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POSTCONVICTION PROCEDURE

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CAPITAL SENTENCING—AGGRAVATING CIRCUMSTANCES

In a recent decision, *State v. Sonnier*,[1] Justice Dennis acknowledged that his approach to unsupported jury findings of aggravating circumstances has failed to gain majority support. Justice Dennis earlier had expressed the view that if one of the aggravating circumstances found by the jury was unsupported by the evidence a remand was necessary because the supreme court could not discern whether the jurors would have unanimously recommended death had they known (or had one of them known) that one of the aggravating circumstances was unsupported.[2] Rather than following this approach, the Louisiana Supreme Court has, in a series of cases, decided that it need only determine whether *at least one* of the aggravating circumstances found by the jury is supported by the evidence.[3]

A panel of the United States Court of Appeals for the Fifth Circuit has adopted an approach somewhat similar to that espoused by Justice Dennis. In *Stephens v. Zant*,[4] the appellate court set aside a death sentence because one of the statutory aggravating circumstances relied on by the jury was unconstitutional. The Louisiana Supreme Court, in *State v. Monroe*,[5] rather straight-forwardly rejected the argument that *Stephens* dictated a remand if the evidence was insufficient to support one of the aggravating circumstances. Chief Justice Dixon, the author of *Monroe*, did not endeavor to distinguish *Stephens*, but instead rejected the approach. Although the Louisiana Supreme Court is not bound by the federal appellate court's views, the lower federal courts are. In the exercise of their habeas corpus jurisdiction, these lower courts undoubtedly will be required to confront the potential conflict.

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1. 402 So. 2d 650 (La. 1981).
2. *See* State v. Martin, 376 So. 2d 300, 315-17 (La. 1979) (Dennis, J., dissenting).
3. *See* State v. Monroe, 397 So. 2d 1258 (La. 1981); State v. Martin, 376 So. 2d 300 (La. 1979).
4. 631 F.2d 397 (5th Cir. 1980); petition for cert. filed July 16, 1981.
5. 397 So. 2d 1258 (La. 1981).

CAPITAL SENTENCING – JURY INSTRUCTIONS REGARDING THE EFFECT OF A NON-UNANIMOUS VERDICT

In *State v. Williams*,[6] the Louisiana Supreme Court discussed the role of jury instructions in capital cases. The jury in *Williams* deliberated for three hours; the foreman felt that the jury might not be able to reach a unanimous verdict. Despite the foreman's request that they be told whether their verdict "had to be unanimous,"[7] the trial judge refused to advise the jury of the effect of their inability to reach unanimity. The supreme court, on rehearing, remanded the case, ordering a new penalty hearing.

Justice Dennis, author of the plurality opinion on rehearing, phrased the issue in terms of "whether the jurors in a capital sentence hearing must be informed by the trial judge that the defendant will be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence, if they are unable to be unanimous on a recommendation."[8] Justice Dennis reasoned that the failure to instruct the jury left them "free to speculate"[9] as to the result of their inability to agree, thus creating a substantial risk of arbitrariness.

The approach of the plurality on rehearing is broader than required by the facts. The plurality on rehearing is significantly silent on the critical issue addressed by Justice Lemmon's concurring opinion. In his concurrence, Justice Lemmon construed the legislative unanimity requirement as a means of insuring the state's right to have the jury make a "substantial effort"[10] to reach unanimity. To require a pre-deliberation instruction on the result of non-unanimity would have the effect of informing the jury that twelve jurors must vote to render a death sentence, while only one juror's vote is required to impose a life sentence. Justice Lemmon reasoned that after the jury has deliberated for a significant period and appears deadlocked, the state's legislative right to have the jury strive to seek unanimity must be subordinated to the defendant's right to prevent an otherwise dissenting juror from acquiescing in the death penalty recommendation solely for the purpose of reaching unanimity. If the jury appears to be deadlocked disclosure becomes critical as a means of minimizing the risk of arbitrary action.

