Louisiana Law Review

Volume 47 | Number 2
Developments in the Law, 1985-1986 - Part I
November 1986

Criminal Procedure

Cheney C. Joseph Jr.
Louisiana State University Law Center

CRIMINAL PROCEDURE

*Cheney C. Joseph, Jr.**

Right to Trial by Jury—Fines and "Special Costs"

When the Louisiana Fourth Circuit Court of Appeal held in *State v. Henderson*[1] in March, 1986, that defendants are entitled to jury trials in DWI cases, it was easy to predict that the supreme court would grant the State's request for a writ of review. The issue required prompt and definitive review producing a decision applicable statewide.

Chief Judge Redmann's fourth circuit opinion reasoned that DWI defendants are statutorily entitled to jury trials, because the "special costs" (i.e. a drivers license reinstatement fee, a $50.00 fee to defray cost of supervision or jail, a $50.00 fee for the cost of chemical tests for intoxication) imposed by the legislature in addition to the maximum fine of $500.00 made the offense one for which "a fine in excess of five hundred dollars" may be imposed. Thus, under article 779 of the Code of Criminal Procedure, the offense was necessarily triable by a jury of six persons. Judge Redmann treated the "special costs" as a part of the "punishment" assessed for the conviction, and therefore, as a part of the "fine" for purposes of determining the statutory right to jury trial. The issue, of course, concerned the meaning of the term "fine" as used in article 779.

The supreme court correctly held that the term "fine" is used by the legislature to describe the monetary penalty set forth in the statute defining the sanction, and is distinguished from and does not include "costs."[2] The idea that the term "fine" is to include all statutorily provided adverse fiscal consequences which result from conviction seriously misconstrues the meaning of that term. Judges and lawyers clearly recognize the distinction between "fines" and "costs."

There is no doubt a possible danger that the legislature could exploit this distinction by imposing heavy financial consequences on convicted defendants and enumerating them as "costs." Hopefully, this will not occur. Nevertheless, were this to occur, the supreme court would have to address more directly a second point raised by Judge Redmann in

---

* Professor of Law, Louisiana State University.

1. 485 So. 2d 656 (La. App. 4th Cir. 1986).
2. State v. Henderson, 491 So. 2d 647 (La. 1986).

his opinion in *Henderson*. Judge Redmann also expressed the theory that DWI is a "serious offense" because of financial and other adverse consequences flowing from a DWI conviction. While he avoided purporting to "hold" that DWI defendants have a Sixth Amendment right to a jury trial, because the maximum "fine" exceeds $500.00 and because serious collateral consequences result from conviction, his discussion leaves little doubt that he would agree with such a position.

In reversing the fourth circuit,[3] Justice Calogero correctly and wisely avoided definitive treatment of the very sensitive problem of drawing the "jury trial line" in terms of adverse financial effects. Writing for the majority, Justice Calogero simply recognized the basic legislatively intended distinction between fines and costs and merely held that article 779 does not *statutorily* require a jury trial if the maximum "fine" does not exceed $500.00, even though additional special costs do create the possibility that the required expenditures flowing from a conviction may exceed $500.00.

Justice Calogero pointed to the rather clear lack of a "bright line" for ascertaining the Sixth Amendment right to a jury based on possible "monetary assessments" resulting from conviction.[4] The period of six months imprisonment, on the other hand, is a "bright line" in both the Louisiana Constitution and the federal jurisprudence.[5] It appears clear that the Louisiana Supreme Court does not view the mere fact of exposure to adverse monetary consequences exceeding five hundred dollars as triggering the federal constitutional guarantee of a jury trial.[6]

Whether this case will pave the way for judicial approval of legislation increasing the fine limits in article 779 is by no means evident. The rationale of *Henderson* neither approves nor precludes such a move.

Amendment of Sentences by Courts of Appeal

The continuing "skirmishing" over the duty and prerogative of the courts of appeal to correct sentences which do not conform to mandatory leglislative guidelines may finally have come to an end. Prior to *State v. Jackson*,[7] courts were divided on the question of their authority and duty to recognize and correct sentences which failed, for example, to

---

3. Id.

4. See Muniz v. Hoffman, 422 U.S. 454, 95 S. Ct. 2178 (1975).

5. La. Const. art. 1, § 17; Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886 (1970).

6. See Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968). La. Const. art. 1, § 17 does not provide for a right to jury trial based on any amount of fine. The "$500.00 fine" rule is found solely in La. Code Crim. P. art. 779.

7. 452 So. 2d 682 (La. 1984).

deny parole eligibility in cases of armed robbery.[8] Some courts viewed the error as "patent" and therefore, under Code of Criminal Procedure article 920 (2), within the scope of appellate review, even without an objection in the trial court or an assignment of error filed by the state on appeal.

In acting to "correct" the sentences, courts of appeal were evidently serving as guardians of the legislative mandate when the prosecutor failed to act to protect the state's interest in the strict application of mandatory sentencing provisions. On the other hand, some courts felt that correcting unobjected to error on a defendant's appeal in a manner which adversely affected the defendant was inappropriate and served to "chill" the exercise of appellate rights.

In *Jackson*, a unanimous opinion authored by Justice Lemmon, the supreme court denied the courts of appeal the authority to correct sentences unless the prosecution had properly raised the issue in the trial court.[9] The court's holding seemed to be based on a theory that Code of Criminal Procedure article 882 allows only the trial court to amend an illegal sentence, despite the normal restrictions otherwise prohibiting amendment of sentence. The court in *Jackson* also alluded to the "chilling effect" of appellate amendments on the defendant's exercise of his right to appeal.

While *Jackson* was before the supreme court, the legislature amended article 882 to provide explicitly that illegal sentences can be amended by courts of appeal.[10] This writer wrongly predicted that courts of appeal would ignore the amendment, because *Jackson* seemed to be based on constitutional principles.[11]

Instead, the courts of appeal quickly divided on the amendment's effect. In *State v. Fraser*,[12] the first circuit, en banc, concluded that *Jackson* had been legislatively overruled. Judge Lanier's very thorough and scholarly opinion canvassed the issues and concluded that no statutory or constitutional limits prevented appellate courts from noticing and correcting illegally lenient sentences. Judge Lanier, writing for the majority of the circuit judges, concluded that the proper course was to remand if correcting the sentence would impose a more severe sentence than would be *minimally* required by the statute. Otherwise, the appellate

---

8. See State v. Jimmerson, 432 So. 2d 1093 (La. App. 3d Cir. 1983); State v. Davis, 463 So. 2d 733 (La. App. 4th Cir. 1985); State v. Holmes, 462 So. 2d 286 (La. App. 1st Cir. 1984); State v. Liddell, 463 So. 2d 678 (La. App. 4th Cir. 1985); State v. Marien, 457 So. 2d 895 (La. App. 3d Cir. 1984).

9. 452 So. 2d at 684.

10. 1984 La. Acts No. 587, § 1.

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

12. 471 So. 2d 769 (La. App. 1st Cir. 1985).

court should simply amend the sentence to bring it up to minimum requirement.[13]

The supreme court granted writs in *Fraser* and reversed.[14] Justice Lemmon, again writing for the court, held his *Jackson* position by a four to three margin. The majority concluded that the amendment to Code of Criminal Procedure article 882 required a proper trial court objection before an appellate court could consider the correction. The court found "no codal or statutory authority for an appellate court to search the record for patent sentencing errors to the detriment of the only party who sought review."[15] The court held fast to the principle that "a sole appellant's position should not be worsened" by his bringing an appeal.[16]

The supreme court also based its decision on what it perceived to be the "proper allocation of functions between the appellate court and the prosecutor."[17] Justice Lemmon expressed concern that "the appearance of an impartial judiciary" would suffer if the appellate court interposes itself into the role of protecting the state's interest.[18] This, as Justice Lemmon pointed out, is properly the duty of the prosecuting attorney as the advocate representing the state.

