Louisiana Law Review

Volume 79 | Number 2
Winter 2018

Appealing Standards: Louisiana's Constitutional Provision Governing Appellate Review of Criminal Facts

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INTRODUCTION

The Louisiana Constitution provides for criminal cases that "appellate jurisdiction extends only to questions of law."[1] This Article asks a simple question: what does that mean?

Perhaps the Louisiana Constitution restricts appellate courts from reviewing *any* error of fact in criminal matters. Yet, defendants in criminal proceedings who appeal guilty verdicts often argue there was insufficient evidence to prove guilt beyond a reasonable doubt. To review those claims, appellate courts must review facts; therefore, interpreting the Louisiana Constitution to prohibit any review of factual errors in criminal matters appears misleading.

There is likely a more nuanced interpretation of the Louisiana Constitution; however, there is only one significant scholarship on this topic, and it was published in 1959.[2] Much has changed since then, including Louisiana's new constitution in 1974. This Article is an effort to update that scholarship based on Louisiana constitutional history, Louisiana jurisprudence, and United States Supreme Court precedent.

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1. LA. CONST. art. V, § 5(C).

2. This Article is indebted to the thorough scholarship of the late-Joseph G. Hebert's Comment, *Appellate Review on the Facts in a Criminal Case*, 19 LA. L. REV. 843, 844 (1958), and we incorporate much of its research. Mr. Hebert's comment has two notable citations: one in a U.S. Supreme Court opinion and another in a law review article recognizing its achievement. Shortly after Mr. Hebert's article was published, the U.S. Supreme Court cited it. *See* Garner v. Louisiana, 368 U.S. 157, 161 n.6 (1961). At issue in *Garner* was the constitutionality of a conviction in Louisiana. *Id*. at 159. In discussing the procedural history, the Court noted the Louisiana Supreme Court had denied writ, with an oral opinion stating, in part: "This court is without jurisdiction to review facts in criminal cases." *Id*. at 161. In a footnote, the Court cited the Louisiana constitutional provision that provides appellate jurisdiction in criminal cases over questions of law. *Id*. at n.6. In support, the Court cited Mr. Hebert's article. *Id*. Interestingly, in that same footnote, the Court suggested that even if the Louisiana Supreme Court did not have *appellate* jurisdiction, it still should have *general supervisory* jurisdiction, which can be exercised in the sound discretion of the court. *Id*. Many years later, in an article celebrating the *Louisiana Law Review*, Professor Paul R. Baier mentioned Mr. Hebert's comment as one of 26 *Louisiana Law Review* citations found in U.S. Supreme Court opinions. Paul R. Baier, *Foreword: Volume 75—Of Legal Scholarship and the* Louisiana Law Review, 75 LA. L. REV. 971, 978 (2015). Among this group of citations, Professor Baier highlighted Mr. Hebert's comment as one of his favorites. *Id*. at n.42. Mr. Hebert is now deceased (records indicate his bar status changed to deceased on April 29, 1979). Though Mr. Hebert of course lived to see his article cited by the United States Supreme Court, he sadly did not see Professor Baier further distinguish his comment.

Louisiana appellate courts use at least three standards to apply to review facts in criminal matters.

First, the constitutional limitation to "questions of law" should not apply to pretrial or procedural issues—e.g., pretrial rulings to quash an indictment or motions to suppress certain evidence. The constitutional limitation to questions of law applies only to facts addressing a defendant's guilt or innocence; therefore, for pretrial or procedural facts, a reviewing court is free to review.

Second, for facts that go to a defendant's guilt or innocence, the U.S. Supreme Court held in 1979 that due process requires appellate courts to review convictions for sufficiency of evidence.[3] Ever since then, Louisiana appellate courts determine whether the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime were proven beyond a reasonable doubt.

Third, to review a defendant's sentence, appellate courts must review facts. Appellate courts may weigh the seriousness of the crime, e.g., whether it is a crime of violence under Louisiana Revised Statutes § 14:2 or a nonviolent offense. Similarly, appellate courts review whether a court can sentence a defendant as a multiple offender.

By providing a fresh look at the Louisiana Constitution, this Article aims to trigger further interest in the complex nature of Louisiana appellate review of criminal cases. Part I briefly discusses the fundamental distinction between law and fact. Part II introduces the provisions in the Louisiana Constitution providing appellate jurisdiction. Part III is a brief historical review of changes in the Louisiana Constitution's definition of appellate jurisdiction. Part IV analyzes the Constitution of 1974 and provides examples of appellate review of criminal facts.[4] Finally, Part V examines what facts remain unreviewable by appellate courts.

I. A BRIEF REFRESHER ON THE FUNDAMENTAL DISTINCTION BETWEEN LAW AND FACT

Courts often approach factual and legal questions differently. Generally, trial courts determine the facts and appellate courts determine the law. Conventionally, facts are the "who," "what," "where," "when,"

3. Jackson v. Virginia, 443 U.S. 307 (1979).

4. The authors selected certain issues to provide contrasting examples of appellate review. But it is beyond the scope of this Article to discuss *all* issues appellate courts review in criminal cases. For example, the Article does not discuss post-conviction or collateral review, nor does it distinguish between capital and non-capital cases.

"why," and "how" of a case;[5] the law is the governing rule, as a constitution, statutes, codes, rules, and judicial opinions state.

For example, most drivers should understand that they cannot drive through a red light;[6] a trial court could determine who was driving the car, whether the red light had any malfunctions, and whether the light was red. The court determines these facts by admitting or denying evidence, hearing witness testimony, or taking judicial notice of other forms of evidentiary proof. All of this information later constitutes the "record," which an appellate court reviews and determines whether, under the facts, it was against the law to drive through the red light.

In reviewing the record, the appellate court may state that it will defer to the lower court's findings of fact. Frequently, the amount of deference is based on a "standard of review." A leading scholar on appellate law defines standards of review as "whether the reviewing court should defer to the trial court, and, if so, to what extent."[7]

Most cases, however, are more complicated than a traffic violation;[8] records can be more detailed, and factual and legal issues are often intertwined. Notwithstanding these hurdles, under the Louisiana Constitution, determining appellate jurisdiction for criminal cases may hinge on the fact-versus-law distinction—or maybe not.

II. APPELLATE JURISDICTION UNDER THE LOUISIANA CONSTITUTION

The Louisiana Constitution is the governing document that provides courts with jurisdiction—i.e., the power to make legal decisions[9]—over

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5. *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1778 (2003) ("Under the conventional view, legal issues concern the applicable rules and standards; factual issues involve the underlying transaction or events, in other words, 'who did what, where, when, how, why, with what motive or intent.'").

6. *See, e.g.*, LA. REV. STAT. § 32:232(3)(b) (2018) (providing instructions on traffic-control devices); *id.* § 32:231(A) (mandating drivers obey instructions of traffic-control devices).

7. DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 222 (2d ed. 2006).

8. *See* George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 20 (1992) (internal quotations removed). The article gives a great example of why it is difficult to distinguish facts from law. It states: "[W]hile some factual issues seem like observations, i.e. was it raining, those same factual issues could also be thought of as questions of fact that require reflection—i.e. was it a light drizzle or heavy rain—from other observations." *Id.* at 39.