Whether the jurors' *request* will be deemed critical remains an unanswered question. After a significant period of deliberation has

6. 392 So. 2d 619 (La. 1980).
7. *Id.* at 624.
8. *Id.* at 634.
9. *Id.*
10. *Id.* at 640.

revealed a possible deadlock (or at least some difficulty in reaching unanimity), defense counsel will undoubtedly request the instruction on the effect of non-unanimity (or renew his earlier request). At that point, the writer submits that the jury should be given the instruction. The same concerns expressed by the four members of the court who joined in the remand[11] would seem to apply without regard to whether the jury or the defendant makes the request—or whether a request is made at all. The issue seems to be whether the jury has apparently made a substantial effort to reach unanimity and is apparently unable to do so. At such point, the danger that a juror may acquiesce in a death recommendation solely for the purpose of reaching a verdict becomes a real possibility.

REINSTATEMENT OF APPEAL AFTER DISMISSAL DUE TO ERRONEOUS INFORMATION CONCERNING DEFENDANT'S DEATH

In *State v. Morris*,[12] the supreme court concluded that when the defendant dies during the pendency of his appeal the conviction should be set aside and the charges dismissed. The court reasoned that whereas the state has no further interest in the finality of the conviction, the defendant's family has an interest in the conviction being set aside to preserve the defendant's memory. Although the author disagrees with this rationale (particularly when a fine has been imposed), the matter seems settled in Louisiana.

When the case of *State v. McClow*[13] first appeared on the supreme court appellate docket, the attorney general informed the court that the defendant was dead. Following *Morris*, the court vacated McClow's conviction and ordered the charges dismissed. However, the defendant was not dead. When he discovered that his case had been ordered dismissed, the defendant filed an application for a writ of habeas corpus. The application was denied by the trial court and the supreme court affirmed, merely ordering that McClow's appeal be reinstated for later consideration on the merits. The supreme court wisely concluded that a dismissal would "demean [the court's] legitimate authority and make an erroneous 'fact' not having anything to do with ultimate conviction or acquittal the basis of a final and immutable decision. . . ."[14]

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11. Chief Justice Dixon and Justice Calogero concurred fully in the plurality opinion on rehearing. Justice Lemmon concurred for assigned reasons. Justice Blanche, author of the original opinion, and Justices Marcus and Watson dissented from the reversal of the sentence while concurring with the affirmance of the conviction.

12. 328 So. 2d 65 (La. 1976).

13. 395 So. 2d 757 (La. 1981).

14. *Id.* at 759.

McClow highlights a flaw in the supreme court's present approach. Obviously the appellate court generally is not the proper tribunal to make new factual determinations of matters not considered by the trial court. In the future, hopefully the supreme court will remand the matter to the district court for an adversary factual determination of the defendant's status, and instruct the trial court to dismiss the charges if the defendant no longer is alive.

SUFFICIENCY OF EVIDENCE— THE JUDGE AS THE "THIRTEENTH JUROR"

In *Hudson v. Louisiana*,[15] the United States Supreme Court reversed the judgment of the Louisiana Supreme Court and found that double jeopardy principles required dismissal of charges against the defendant. Hudson's first conviction was set aside and a *new trial* was ordered by the trial court based on the trial court's finding that the evidence was "legally insufficient" to sustain the conviction. At the new trial the state produced additional evidence and again convicted the defendant. The Louisiana Supreme Court affirmed.[16] Concurring, Justice Tate reasoned that the trial judge ordered a new trial because he was not personally satisfied with the state's proof, and not because the evidence was legally insufficient.[17]

In reversing, the United States Supreme Court did not reject Justice Tate's analysis of the legal issues; rather, an independent review of the record led the Supreme Court to conclude that the trial judge's basis for setting aside the conviction *was* a finding of legal insufficiency.[18] If that finding was incorrect, the state's only remedy was to seek review by an appellate court. The state did not have the option to retry the case and endeavor to supply the deficiency. This reasoning is, of course, eminently sound, logical, and fair.