Justice Lemmon's carefully crafted opinion avoids pronouncements of constitutional law. As in *Jackson*, he construed legislatively ordained appellate procedures in light of "time-honored procedural rules."[19]

Hopefully, the legislature will be satisfied that the state's interest in enforcement of mandatory penalties can be adequately protected by the district attorney who is, after all, charged by the Louisiana Constitution with the ultimate responsibility for enforcement of criminal laws.[20]

An even more important implication of *Fraser*, particularly when read in light of *Jackson*,[21] and which is discussed later in this article,[22] is the theory that the trial court may be empowered to sentence without compliance with "mandatory" features of sentencing legislation if the prosecution expresses its tacit approval by failing to object. The sentence,

---

13. See Joseph, Developments in the Law, 1984-1985—Criminal Trial and Post Conviction Procedure, 46 La. L. Rev. 445, 458 (1986).
14. State v. Fraser, 484 So. 2d 122 (La. 1986).
15. Id. at 124.
16. Id. at 125.
17. Id.
18. Id.
19. Id.
20. La. Const. art. 5, § 26.
21. 452 So. 2d 682 (La. 1984).
22. See discussion accompanying infra notes 75-88.

if unobjected to and unappealed, becomes a final judgement and a "legal sentence" from a de facto perspective.[23]

Two theories support the view that such sentences are "legal." First, presumably the trial court will sentence without compliance with mandatory features and the prosecutor will acquiesce in such a sentence only if in their judgment a sentence which does comport with mandatory requirements would be "excessive" and, hence, prohibited by the Louisiana Constitution.[24] Second, if the decision to invoke sanctions is a constitutional prerogative of the prosecutor, and the prosecutor fails to invoke those sanctions, then the sanctions do not apply. In an analogous context, Justice Calogero in *Jackson* employed this theory to hold that the mandatory sentencing features of the Code of Criminal Procedure article 893.1 were not to be applied without action by the prosecutor.[25]

Burden of Proof in Cases of Self Defense

The Louisiana Supreme Court faces one of the most interesting questions posed by the 1942 Criminal Code's redefinition of the crime of murder in connection with the issue of the burden of proof in cases of self defense. The jurisprudence places the burden on the state to disprove self defense; that is, the state must negate the defense by proof beyond a reasonable doubt that the defendant *did not* act in self defense.[26] The cases can be traced back to the pre-code era when the mental element of murder was the common law's "malice aforethought."[27] Clearly, at common law, a self defensive state of mind was inconsistent with "malice."[28] Thus self defense defeated the state of mind required for murder. In proving that the defendant killed with "malice," the State had to show that his action was *not* in self defense. Pre-code Louisiana decisions, such as *State v. Ardoin*,[29] clearly reflect this theory.

---

23. In *Fraser*, Justice Lemmon said:

> It is the prosecutor's *duty* to protect the state's interest in obtaining adequate sentences, and the criminal justice system suffers no detriment from the application of time-honored procedural rules which require the parties, and not the appellate court, to complain of some dissatisfaction with the judgment of the lower court in order to obtain any favorable change in the judgment on appeal.

484 So. 2d at 125.

24. La. Const. art. 1, § 20, which provides that "[n]o law shall subject any person to . . . excessive . . . punishment," requires judicial review of sentences imposed in particular cases. State v. Sepulvado, 367 So. 2d 762 (La. 1979).

25. See discussion accompanying infra notes 75-88.

26. For an excellent discussion of the burden of proof in homicide and non-homicide cases, without resolving the issue, see Justice Calogero's opinion in State v. Freeman, 427 So. 2d 1161 (La. 1983).

27. See State v. Ardoin, 54 So. 407 (La. 1911).

28. Id.

29. Id.

In defining murder as a "specific intent" killing,[30] the legislature eliminated the inconsistency between a defendant having an "active desire" to kill (or inflict great bodily harm)[31] and nevertheless believing reasonably that such killing is necessary to save himself (or another).[32] The two states of mind (specific intent and self defense) can coexist without the prior inconsistency.

Nevertheless, Louisiana courts, following the enactment of the 1942 Criminal Code, continued to cite the pre-code cases for the proposition that the state must negate self defense when the issue is "raised" by the evidence.[33]

Recently, in *State v. Cheatwood*,[34] Justice Lemmon, in an extensive footnote, outlined the theoretical distinction between defenses which defeat essential elements of offenses and those which negate culpability, "despite the state's proof beyond a reasonable doubt of all the essential elements."[35] For example, intoxication and mistake of fact are categorized under the first group, because they are "element defeating" defenses. On the other hand, the justification defenses of articles 18 through 22 in effect add a "mitigatory factor" which eliminates culpability despite proof beyond a reasonable doubt of all essential elements of the offense. These latter defenses are "culpability defeating" as opposed to "element defeating."

The *Cheatwood* footnote concludes that, in such cases of true affirmative defenses, the legislature intended only to require the State to carry the burden of proving the elements of the offense and to require the defendant to prove the mitigatory factor. The footnote correctly refers to the State's "constitutional and statutory burden of proving guilt beyond a reasonable doubt."[36] The statutory law does not require the state to disprove exculpatory circumstances.[37]

---

30. See La. Crim. Code art. 30, enacted by 1942 La. Acts No. 43. See also La. R.S. 14:30.1(1) (1986), as amended by 1979 La. Acts No. 74.

31. The "specific intent killings" defined in La. R.S. 14:30 (1986) and La. R.S. 14:30.1(1) (1986) require the State to prove that the offender acted with a specific intent to kill or inflict great bodily harm. Specific intent is defined by La. R.S. 14:10 (1986) in terms of an offender acting with an "active desire" to produce certain criminal consequences.

32. La. R.S. 14:19 (1986) and La. R.S. 14:20(1) (1986) set forth the statutory defenses of self defense.

33. See, e.g., State v. Freeman, 427 So. 2d 1161 (La. 1983).

34. 458 So. 2d 907 (La. 1984).

35. Id. at 910 n.4.

36. Id.

37. The pertinent text of this footnote is as follows:

In *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), the Court said:

"[T]he Due Process Clause requires the prosecution to prove beyond a reasonable

This position becomes the rationale for Judge Wicker's opinion in *State v. Barnes*, in which the fifth circuit affirmed a conviction for aggravated battery.[38] In *Barnes*, the trial court instructed the jury that "the burden of proving that the use of force or violence is justified in non-homicide cases is on the defendant and need only be established by a preponderance of the evidence.[39]

Judge Wicker's opinion is carefully written and thoroughly analyzes the issues. He has squarely presented the Louisiana Supreme Court with the issue of legislative intent to allocate the burden to the defendant. The issue of the constitutionality of such a legislative allocation is also a critical issue and is pending before the United States Supreme Court

---

doubt all of the elements included in the definition of the offense of which defendant is charged. Proof of the non-existence of all affirmative defenses has never been constitutionally required . . . ." 97 S.Ct. at 2327.

Except in a few specific instances, such as La.R.S. 14:63 (trespassing), La.R.S. 14:69 (possession of stolen property) and La.R.S. 14:14 (insanity), Louisiana statutory criminal law does not directly address the burden of proof for "defenses". Nevertheless, there is a logical distinction between those defenses which actually defeat an essential *element* of the offense and those defenses which present exculpatory circumstances that defeat culpability, despite the state's proof beyond a reasonable doubt of all the essential elements. In the first category are defenses such as intoxication (La.R.S. 14:15) and mistake of fact (La.R.S. 14:16), which preclude the presence of a mental element of the offense. When such defenses are raised by the evidence, the state must overcome the defense by evidence which proves beyond a reasonable doubt that the mental element was present despite the alleged intoxication or mistake of fact. Otherwise, the state would fail to meet its constitutional and statutory burden of proving guilt beyond a reasonable doubt of each element of the offense charged. La. Const. Art. I § 16 (1974); La.C.Cr.P. Art. 804; La.R.S. 15:271. However, defenses such as justification (La. R.S. 14:18) are truly "affirmative" defenses, because they do not negate any element of the offense. Compare *United States v. Mitchell*, 725 F.2d 832 (2nd Cir.1983) with *State v. Burrow*, 293 Or. 691, 653 P.2d 226 (1982); see also Model Penal Code, Proposed First Draft No. 1, § 1.12(2) (1961).

It is logical to conclude that the Legislature intended to require the state to prove beyond a reasonable doubt only the elements of the offense and to require defendant to prove by preponderance of evidence the exculpatory circumstances constituting the "affirmative" defense. See W. Lafave & A. Scott, Criminal Law § 8 (1972). The statutory provisions setting forth the state's burden of proof refer only to the requirement that the state *prove* the elements of the crime—not that the state disprove the exculpatory circumstances constituting defenses which defeat criminal culpability despite proof of the presence of all elements of the offense. See La.R.S. 15:271; La.C.Cr.P. Art. 804; former La.C.Cr.P. Arts. 263 and 387 (1928). See also *State v. Freeman*, 427 So.2d 1161 (La. 1983), Lemmon, J., concurring.

458 So.2d at 910.

38. 491 So. 2d 42 (La. App. 5th Cir. 1986).

39. Id. at 44.

at the time of this writing in *Martin v. Ohio*.[40] The writer predicts that the United States Supreme Court will uphold such an allocation of the burden for those states with statutory schemes in which self defense defeats no elements of the offense. The Louisiana Supreme Court will eventually have to decide whether the Louisiana Legislature intended such a result. Justice Lemmon's *Cheatwood* footnote and Judge Wicker's application of that theory certainly make sense. Nevertheless, the legislature may indeed have intended to require the State to shoulder the full burden of proof regarding the culpability of the accused. The court must decide whether the legislature meant to require the State not only to prove all elements of the offense, but also to prove the non-existence of mitigating factors which, if present, will lower or eliminate the level of culpability.