9. For a definition of jurisdiction in a Louisiana treatise, see *Jurisdiction of court*, LA. PRAC. CIV. APP. § 1:1 ("Jurisdiction is the legal power and authority of

criminal and civil cases. Criminal law concerns punishment of those whom the government accuses of committing a crime such as theft, robbery, or murder, and then seeks to impose a penalty.[10] In contrast, civil cases resolve disputes between two or more parties.[11] The Louisiana Constitution provides different types of courts to hear both civil and criminal cases. Typically, the first court to hear a case is a trial court, or a "district court."[12] After, intermediary appellate courts can review what happened at the trial court.[13] The highest appellate court is the Louisiana Supreme Court, which can review decisions either trial courts or intermediary appellate courts made.[14]

Two sections in Article V of the Louisiana Constitution govern the scope of appellate jurisdiction, one for the Supreme Court and the other for the courts of appeal.[15] For the Supreme Court, Article V, § 5 provides, in pertinent part:

> (C) Scope of Review. Except as otherwise provided by this constitution, the jurisdiction of the supreme court in civil cases extends to both law and facts. *In criminal matters, its appellate*

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a court to hear and determine an action or proceeding involving the legal relations of the parties and to grant the relief to which they are entitled."). For a more general definition, see *Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A court's power to decide a case or issue a decree.").

10. A "criminal proceeding," as defined in Louisiana's Administrative Code, is "any litigation involving the investigation or commission of any offense punishable by imprisonment, confinement, or custody." LA. ADMIN. CODE. tit. 22, § 103 (Definitions).

11. For instance, one Louisiana Supreme Court decision defines a civil case as including "a dispute between private parties and results in a money judgment affecting only those parties." Moore v. Roemer, 567 So. 2d 75, 81 (La. 1990) (overruled by constitutional amendment on grounds not pertinent to the definition of a civil matter). The Court is defining the term "civil matter" as the Louisiana constitutional article on district court jurisdiction uses. For purposes of this Article, civil cases are referred to as anything not criminal, i.e., family law disputes, administrative suits, and certain juvenile proceedings.

12. *See* LA. CONST. art. V, § 16(A)(1) ("Except as otherwise authorized by this constitution or except as heretofore or hereafter provided by law for administrative agency determinations in worker's compensation matters, a district court shall have original jurisdiction of all civil and criminal matters.").

13. *See id.* art. V, §§ 5 (Supreme Court) & 10 (Courts of Appeal).

14. *See id.* art. V, § 5.

15. *Id.* Section 5 describes the jurisdiction of the Supreme Court and § 10 describes the jurisdiction of the intermediate courts of appeal.

jurisdiction[16] *extends only to questions of law*.[17]

For the courts of appeal, Article V, § 10 provides, in pertinent part:

> (B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts. In the review of an administrative agency determination in a worker's compensation matter, a court of appeal may render judgment as provided by law, or, in the interest of justice, remand the matter to the administrative agency for further proceedings. *In criminal cases*[18] *its appellate jurisdiction extends only to questions of law*.[19]

These provisions provide that appellate jurisdiction in criminal cases extends only to questions of law. The purpose of limiting appellate review in criminal cases to questions of law is to limit review of a jury verdict—and sometimes a judge—of a defendant's guilt or innocence. In contrast, appellate jurisdiction in civil cases extends to law *and* fact.

The U.S. Constitution treats criminal and civil facts in the opposite way.[20] For civil cases, the Seventh Amendment generally prohibits courts

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16. Curiously, the provisions include the phrase "appellate jurisdiction," not "appellate court jurisdiction." This is an intriguing phrase because appellate jurisdiction is supposed to refer only to cases that *must be appealed*. But interpreting the constitutional restriction of factual review to just those cases that *must be appealed* would create an odd disparity between appellate jurisdiction and supervisory jurisdiction.

17. LA. CONST. art. V, § 5 (emphasis added).

18. In the Supreme Court provision, it includes the phrase "criminal matters," but in the Courts of Appeal provision, it includes the phrase "criminal cases." This is a curious inconsistency. Discussing another section in the Constitution of 1974, Professor Hargrave discusses that "[t]he reference to matters, rather than cases, accommodates ex parte, non-contradictory proceedings in the district courts which may not technically be adversary cases." Lee Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV. 765, 810 (1977). Apparently, the words "matters" and "cases" do not mean the same thing.

19. LA. CONST. art. V, § 10 (emphasis added).

20. At least one scholar, Professor William Crawford, believes the grant of authority to review facts in *civil* cases is problematic. *See* William E. Crawford, *The Constitutional Authority Giving Our Appellate Courts Jurisdiction of Fact Should Be Repealed*, 73 LA. L. REV. 703 (2013) (based on a review of selected Louisiana appellate cases and data from the National Center for State Courts, the author argues that the jurisdiction of fact in civil cases may be why Louisiana has a higher caseload compared with other states of similar populations).

from reviewing a jury's findings of fact.[21] Specifically, the Seventh Amendment states, "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[22] Conversely, there is no similar constitutional restriction on the review of facts in criminal cases.[23]

III. HISTORICAL DEVELOPMENT OF THE LOUISIANA CONSTITUTION

The Louisiana Constitution enacted in 1974 ("Constitution of 1974") is the current operative version. Commentators refer to it by its date because there have been ten Louisiana Constitutions.[24] Of all states, Louisiana has had the most constitutions,[25] which may be a good or bad

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21. The current practice in federal courts, however, is not rigid. Generally, despite the Seventh Amendment, federal courts may conduct a complete review of facts—even in jury trials—when those facts matter to important constitutional or jurisdictional issues. *See* Christie, *supra* note 8, at 52 ("As the evolving doctrine of constitutional fact demonstrates, the strictures of the Seventh Amendment have never been an insurmountable impediment to a federal court's reviewing a jury's findings."). Professor Christie's article discusses two foundational pieces of scholarship on this topic: LOUIS. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 629–30 (1965) (jurisdictional fact); John Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"*, 80 U. PA. L. REV. 1055, 1059–63 (1932) (constitutional fact). For a recent discussion on this point, see Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 322–23 (2017).

22. U.S. CONST. amend. VII. This amendment affected Article III, § 2 of the Federal Constitution, which provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

23. *See id.* amend. VI.

24. These include: LA. CONST. of 1812; LA. CONST. of 1845; LA. CONST. of 1852; LA. CONST. of 1864; LA. CONST. of 1868; LA. CONST. of 1879; LA. CONST. of 1898; LA. CONST. of 1913; LA. CONST. of 1921; LA. CONST. of 1974. In this Article, each constitution will be referred to by its date.

25. *See* Warren G. Billings, *Introduction*, *in* IN SEARCH OF FUNDAMENTAL LAW, LOUISIANA'S CONSTITUTIONS, 1812–1974 3 (Warren G. Billings & Edward F. Haas eds., 1993) ("The eighteenth state to join the Union, Louisiana has had more constitutions than any other state."); *see also id.* at 21–22 (Judith K. Schafer, *Reform or Experiment? The Louisiana Constitution of 1845* ("Ten constitutions (or eleven

thing[26]—*good* because multiple constitutional conventions enabled Louisiana to declare fundamental principles of its governing laws that aligned closely to the times; *bad* because frequent constitutional conventions and amendments can enable certain interest groups to exert too much influence on the shape of Louisiana law.[27]

Starting in 1812, as a condition of statehood, Louisiana enacted its first constitution.[28] At that time, appellate courts had *no* jurisdiction to review criminal cases.[29] The public outcry of being unable to contest a guilty verdict was great.[30] In 1843, the Louisiana Legislature established the

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if the 1861 secession convention can be counted) is a staggering but dubious achievement. Only Georgia comes close to achieving such an honor, with six.")).

