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Criminal Procedure

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CRIMINAL PROCEDURE

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During the 1977 and 1981 Regular Sessions, the legislature, in an effort to provide stiffer mandatory sentences for felonies committed with firearms, enacted two essentially duplicative statutes.[1] The statutes attacked the problem somewhat differently. The approach taken in the first statute, Louisiana Revised Statutes 14:95.2, was to impose a mandatory two year nonsuspendable sentence in addition to whatever other sentence might be imposed. This statute applied only to certain enumerated felonies and only if the offender committed the crime with the use of a "firearm" or "explosive device." Not satisfied with this approach alone, the legislature later enacted Louisiana Code of Criminal Procedure article 893.1, which parallels the firearm-sentencing statutes of several other states.[2] Article 893.1 requires a mandatory five year nonsuspendable sentence in all felony cases in which a firearm is used.

In a series of cases handed down in 1985 and 1986, the supreme court set forth the procedures that the prosecution must follow in order to take advantage of the statutes.[3] According to the court, neither statute is "self-operative"; rather, both statutes require action by the prosecutor before the court can use the enhanced sentencing measures.[4] Under section 95.2, use of a firearm or explosive device is an elemental fact that the prosecutor must charge in the indictment.[5] On the other hand, under article 893.1, use of a firearm is merely a sentencing factor; therefore, all that the prosecutor must do is to file a pre-trial motion requesting enhancement of the sentence in the event of conviction.[6]

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1. See 1977 La. Acts No. 622; 1981 La. Acts No. 139.

2. For an example of a similar firearm sentencing procedure see McMillan v. Pennsylvania, 474 U.S. 815, 106 S. Ct. 2411 (1986).

3. See State v. Kennedy, 480 So. 2d 299 (La. 1986); State v. Jackson, 480 So. 2d 263 (La. 1985), rev'd on other grounds, 496 So. 2d 301 (1986) and 523 So. 2d 209 (1988); 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). See also Joseph, Developments in the Law, 1985-1986—Criminal Procedure, 47 La. L. Rev. 267, 274-80 (1986).

4. *Jackson*, 480 So. 2d at 271.

5. *Jackson*, 480 So. 2d 263 (overruling State v. Roussell, 424 So. 2d 226 (La. 1983)). See also State ex rel. Brisco v. Court of Appeal, 521 So. 2d 396 (La. 1988).

6. *Jackson*, 480 So. 2d at 271.

During the past legislative session, the legislature took several important steps with regard to the enhanced penalty statutes. First, it repealed section 95.2, apparently deciding that one sentencing enhancement provision for firearm-related felonies is enough.[7] Second, it added a series of amendments to article 893.1. Many of those amendments simply incorporated into the article several of the jurisprudential rules that the courts had already engrafted onto it. Others, however, brought about more significant changes.

Of the revisions designed to incorporate the jurisprudential developments under article 893.1, two are particularly noteworthy. The first concerns the jurisprudential rule that the prosecutor file a motion within a "reasonable period" prior to commencement of trial if he plans to seek an enhanced sentence. The article as amended not only enshrines this requirement, but also mandates that the motion set forth the factual basis for the enhancement. These new provisions therefore incorporate the supreme court's ruling that the defendant is entitled to pretrial (not merely posttrial, presentence) notice that the prosecutor will invoke the statute.[8] These provisions also make it clear that the prosecutor's election not to file or his failure to file will preclude application of the mandatory sentence.[9] This scheme is consistent with the view that the prosecutor, as the state's representative, must decide whether to invoke the statute to vindicate the state's interest in the strict enforcement of "firearm laws." Just as the prosecutor can elect to charge the defendant with a lesser offense than that which the facts would support, he can also elect to forgo the sentencing statute when, in his opinion, justice would not be served by requiring the judge to impose the mandatory sentence.[10] Another important jurisprudential rule incorporated by the revisions is that the prosecutor's motion must be tried by adversary hearing.[11]

In addition to codifying the jurisprudence that had grown up under article 893.1, the legislature made several other revisions to the article, most of which concern problems that had not yet arisen in the courts. One such change involves the kinds of evidence that the trial court may receive at the hearing on the prosecutor's motion. Article 893.2 B permits

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7. The writer and Mark Menezes, Deputy Clerk for the Louisiana House of Representatives drafted House Bill 1350 to submit to the Louisiana Sentencing Commission. The Commission did not take formal action on the recommendation. Nevertheless, the bill was introduced by Representative Miller, and Judge Tom Tanner, Chairman of the Sentencing Commission, presented the proposal in the House Committee hearing.

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

9. Id. In *Jackson*, Justice Calogero clearly stated that the provisions of article 893.1 are not self operative or imperative absent the prosecutor's filing of a timely motion.

10. See La. Const. art. 5, § 26.

11. See *Jackson*, 480 So. 2d at 270. See La. Code Crim. P. art. 893.2 A, as enacted by 1988 La. Acts No. 319.

the sentencing court to consider "hearsay" as well as "any evidence introduced" at the trial, the guilty plea hearing, or at other motion hearings in the case. The grant of authority to the trial court to consider "any other relevant evidence" reflects the general view that the sources of information available to a sentencing judge should be fairly broad.[12] Although the contradictory hearing should focus primarily on the issue of "actual use" of a firearm by the defendant, the judge must still exercise significant discretion in determining the final sentence. Thus, the phrase "relevant evidence" should include any evidence that assists the trial court in deciding upon the appropriate sentence, not merely upon whether the defendant "actually used" a firearm.