Due to the absence of a clear legislative response in Louisiana to the problem, trial courts must carefully approach the issue when presented with an application for a new trial if the allegation is simply that the "verdict is contrary to the law and the evidence."[19] Under *State v. Jones*,[20] the judge should set aside the conviction if he is not personally satisfied that the state's case was proven beyond a reasonable doubt (even though a reasonable juror could

15. 101 S. Ct. 970 (1981).
16. State v. Hudson, 373 So. 2d 1294 (La. 1979).
17. *Id.* at 1298.
18. 101 S. Ct. at 972-73.
19. LA. CODE CRIM. P. art. 851(1).
20. 288 So. 2d 48 (La. 1973).

have found guilt beyond a reasonable doubt). As *Jones* acknowledged, such a decision to grant (or deny) a new trial on the basis of the judge's personal feelings about the evidence is not subject to review. However, if the judge concludes that the state's evidence, even viewed in a light most favorable to the state, is such that no reasonable juror could conclude that guilt was proven beyond a reasonable doubt, the trial court must grant a judgment of acquittal and dismiss the prosecution.[21] The basis for the trial court's decision ought to be clearly stated for the record. If the trial judge simply chooses to act as a "thirteenth juror" in granting a new trial, he should clearly announce his reason. Otherwise the state's opportunity to retry the case is in jeopardy.

APPELLATE REVIEW OF SENTENCE—COMPLIANCE WITH THE SENTENCING GUIDELINES STATUTE

Since the legislature adopted Louisiana Code of Criminal Procedure article 894.1 requiring the trial court to set forth the factual basis for the sentence, the supreme court has been deluged with complaints regarding non-compliance. The court wisely has perceived two related situations when, despite non-compliance with article 894.1, remand for resentencing is unnecessary. If the sentence is not apparently severe for the offense, the court does not remand for compliance. The "apparently severe" test was adopted in *State v. Jones*,[22] a case in which a fifteen year sentence was imposed for a pistol robbery at a business establishment. Later, in *State v. Day*,[23] the supreme court held that a severe sentence imposed without compliance would be affirmed if the record supported the sentence imposed. In *Day*, a youthful offender broke into an elderly female's home and beat her into a state of blindness. He sexually assaulted his victim and left her in a pitiful state, seemingly unconcerned with whether she lived or died. The case was tried before a jury. In imposing a 42½ year sentence, the trial judge merely recited the language of article 894.1's aggravating circumstances. Although the unilluminating recitation clearly failed to constitute "compliance" with the statute, the supreme court affirmed. The court said that because the record supported the sentence, the appellate review function could be performed without remand.

The supreme court's approach is very logical. Obviously the guidelines statute is designed both to assist the sentencing court in the exercise of discretion and to facilitate review of the sentence.

21. Jackson v. Virginia, 443 U.S. 307 (1979).
22. 381 So. 2d 416 (La. 1980).
23. 391 So. 2d 1147 (La. 1980).

However, if the appellate court is able to determine that the sentence is not excessive, no reason for remand exists. On the other hand, if the record is inadequate due to non-compliance, then the court must remand for compliance. Otherwise, there can be no effective basis for reviewing the trial court's sentence.

POST CONVICTION BAIL

In *State v. Glass*[24] the supreme court very logically employed the concept of a "case" developed in *State v. McCarroll*[25] to determine whether the defendant, convicted on multiple counts charged in a single indictment, was entitled to postconviction bail. In *McCarroll*, Justice Dennis reasoned that the term "case" as used in the Louisiana Constitution[26] included a single indictment charging multiple offenses in separate counts. In *McCarroll*, the court held that the defendant was entitled to a jury trial if charged in a multiple count indictment with a series of misdemeanors whose total aggregate penalty could exceed a $500.00 fine or six months imprisonment.

Glass involved convictions on multiple counts in which the aggregate penalty did exceed five years.[27] The supreme court, consistent with the *McCarroll* rationale, held that the defendant was not entitled to have bail set pending sentencing and appeal. The court reasoned that the constitution's five year rule[28] was designed to recognize the danger of flight by appellants exposed to a severe penalty. Obviously the same fear of flight extends to situations in which a total aggregate penalty exposure exceeds five years.

