choose to entertain the writ application which adequately asserts the petitioner's complaints even though it is not filed in the approved form. However, requiring use of the Uniform Application assures inclusion of the necessary information.

The Uniform Application also explicitly warns the petitioner that he must include all complaints (which are "known or

43. LA. CODE CRIM. P. art. 926A.

44. See Louisiana Supreme Court Rules, Appendix A.

45. LA. CODE CRIM. P. art. 926D.

discoverable by the exercise of due diligence") and that failure to do so can result in dismissal of any subsequent petitions. This "repetitive writs" warning follows the language of the statute and is designed to prevent a protracted series of petitions, all based on different alleged errors.⁴⁶

The Uniform Application contains a list of commonly alleged errors to assist the applicant in assuring inclusion of all known or discoverable complaints. The list also should eliminate the contention that, although aware of the *facts*, the petitioner was unaware that those facts constituted a ground for postconviction relief.

The Code of Criminal Procedure (and the Uniform Application) call for allegations of *fact*, not conclusory allegations, concerning the alleged errors.⁴⁷ The form requires the petitioner to "tell his story" and to list witnesses who can support his version. If the petition does not allege a factual basis for relief, it may be dismissed without a hearing or even an answer by the district attorney.⁴⁸

Dismissal without an answer is also appropriate if the petition does not include the required information.⁴⁹ Before dismissal, however, the court should have the clerk note the deficiencies and send the petition back to the petitioner so that he can correct them.⁵⁰

The District Attorney's Answer

The Code of Criminal Procedure requires the district court to order the district attorney to file an answer whenever "an application alleges a *claim* which, *if established*, would entitle the petitioner to relief."⁵¹

The answer must be filed within a time frame to be set by the district court, but not to exceed thirty days.⁵² Actually, the Code of Criminal Procedure requires the "custodian, through the district attorney in the parish in which the defendant was convicted," to file the answer.⁵³ Although the Code retains the fiction that the custodian is the opposing party, in cases of postconviction challenges, the prosecutor who sought and secured the challenged conviction is really the opposing party. Thus, the Code of Criminal Procedure articles

46. LA. CODE CRIM. P. art. 930.4E.

47. LA. CODE CRIM. P. art. 926B(3).

48. LA. CODE CRIM. P. art. 928.

49. LA. CODE CRIM. P. arts. 926E & 928.

50. LA. CODE CRIM. P. art. 926E & 930.4F.

51. LA. CODE CRIM. P. art. 927.

52. *Id.*

53. *Id.*

clearly recognize his role as the attorney for the respondent custodian.

District courts must not confuse ordering the *filing* of an answer with ordering the *production* of the prisoner.⁵⁴ Ordering an answer merely requires a response from the prosecution. Whether the case will proceed further after the answer is filed and the record reviewed is an entirely separate question. Whether *further* proceedings are necessary often can be decided only *after* the district attorney files an answer. In some cases the answer and supporting documents may satisfy the district court that the claims are without foundation and that summary dismissal is appropriate.⁵⁵

Summary Disposition Without an Evidentiary Hearing

Louisiana Code of Criminal Procedure article 929 envisions the possibility of disposition based on the application, the answer, and other supporting documents.

In order to expand the record,⁵⁶ the district court may order production of the record of the proceedings leading to the conviction. For example, the colloquy of a guilty plea may adequately resolve the merits of a challenge to the adequacy of the "*Boykin* examination."

Recognizing the need in some cases to go beyond the record of the proceedings, the Code of Criminal Procedure now empowers the district court to authorize oral depositions, requests for admissions of fact, and requests for admission of genuineness of documents.⁵⁷ Such discovery techniques may be used upon a showing of "good cause" and are to be regulated by the court. The court should be guided by the Louisiana Code of Civil Procedure in specifying the conditions under which the discovery techniques are to be used.⁵⁸

Discovery devices may be employed effectively to eliminate possible factual disputes by fully developing the petitioner's allegations. What appears to be a factually meritorious claim (when alleged in the petition) may collapse after the petitioner's deposition has been taken and, under oath, he recants some of his allegations.