Firearm Sentencing Statutes

In a series of cases handed down on December 2, 1985,[41] the supreme court settled many issues regarding the application of the two Louisiana firearm sentencing statutes. In *State v. Jackson*,[42] the "lead case" of the series, the court announced the critical distinction between Louisiana Revised Statutes (La. R.S.) 14:95.2 and Code of Criminal Procedure article 893.1. The court, overruling *State v. Roussel*,[43] held that La. R.S. 14:95.2 creates a substantive criminal offense of firearm use during the commission of enumerated felonies.[44] Code of Criminal Procedure

---

40. 21 Ohio St. 3d 91, 488 N.E. 2d 166, cert. granted, 106 S. Ct. 1634 (1986).

41. State v. Jackson, 480 So. 2d 263 (La. 1985); State v. Kennedy, 480 So. 2d 299 (La. 1985); State v. Delcambre, 480 So. 2d 294 (La. 1985); State v. Harris, 480 So. 2d 281 (La. 1985); State v. Hogan, 480 So. 2d 288 (La. 1985); State v. Street, 480 So. 2d 309 (La. 1985); State v. Barberousse, 480 So. 2d 273 (La. 1985).

42. 480 So. 2d 263 (La. 1985).

43. 424 So. 2d 226 (La. 1983).

44. La. R.S. 14:95.2 (1986) provides:

> A. Notwithstanding any other provisions of law to the contrary, any person who *uses a firearm* or explosive device at the time he commits or attempts to commit the crime of second degree murder, manslaughter, aggravated battery, simple kidnapping, aggravated escape, aggravated burglary, aggravated arson, attempted aggravated rape, attempted first degree murder, or attempted aggravated kidnapping shall upon conviction serve a term of two years imprisonment for the first conviction and upon conviction for each second and subsequent offense listed in this Section, he shall serve a term of five years imprisonment.
>
> B. The penalty provided herein shall be in addition to any other penalty imposed under the provisions of this Title and such person shall serve the additional term of imprisonment in the same manner as provided in the offense for which he was convicted and without benefit of parole, probation, suspension of sentence or credit for good time and any adjudication of guilt or imposition of sentence shall not be suspended.
>
> C. The prison terms provided under the provisions of this Section shall run consecutively to any other penalty imposed upon conviction of any of the crimes listed in this Section.

article 893.1 defines firearm use during the commission of a felony as an aggravating factor for sentencing.[45] Thus, if the prosecution intends to utilize La. R.S. 14:95.2, "firearm use" must be charged in the indictment, because it is an essential element of a criminal offense defined under La. R.S. 14:95.2. On the other hand, article 893.1 may be invoked by filing pretrial notice without charging firearm use in the indictment. The distinction stems from the fact that article 893.1 does not define a new offense, but rather sets forth a "sentencing factor" or "sentencing element" which, if established by the State, effectively limits the trial court's discretion by mandating imposition of a severe minimum sentence.

In a footnote,[46] the supreme court recognized that the constitutionality of establishing such a "sentencing factor" was before the United State Supreme Court in *McMillan v. Pennsylvania*.[47] Justice Calogero, writing for the court, correctly anticipated the result in *McMillan*, in which the United State Supreme Court upheld a Pennsylvania statute, similar in many respects to Louisiana's.[48] In *McMillan*, the Court recognized the authority of the legislature to define the essential elements of an offense without including sentencing factors which may result in the imposition of a more severe sanction. *McMillan* established that such "sentencing elements" may properly be proven to the judge at a post-conviction proceeding utilizing a "preponderance" standard of proof. The statute at issue in *McMillan*, like Code of Criminal Procedure article 893.1, provided a sentencing procedure which did not *increase* the maximum sentence, but set forth a mandatory minimum.

Jackson requires that the prosecutor provide the defendant with a written pretrial notice of intent to invoke the mandatory sentencing provisions of article 893.1. The court noted that such a notice is "not foreign to our criminal procedure,"[49] referring to the notice requirement set forth in *State v. Prieur*[50] (notice of intent to offer evidence of uncharged crimes). Like the "*Prieur* notice," the firearm sentencing

---

45. La. Code Crim. P. art. 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: (1) 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 (2) 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.

46. 480 So. 2d 263, 269 n.10.

47. 508 Pa. 25, 494 A.2d 354 (1985), cert. granted, 106 S. Ct. 58 (1986).

48. 106 S. Ct. 2411 (1986).

49. 480 So. 2d 271 n.14.

50. 277 So. 2d 126 (La. 1973).

notice must be filed "within a reasonable time before trial"[51] and must describe the act of firearm use.

The "reasonable time before the trial" requirement is easy to comprehend. This gives the defendant an opportunity to prepare to raise whatever defenses he may have to the "firearm use" charge at sentencing. The notice also alerts him to sentencing consequences which may flow from conviction by trial or guilty plea. Requiring that the notice be in writing and furnished to the defendant is a simple requirement which eliminates questions about the content of the notice and whether the defendant was aware of the State's intent to invoke the statute.

The notice requirement can certainly be satisfied by personally serving the defendant with a copy of the notice. Hopefully, mailing a copy of the notice to defense counsel with a certificate from the prosecutor certifying such mailing will also be acceptable, at least if the notice and certificate are also filed in the record of the proceedings. Obviously, the court was not required to define with inalterable precision the details of its notice rule.

The court alluded to the consitutional requirements of "fair notice" but did not hold in *Jackson* that the procedures announced are constitutionally required.[52] In the subsequent case of *State v. Allen*, the court held that the notice requirements are mandated by state and federal "constitutional due process principles."[53] Although the notice procedure could have been grounded on supervisory powers,[54] the court obviously preferred to base it on constitutional grounds.

The most significant result of the notice requirement is that it confirms the implication of the earlier case of *State v.Coleman*[55] that

---

51. The court said:

> Although our concerns in this case are not the same as those in *Prieur*, the need for pre-trial notice to facilitate a more certain and fair administration of criminal procedure exists in both. The *Prieur* notice consists of a written statement, describing the act which the state intends to offer into evidence, furnished the defendant within a reasonable time before trial. Similar notice of the use of a firearm enhancement statute would enable defendant to prepare for his post-trial pre-sentence opportunity to dissuade the trial judge's "finding" that a firearm was used and, just as importantly, alert him timely to the consequence of a guilty plea.

480 So. 2d at 271 n.14.

52. The court said: "We conclude that this pre-trial written notice . . . is not compelled by a need to vindicate the sixth amendment's right to be informed of the nature and cause of an accusation nor by the fourteenth amendment's due process clause." 480 So. 2d at 271.

53. State v. Allen, No. 85-K-2304 (La. Oct. 20, 1986). See also State v. Shows, 488 So. 2d 992 (La. 1986).

54. The court certainly has the authority in exercising its supervisory powers to specify a procedure which is "consistent with the spirit" of the constitutional requirements of fairness. See La. Const. art. 5, § 5 (1); La. Code Crim. P. art. 3.

55. 465 So. 2d 709 (La. 1985).

the decision to invoke the provisions of article 893.1 rests within the constitutional prerogative of the prosecutor.[56] In *Jackson*, Justice Calogero clearly stated that the provisions of article 893.1 are "neither self operative nor imperative absent the district attorney's . . . timely moving for enhancement of sentence."[57] Thus, without formal pre-trial prosecutory action, the trial court can not impose a sentence under article 893.1. After *Coleman*, some courts had held that the trial court was neither required to *nor prohibited* from sentencing under article 893.1 if the prosecution failed to make a request.[58] Following *Jackson*, the option to invoke is not in the hands of the judge, but is exclusivley left to the prosecutor.[59]

Actually the most significant additional sanction not available to the sentencing court absent a formal notice is the power to deny parole eligibility. Defendants sentenced under article 893.1 are not eligible for parole. Even without article 893.1, the sentencing judge can refuse to grant probation and can impose a sentence of five years (or the maximum sentence if that is less than five years). The ability to deny parole is therefore the only feature lost to the trial court if the prosecution fails to invoke article 893.1.[60]

Another significant effect of the firearm sentencing cases is the supreme court's clear recognition that stiff mandatory sentences for felonies committed with firearms may be excessive if extenuating circumstances exist.[61] For example, suppose that a seventy-five year old man with no prior criminal record is convicted of aggravated battery of a younger "tough" who had previously threatened him. Suppose that the old gentleman shot the "tough" in the buttocks as the young man fled when the older man pulled his pistol, thereby clearly eliminating self defense. A five year non-parolable sentence of imprisonment would

---

56. La. Const. art. 5, § 26. See also *Shows*, 488 So. 2d 992.

57. 480 So. 2d at 267.