The same result would, of course, follow in postconviction sentence situations involving multiple count indictments if the total consecutive sentences imposed exceed five years. However, whether the supreme court will reach the same result if the multiple convictions (or sentences) do not arise from multiple counts of a single indictment remains to be seen. The concern with the danger of flight due to exposure to a severe sentence is the same and would seem to dictate that the trial court should have discretion to deny bail.

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24. 389 So. 2d 387 (La. 1980).

25. 337 So. 2d 475 (La. 1976).

26. LA. CONST. art. 1, § 17 provides that the defendant has a right to a jury trial in a "case" in which his maximum penalty exposure exceeds imprisonment for six months.

27. LA. CONST. art. 1, § 18 provides that the defendant has a right to bail prior to sentence in a "case" in which the maximum penalty exposure does not exceed five years imprisonment. Otherwise the granting of bail is discretionary with the court. Similarly, after sentence and pending final disposition of the appeal, the defendant has a right to bail only if the sentence in the "case" does not exceed five years imprisonment. Otherwise, the granting of bail is discretionary.

28. See note 24, *supra*.

The writer prefers the federal approach to postconviction bail. The federal statutes[29] make postconviction bail discretionary in all felony cases. The statutes also list certain factors—danger to the community, the possibility of flight, and frivolity of the appeal—to be considered in determining whether a defendant should remain free on bail pending appeal. These factors ought to be the trial court's basis for deciding whether to grant bail in Louisiana cases in which postconviction bail is discretionary. Further, in juvenile delinquency cases, in which release pending appeal is always discretionary, the trial courts should consider the same factors.[30]

SUFFICIENCY OF EVIDENCE— REVIEW OF EVIDENCE TO SUPPORT AFFIRMATIVE DEFENSES

In *State v. Roy*,[31] the supreme court developed a modified *Jackson v. Virginia*[32] test to review the sufficiency of the defendant's evidence establishing the insanity defense. The court concluded that even viewing the evidence in a light most favorable to the state no rational fact finder could fail to conclude that "the defendant established the affirmative defense of insanity by a preponderance of evidence."[33] The supreme court remanded the case and held that the trial court should have granted the defendant's motion for a new trial.

The writer feels that the supreme court should have entered a judgment declaring the defendant not guilty by reason of insanity. Although such an approach would go beyond the *Byrd* approach[34] (in which the appellate court merely strikes the unsupported elements), it appears logical in view of the nature of the affirmative defense. The issue of sanity was joined and the jury concluded the matter in a manner favorable to the state. However, according to the *Roy* test, that judgment was not reasonably supported by the evidence. Such a situation should be treated analogously to the failure of the state to prove its case. Rather than remand for retrial of the issue of sanity (or for retrial where the only two verdicts available would be not guilty by reason of insanity and not guilty) the court should merely enter the appropriate judgment. The right to trial by jury is

29. *See* United States v. Stanley, 469 F.2d 576 (D.C. Cir. 1972); 18 U.S.C. §§ 3146, 3148 (1966); FED. R. APP. P. 9.

30. *See* State *in re* Banks, 402 So. 2d 690 (La. 1981).

31. 395 So. 2d 664 (La. 1981). *See also* State v. Claibon, 395 So. 2d 770 (La. 1981); State v. Price, 403 So. 2d 660 (La. 1981).

32. Jackson v. Virginia, 433 U.S. 307 (1979).

33. 395 So. 2d at 669.

34. *See* State v. Gould, 395 So. 2d 647 (La. 1981); State v. Byrd, 385 So. 2d 248 (La. 1980).

essentially designed to protect the defendant. Therefore, a substitution of verdicts in a manner more favorable to the defendant does not deny to the defendant his right to have a jury make the appropriate findings. Similarly, the test (whether a reasonable juror could have found that the defendant *failed* to prove his insanity) is obviously a question of law, not fact, and hence is reviewable. Little difference may be discerned between: 1) concluding from a review of the evidence that the defendant preponderantly established his insanity and remanding for a new trial, and 2) so concluding and remanding with instructions to enter a judgment of not guilty by reason of insanity. The latter course seems the fairest and most efficient method.