After the methods of expanding the record have been employed, the court may find that no evidentiary hearing is needed.⁵⁹

54. LA. CODE CRIM. P. art. 927B.

55. LA. CODE CRIM. P. art. 929A.

56. LA. CODE CRIM. P. art. 929B.

57. *Id.*

58. *Id.*

59. LA. CODE CRIM. P. art. 929A.

Due to the obvious importance of the discovery procedures in determining the appropriateness of summary dismissal, the petitioner is entitled to the assistance of counsel if such methods are utilized.⁶⁰

The availability of summary disposition recognizes the obvious fact that the record or expanded record will sometimes conclusively belie the allegations of the petition. An evidentiary hearing will be necessary only to resolve disputes over contested facts where real credibility issues are presented.⁶¹

Whether the sort of factual dispute exists which requires an evidentiary hearing is obviously a sensitive question and deserves the most careful consideration by the trial court. The credibility of witnesses cannot generally be resolved on a "cold record." The proper method to dispose of a genuine and material factual dispute is by evidentiary hearing where witnesses testify before the district court subject to cross examination. However, that is not to suggest that a summary disposition is never appropriate just because there are some factual disputes. For example, if a petitioner alleges that he was not advised of certain of his rights during his arraignment and the record shows that such advice was given, summary disposition may be appropriate despite what might be characterized as a factual dispute.

The wording of the code article is significant. Louisiana Code of Criminal Procedure article 930 requires an evidentiary hearing if there are "questions of fact which cannot *properly* be resolved" on the basis of the expanded record. Obviously, the Code of Criminal Procedure assumes that some factual disputes can be resolved on the record and some cannot. Article 929A specifically refers to the resolution of "factual and legal" issues on the basis of the expanded record (including depositions, other "reliable" documents, etc.). This is a matter which must be approached with much caution. The trial court must be sensitive to the petitioner's right to have fair determination of the factual basis of his claim.⁶²

A hearing requiring production of the petitioner will be required when factual disputes exist which cannot properly be resolved on the basis of the record or the expanded record. Several aspects of this evidentiary hearing should be considered.

Evidentiary rules governing the trial on the question of guilt or

60. LA. CODE CRIM. P. art. 930.7.

61. LA. CODE CRIM. P. arts. 929 & 930.

62. See *Jordon v. Estelle*, 594 F.2d 144 (5th Cir. 1979); *Scott v. Estelle*, 567 F.2d 632 (5th Cir. 1978); *Crawford v. Linahan*, 253 S.E.2d 171 (Ga. 1979).

innocence need not be followed at the hearing.⁶³ Louisiana Code of Criminal Procedure article 930B specifically recognizes admissibility of various properly authenticated documents, such as records, transcripts, depositions and admissions of fact.

Since the search for truth is the district court's paramount concern, all reliable evidence tending to establish the relevant facts should be considered. With the judge as fact-finder in this hearing, objections on traditional hearsay grounds generally can be considered as affecting the weight rather than the admissibility of the evidence.

If an evidentiary hearing is held, the petitioner is entitled to counsel, and to court-appointed counsel if indigent.⁶⁴ Because most petitioners will be indigent prisoners who have no means to employ counsel, the court generally must appoint counsel if an evidentiary hearing is ordered.

Basis for Granting or Denying Relief

Not all issues will be considered on their merits in postconviction proceedings. First, some purely statutory rights are not deemed crucial enough to warrant inclusion in the postconviction relief provisions.⁶⁵ Second, issues which already have been fully litigated generally cannot be reasserted.⁶⁶ Third, failure to raise cognizable issues at an earlier stage of the proceedings often will bar relief.⁶⁷

As is evident, only matters of fundamental significance can be raised. Most of the grounds for relief have a constitutional basis, either state or federal.