58. See State v. Collins, 470 So. 2d 549 (La. App. 1st Cir. 1985); State v. Wade, 470 So. 2d 562 (La. App. 1st Cir. 1985).

59. In *Jackson*, the court said: "Absent such pre-trial notice, the penalty enhancement provision contained in Art. 893.1 *shall not* be applied." 480 So. 2d at 271 (emphasis added). See also *Shows*, 488 So. 2d 992.

60. The supreme court has not decided whether the trial court may deny parole eligibility for the entire sentence or for five years of the sentence if the prosecution invokes article 893.1. See *Jackson*, 480 So. 2d at 265 n.3, 270 n.11. See also *Shows*, 488 So. 2d 992; *Allen*, No. 85-K-2304.

61. In State v. Barberousse, 480 So. 2d 273, 280 (La. 1985), the court said:

> Mandatory sentences generally fall within the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. *State v. Prestridge*, 399 So. 2d 564, 582 (La.1981). On the other hand, the constitutional proscription against cruel and unusual punishment will override a legislatively imposed mandatory minimum sentence if, as applied to a given defendant for a given crime the punishment is constitutionally excessive.

be inappropriate and probably excessive, even though mandated by article 893.1. Thus, even if the prosecutor moves timely for article 893.1 enhancement, the trial court must still evaluate the circumstances to decide whether imposition of the mandatory minimum sentence without parole would be constitutionally excessive. The supreme court has by no means implied that mandatory sentences are immune from judicial scrutiny.

Retroactivity of Jackson

The supreme court held in *Jackson* that the newly announced notice requirement for Code of Criminal Procedure article 893.1 will be given only prospective application to cases "which are tried after the date of this opinion" (Dec. 2, 1985), unless the defendant can show he was "prejudiced."[62] However, less than a year after *Jackson*, in *Allen*,[63] the court held that the notice rule of *Jackson* should be applied to all cases pending on direct appeal.

The court in *Jackson* also said that the requirement that La. R.S. 14:95.2 be included in the indictment would be given partially retroactive treatment.[64] Nevertheless, since the court has recognized that "firearm use" under La. R.S. 14:95.2 is an *element* of an offense, full retroactivity may be required. Otherwise, the state will be permitted to sustain a conviction for an offense in which the *elements* were not proven beyond a reasonable doubt.[65]

Application of Article 893.1 to Felonies Involving Only Criminal Negligence

In *State v. Barberousse*,[66] the supreme court upheld the application of acticle 893.1 to a conviction for negligent homicide.[67] Justices Lemmon

---

62. 480 So. 2d at 271. See also State v. Delcambre, 480 So. 2d 294 (La. 1985). By "prejudiced," the court appears to mean that the defendant must show "absence of actual knowledge." 480 So. 2d at 271.

63. *Allen*, No. 85-K-2304, slip op. at 7.

64. 480 So. 2d at 268-69. The court said that the decision would be applicable to cases "which are still subject to direct review . . . that is . . . which have not become final upon first appellate review." Id.

65. The due process clause of the Fourteenth Amendment prohibits convictions unless the state proves every element of the offense to the fact finder beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970). See also Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881 (1975); McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986). By permitting the state to utilze La. R.S. 14:95.2 (1986) without requiring proof beyond a reasonable doubt of "firearm use," the precepts of *Winship* have been violated. Since the *Winship* rule is designed to enhance the "truth finding function," full retroactivity seems appropriate. *Jackson* changes the rule of substantive law, not merely procedure, in overruling *Roussel*. See Allen v. Hardy, 106 S. Ct. 2827 (1986); United States v. Johnson, 457 U.S. 537, 102 S. Ct. 2579 (1982). In *Allen*, Justice Lemmon recognized this problem in footnote 5. No. 85-K-2304, slip op. at 6. The court in *Allen* was not, however, required to deal with the issue.

66. 480 So. 2d 273 (La. 1985).

67. La. R.S. 14:32 (1986). The statute proscribes killing by criminal negligence. La.

and Watson dissented, expressing their belief that the enhanced mandatory firearm sentences were not intended for application to "unintentional crimes." Justice Calogero correctly pointed out that no such limit is found in the statute. Nevertheless, the apparent purpose of the statute is to deter felons from intentionally using firearms in pursuit of their criminal schemes. This purpose is not served in applying the statute to an accidental, although "grossly negligent," discharge of a firearm which causes death. Hopefully the legislature will correct this inequity. There seems no reason to impose greater prison terms on criminally negligent firearm users than on criminally negligent motor vehicle operators.[68]

Application of Article 893.1 to Crimes in which Firearm Use is an Essential Element

In *State v. Street*,[69] the supreme court refused to permit the state to invoke article 893.1 in a case involving a conviction for violation of La. R.S. 14:94 for intentionally discharging a firearm under circumstances where death or great bodily harm could forseeably result. The court reasoned that the legislature described the criminal behavior in terms of firearms use and therefore "must not have intended that the identical conduct, use of a weapon, should trigger a more harsh punishment than that prescribed for the same act."[70] The court applied the "principle of lenity"[71] to resolve the issue in favor of the accused. The court reasoned that the legislature, in enacting penalties for felony offenses in which an essential element is use of a firearm, chose the sanction provided in the statute in light of the danger posed by such firearm use. Thus, the legislature must not have intended for article 893.1 to apply to crimes in which use of a firearm is an essential element.

The writer agrees with Judge Yelverton's approach in the third circuit case of *State v. Victorian*,[72] which was overruled by *State v. Street*.[73] The illegal use of instrumentalities statute, La. R.S. 14:94, may be violated in

---

R.S. 14:12 (1986). The defendant accidentally shot his sister to death.

68. La. R.S. 14:32 (1986) provides for a five year maximum prison sentence which does not prohibit probation or parole. Even La. R.S. 14:32.1 (1986), involving vehicular killings by intoxicated motorists, is punishable by not less than two nor more than five years imprisonment with no limitation on eligibility for probation or parole.

69. 480 So. 2d 309 (La. 1985).

70. Id. at 312.

71. Quoting State v. Cox, 344 So. 2d 1024 (La. 1977), the court said: "'Criminal and penal laws are to be strictly construed and in the absence of an express legislative intent should be resolved in favor of lenity.'" 480 So. 2d at 312.

72. 448 So. 2d 1304 (La. App. 3d Cir. 1984).

73. 480 So. 2d 309 (La. 1985).

several ways,[74] only one of which is the use of a firearm. It is not at all illogical to assume that the legislature intended for the mandatory sentence to apply when commission of that felony is by means of firearm use. It is difficult to believe, as Judge Yelverton pointed out in *Victorian*, that the legislature wished to exclude those crimes directly involving firearm use as an essential element and to include only felonies in which firearm use is not an element.

How Mandatory are Mandatory Sentences?

From the series of cases decided recently dealing with so called "mandatory" sentences,[75] there arises a serious question of how "mandatory" such sentences actually are.

Three theories emerge which combine effectively to give the trial court significant latitude in appropriate cases, despite mandatory sentencing requirements. The first is the theory that such provisions require the invocation of the sanction by the exercise of prosecutory discretion;[76] the second is the theory that such sentences may be unconstitutionally excessive as applied to an individual case;[77] and the third is the theory that appellate courts on review should not alter an unobjected to sentence to the detriment of the appellant.[78]

In *Jackson* and *Fraser*, the supreme court clearly relied on the prosecutor's constitutional prerogative to determine how and under what circumstances to enforce the full range of legislative proscriptions and sanctions available against individuals.[79] Although the district attorney is the lawyer representing the state, he has a constitutionally recognized

---

74. The statute proscribes the "intentional or criminally negligent discharging of a firearm, *or the throwing, placing or other use of any article* . . ., where it is forseeable that it may result in death or great bodily harm." La. R.S. 14:94A (1986) (emphasis added).

75. State v. Fraser, 484 So. 2d 122 (La. 1986); State v. Jackson, 480 So. 2d 263 (La. 1985); State v. Barberousse, 480 So. 2d 273 (La. 1985).

76. *Jackson*, 480 So. 2d 263.

77. *Barberousse*, 480 So. 2d 273.

78. *Fraser*, 484 So. 2d 122.

79. In *Jackson*, the court said: "[This ruling] is prompted by the need to respect both the judge's impartial role and the district attorney's constitutional right to control every prosecution in his district." 480 So. 2d at 271.

In *Fraser*, the court said:

> We also base our decision on the proper allocation of functions between the appellate court and the prosecutor. We note that the appearance of an impartial judiciary is not served when an appellate court supplies an objection to the prosecutor who has not complained that the defendant did not receive the harshest minimum sentence under the penalty statute. It is the prosecutor's duty to protect the state's interest in obtaining adequate sentences, ...