26. Billings, *supra* note 25, at 3. ("Whether that is a record to scorn or prize is a matter of perspective. It may indicate a 'fickleness' among the state's constitution-makers or the lack of a self-governing tradition. Such conclusions have found credent with some pundits who have never bothered to examine those interpretations in more than a superficial way."). Professor Billings goes on to suggest that the essays compiled in the book suggest a different conclusion. *Id.*

27. *See* Michael L. Kurtz, *The Era of Edwin Edwards, 1972–1987*, *in* LOUISIANA: A HISTORY 396 (Bennett H. Wall & John C. Rodrigue eds., 2014); *see also* Mark T. Carleton, *Fundamental Special Interests: The Constitution of 1974*, *in* IN SEARCH OF FUNDAMENTAL LAW, LOUISIANA'S CONSTITUTIONS, 1812–1974, *supra* note 25, at 142. Another example of selective influence on Louisiana Constitutions is the relatively brief period between the Constitution of 1845 and Constitution of 1852. *See* Judith Kelleher Schafer, *The Political Development of Antebellum Louisiana*, *in* LOUISIANA: A HISTORY 142 (Bennett H. Wall & John C. Rodrigue eds., 2014).

28. W.O. Hart, *The Constitutions of Louisiana, 1812 to 1913*, 2 LOY. L.J. 1, 1 (1920–21) ("The Constitution of 1812, under which the State was admitted into the Union, was adopted in convention held at New Orleans, January 2, 1812 . . . [and] remained in force for thirty-three years, the Constitution of 1845 having been adopted in convention on May 14th of that year.").

29. For an excellent discussion on the history of criminal law in Louisiana, see Warren M. Billings, *Origins of Criminal Law in Louisiana*, *in* THE LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA HISTORY, VOL. XII: AN UNCOMMON EXPERIENCE LAW AND JUDICIAL INSTITUTIONS IN LOUISIANA 1803–2003 761.

30. *See id.* at 763 (Professor Billings discusses the public's opinion of the lack of criminal appellate jurisdiction, and states that that the lack of criminal appellate jurisdiction "was an opinion that never fully satisfied the lower bench, the bar, or the literate public. Critics contended that uniform justice could not exist without appellate review. Moreover, the absence of uniformity meant the guilty might go free while the innocent lost liberty or worse.")

Court of Errors and Appeals, which heard criminal appeals.[31] The state abolished the Court of Errors and Appeals in 1845 when the new Louisiana Constitution provided the Louisiana Supreme Court with jurisdiction to review criminal cases.[32] As a result, criminal defendants had the right to an appeal, which was "the first time that such a right was made explicitly constitutional in any American constitution."[33]

Thus, since 1845, appellate courts have had the constitutional authority to review criminal cases. From 1845 to 1921, all iterations of the related constitutional provision included the word "alone" following the phrase "questions of law."[34] It is not clear what "alone" meant. One judge believed that it was meant to exclude even blended questions of law and fact.[35] The meaning of the word is no longer pertinent, as the word "alone" does not appear in the Constitution of 1974.

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31. *Id.* ("Legislators responded in 1843 when they erected a court of errors and appeals. Their solution was only a stopgap measure however. The second constitutional convention abolished the Court of Errors and Appeals, and the delegates assigned appellate jurisdiction to a revamped Supreme Court.").

32. LA. CONST. art. 63 (1845) ("[A]nd in criminal cases on questions of law alone, whenever the punishment of death or hard labor may be inflicted, or when a fine exceeding three hundred dollars is actually imposed."); *see also* Judith K. Schafer, *Reform or Experiment? The Louisiana Constitution of 1845*, *in* IN SEARCH OF FUNDAMENTAL LAW, LOUISIANA'S CONSTITUTIONS, 1812–1974, *supra* note 25, at 33 (noting that at the time of enacting the Constitution of 1845 "[t]here seemed to be a general agreement that the jurisdiction of the supreme court should be extended to include criminal appeals (in the Constitution of 1812 the court was only permitted to take civil appeals)").

33. *See* Jeremiah E. Goulka, *The First Constitutional Right to Criminal Appeal: Louisiana's Constitution of 1845 and the Clash of the Common Law and Natural Law Traditions*, 17 TUL. EURO. CIV. L.F. 151, 194 (2002). The Article states that before 1845, many state supreme courts interpreted their constitutions as providing both civil and appellate jurisdiction, but that Louisiana was the first state to make it explicit. *Id*. at 153; *see also* State v. Washington, 380 So. 2d 64, 65 (La. 1980) (noting that under the 1974 constitution an accused has a constitutional right of appeal in Louisiana). Today, Article I, § 19 of the Louisiana Constitution provides this right, stating:

> No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

See also State v. Malone, 25 So. 3d 113, 122 (La. 2009) (providing a history of this constitutional provision).

34. *See supra* note 24.

35. State v. Seiley, 6 So. 571, 575–77 (La. 1889) (Fenner, J., dissenting).

The second-to-last iteration of the Louisiana Constitution was the Constitution of 1921. It provided: "The appellate jurisdiction of the Supreme Court shall also extend to criminal cases on questions of law alone, whenever the penalty of death, or imprisonment at hard labor may be imposed; or where a fine exceeding three hundred dollars or imprisonment exceeding six months has been actually imposed."[36]

A 1959 student article that Joseph G. Hebert wrote and published in the *Louisiana Law Review* interpreted the Constitution of 1921.[37] Mr. Hebert determined that appellate court jurisdiction over criminal matters was *not* restricted to pure questions of law.[38] According to Mr. Hebert, the Louisiana Constitution did not prevent an appellate court from reviewing *all* facts in a criminal matter. Rather, some factual issues could be reviewed. As Mr. Hebert states:

> It is inevitable, however, that questions of law do not arise in a vacuum void of facts. To interpret the constitutional provision as restricting the court's power of review to questions of "pure law" would emasculate the utility of appellate review. Recognizing this, the Louisiana Supreme Court has interpreted the constitutional provision so as to allow, in effect, a review or "examination" of the facts in a criminal case in certain limited instances. Thus although questions of fact passed on by the jury are generally beyond review, where the trial judge himself passes on mixed questions of law and

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36. LA. CONST. art. VII, § 10 (1921). Confining appellate review to questions of law corresponded with another provision, which provided "[t]he jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence . . . ." *id.* art. XIX, § 9. In full, that provision states:

> In all proceedings or indictments for libel, the truth thereof may be given in evidence. The jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge.

Id. A similar rule is currently in Louisiana Code of Criminal Procedure article 802, which provides:

> The court shall charge the jury:
> (1) As to the law applicable to the case;
> (2) That the jury is the judge of the law and of the facts on the question of guilt or innocence, but that it has the duty to accept and to apply the law as given by the court; and
> (3) That the jury alone shall determine the weight and credibility of the evidence.

37. Joseph G. Hebert, Comment, *Appellate Review on the Facts in a Criminal Case*, 19 LA. L. REV. 843 (1959).

38. *See id.* at 844.

> fact or on questions of fact which do not directly pertain to the guilt or innocence of the accused, such facts are reviewable.[39]

Mr. Hebert's article cited a 1919 Louisiana Supreme Court decision, which noted the Louisiana Constitution "does not apply to a question of fact, upon which the trial judge has based a ruling, not pertaining to the question of guilt or innocence, or to the merits of the case."[40] For example, there is "no constitutional prohibition" to review facts regarding the appropriate venue for a criminal trial.[41]

Further, Mr. Hebert found appellate courts could *examine* facts that pertain to the guilt or innocence of a defendant.[42] That is, if there was no evidence of an essential element of the crime, the question of law before the appellate court is "whether it be lawful to convict an accused without any proof whatsoever as to his guilt."[43] But if the appeal concerned evidence to support or negate a conviction, it was unreviewable. Appellate courts could not even question whether the evidence was sufficient to prove the conviction was beyond approach.[44] For instance, in a case in which a court convicted a defendant of possession of whiskey with the intent to sell, the appellate court held that it could not review the evidence.[45]

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39. *Id.* at 844–45 (internal citations omitted).