The "repetitive applications" article recognizes two distinctly

63. See *Crawford v. Linahan*, 253 S.E.2d 171 (Ga. 1979).

64. LA. CODE CRIM. P. art. 930.7. See *State ex rel. Cherry v. Cormier*, 281 So. 2d 99 (1973).

65. LA. CODE CRIM. P. art. 930.3 provides:

If the petitioner is in custody after sentence for conviction for an offense, relief shall be granted only on the following grounds:

(1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana;

(2) The court exceeded its jurisdiction;

(3) The conviction or sentence subjected him to double jeopardy;

(4) The limitations on the institution of prosecution had expired;

(5) The statute creating the offense for which he was convicted and sentenced is unconstitutional; or

(6) The conviction or sentences constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana.

66. LA. CODE CRIM. P. art. 930.4A & D.

67. LA. CODE CRIM. P. art. 930.4B, C, & E.

different bases for dismissal without reaching the merits of application. The first involves the prior litigation of the issue on appeal or in a prior application for postconviction relief.⁶⁸ The second involves an "inexcusable" procedural default on the part of petitioner due to his failure to raise or pursue the claim in earlier proceedings.⁶⁹ The "repetitive applications" article is very broad in scope and is phrased in discretionary terms. Obviously, the court must assess fairness considerations to the state and the petitioner in deciding whether to allow the petitioner to relitigate or raise his claim.

If the claim was previously considered on appeal (or in a prior application), the court should give the petitioner an opportunity to show why relitigation is appropriate because (1) the ground may be considered in the interest of justice, and (2) the ground must have been litigated fully on appeal. Thus, the court properly may consider an issue previously disposed of if justice requires relitigation or if the handling of the appeal was such that the ground was not litigated fully. The court must consider such factors as the competency of defense counsel and subsequent jurisprudential developments.

The following situations give rise to a procedural default which may bar raising the claim in post conviction proceedings:

- (1) "If the application alleges a claim of which the petitioner had knowledge and inexcusably failed to raise in the proceedings leading to conviction, the court may deny relief."⁷⁰
- (2) "If the application alleges a claim which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court may deny relief."⁷¹
- (3) "A successive application may be dismissed if it raises a new or different claim that was inexcusably omitted from a prior application."⁷²

The concept of an inexcusable procedural default obviously will have to be developed by the jurisprudence. Federal courts have employed the "cause and prejudice" test of *Wainwright v. Sykes*.⁷³

68. LA. CODE CRIM. P. art. 930.4A & D.

69. LA. CODE CRIM. P. art. 930.4B, C, & E.

70. LA. CODE CRIM. P. art. 930.4B.

71. LA. CODE CRIM. P. art. 930.4C.

72. LA. CODE CRIM. P. art. 930.4E.

73. 433 U.S. 72 (1977). See *United States v. Brown*, ___ F.2d ___ (D.C. Cir. 1980); *Tyler v. Phelps*, 622 F.2d 172 (5th Cir. 1980); *Parton v. Wyrich*, 614 F.2d 154 (8th Cir. 1980); *Indiviglio v. United States*, 612 F.2d 624 (2d Cir. 1979); *Jurek v. Estelle*, 593 F.2d 672 (5th Cir. 1979); *Rachel v. Bordenkircher* 590 F.2d 200 (6th Cir. 1978); *O'Berry v. Wainwright*, 546 F.2d 1204 (5th Cir. 1977).

The two tests should be developed along parallel lines for the obvious reason that to do otherwise would be to invite the necessity of federal intervention into the state criminal justice process. If Louisiana courts will not allow petitioners to raise federal constitutional claims which can be raised in federal district courts, they will prevent full and fair litigation in state courts, thereby paving the way to the federal habeas court.⁷⁴ The state courts should, of course, provide an adequate corrective process and must be cognizant of the development of the "cause and prejudice" test by federal courts.

Whether a procedural default by the petitioner is "excusable" is obviously a very sensitive issue which must be decided in an adversary context.⁷⁵ The district court should never simply dismiss an application as "repetitive" on the face of the pleadings without first affording the petitioner an opportunity to show cause for his failure to raise or pursue the claim in the earlier proceedings.⁷⁶

Judgment Granting or Denying Relief

The Code of Criminal Procedure requires the district court to render written or transcribed reasons for granting or denying relief.⁷⁷ A copy of the judgment and of the reasons for judgment must be furnished to the petitioner, the district attorney, and the custodian.⁷⁸

The Code of Criminal Procedure uses the term "furnished" rather than "served" to avoid technical connotations associated with service of process. It is enough that all concerned are given a copy by some means.