484 So. 2d at 125.

power to "settle" the case.[80] This power has traditionally been recognized in the context of the decision to invoke the various available criminal statutes which may cover a defendant's misbehavior.[81] He is not required to charge an offense which provides for a mandatory sentence. For example, he can choose to charge a defendant with forcible rape[82] (carrying a range of sentences) rather than aggravated rape[83] (carrying a mandatory life sentence). Similarly, he can choose not to invoke the mandatory sentencing provisions of article 893.1.[84]

The second theory probably has the clearest support in the jurisprudence. As *Jackson* indicates, the mere existence of a legislative mandatory sentence does not shield a sentence from constitutional "excessiveness" review based on the particular facts and circumstances of the case. The constitutional prohibition against excessive sentences does not apply only to appellate courts. If the trial court is convinced that imposition of a mandatory sentence would violate "excessiveness" principles, then the trial court's duty is to impose the most severe sentence which can be imposed without being excessive.

If the sentence is less than the legislatively prescribed mandatory sentence, the prosecutor can litigate the "excessiveness" issue by objecting and appealing. If no objection and appeal are forthcoming, the sentence should be deemed to be "legal," because one must logically conclude that both the state and the trial court found that compliance with the mandatory sentence requirement would result in an unconstitutionally excessive sentence.[85]

---

80. See La. Const. art. 5, § 26. The district attorney's complete control over the disposition of a case is also reflected in La. Code Crim. P. art. 691 which gives him the power to dismiss without having to seek approval of the court.

81. See La. R.S. 14:4 (1986); La. Code Crim. P. art 61.

82. La. R.S. 14:42.1 (1986).

83. La. R.S. 14:42 (1986).

84. *Jackson*, 480 So. 2d 263. Following this same line of reasoning, La. Code Crim. P. art 893, which prohibits granting probation for second felony convictions, is probably not "self-operative." If the prosecutor does not invoke that provision, the sentencing judge may choose to ignore it.

There certainly may be a valid basis for distinguishing enhancement provisions found in the penalty provision of the criminal statute itself from enhancement provisions which are found in other statutes. The real issue, however, seems to be the prosecutor's constitutionally recognized enforcement prerogatives. Should the public become unhappy with the manner in which their locally elected district attorney is enforcing the law, the voters can turn him out of office at the end of his term. La. Const. art. 5, § 26 (A).

85. Since the constitutional prohibition against excessive sentences "outranks" the legislatively prescribed mandatory sentences, the legislature's only option is to amend the code of criminal procedure to require the trial court to state for the record at the time of sentencing why it finds that imposition of a mandatory sentence would be excessive. Further, the legislature could direct courts of appeal to remand for such a statement or for resentencing if a non-complying sentence is imposed.

The third theory deals with the role of the appellate courts and is closely tied to the two previously discussed theories. As Justice Lemmon illustrated in *State v. Fraser*,[86] it is well settled that the appellate court does not alter a judgement on appeal to the detriment of the sole appellant where the issue is not raised by the other party.[87] Justice Lemmon would not assume that the legislature intended such an anomalous result in amending article 882 to provide that an illegal sentence can be amended on appeal. Thus, absent a prosecutor's timely effort to seek review, the judgment of the trial court becomes final, and hence "legal."

Further, as is pointed out in *Fraser*, the prosecutor, not the court of appeal, is charged with the duty of protecting the state's right to insist that the full measure of punishment be levied against the defendant for his transgression.[88]

Exhaustion of Peremptory Challenges as Predicate for Showing Prejudice Based on an Erroneous Refusal to Sustain a Challenge for Cause

Prior to a 1983 amendment,[89] Code of Criminal Procedure article 800 explicitly provided that the defendant could not appeal the erroneous denial of a challenge for cause unless he had "exhausted" his peremptory challenges. The comment to the projet of the Code of Criminal Procedure explained that this provision was designed to overrule legislatively jurisprudence which required a defendant to establish that he was "forced to accept an obnoxious juror."[90] The defendant was not required by the proposed article 800 to risk antagonizing a juror by challenging him and then being forced to accept him. The article did require however, that the defendant expend all of his peremptory challenges before completion of the panel. Very logically, the code eliminated the obligation to challenge and be forced to accept, but precluded complaint concerning the denial of a challenge of cause if the defendant still had remaining peremptory challenges.

The 1983 amendment eliminated the "exhaustion" requirement. The purpose for doing so was obviously to speed up the jury selection process. There was apparently a perception that defense counsel would drag out

86. 484 So. 2d 122.

87. See supra note 23.

88. See supra note 79.

89. 1983 La. Acts No. 181.

90. Project of the Louisiana Code of Criminal Procedure, La. State Law Inst., art. 800 Comment (b) (1966). The comment provides that article 800 was designed to overrule State v. Breedlove, 199 La. 965, 7 So. 2d 221 (1942). *Breedlove* imposed the "obnoxious juror" requirement. Article 800 was adopted as proposed in the Projet.

the process in order to exhaust peremptory challenges so that he could preserve the right to raise complaints about denial of challenges for cause. Whether there is any empirical basis for that assumption is certainly beyond the writer's competence to speculate.

In *State v. Vanderpool*,[91] the court confronted a conviction in which the defendant had a valid complaint concerning the trial court's refusal to grant a challenge for cause, but completed jury selection with two remaining peremptory challenges.

Writing for the majority, Chief Justice Dixon traced the legislative history and concluded that removal of the "exhaustion" requirement did not imply that the "harmless error" standard of article 921 was not applicable. By complying with the "exhaustion" requirement, the defendant in effect established that he was prejudiced by having to use one of his peremptory challenges to excuse a juror who should have been excused for cause. Thus, he was improperly deprived of one of his peremptory challenges when presumably he needed all of them because he used all he had available.

In *Vanderpool*, the court said that the trial court erred in failing to remove for cause a Deputy Sheriff actively involved in law enforcement.[92] The deputy was called after ten of the jurors were already seated. After the improper denial of the defendant's challenge for cause, the deputy was peremptorily excused. The defendant still had three of his eight peremptory challenges remaining. He exercised only two more before completion of the panel.

Despite utilizing the "harmless error" rule to affirm, the court did not suggest that it is in effect reviving the "exhaustion" doctrine under the guise of "harmless error." Nonetheless, it is clear from *Vanderpool* that the "harmless error" doctrine will be applied in evaluating the prejudicial effect of denial of challenges for cause, and that failure to exhaust peremptory challenges is a *factor* in the "harmless error" equation.

Application of the Exclusionary Rule to Civil Cases

In *Pullin v. Louisiana State Racing Commission*,[93] the State Police Racing Investigators Unit conducted a warrantless search of a race track barn assigned to Pullin. The search produced various controlled substances and syringes. Possession of such items in the barn was a violation of the rules governing the conduct of a licensed owner and trainer of race horses. The evidence was utilized at a hearing before the track stewards which resulted in Pullin's suspension for three years and the

91. 493 So. 2d 574 (La. 1986).
92. See State v. Simmons, 390 So. 2d 1317 (La. 1980).
93. 484 So. 2d 105 (La. 1986).

imposition of a $2000.00 fine by the Louisiana State Racing Commission. The district court affirmed the commission's action, but the court of appeal reversed.[94] The appellate court found that the evidence was discovered by virtue of an unconstitutional search and was, hence, inadmissiable in the proceeding to sanction Pullin for misconduct.

The supreme court granted the commission's application for review. On original hearing the court reversed the appellate court on the theory that the defendant *consented* to the search.[95] On rehearing, however, in a plurality opinion by Justice Marcus, the court found that, although the warrantless search conducted by the state police violated Pullin's Fourth Amendment rights, the exclusion of evidence in the civil action by the State against Pullin did not automatically result.[96]

Justice Marcus adopted the rationale of the United States Supreme Court in *United States v. Janis*[97] and *INS v. Lopez-Mendoza*.[98] In these cases, both involving civil actions by the government against an individual, the Court balanced the "deterrence" benefits derived from exclusion against the societal cost resulting from the loss of probative evidence. In assessing the deterrence value of exclusion, the Court considered whether the "primary objective" of the government agents conducting the unconstitutional search was enforcement of criminal laws or enforcement of the civil regulatory scheme. To the extent that the "primary objective" was criminal law enforcement, loss of the evidence in a criminal action was sufficient deterrent incentive for compliance with Fourth Amendment standards. Thus, the second societal cost of exclusion in the civil action by the governmental agency against the individual will not provide significantly higher deterrent dividends.