PLAIN ERROR— REVIEW OF FUNDAMENTALLY ERRONEOUS JURY INSTRUCTIONS

Although *State v. Williamson*[35] arose in a unique factual context, its potential impact on appellate procedure may be profound. The defendant, a taxi driver, was charged with attempted first degree murder. The defendant and the victim became involved in a heated argument. As the victim and his companions drove away, the defendant pursued and fired a shot at their vehicle, striking the victim. The jury was instructed erroneously that first degree murder was the specific intent killing of a human being and that second degree murder was the unintended killing of another during the perpetration (or attempted perpetration) of various felonies. In fact, the first and second degree murder statutes in effect at the time of the defendant's offense defined first degree murder as a murder committed under certain enumerated aggravating circumstances and defined second degree murder to include all other specific intent killings (and felony murder).

The mistaken instructions are understandable given the numerous amendments to Louisiana's first and second degree murder statutes.[36] Defense counsel did not object to the instructions given and the evidence did support the jury's verdict of guilty of attempted second degree murder under the proper, applicable definition of the offense. The issue, thus, was clearly not insufficiency of evidence. Oddly, had the jury returned a verdict of "guilty as charged," the evidence would not have supported the conviction because there was no evidence at all (or even any allegations by the

35. 389 So. 2d 1328 (La. 1980).

36. *See* 1973 La. Acts, Nos. 109 & 111; 1975 La. Acts, Nos. 327 & 380; 1976 La. Acts, No. 657; 1977 La. Acts, No. 121; 1978 La. Acts, No. 796; 1979 La. Acts, No. 74.

state) tending to prove one of the additional aggravating elements of the newly defined first degree murder.

Therefore, to reverse the conviction the supreme court was required to recognize a very critical principle: The court may reverse a conviction if an *unobjected-to* jury instruction was fundamentally erroneous in its description of the elements of an offense (even though the jury's verdict was supported by the evidence). In reaching this result the court recognized that "it is within the province of this reviewing court to entertain complaint of Constitutional violations on appellate review notwithstanding that consideration of such complaint more often than not is deferred until [the] filing of a writ of habeas corpus."[37]

The supreme court wisely reasoned that there was no need for any further evidentiary determinations and that to delay consideration of the issue would needlessly delay the ultimate resolution of the issue (and a new prosecution by the state, should the district attorney choose to proceed).

In *Williamson* the court was dealing with a fundamental error in the "very definition of the crime."[38] This error was perceived to be "of such importance and significance as to violate fundamental requirements of due process."[39] There should be no logical distinction betweeen a definitional error and other fundamentally erroneous instructions which violate due process.

The supreme court seems to be moving toward a plain error review of fundamentally erroneous jury instructions, a step which the author applauds. Unquestionably, the contemporaneous objection rule[40] serves an extremely valid purpose in the context of the admissibility of evidentiary items. That is not to say that the rule serves no purpose in connection with jury instructions. However, when an instruction (like the one in *Williams*) is fundamentally erroneous, it may be more appropriate for the court simply to consider the error on direct appeal rather than to decide the issue in a postconviction proceeding in the context of defense counsel's alleged incompetence for failure to raise an objection.

SENTENCING—COMMISSION OF FELONY WITH A FIREARM

Frequently Louisiana offenses are graded depending upon whether a "dangerous weapon" is employed in the commission of the

37. 389 So. 2d at 1331.
38. *Id.*
39. *Id.*
40. LA. CODE CRIM. P. art. 841.

offense.[41] In the past the legislature defined the crimes themselves in terms of the mode of execution—*i.e.*, with a dangerous weapon. The mode of execution became an element of the crime—and thus an issue to be litigated at the trial on the merits and to be decided by the jury.[42]

However, in the 1981 Regular Session the legislature took a significant step, along a different path, toward more severely sanctioning felony offenses committed with firearms. The legislature enacted a new article in the sentencing section of the Code of Criminal Procedure[43] (newly enacted article 893.1) which mandates a rather severe formula for imposing terms of imprisonment, without eligibility for probation or parole, if the judge *finds* that a firearm was used in the felony offense for which the accused was convicted. The accused must be given the maximum sentence if the possible sentence is less than five years. For offenses with maximum terms exceeding five years, the new sentencing provision sets a mandatory five year minimum sentence. The new statute, obviously designed with the laudatory purpose of deterring felony offenders from using firearms, creates some interesting problems which must soon be confronted by the courts.