40. State v. Smith, 83 So. 189, 190 (La. 1919).

41. *See, e.g.*, State v. Paternostro, 68 So. 2d 767, 770 (La. 1953) ("It has been the jurisprudence of this court since *State v. Moore*, 1916, 140 La. 281, 72 So. 965, that, although the question of venue is one of fact, it is a matter not pertaining to the guilt or innocence of the accused which may be raised in limine and that there is no constitutional prohibition of the right of the trial judge or this court to decide the issue.").

42. Hebert, *supra* note 37, at 844. For examples cited in the article, see State v. Thomas, 69 So. 2d 738, 741 (La. 1953); State v. D'Ingianni, 47 So. 2d 731, 734 (La. 1950); State v. Drew, 11 So. 2d 12, 13 (La. 1942).

43. Hebert, *supra* note 37, at 845–46 (quoting State v. Nomey, 16 So. 2d 226, 227 (La. 1943)).

44. State v. Haddad, 59 So. 2d 411, 417–18 (La. 1951). The issue in *Haddad* was said to be before the Court "under [its] supervisory jurisdiction." *Id.* at 413. In addressing the sufficiency claim, the Court noted that its "appellate jurisdiction" vested only upon a question of law where "there is no evidence at all upon some essential element of the crime charged." *Id.* at 417. That statement possibly undermines the thought commenters and the U.S. Supreme Court offered that the Court might have the power to review facts in criminal cases under its supervisory jurisdiction.

45. State v. Smith, 95 So. 705 (La. 1923).

For many years, such was the form of appellate jurisdiction over criminal cases. After the Constitution of 1974, the U.S. Supreme Court in 1979 found that due process requires appellate courts to review convictions for sufficiency of evidence.[46] That 1979 decision altered Louisiana's scope of review of criminal facts.

IV. THE CONSTITUTION OF 1974

Before the U.S. Supreme Court decision in 1979 that changed the landscape of criminal appellate review, Louisiana enacted the Constitution of 1974, the most recent state constitution.[47] Similar to Mr. Hebert's analysis of the Constitution of 1921, the Constitution of 1974 restricts appellate review on matters of guilt or innocence only to pure questions of law.[48] For all other factual issues, however, the Constitution of 1974 does not restrict review. The Louisiana Supreme Court addressed this point in 1981 in *State v. Campbell*.[49] In that case, a defendant moved to quash the indictment because, as he claimed, the case was not brought to trial within the two-year limitation period.[50] The trial court granted the

46. "Louisiana law has been displaced in part by fourteenth amendment due process standards which require appellate courts to review whether the evidence has proven guilt beyond a reasonable doubt." John S. Baker, Jr., *Criminal Law*, 44 LA. L. REV. 279 (1983). Mr. Baker appears to make the case that the courts used Louisiana Revised Statutes § 15:438 to expand the scope of appellate review beyond *Jackson*. *Id*. at 282.

47. Originally, only the Louisiana Supreme Court had the authority to review criminal cases. *See* Hargrave, *supra* note 18, at 771 (stating that "[t]he Judiciary Committee considered the possibility of providing some intermediate appellate review of criminal matters instead of continuing the prior system of having most criminal appeals heard by the supreme court."). A criminal appeal or writ would skip the intermediate appellate court. That all changed on July 1, 1982, when the original criminal appellate jurisdiction was transferred to the intermediate appellate, or circuit, courts. *See* LA. CONST. art. V, § 10 (eff. July 1, 1982) ("[A] court of appeal has appellate jurisdiction of . . . all criminal cases triable by a jury," except when a law has been declared unconstitutional or when the death penalty has been imposed). The text referenced at the beginning of this Part is what is in effect today.

48. "Traditionally, the scope of appellate review of criminal convictions on matters of guilt or innocence has been rather restricted in Louisiana due to state constitutional provisions and the broad language of the Criminal Code which leaves most issues to be resolved by the jury as questions of fact." Baker, Jr., *supra* note 46, at 279.

49. State v. Campbell, 404 So. 2d 956, 959 (La. 1981).

50. *Id.* at 957.

motion to quash.[51] After the State filed a writ to the Louisiana Supreme Court,[52] the defense counsel argued the court did not have jurisdiction to review the factual question.[53] The Louisiana Supreme Court disagreed:

> We are unable to agree with defense counsel's contention that because interruption of prescription involves a question of fact this court is prohibited by Article 5, § 5(C), of the Louisiana Constitution of 1974 from reviewing the trial court's decision thereon. In *State v. Guilot*, 200 La. 935, 9 So. 2d 235 (La. 1942), this court stated: "Although the plea of prescription presented in a criminal case is a question of fact, it is not a question of fact relating to the guilt or innocence of the accused. The decision of the trial judge as to whether the offense charged is prescribed is reviewable by this court on the same facts upon which the decision was based." However, it is quite clear that in reviewing a trial judge's ruling on a preliminary motion this court attaches great weight to his factual determinations and will not disturb them unless they are clearly erroneous. *State v. Holley*, 362 So. 2d 1089 (La. 1978).[54]

Appellate courts *can* review questions of fact *not* related to the guilt or innocence of the accused. Because *State v. Campbell* is a 1981 case, it interpreted the Constitution of 1974. The court also relied on a 1942 case,[55] indicating that this distinction had been around for a while.

But did this distinction matter to delegates at the 1973 Constitutional Convention? According to the convention transcripts, the delegates only once discussed extending appellate jurisdiction in criminal cases to facts. One delegate, Judge Albert Tate—whose judicial career spanned the Louisiana Court of Appeal, Louisiana Supreme Court, and U.S. Court of Appeals for the Fifth Circuit—briefly noted that the committee did not seriously consider extending review of facts to criminal cases.[56] Without any guidance from the 1973 Constitutional Convention, we must rely on jurisprudence and secondary sources.

The Louisiana Constitution's limitation on appellate review of criminal facts distinguishes facts that prove a defendant's guilt or innocence *from* other facts. To provide examples of this distinction, the next three subparts

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51. *Id.*
52. *Id.*
53. *Id.* at 959.
54. *Id.*
55. *Id.*
56. VOLUME VI, RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS 728 (Aug. 15, 1973).

discuss the applicable standards governing issues that arise: (1) pretrial; (2) during trial; and (3) at sentencing.

A. Pretrial

Appellate courts review pretrial facts under a deferential standard of review.[57] The standard of review is sometimes called "manifest error" or "clearly erroneous."[58] The Louisiana Supreme Court has stated that this standard does not simply require an appellate court to look for *some* evidence to support a judgment but, instead, requires an appellate court to determine whether the judgment is "clearly wrong considering all the

57. *See, e.g.*, State v. Hunt, 25 So. 3d 746, 751 (La. 2009) ("As a general rule, this Court reviews trial court rulings under a deferential standard with regard to factual and other trial determinations, while legal findings are subject to a de novo standard of review."); *see also* State v. Hampton, 750 So. 2d 867, 884 (La. 1999) ("As a general rule, deferential standards of review apply to factual and other trial determinations, while determinations of law are subject to de novo review.").