Further, in *Pullin*, the Louisiana Supreme Court evaluated the "cost" in terms of the significance of the proceedings. Pointing to the state's "vital interest"[99] in regulating the horse racing industry to prevent "corrupt, incompetent, dishonest, and unprincipled horse racing practices,"[100] the court balanced in favor of admitting the unconstitutionally seized evidence.

Justices Dennis and Calogero dissented,[101] arguing that the evidence should be suppressed. Both Justices noted that the officers who conducted the unconstitutional search were agents of the same governmental entity which instituted the civil proceedings. The dissenting Justices were

94. 465 So. 2d 122 (La. App. 4th Cir. 1985).
95. 477 So. 2d 683 (La. 1985).
96. 484 So. 2d 105.
97. 428 U.S. 433, 96 S. Ct. 3021 (1976).
98. 468 U.S. 1032, 104 S. Ct. 3479 (1984).
99. 484 So. 2d at 108.
100. Id.
101. 484 So. 2d at 109.

not convinced that the "primary objective" of the Louisiana State Police Racing Investigations Unit was enforcement of *criminal* laws as opposed to enforcement of the racing commission's regulatory scheme. Thus, they were satisfied that the "primary objective" was to seize evidence for use in an adminstrative disciplinary proceeding.

Justices Watson[102] and Lemmon,[103] for different reasons, would not have reached the issue. They concurred because they would have reversed the judgment of court of appeals on other grounds.

The wise approach taken by Justice Marcus does not purport to adopt an inflexible rule. Rather, his balancing approach can fairly accomodate the often competing values of protecting privacy rights and admitting reliable evidence.

Certainly, to the extent that the "primary objective" of the government agent's search is enforcement of an administrative scheme, exclusion will probably be required. Also, if the state's interest in enforcement of the admininstrative scheme is rather low, suppression may result, even if the searching agency's "primary objective" is criminal enforcement.

Application of Exclusionary Rule to Cases Involving Search Warrants Issued by Justices of the Peace

In *State v. A Minor Child*,[104] the supreme court affirmed the suppression by the trial court of marijuana seized under the authority of a search warrant issued by a justice of the peace. Justice Lemmon, writing for a unanimous court, traced the history of the authority of the justice of the peace to issue search warrants. He noted the explicit limitation in Code of Criminal Procedure article 161 which only permits justices of the peace to issue search warrants in "those cases specifically provided by law."

In *Minor Child*, the state relied on the reference in La. R.S. 40:985 to the "judge or magistrate issuing the warrant" being satisfied that "probable cause" exists for issuance of the warrant.[105] The supreme court (as well as the trial judge) correctly found this not to be specific authorization for issuance of search warrants by justices of the peace, although they are "magistrates" as defined in Code of Criminal Procedure article 931(4). The language of La. R.S. 40:985 is very similar

102. 484 So. 2d at 108 (citing original hearing, 477 So. 2d 683).

103. 484 So. 2d at 108.

104. 493 So. 2d 618 (La. 1986).

105. La. R.S. 40:985 (1977) provides: "A search warrant relating to offenses involving controlled dangerous substances may be authorized to be served at any time of the day or night if the judge or magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant."

to 21 United States Code Section 879,[106] and United States magistrates can issue federal search warrants.[107] Louisiana's uniform controlled dangerous substances law is very similar in many respects to the federal law and was obviously copied from the federal legislation. Use of the term "magistrate" in La. R.S. 40:985 is a good example of the confusion sometimes created by borrowing a term from another statutory scheme without carefully evaluating the full significance of using such a term.

The most interesting aspect of *Minor Child* lies in the issue which was *not* discussed. In the closing paragraph of the opinion, Justice Lemmon made reference to the absence of prosecutory assertion of "any other basis for reversing the judgment suppressing the evidence."[108] This may be an oblique and pregnant allusion to the issue of the application of exclusionary policy in such a case.

There are two arguments which the state could have raised but obviously did not.

The first is that exclusion is only appropriate in instances of violations of constitutional (as opposed to statutory) rights. Justice Lemmon recognized this distinction earlier in *State v. Bickham*.[109] Indeed, Code of Criminal Procedure article 703, creating the motion to suppress, specifically refers to suppression of evidence "on the grounds that it was unconstitutionally obtained."[110] The comment explains that "[t]he term 'unconstitutional,' rather than the term 'illegal,' is employed on the theory that a search and seizure can be 'illegal' if some minor aspect of search or seizure . . . was technically contrary to law even if not violative of [constitutional rights]."[111]

In *Minor Child*, the supreme court never questioned the utilization of exclusionary policy to enforce the clear legislative dictate of article 161. Furthermore, there is no hint, as there was in *State v. Langlois*,[112]

---

106. 21 U.S.C. § 879 (1981) provides:

> A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

107. Rule 41 (a) of the Federal Rules of Criminal Procedure provides: "A search warrant authorized by this rule may be issued by a *federal magistrate* or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government." (emphasis added).

108. 493 So. 2d at 620.

109. 404 So. 2d 929 (La. 1981).

110. La. Code Crim. P. art. 703(A), comment (b).

111. La. Code Crim. P. art. 703, comment (b).

112. 374 So. 2d 1208 (La. 1979). In *Langlois*, a wildlife agent arrested defendant for possession of marijuana. The court found that the arrest was unlawful despite the existence of probable cause. The legislative history of the authority of wildlife agents to arrest

that the statutory violation might constitute an "unreasonable search" under article 1, section 5 of the Louisiana Constitution. There is no suggestion that a *statute* authorizing a justice of the peace to issue a search warrant would violate the state or federal constitutions.

The second argument stems from the so-called "good faith" exception to the exclusionary rule carved out in *United State v. Leon*.[113] Although *Leon* has been adopted by several Louisiana courts of appeal,[114] the supreme court has not decided whether *Leon*'s logic applies to the Louisiana Constitution. Thus, approaching the problem in *Minor Child* from the *Leon* perspective would require the court to decide whether suppression is appropriate if an officer relies in good faith on a judicial order. Even if the *Leon* approach is applicable, arguably no reasonably well trained officer could reasonably rely on the validity of a search warrant issued by a justice of the peace.[115]

Nevertheless, since the matter was not briefed and argued by the advocates, Justice Lemmon wisely avoided discussion of the more subtle issue of exclusionary policy.

---

reflects a clear legislative intent to limit their arrest powers to wildlife violations and a list of specifically enumerated offenses. La. R.S. 56:108 (H). The court found that the agent acted under "color of authority" but lacked authority. The court then made the sweeping statement that "such an arrest is an unreasonable seizure for the purposes of Article 1, § 5 of our Constitution." 374 So. 2d at 1211. Later in *State v. Bickham*, 404 So. 2d 929 (La. 1981), the court, in dicta, said:

> [T]his court in the *Patton* and *Longlois* [sic] decisions did not intend to suggest that all violations of statutory restrictions on arrest will be deemed constitutional violations under La.Const. Art. I, § 5 (1974). Nor did we intend to extend the exclusionary rule to include non-constitutional violations of statutes which are not designed to protect the privacy interests of citizens. When the statutory limitation (or duty) alleged to have been violated by the officer is not designed to implement fundamental rights of privacy, this court should not employ the exclusionary rule as a device to enforce such legislative directives. This is, of course, particularly true when the facts strongly support a finding that the officer acted reasonably and in good faith in arguably exceeding the bounds of his authority.

404 So. 2d at 933.

113. 468 U.S. 897, 104 S. Ct. 3405 (1984).

114. See State v. Shannon, 472 So. 2d 286 (La. App. 1st Cir. 1985); State v. Wood, 457 So. 2d 206 (La. App. 2d Cir. 1984); State v. DiMaggio, 461 So. 2d 439 (La. App. 5th Cir. 1984); State v. Ebey, 491 So. 2d 498 (La. App. 3d Cir. 1986). See also State v. Saddler, 490 So. 2d 1155 (La. App. 3d Cir. 1986), in which the court utilized *Leon* and still suppressed the evidence. In *Saddler*, the court found that the affidavit supporting the search warrant was "so lacking in indicia of probable cause" that the policeman who sought (and obtained) the warrant "should have known" of its deficiency, and hence "it was not reasonable for him to rely on the warrant once he obtained it." 490 So. 2d at 1157-58.

115. See *Saddler*, 490 So. 2d 1155.

Modification of Verdict Based on Jury's Unreasonable Failure to Find Affirmative Defense

In *State v. Lombard*,[116] the supreme court made two very significant pronouncements. One involves substantive criminal law, and the other involves criminal appellate procedure.

Lombard and the victim, another high school student, became involved in a heated verbal exchange at an athletic contest. Lombard obviously provoked the victim (a larger fellow) with taunting words and obscene gestures. Nevertheless, it was the victim who first exercised unprivileged force—he walked up a ramp and clearly "threw the first punch." As Lombard was being beaten, Lombard unsheathed a knife and fatally stabbed the victim.