Although article 893.1 appears to require the mandatory sentence upon a "finding," upon what evidence should such a "finding" be based? Certainly, in the case of a trial, the evidence presented should be an obvious source. However, in the case of a guilty plea, no such record will exist. Under those circumstances, the writer assumes that the trial courts will require an adversary determination of the question based on evidence properly introduced. Although all of the rules of evidence are not applicable to sentencing determinations, fairness would seem to require an adversary determination of this critical factor, with the burden of proof falling on the state.

Certainly the defendant should be entitled to notice that the

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41. *See, e.g.*, LA. R.S. 14:34, 37, 60 & 64 (1950).

42. *See* cases cited in note 34, *supra*.

43. 1981 La. Acts, No. 139. The new article 893.1 provides:

When the court makes a finding that a firearm was used in the commission of a felony and when suspension of sentence is not otherwise prohibited, the court shall impose a sentence which is not less than:

(a) The maximum sentence provided by law in the same manner as provided in the offense, if the maximum sentence is less than five years or

(b) Five years, in the same manner as provided in the offense, if the maximum sentence is five years or more.

Imposition or execution of sentence shall not be suspended and the offender shall not be eligible for probation or parole.

state (or trial court) intends to invoke the mandatory penalty. In some cases the indictment (and responses to bills of particulars) will allege that a firearm was the "dangerous weapon" used in the commission of an offense. However, the sentencing statute is not limited to crimes *requiring* the use of a dangerous weapon (and particularly not a "firearm"). Thus, for example, crimes such as aggravated battery, attempted murder, and aggravated criminal damage to property which may be committed using a firearm will require a post verdict finding by the trial court to decide whether the mandatory penalty provisions are applicable. In such a case, the defendant obviously needs to know exactly what he is admitting if he pleads guilty since the plea of guilty may be the basis of a "finding" for an article 893.1 mandatory sentence. Therefore, a special notice of intent to seek such a finding should be required, and should form the basis for a sentencing hearing.

The courts must also determine the nature of the proceeding at which such a "finding" will be made. The writer feels that the state should be required to provoke an adversary hearing at which such a finding would be made (similar to the habitual offender procedures). The defendant should be entitled to seek appellate review and reversal of an adverse judgment if the evidence does not support the finding. On the other hand, if the evidence does compel the finding then the state apparently is entitled to demand that the mandatory sentence be imposed. The legislature apparently did not intend to vest discretion in the trial court to impose the mandatory sentence if the evidence would convince any reasonable fact finder that a firearm was used in the commission of the felony. Thus, appellate review of the refusal to make a finding obviously is necessary in order to assure compliance with the legislative mandate.

The courts also will have to decide whether the mandatory sentencing rules apply when a *firearm* is *used* in the commission of the felony offense by a participant other than the defendant himself. The courts will also face problems in defining the scope of terms like "firearm," "used," and "commission." Presumably a firearm includes an unloaded weapon capable of firing—and whether an unworkable pistol falls within the scope of the statute must be decided. Further, the concept of "commission" may include only activity more closely related to the offense than the "perpetration zone," a concept used in the "felony murder" and "felony manslaughter" statutes. Even the concept of "use" will require development. A person who committed a kidnapping with a loaded pistol in his coat pocket (which he never displayed to the victim) was "armed" with the firearm. Whether he "used" the firearm is a separate question.

The writer's purpose in illustrating some of the incipient litigation problems is not to be critical of the concept of developing mandatory sentencing procedures with clearly articulated elements. The statute's purpose is laudable and the legislature, in the writer's opinion, was wise to employ generic terms. The approach wisely relegates the development of some of these conceptual problems to the adversary process of case-by-case litigation.