58. For examples of the phrase "manifest error," see State v. Higgins, 898 So. 2d 1219 (La. 2005) (photo lineup not rendered unduly suggestive by information conveyed to the witness by the police that the lineup contains a photo of the suspect; trial court's ruling that the police conducted the lineup fairly and did not coerce or otherwise influence the witness into selecting defendant's picture entitled to great deference on review and will not be set aside in the absence of manifest error); State v. Ball, 824 So. 2d 1089 (La. 2002) (the jurisprudential criteria governing the use of prior recorded testimony are subsumed in the requirements of Louisiana Code of Evidence article 804(B)(1) including the necessity of the offering party to show that the witness is unavailable; the trial court's ruling in that regard is subject to review only for manifest error, which did not occur here, although the state's documentary proof that the witness had died was shot through with unexplained discrepancies); State v. Williams, 800 So. 2d 819, 826 (La. 2002) ("The above erroneous findings of the trial court [concerning the officers' knock-and-announce] to the contrary are manifestly erroneous and are hereby reversed."); State v. Arnaud, 412 So. 2d 1013, 1018 (La. 1982) ("When a trial judge has ruled that a child is competent to testify, his ruling will not be disturbed unless testimony brought up shows that the judge manifestly erred."). For examples of the phrase "clearly erroneous," see State v. Tyler, 723 So. 2d 939, 943 (La. 1998) ("A reviewing court should afford great deference to the trial judge's evaluation of discriminatory intent and should not reverse unless the evaluation is clearly erroneous."); State v. Bennett, 345 So. 2d 1129, 1132 (La. 1977) ("[T]he judge's determination of a defendant's present mental capacity is entitled to great weight and his ruling will be reversed only if it is clearly erroneous.").

evidence."[59] When appellate courts review motions to suppress, they look to the entirety of the evidence presented at the suppression hearing and at the trial.[60]

Appellate courts apply this type of review to many pretrial or procedural factual issues, including: (1) common evidentiary disputes;[61] (2) whether a trial court properly determined the venue of the trial;[62] (3) whether a case was properly severed;[63] (4) whether a defendant was timely brought to trial;[64] (5) whether a judge properly ruled on a for cause challenge of a juror;[65] or (6) whether a confession was voluntary.[66]

"Manifest error" or "clearly erroneous," however, are not the only phrases courts use to define the standard of review for pretrial factual disputes. Some appellate courts have reviewed pretrial or procedural

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59. Arceneaux v. Domingue, 365 So. 2d 1330, 1333 (La. 1978). Although this is a civil case, this case provides the best articulation of the "manifest error" or "clearly erroneous" standard of review.

60. State v. Burkhalter, 428 So. 2d 449, 455 (La. 1983).

61. *See* State v. Stramiello, 392 So. 2d 425, 428 (La. 1980) ("Additionally, as the appellate court noted, the trial court is given great discretion in the admissibility and relevance of evidence such as this, which holding should not be disturbed on appeal, absent a clear abuse of discretion."); State v. Scales, 655 So. 2d 1326, 1330–31 (La. 1995) (trial court ruling on other crimes evidence can be abused); State v. Stucke, 419 So. 2d 939 (La. 1982) (competence of expert witness not disturbed unless manifest error).

62. *See, e.g.*, State v. Wallis, 807 So. 2d 1082, 1084 (La. Ct. App. 2002) ("Venue is a question of fact, and a jurisdictional matter that shall be proven by the state, by a preponderance of the evidence, in advance of trial.").

63. State v. Allen, 677 So. 2d 709, 713 (La. Ct. App. 1996) (holding that a motion for severance is addressed to the sound discretion of the trial court and its ruling should not be disturbed on appeal absent a showing of an abuse of discretion).

64. State v. Francis, 977 So. 2d 187, 192 (La. Ct. App. 2008) (reversing a trial court's grant of a motion to quash because the trial court failed to take into account a May 31, 2005 defense continuance and an Executive Order that permitted an interruption caused by Hurricane Katrina).

65. State v. Knighton, 436 So. 2d 1141, 1148 (La. 1983).

66. Although that trial court determination can turn on the credibility of witnesses, an appellate court may still review and reverse the decision if that determination is unsupported by the evidence. *See* State v. Wilson, 119 So. 3d 843 (La. Ct. App. 2013) (reviewing the record and testimony of the defendant's intoxicated state to find that evidence not sufficient to vitiate the confession); State v. Brooks, 541 So. 2d 801, 814 (La. 1989) ("Voluntariness of a confession is a question of fact and the trial judge's ruling thereon, based on conclusions of credibility and weight of the testimony, is given great weight. Such ruling will not be disturbed on appeal unless clearly unsupported by the evidence.").

factual matters under a "heightened deference" standard that looks only for "no evidence."[67] For example, one recent court of appeal opinion stated:

> [W]e grant great deference to the factual findings of the district judge and will "not overturn those findings unless there is no evidence to support those findings." *Wells*, 08–2262, p. 4, 45 So.3d at 580. This extremely heightened deference is rooted in the limitations of our appellate jurisdiction set forth in La. Const. art. V, § 10(B), which provides: "In criminal cases, [an appellate court's] jurisdiction extends only to questions of law."[68]

The issues in *Le* were pretrial and unrelated to whether the defendant was guilty or innocent.[69] Nonetheless, the court cited the Louisiana Constitution and noted an appellate court gives the trial court decision "extremely-heightened deference."[70]

State v. Karey is a recent plurality Louisiana Supreme Court decision that applied a similar, heightened standard of review.[71] At issue was whether there was an agreement between prosecutors and defense counsel to abide by the charge—e.g., manslaughter or second degree murder—of a grand jury determination.[72] The defense argued that it assisted and cooperated with the prosecutors in exchange for the prosecutors abiding by a grand

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67. *See, e.g.*, State v. Le, 188 So. 3d 1072, 1081 (La. Ct. App. 2015), *writ denied sub nom.* State v. Trung Le, 178 So. 3d 569 (La. 2015) (reviewing a trial judge's ruling to redact identifying information of a witness, the court stated "we grant great deference to the factual findings of the district judge and will 'not overturn those findings unless there is no evidence to support those findings.' This extremely heightened deference is rooted in the limitations of our appellate jurisdiction set forth in La. Const. art. V, § 10(B) . . . .") (internal citations omitted); State v. Jones, 165 So. 3d 217, 224 (La. Ct. App. 2015) (reviewing adjudication as a fourth-felony offender under a "no evidence," heightened-deference standard); State v. Dixon, 146 So. 3d 662, 666 n.5 (La. Ct. App. 2014) (stating there is an extremely deferential review for factual questions arising in a motion to quash); State v. Franklin, 147 So. 3d 231, 240 (La. Ct. App. 2014), *writ denied*, 159 So. 3d 460 (La. 2015) (factual issues in motion to quash); State v. Thomas, 138 So. 3d 92, 97 (La. Ct. App. 2014) (factual issues in motion to quash).

68. *Le*, 188 So. 3d at 1081 (citations omitted).

69. The court was reviewing "a trial judge's ruling to maintain a redacting party's deletion or excision of a witness's identifying information . . . ." *Id.*

70. *Id.*

71. State v. Karey, 232 So. 3d 1186 (La. 2017).

72. *Id.* at 1198 (finding an enforceable agreement not to prosecute because "[t]he district court's decision to credit the defense testimony over that of the prosecution cannot be overturned").

jury decision.[73] That grand jury returned an indictment against the defendant for manslaughter, a violation of Louisiana Revised Statutes § 14:31.[74] After the prosecutors took the case to a second grand jury, which returned an indictment for second degree murder, a violation of Louisiana Revised Statutes § 14:30.1, the defense counsel argued that the prosecutors breached their agreement.[75] To determine whether an agreement existed, "a trial judge must first make findings of fact as to the terms of and the conditions surrounding that agreement and then apply those findings to principles of contract and constitutional law."[76] When the issue was before the Louisiana Supreme Court, it reviewed whether there was an enforceable agreement under a "no evidence" standard. In support, the court cited the Louisiana constitutional provisions on appellate review of facts in criminal matters.[77]

Regardless of the standard of review, these examples demonstrate appellate courts can, and do, review a wide range of pretrial factual disputes.