The jury was instructed on manslaughter,[117] self defense[118] and the aggressor doctrine.[119] The jury convicted the defendant of second degree murder, apparently rejecting his argument that the killing was committed in self defense or at least in a "heat of blood" following the victim's provocation.

On appeal, the supreme court relied on *State v. Peterson*[120] for the proposition that "heat of blood" and "sudden passion" are not elements of manslaughter; "rather, they are mitigatory factors in the nature of a defense which exhibits a degree of culpability less than present when homicide is committed without them."[121] Thus, the court recognized that the *elements* of specific intent second degree murder and specific intent manslaughter are the *same*: the killing of a human being combined with a specific intent to kill or inflict great bodily harm.[122] If the state proves

---

116. 486 So. 2d 106 (La. 1986).

117. La. R.S. 14:31 (1986).

118. La. R.S. 14:20(1) (1986).

119. La. R.S. 14:21 (1986).

120. 290 So. 2d 307 (La. 1974).

121. 486 So. 2d at 111. The court continued:

> Since "sudden passion" and "heat of blood" are not elements of the crime, the state does not bear the burden of proving them. Neither is there a requirement in our law that these factors be affirmatively established by the defendant. Instead, the jury is free to infer these mitigatory factors from the evidence. Thus, a manslaughter verdict is responsive to a second degree murder indictment even though the record contains no evidence of "sudden passion" or "heat of blood."

Id. at n.9.

122. La. R.S. 14:30.1(1) (1986) defines specific intent second degree murder as: "[T]he killing of a human being . . . when the offender has a specific intent to kill or to inflict great bodily harm." La. R.S. 14:31(1) (1986) defines manslaughter as:

> [A] homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive

both elements beyond a reasonable doubt, it has proven second degree murder. For the offense to be manslaughter instead of second degree murder, the defendant must additionally prove by a preponderance of the evidence that the killing was committed in the "heat of blood" generated by "adequate provocation." In other words, once the state proves a specific intent to kill or inflict great bodily harm, then the jury should find manslaughter *only if* the defendant proves by a preponderence of evidence that his "hot blooded" desire to kill stemmed immediately from "adequate provocation." *Lombard* makes clear the allocation of burdens.

Lombard also firmly establishes the proposition that the defendant is entitled to have the judgment reduced to manslaughter if his proof of provocation and "heat of blood" are so strong that no reasonable juror could have failed to find the "mitigatory factors" proven by a preponderance of evidence.

Justice Marcus' carefully reasoned opinion in *Lombard* is thus a commendable and logical application of the theory of *State v. Byrd*[123] and Code of Criminal Procedure article 821.[124] *Lombard*, however, is, in a sense, the other side of the coin.

In *Byrd*, the evidence did not reasonably support all of the *elements* of the offense for which the defendant was convicted, but did support conviction for a lesser included responsive offense. Thus, the court modified the verdict to affirm a conviction of the lesser offense because the elements of the lesser offense were *necessarily* found by the jury in convicting for the greater. In *Lombard*, all of the elements of the offense were adequately supported by the evidence, but the jury unreasonably *failed* to find the *mitigatory factors* which reduce the level of culpability without eliminating the presence of essential elements of the offense.[125]

---

an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average perons's blood would have cooled, at the time the offense was committed . . . .

123. 385 So. 2d 248 (La. 1980).

124. La. Code Crim. P. art. 821 is a codification of *Byrd*.

125. The court said:

> A preponderance of the evidence clearly shows that defendant committed the offense in a sudden passion or heat of blood caused by a provocation which would have deprived an average person of his self control and cool reflection. No rational trier of fact could have concluded otherwise. Thus, the jury erred when it found defendant guilty of second degree murder. It should have returned a verdict of manslaughter. Hence, the trial judge erred in failing to modify the verdict and render a judgement for the lesser offense. La.Code Crim.P. art. 821(C).
>
> If the appellate court finds that the evidence, viewed in a light most favorable to the state, supports only a conviction of a lesser included responsive offense,

The *Lombard* approach in effect requires the court to make a *finding* not made by the jury. This approach protects defendants from being prejudiced by a jury's unreasonable rejection of an affirmative defense.[126] The old Louisiana view, reflected in the 1954 decision of *State v. Riviere*,[127] that such matters as "heat of blood" and "adequacy of provocation" are exclusively matters for the jury, is simply not good law. Under *Lombard*, a jury's unreasonable failure to find a mitigatory factor or affirmative defense is reviewable error of law—just as under *Byrd* a jury's unreasonable finding of an element is reviewable error of law.

Closure of Pretrial Proceedings to the Public

In *State v. Eaton*,[128] Judge Hall forsaw the direction of the United State Supreme Court's cases and recognized that the Louisiana Supreme Court's position in *State v. Birdsong*[129] was soon to be overruled. In *Birdsong*, the court held that the trial court should close a pretrial hearing if defendant can show "a *reasonable likelihood* of substantial prejudice to his right to a fair trial."[130] Judge Hall noted that Justice Lemmon, in his concurrence in *Birdsong*, would additionally require the trial court to consider "alternative means of eliminating or minimizing prejudicial effects" and to set forth for the record his "reasons for determining that closing the hearing is the only reasonable method."[131]

In *Eaton*, the trial court closed a hearing (and sealed the record) on defendant's capacity to stand trial in a highly publicized murder case. The trial court found that the *Birdsong* test had been met. The press applied for a writ of review. The court of appeal reversed and ordered that the record be unsealed.

> the court may modify the verdict and render a judgement of conviction on the lesser included responsive offense. La.Code Crim.P. art. 821(E). Manslaughter is a lesser included responsive offense to second degree murder. La.Code Crim.P. art. 814 (A)(3). Accordingly, in the instant case, the verdict of second degree murder should be reduced to manslaughter.

486 So. 2d at 111.

126. See also State v. Roy, 395 So. 2d 664 (La. 1981), reversing a jury verdict for failure to find that the defendant proved his insanity at the time of the offense by a preponderance of the evidence.

The writer has praised the courts of appeal for the first and third circuits for approaching the problem in similar fashion. See State v. Gerone, 435 So. 2d 1132 (La. App. 1st Cir. 1983); Joseph, Developments in the Law, 1982-1983—Post Conviction Procedure, 44 La. L. Rev. 477, 482 (1983); State v. Bryan, 454 So. 2d 1297 (La. App. 3d Cir. 1984); Joseph, Developments in the Law, 1984-1985—Criminal Trial and Post Conviction Procedure, 46 La. L. Rev. 445, 451 (1985).

127. 225 La. 114, 72 So. 2d 316 (La. 1954).

128. 483 So. 2d 651 (La. App. 2d Cir. 1986).

129. 422 So. 2d 1135 (La. 1982).

130. Id. at 1138 (emphasis in original).

131. 425 So. 2d 1266 (Lemmon, J., concurring).

Judge Hall did a masterful and scholarly job of tracing the evolution of this rapidly developing area of the law and predicting the direction of the United States Supreme Court.

In *Gannett Co. v. De Pasquale*,[132] a plurality opinion by former Justice Stewart, the United States Supreme Court held only that the *Sixth* Amendment "public trial right" of the accused provided no right of access by the press and public to pretrial hearings. Subsequent United States Supreme Court cases[133] have recognized that the First Amendment does protect the press' right of access to certain proceedings. Judge Hall cited later federal appellate decisions[134] holding that the First Amendment provides a right of access to certain pretrial proceedings. Indeed, Judge Hall recognized in *Eaton* what would only six months[135] later become the position of the United States Supreme Court in *Press Enterprise v. Superior Court*.[136]

In *Press Enterprise*, the Court found unconstitutional the California rule which, like Louisiana's, permitted closure of a pretrial proceeding upon a showing of "a reasonable likelihood of substantial prejudice." The Court held that a higher burden must be met in order to justify closure of pretrial proceedings which are normally open to the press and public and whose function is influenced in a positive manner by public access. The Court said that the pretrial hearing may be closed "only if specific findings are made demonstrating that first, there is a substantial probability that defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's free [sic] trial rights."[137]

Judge Hall had already adopted essentially the same position in *Eaton*.

Jury Instructions—Review of Error without Objection in the Trial Court

In *State v. Green*,[138] the Louisiana Supreme Court held that the trial court committed reversible error in failing to instruct the jury in

---

132. 443 U.S. 368, 99 S. Ct. 2898 (1979).

133. Richmond Newspapers v. Virginia, 448 U.S. 555, 100 S. Ct. 2814 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S. Ct. 2613 (1982); Press Enterprise v. Superior Court, 464 U.S. 501, 104 S. Ct. 819 (1984); Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210 (1984).