The district judge's reasons will be very important if the judgment is reviewed by the Louisiana Supreme Court or by a federal district or appellate court.⁷⁹ The reasons may be brief but should include findings of fact and conclusions of law.

Custody of Petitioner

The petitioner is entitled to be released from custody if relief is granted on a ground which would bar retrial for the offense, *e.g.*, a successful plea of double jeopardy.⁸⁰ However, even in such case the

74. 28 U.S.C. § 2254 (1976); *Tyler v. Phelps*, 622 F.2d 172 (5th Cir. 1980); *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978).

75. LA. CODE CRIM. P. art. 930.4F & 930.7.

76. LA. CODE CRIM. P. art. 930.4F.

77. LA. CODE CRIM. P. art. 930.1.

78. *Id.*

79. *See* 28 U.S.C. § 2254 (1976).

80. LA. CODE CRIM. P. art. 930.5.

district court or supreme court may stay the effect of the judgment granting relief pending the state's application for review.⁸¹ The granting of a stay is discretionary with either court.

If relief is granted on a ground which merely would entitle the petitioner to a new trial, then he is entitled to have bail set pending the new trial.⁸² An exception to this general rule exists in capital cases in which bail may be denied initially.⁸³ An application for bail may be stayed pending the state's application for review.⁸⁴ Thus, the petitioner's right to be admitted to bail may come into effect only upon the supreme court's denial of the state's application for review.⁸⁵

Review of District Court Judgments

The petitioner's review of a trial court judgment is by application to the supreme court under the supreme court's supervisory jurisdiction.⁸⁶ The state also may apply to the supreme court for supervisory review from an adverse judgment.⁸⁷ The only exception exists in a case in which the basis for granting relief involves declaring a statute or ordinance to be unconstitutional.⁸⁸ In that case, under article V, section 5 of the Louisiana Constitution, the supreme court has appellate jurisdiction and the state may appeal. The appeal provisions of the Code of Criminal Procedure are applicable.⁸⁹ The district court must set the appropriate return dates in cases of applications for supervisory writs or appeals.⁹⁰

Right to Counsel

Petitioners are statutorily entitled to counsel if:

- (1) an evidentiary hearing is ordered, or
- (2) discovery is authorized to expand the record, or
- (3) the court is considering dismissal for failure to raise the issue in an earlier proceeding.⁹¹

If the court determines that the "repetitive writs" provisions

81. LA. CODE CRIM. P. art. 930.6.

82. LA. CODE CRIM. P. art. 930.5.

83. LA. CODE CRIM. P. art. 930.5 & 313.

84. LA. CODE CRIM. P. art. 930.6.

85. *Id.*

86. LA. CODE CRIM. P. art. 930.5; LA. CONST. art. V, § 5.

87. *Id.*

88. *Id.*

89. *See* LA. CODE CRIM. P. arts. 911-23.

90. LA. CODE CRIM. P. art. 919.

91. LA. CODE CRIM. P. art. 930.7.

may be a basis for dismissal, the court must appoint counsel.⁹² Counsel for the petitioner is critical in assisting him in explaining his failure to raise the issue in earlier proceedings. Because dismissal on this basis precludes reaching the merits of the petitioner's contentions, counsel's intervention at this stage is of extreme importance. Similarly, the authorization of the use of discovery to expand the record may lead the court to dismiss without an evidentiary hearing.⁹³ Thus, counsel must be appointed to protect the interest of the petitioner.

In Louisiana, counsel has always been required if an evidentiary hearing is held.⁹⁴ Counsel's role in developing the facts and in cross-examining the state's witnesses is obvious.

Otherwise, the appointment of counsel is discretionary, even though the petition alleges a claim which, if established, would entitle him to relief. Appointment of counsel is not required on the basis of the allegations of the petition alone.

92. *Id.*

93. *Id.*

94. *See State ex rel. Cherry v. Cormier*, 281 So. 2d 99 (La. 1973).