B. Trial

Jackson v. Virginia is a seminal case concerning appellate review of criminal guilt.[78] The U.S. Supreme Court held that, to safeguard a defendant's due process right, an "appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt."[79] In applying this standard, the appellate court considers all evidence—even evidence parties erroneously admitted—at trial.[80]

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73. *Id.* at 1189.
74. *Id.*
75. *Id.*
76. State v. Franklin, 147 So. 3d 231, 240 (La. Ct. App. 2014).
77. *Id.*
78. In *Jackson v. Virginia*, "the Court concluded that habeas courts must evaluate state convictions by determining whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. In so deciding, the Court established a constitutionally mandated standard for review of all criminal convictions." Note, *Standard of Review of Sufficiency of Evidence Supporting Criminal Conviction*, 93 HARV. L. REV. 199, 210 (1979).
79. Jackson v. Virginia, 443 U.S. 307 (1979); *see also* State v. Captville, 448 So. 2d 676, 678 (La. 1984).
80. *See* State v. Hearold, 603 So. 2d 731, 734 (La. 1992); *see also* Lockhart v. Nelson, 488 U.S. 33 (1988).

Before *Jackson*, appellate courts in Louisiana could not review a conviction for sufficiency of evidence.[81] Instead, appellate courts could only review the guilt or innocence of an accused when there was "no evidence."[82] In contrast, if there was *some* evidence supporting a finding of guilt or innocence, the issue would be beyond the scope of appellate review.[83]

The Louisiana Supreme Court applied *Jackson* in its 1979 decision in *State v. Mathews*.[84] Recognizing the importance of the *Jackson* decision on Louisiana state appellate review, the Louisiana Supreme Court stated:

> [I]n *Jackson*, the United States Supreme Court held that due process requirements of the federal constitution are offended by a lesser standard of review than that enunciated by it. Although the issue arose in terms of federal habeas review, the *Jackson* holding also applies, inferentially, to state or federal direct review, where due process would be equally offended by a lesser standard.[85]

Not all judges agreed that *Jackson* could upend the Louisiana Constitution. Dissenting from *State v. Mathews*, one justice stated:

> This majority opinion usurps the fact-finding prerogative of the trier of fact in its determination of guilt or innocence contrary to the specific limitation contained in Section 5(C) of Article V of the Constitution. . . . The reliance on *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) to support the majority view is misplaced. That decision does not purport to invalidate Louisiana's constitutional limitation on review of facts by this Court in criminal cases. So deeply ingrained is the law's tradition of refusal to engage in after-the-fact review of jury deliberations, until the United States Supreme Court invalidates

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81. *See, e.g.*, State v. Celestine, 320 So. 2d 161, 162 (La. 1975) ("Defendant's contention that the jury did not give him the benefit of every reasonable doubt is a fact question which we cannot review on appeal, and for that additional reason this improperly presented assignment of error has no merit."); *see also* Hebert, *supra* note 37, at 846 (citing cases from 1945 to 1953). Nor could an appellate court review if the evidence was "beyond a reasonable doubt." *Id.* (citing State v. Bell, 177 So. 63, 64 (La. 1937) ("A complaint that the [criminal facts were] not proven beyond a reasonable doubt raises an issue of fact, not an issue of law.") and other cases from 1947 to 1953).

82. *See* Hebert, *supra* note 37, at 846.

83. *See, e.g.*, State v. Di Vincenti, 93 So. 2d 676, 681 (La. 1957).

84. State v. Mathews, 375 So. 2d 1165 (La. 1979).

85. *Id.* at 1168.

> that concept in Louisiana's Constitution, I will adhere to the Louisiana Constitution.[86]

The dissenting view failed to carry the day. Problematically, the dissent ignored the supremacy of the U.S. Supreme Court and federal law.[87] The U.S. Supreme Court requires appellate courts to review for sufficient evidence to sustain a conviction. The standard that appellate courts must apply is "whether any alternate hypothesis of innocence is sufficiently reasonable that no rational factfinder . . . could have found proof of guilt beyond a reasonable doubt."[88] Another way of viewing the *Jackson* standard is appellate courts review whether the conviction was rational.[89] Sufficiency

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86. *Id.* at 1170. Similarly, in a case that reversed a defendant's conviction because of insufficient evidence proving the defendant knew that the car had been stolen, a dissenting judge believed that *Jackson v. Virginia* could not alter the Louisiana constitutional scheme. State v. Ennis, 414 So. 2d 661 (La. 1982). In the dissenting judge's view, *Jackson v. Virginia* only provided *if* a reviewing court has jurisdiction *then* it must review for sufficiency of evidence. But because Louisiana appellate courts do not have jurisdiction to review facts, *Jackson v. Virginia* does not apply. *Id.* at 666 (Lanier, J., dissenting).

87. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also Mathews*, 375 So. 2d at 1168 ("Although the issue arose in terms of federal habeas review, the *Jackson* holding also applies, inferentially, to state or federal direct review, where due process would be equally offended by a lesser standard.")

88. State v. Davis, 559 So. 2d 114 (La. 1990). Beyond the scope of this Article is *Jackson*'s impact on circumstantial versus direct evidence. *See* LA. REV. STAT. § 15:438 (2018) (setting forth the statutory circumstantial evidence test); *see also* State v. Chism, 436 So. 2d 464, 469 (La. 1983) ("Circumstantial evidence involves, in addition to the assertion of witnesses as to what they have observed, a process of reasoning, or inference by which a conclusion is drawn. Like all other evidence, it may be strong or weak; it may be so unconvincing as to be quite worthless, or it may be irresistible and overwhelming . . . ."). Nonetheless, future scholarship may wish to study the impact of *Jackson* on appellate review of circumstantial evidence, as it may be more significant than its impact on appellate review of direct evidence.

89. State v. Mussall, 523 So. 2d 1305, 1310 (La. 1988) ("If *rational* triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all of the evidence most favorable to the prosecution must be adopted. Thus, *irrational* decisions to convict will be overturned, *rational* decisions to convict will

review essentially addresses whether "the government's case was so lacking that it should not have even been submitted to the jury."[90] On sufficiency review, a reviewing court makes a limited inquiry tailored to ensure that a defendant receives the minimum that due process requires: a "meaningful opportunity to defend" against the charge against him and a jury finding of guilt "beyond a reasonable doubt."[91] The reviewing court considers only the "legal" question "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[92] That limited review does not intrude on the jury's role "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."[93]

Based on the *Jackson* precedent, appellate courts may reverse convictions based on insufficient evidence.[94]

C. Sentencing

If a court finds a defendant is found guilty, it must then determine the appropriate sentence.[95] Although the Louisiana Legislature provides a sentencing range, appellate courts may review whether a sentence is excessive. As the examples below show, appellate courts review facts to review sentences. Under Louisiana Constitution article I, § 20: "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."[96]

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be upheld, and the actual fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law.")

90. Musacchio v. United States, 136 S. Ct. 709, 715 (2016) (internal citations omitted).

91. *Id.*

92. *Id.*

93. *Id.*

94. *See, e.g.*, State v. Maise, 172 So. 3d 639 (La. 2015) (convictions reversed, sentences vacated, remanded for new trial); State v. Washington, 412 So. 2d 991, 993 (La. 1982) (conviction reversed); State v. Jack, 700 So. 2d 1177, 1180 (La. Ct. App. 1997) (conviction for possession of controlled substance with intent to distribute vacated and appellate court instructed the lower court to enter judgment on lesser included offense of possession).