134. In re Herald Co., 734 F.2d 93 (2d Cir. 1984); United States v. Criden, 675 F.2d 550 (3d Cir. 1982); United States v. Chagra, 701 F.2d 354 (5th Cir. 1983); United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982).

135. *Eaton* was rendered on January 22, 1986. *Press Enterprise* was decided on June 30, 1986.

136. 106 S. Ct. 2735 (1986).

137. Id. at 2743.

138. 493 So. 2d 588 (La. 1986).

a trial for third offense theft[139] that the two prior convictions were proven only to enhance defendant's sentence exposure and not to prove the defendant's *guilt* for the theft currently charged.[140] Although defense counsel objected to the reading of the allegations of the two prior convictions to the jury, he did not request a limiting instruction. He relied instead on the argument that the prior convictions were not elements of the offense, but rather were only sentencing factors.[141] When the trial court overrruled his objection, he stipulated to the prior convictions.

On appeal, defense counsel argued that the trial court erred in not giving a limiting instruction. The court of appeal affirmed due to the defendant's failure to object to the absence of a limiting instruction or to request a special instruction as required by Code of Criminal Procdure articles 801 and 841. The supreme court granted writs and reversed. Justice Dennis, writing for the court, concluded that Louisiana's multiple offense procedures fail to comply with minimum due process standards unless a contemporaneous limiting instruction is given whether requested or not.

Justice Dennis noted that in *Spencer v. Texas*,[142] the United States Supreme Court upheld the Texas procedure of offering evidence of both the current offense and the prior convictions of similar crimes at the guilt determination trial. The Texas procedure, however, required that the jury be "charged that such matters were to be considered only for the limited purpose of enhancement of punishment and not for deciding guilt or innocence."[143] Justice Dennis concluded that: "It follows from the high court's rationale that a recidivist procedure is unconstitutional, when it allows evidence of defendant's past crimes . . . during the guilt determination trial, unless the procedure requires a jury instruction as to the limited purpose of the prior crime evidence."[144]

By describing the problem in terms of the facial unconstitutionality of the statute (i.e., its failure to *require* the limiting instruction), Justice Dennis avoided a direct confrontation with the contemporaneous objection rule which is solidly founded in the Code of Criminal Procedure and the jurisprudence. Indeed, Justice Dennis, writing for the court in

---

139. La. R.S. 14:67 (1986) makes the offense of theft a felony (even if the value of the stolen thing is less than one hundred dollars) "[i]f the offender . . . has been convicted of theft two or more times."

140. Such prior convictions are treated as elements of third offense theft and must be alleged in the indictment and proved to the jury. See State v. Bouzigard, 286 So. 2d 633 (La. 1973).

141. See supra note 140.

142. 385 U.S. 554, 87 S. Ct. 648 (1967).

143. 493 So. 2d at 590.

144. Id.

State v. Thomas (on rehearing),[145] in affirming a conviction, went to great lengths to disavow any doctrine of "plain error" in evaluating unobjected to jury instructions which may be fundamentally erroneous. Yet, this is clearly the problem in *Green*: the unobjected to failure to give an appropriate instruction to the jury regarding the effect to be given to the highly prejudicial evidence of prior convictions. Indeed without such an instruction, as Justice Dennis brilliantly demonstrates, there is a real danger that the fact finding may be unreliable.

In *State v. Hamilton*,[146] Justice Lemmon considered the possible harmful effect of an unobjected to jury instruction which violated the constitutional principles enunciated in *Sandstrom v. Montana*.[147] The jury was improperly instructed without objection that "[t]he law holds that a sane person is presumed to intend the natural and probable consequences of his own deliberate act."[148] The jury returned a capital verdict and condemned the defendant to death.

Appellate defense counsel, despite the lack of trial objection, argued for reversal of the first degree murder conviction. Rather than refusing to consider the error due to trial counsel's procedural default, Justice Lemmon thoroughly analyzed the possible prejudicial effects of the instructions and concluded that the error was harmless beyond a reasonable doubt in light of the evidence, the factual issues presented, and the other jury instructions. Thus, the conviction was affirmed.

In footnote seven, Justice Lemmon justified reviewing the error even in the absence of a contemporaneous objection in a capital case "in order to determine whether the error 'render[ed] the result unreliable,' thus avoiding later consideration of the error in the context of ineffective assistance of counsel."[149] He cited *Washington v. Strickland*,[150] the United

---

145. 427 So. 2d 428 (La. 1983).

146. 478 So. 2d 123 (La. 1985).

147. 442 U.S. 510, 99 S. Ct. 2450 (1979).

148. 478 So. 2d at 127 (emphasis omitted). Such an instruction has the effect of relieving the state of proving "specific intent" beyond a reasonable doubt by purporting to create a "presumption of intent." See also Francis v. Franklin, 105 S. Ct. 1965 (1985).

149. 478 So. 2d at 127.

150. 466 U.S. 668, 104 S. Ct. 2052 (1984). In Kimmelman v. Morrison, 106 S. Ct. 2574, 2586-87 (1986), the Court described the "*Strickland*" test as follows:

> In order to establish ineffective representation, the defendant must prove both incompetence and prejudice . . . . There is a strong presumption that counsel's performance falls within the "wide range of professional assistance" . . . . [T]he defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy . . . . The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances and the standard of review is highly deferential. . . . The defendant shows that he was prejudiced by his attorney's inef-

States Supreme Court opinion setting forth the standard for review of such claims.

In *Smith v. Murray*[151] and *Murray v. Carrier*,[152] the United States Supreme Court dealt with application of the "cause and prejudice" standard for federal review of constitutional claims despite procedural defaults in state courts.[153] The Court outlined the relationship between competency of counsel and "cause" for relieving the defendant of his lawyer's failure to take the proper steps required by state law to preserve an error for review. If counsel is otherwise competent, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default,"[154] so long as counsel's performance is not "constitutionally ineffective." On the other hand, "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State."[155] Thus, the Court concluded that "ineffective assistance" is *cause* requiring post conviction collateral review of the error despite the procedural defaults of defense counsel.[156]

---

fectiveness by demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." . . . (Where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"). And, in determining the existence *vel non* of prejudice, the court "must consider the totality of the evidence before the judge or jury."

(citations omitted).

151. 106 S. Ct. 2661 (1986).

152. 106 S. Ct. 2639 (1986).

153. See Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977); Engle v. Isaac, 456 U.S. 107, 102 S. Ct. 1558 (1982). In Murray v. Carrier, 106 S. Ct. 2639, 2644 (1986), the Court described the *Sykes* "cause and prejudice" test as follows:

> *Wainwright v. Sykes* held that a federal habeas petitioner who has failed to comply with a State's contemporaneous-objection rule at trial must show cause for the procedural default and prejudice attributable thereto in order to obtain review of his defaulted constitutional claim . . . . In so holding, the Court explicitly rejected the standard described in *Fay v. Noia*, . . . under which a federal habeas court could refuse to review a defaulted claim only if "an applicant ha[d] deliberately by-passed the orderly procedure of the state courts," . . . by personal waiver of the claim amounting to "'an intentional relinquishment or abandonment of a known right or privilege.'" . . . At a minimum, then, *Wainwright v. Sykes* plainly implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he had not personally waived that claim . . . . Beyond that, the Court left open "for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard."

154. Murray v. Carrier, 106 S. Ct. at 2645.

155. Id. at 2646.

156. The court in *Murray* said:

The writer encourages the Louisiana Supreme Court to follow Justice Lemmon's suggestion in his *Hamilton* footnote in all cases, not simply capital cases. Jury instructions which are "constitutionally erroneous" and which may cause a jury to render an "unreliable" verdict should be reviewed on direct appeal despite the absence of a contemporaneous objection. This procedure is much more efficient than to relegate the defendant to post conviction proceedings.[157] This view also comports with the philosophy that our justice system should not tolerate convictions based on fundamentally unreliable fact finding procedures.

Evaluated in light of the "unreliable result" standard set forth in the *Hamilton* footnote, Justice Dennis' opinion in *Green* would reach the same result. Failure to give a limiting instruction which is vital to the jury's adequate understanding of the role that the prior convictions are to play in their guilt finding process is certainly the kind of error which threatens the reliability of the fact finding and, hence, of the verdict.

> The thrust . . . of our decision in *Engle* is unmistakable: the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. . . . We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington* . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that "some interference by officials," . . . . made compliance impracticable, would constitute cause under this standard.
>
> Similarly, if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not "conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance." . . . Ineffective assistance of counsel, then, is cause for a procedural default.

106 S. Ct. at 2645-47. (citations omitted).

157. See La. Code Crim. P. art. 924 and following. See also 28 U.S.C. § 2254 (1982).