95. *See, e.g.*, State v. Mosby, 180 So. 3d 1274 (La. 2015) (finding a 30-year sentence excessive for a 72-year-old, non-violent offender).

96. LA. CONST. art. I, § 20. This constitutional article includes the word "excessive," which differs from the Federal constitution, and the inclusion of that

To review a sentence, appellate courts might review facts such as the seriousness of the crime—e.g., whether it is a crime of violence under Louisiana Revised Statutes § 14:2 or a nonviolent offense. Appellate courts might also review the defendant's conduct during the commission of the crime.[97] Moreover, when imposing a sentence, the trial court "shall state for the record the considerations taken into account and the factual basis therefor in imposing sentence."[98] A specific procedural rule, Louisiana Code of Criminal Procedure article 894.1, provides courts guidance on the facts to review.[99]

These facts are not outside the scope of appellate review. The Louisiana Supreme Court has held that excessive sentence review is a "question of law":[100]

> Thus, under some circumstances—such as the prior history or criminal dispositions of a certain offender, the particular helplessness of a certain victim, or a particularly vicious method of committing the crime—the maximum penalty under the statute might clearly be justified; while the same punishment might be considered excessive if applied to a more typical offender who commits the crime under less gross circumstances. For instance, a penitentiary sentence of the maximum five years might easily be justified for a mature man who had seduced a frightened and confused twelve-year-old girl, under circumstances falling just short of rape, and who had exhibited similar behavior in the past but showed little hope of reformation. Yet such a penalty might be excessive if applied to a love-struck teenager, of otherwise unblemished character and record, who commits the offense in the course of a teenage romance.[101]

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word was a deliberate attempt to provide review of excessive sentences. State v. Baxley, 656 So. 2d 973, 977 (La. 1995).

97. *See, e.g.*, LA. CODE CRIM. PROC. art. 894.1(B)(1)–(13) (2018).

98. *Id.* art. 894.1(C). By failing to do so, an appellate court may vacate the trial court's imposition of a sentence and order the trial court to comply with this rule. *See* State v. Ladd, 164 So. 3d 184 (La. 2015); *see also id.* (Crichton, J., concurring) ("Without complying with Louisiana Code of Criminal Procedure article 894.1(c), or for that matter supplying any reasons, the trial judge sentenced this young defendant to twenty years hard labor under La. R.S. 40:966(E)(3) and La. R.S. 15:529.1(3)(a).").

99. LA. CODE CRIM. PROC. art. 894.1(B).

100. State v. Sepulvado, 367 So. 2d 762, 766 (La. 1979).

101. *Id.* at 766–67.

Appellate courts, therefore, have jurisdiction to review excessive sentences, even if that review necessarily involves fact-based issues.[102] Often, the appropriate standard of review is "manifest abuse of discretion."[103]

In addition to excessive sentence review, appellate courts review a sentence the defendant's criminal history enhances. Louisiana Revised Statutes § 15:529.1, commonly known as the "Habitual Offender Law," provides certain mandatory sentences for persons convicted of a second or subsequent offense.[104] Under this procedure, a court may enhance a sentence based on the degree of a defendant's recidivism.[105] The trial court determines whether a defendant has previous convictions.[106] In general, a defendant may be deemed a multiple offender after:

> [T]he filing of a multiple offender bill of information; an appearance before the court; a contradictory hearing, if necessary; the presentation of evidence on which the district attorney bears the burden of proof beyond a reasonable doubt on any issue of fact; and either a finding by the court that the defendant has been convicted of a prior felony or felonies or the defendant's acknowledgment or confession in open court, after being duly cautioned as to his rights, that he has been so convicted.[107]

Whether a defendant is a multiple offender is a factual issue.[108] These facts are not outside the scope of appellate jurisdiction. As the Louisiana Supreme Court noted in a different scenario, a "defendant's status as a putative multiple offender is irrelevant to the determination of guilt or

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102. For a discussion on this area of law shortly after the Louisiana Supreme Court issued its opinion in *State v. Sepulvado*, see Erick V. Anderson, Note, *Appellate Review of Excessive Sentences in Non-Capital Cases Review in Louisiana*, 42 LA. L. REV. 1080, 1084–85 (1982).

103. *See* State v. Shaikh, 236 So. 3d 1206, 1209 (La. 2017) ("The trial judge has broad discretion, and a reviewing court may not set sentences aside absent a manifest abuse of discretion.").

104. *See generally* LA. REV. STAT. § 15:529.1 (2018).

105. State v. Guidry, 221 So. 3d 815, 820 (La. 2017).

106. LA. REV. STAT. § 15:529.1(D).

107. *Guidry*, 221 So. 3d at 820–21 (citing LA. REV. STAT. § 15:529.1(D)(1)(a) and (b), (D)(2), and (D)(3)). That decision went on to hold that disclosing a defendant's possible mandatory minimum under the Habitual Offender Law to the jury is an error. *Id.* at 820 (holding a defendant was not entitled to have a jury informed that, if convicted of charged offenses, he faced possibility of mandatory sentence of life imprisonment as fourth habitual offender).

108. LA. REV. STAT. § 15:529.1(D)(1)(b).

innocence of the tried offense."[109] Instead, these facts include, for example, whether the defendant and the prior convicted felon are the same person,[110] or whether a previous conviction is outside the time limitations the Habitual Offender Bill allows.[111] Appellate courts review these types of facts, and, as seen through these examples, review facts to review sentences.[112]

V. WHAT CRIMINAL FACTS CANNOT BE REVIEWED?

In light of the foregoing and Article V of the Louisiana Constitution, it is unclear what facts an appellate court may not review. On the one hand, appellate court supervisory jurisdiction may be boundless. On the other hand, some jurisprudential limitations to appellate review of facts in criminal cases exist.

A. Justice Tate's Theory of Supervisory Jurisdiction

Louisiana appellate courts possess "supervisory jurisdiction."[113] If a court must hear the appeal, then it has appellate jurisdiction. In contrast, if an appellate court has discretion to take the case, then that court has supervisory jurisdiction.[114] As Justice Tate described, supervisory

109. *Guidry*, 224 So. 3d at 821. In support, the Court noted that, under the Louisiana Code of Criminal Procedure, the scope of arguments at trial are confined to admitted evidence and applicable law under Louisiana Code of Criminal Procedure article 774, and a court must charge a jury as to the law and facts on the "question of guilt or innocence." LA. CODE CRIM. PROC. art. 802(2) (2018) ("The court shall charge the jury: . . . [t]hat the jury is the judge of the law and of the facts on the question of guilt or innocence, but that it has the duty to accept and to apply the law as given by the court . . . .").

110. State v. Payton, 810 So. 2d 1127, 1130 (La. 2002). The Court goes on to state:

> In attempting to do so, the State may present: (1) testimony from witnesses; (2) expert opinion regarding the fingerprints of the defendant when compared with those in the prior record; (3) photographs in the duly authenticated record; or (4) evidence of identical driver's license number, sex, race and date of birth.

Id.

111. LA. REV. STAT. § 15:529.1(C).

112. *See, e.g.*, State v. Kisack, 236 So. 3d. 1201, 1205 (La. 2017) (holding that the State must prove as an element of the habitual offender adjudication that the time afforded by Louisiana Revised Statutes § 15:529.1(C) as not elapsed). The Court also reviewed the evidence and found that the State carried its burden. *Id.*

113. LA. CONST. art. V, § 5(A).

114. Hargrave, *supra* note 18, at 795 ("The distinction between supervisory and appellate jurisdiction is a continuation of existing terminology, 'supervisory' referring to the court's discretionary jurisdiction under which it has the power to

jurisdiction has been interpreted to be "plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court."[115]

Armed with this knowledge, it is unclear whether the constitutional text limiting the jurisdiction of criminal cases really means "appellate jurisdiction" or whether it is instead governing all jurisdictional authority of the appellate court. For instance, the Louisiana Supreme Court has appellate jurisdiction over death penalty cases and in cases in which a trial court has declared a statute or ordinance unconstitutional. It is unknown whether this means the constitution restricts review of facts only in these cases, but not most other criminal cases, but it remains an interesting wrinkle in the constitutional text.

The authority to issue a writ of certiorari and correct an error of a lower court is theoretically boundless.[116] Logically, supervisory jurisdiction gives appellate courts the authority in criminal cases to review facts.[117] There is potentially no fact that an appellate court cannot review.

B. Jurisprudential Restriction

Supervisory jurisdiction aside, there may be some facts that an appellate court cannot review. For instance, the Louisiana Supreme Court in *State v. King* ruled that article 851(1) motions for new trial are unreviewable.[118] In granting an article 851(1) motion, a trial court believes the "verdict is contrary to the law *and the evidence*."[119] An article 851(1) motion could occur if a trial court found a testifying witness unreliable, even if the jury relied on that witness in delivering a guilty verdict. When

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select the cases it will hear, and 'appellate' contemplating cases in which a party as a matter of right can demand that the court hear a case.").

115. Albert Tate, Jr., *Supervisory Powers of the Louisiana Courts of Appeal*, 38 TUL. L. REV. 429, 430 (1964). Justice Tate was an iconic scholar of Louisiana law. In the article, he notes that courts of appeal obtained the same plenary powers as the Louisiana Supreme Court by the 1958 constitutional amendment and cites a case that discusses this point. *See also* State Bond Comm'n v. All Taxpayers, Prop. Owners, & Citizens of State, 510 So. 2d 662, 663 (La. 1987) ("The constitutional grant of supervisory authority to this court is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court.").

116. *See generally* Comment, *Supervisory Powers of the Supreme Court of Louisiana over Inferior Courts*, 34 TUL. L. REV. 146 (1959).

117. As mentioned in note 1, the U.S. Supreme Court also made this inference in *Garner v. Louisiana*, 368 U.S. 157, 161 n.6 (1961).

118. State v. King, 232 So. 3d 1207, 1215 (La. 2017).

119. LA. CODE CRIM. PROC. art. 851(B)(1) (2018) (emphasis added).

the trial court grants a motion under article 851(1), it essentially sits as a "thirteenth juror" and reweighs the evidence.[120]

In *King*, after a jury returned verdicts of second degree murder and armed robbery, the trial court granted a motion for new trial.[121] The trial court granted the new trial because it believed that certain witness testimony was not credible.[122] The court of appeal reversed.[123] The Louisiana Supreme Court held, however, that the court of appeal did not have jurisdiction to reverse the trial court's grant of a new trial.[124] The court noted that under article 858 of Louisiana's Code of Criminal Procedure, "[n]either the appellate nor supervisory jurisdiction of the supreme court may be invoked to review the granting or the refusal to grant a new trial, except for error of law."[125] Based on the rules of criminal procedure and the Louisiana Constitution, the Louisiana Supreme Court in *King* held that it "does not permit fact-finding and credibility assessments by an appellate court in a criminal case."[126] *King* is a rare example of a

120. *King*, 232 So. 3d at 1214.

121. *Id.* at 1209.

122. *Id.* (specifically, the trial judge stated, "I've had a lot of problems with the testimony of [the witness] because of so many inconsistencies that she's had in her testimony. And this is strictly a circumstantial case against Mr. King. There were no witnesses who testified that he committed the murder or he did the robbery other than [the witness], who was not a witness to the murder, just to the events that took place in the apartment. I'm going to grant your motion for new trial.").

123. *Id.*

124. *See generally id.*

125. *Id.* at 1210; *see also* LA. CODE CRIM. PROC. art. 858 (2018). This particular rule is a specialized application of the Louisiana constitutional article restricting appellate review of fact in criminal matters. A comment to this article notes that this is an application of the "constitutional limitation of the supreme court's appellate jurisdiction to questions of law only." LA. CODE CRIM. PROC. ANN. art. 858 cmt. a (2018). Yet, this comment is from 1966 and interprets the Constitution of 1921. Further, another comment states this applies to both appellate and supervisory jurisdictions. *Id.* art. 858 cmt. b. But this appears incongruent with Justice Tate's view that courts cannot restrict supervisory; it is always plenary.

126. *King*, 232 So. 3d at 1213. In contrast, a motion for new trial based on a purely legal issue is one granted under article 851(B)(5), where "[t]he court is of the opinion that the ends of justice would be served . . . ." LA. CODE CRIM. PROC. art. 851(B)(5). Appellate courts can review legal issues. *See* State v. Guillory, 45 So. 3d 612, 615 (La. 2010) ("We find our jurisprudence holding the trial court's ruling on a motion for a new trial to serve the ends of justice is reviewable under an abuse of discretion standard comports with the role of this Court and the appellate courts to review questions of law in criminal cases.").

Louisiana appellate court not having jurisdiction to review a case because it involved an unreviewable question of fact.

CONCLUSION

This Article began with a question: in the Louisiana Constitution, what is the meaning of "appellate jurisdiction extends only to questions of law" for criminal matters? The Louisiana Constitution represents fundamental aspects of Louisiana law.[127] Both the rights of defendants and the people's interest in justice are at stake. Therefore, should Article V, §§ 5(C) and 10(B) have much continuing vitality? Should Justice Tate's view of "plenary authority, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court" be the approach that appellate courts take? Alternatively, should appellate courts prevent any further erosion of Article V, §§ 5(C) and 10(B)? The answers to these questions may depend on what people believe should be the proper role of an appellate court. Should appellate courts have *more* or *less* authority? For the parties in a criminal proceeding, the answers may depend on whether they were successful at the trial court. To the public who elects the judges, the answers may depend on its view of criminal justice.

Those fundamental aspects appear to differ for civil and criminal cases. The difference between civil and criminal appellate jurisdiction is easy to spot. For civil cases, appellate jurisdiction extends to questions of law and fact.[128] For criminal cases, appellate jurisdiction only extends to questions of law.[129] But, as this Article shows, the distance between those two forms of appellate review may not be as far as the language signals. Appellate courts in criminal cases may sometimes review facts. We found at least three standards Louisiana appellate courts apply to review facts in

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127. According to the preamble to the Louisiana Constitution of 1974, the purpose is to:

> protect individual rights to life, liberty, and property; afford opportunity for the fullest development of the individual; assure equality of rights; promote the health, safety, education, and welfare of the people; maintain a representative and orderly government; ensure domestic tranquility; provide for the common defense; and secure the blessings of freedom and justice to ourselves and our posterity.

These bold declarations, although not binding, represent the aspirations for Louisiana law. *See* Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 2–3 (1974) (discussing the drafters' debate over the preamble).

128. *See* LA. CONST. art. V, §§ 5 & 10.

129. *Id.*

criminal matters. More standards may exist, as it was beyond the scope of this Article to discuss *all* issues appellate courts review in criminal cases.

This conclusion may appear uncertain, but that uncertainty reflects the shifting nature of the legal landscape. Thus, though this Article may raise more questions than it answers, its purpose is to reignite interest among Louisiana practitioners, lawmakers, and academics to discuss the scope of appellate review of criminal cases.