Although article 893.2 B makes the "hearsay rule" inapplicable at the contradictory hearing, the court should nevertheless be discriminating in admitting evidence. The court should not, for example, consider anonymous, "third hand" accusations of unrelated misconduct unless those accusations bear some indicia of reliability.[13]

A second significant revision to original article 893.1 is found in 893.3 A. Pursuant to that article, the state is required to establish the defendant's use of a firearm by "clear and convincing evidence." Thus, before the court can be compelled to impose the enhanced penalty, it must be satisfied to a high degree of certainty that the defendant in fact used a firearm. Although the simple "preponderance of the evidence" standard would satisfy the "due process" requirement for enhanced sentences,[14] the legislature wisely chose a higher standard in view of the severity of the mandatory minimum sentence.

Another important revision, or rather, set of revisions, affects the trial court's discretion under the article. The article still calls for the same mandatory minimum nonsuspendable sentences;[15] sentences that the trial court is without discretion to alter. Nevertheless, the revised legislation, in at least three respects, restores to some degree the trial judge's discretion to impose what he considers to be an appropriate sentence.

First, the new legislation does not require the judge to impose a sentence without parole.[16] The judge can, however, deny parole eligibility

12. La. Code Crim. P. art. 893.2 B, as enacted by 1988 La. Acts No. 319.

13. See generally Farrow v. United States, 580 F.2d 1339 (9th Cir. 1978); United States v. Weston, 448 F.2d 626 (9th Cir. 1971).

14. See McMillan v. Pennsylvania, 474 U.S. 815, 106 S. Ct. 2411 (1986).

15. La. Code Crim. P. art. 893.3 A and B, as enacted by 1988 La. Acts No. 319.

16. Criminal Procedure article 893.3 C, as enacted by 1988 La. Acts No. 319, provides that "[t]he court *may* order that a defendant . . . shall not be eligible for parole . . . ." (emphasis added).

for a period not to exceed five years.[17] Under the previous legislation there was no possibility of suspension, probation, or *parole*.

Second, the revision of article 893.1 specifically overruled the jurisprudence that allowed sentence enhancement for the use of firearms in cases of negligent homicide.[18] The legislature obviously agreed with Justice Lemmon's dissent in *State v. Barberousse*.[19] According to Justice Lemmon, firearm enhancement is designed to deter people from *intentionally* using firearms during the commission of a felony, not to punish felons who, by using firearms, cause unintentional, but criminally negligent, harm.[20]

Third, the new statute is limited by its terms to enhancing the sentence of a offender who "actually uses" a firearm.[21] This "actual use" language should be construed so that the mandatory sentence is available only in the case of the defendant who physically uses the firearm, that is, the "triggerman." Thus, a codefendant who is equally guilty of the offense under the "principal theory," but does not physically use the firearm, falls outside the article. As to such an offender, the judge retains full discretion to impose whatever sentence he thinks is appropriate. The trial judge, it should be noted, even has some measure of discretion in sentencing the "triggerman": he may, as was noted earlier, deny the "triggerman" parole eligibility.

The last feature of the revised legislation that may have the effect of restoring trial court discretion is the explicit legislative recognition that in some instances imposition of the mandatory minimum sentence may result in a constitutionally excessive penalty. In such cases, the judge is directed to impose "the most severe sentence which is not excessive."[22] Because the supreme court noted in *Barberousse* that mandatory sentences may be unconstitutional under some circumstances,[23] this new legislative provision represents no change in the law. It should, however, serve to remind judges that a sentence which is "excessive" under the circumstances, even if it is mandatory, need not be imposed.[24]

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17. Article 893.3 C provides that the denial of parole may be for a "specified period of time not to exceed five years."

18. Article 893.4 provides that the firearm enhencement "shall not apply to a conviction for a felony in which criminal negligence is an element of the offense."

19. 480 So. 2d 273, 280 (La. 1985).

20. See also Joseph, supra note 3, at 278.

21. Criminal Procedure article 893.3 A, as enacted by 1988 La. Acts No. 319, provides that the enhancement is required if "a firearm was actually used by the defendant . . . ."

22. Id. art. 893.3 D.

23. 480 So. 2d at 280.

24. For a discussion of the eighth amendment's limitations on the imposition of "cruel and unusual" punishment in this context, see Terrebonne v. Butler, 848 F.2d 500 (5th Cir. 1988) (en banc).

The revised provisions that restore judicial discretion apparently are procedural. Because a "procedural" statute ordinarily is given full "retroactive" effect, the revised provisions in question should be applicable to all proceedings conducted after their effective date, September 9, 1988.[25] Thus, a defendant who committed an offense prior to September 9, 1988 but whose penalty enhancement hearing is conducted after that date should be able to take advantage of the procedural changes that allow the sentencing judge to exercise a greater degree of discretion.

Although the legislature did manage to shore up a number of deficiencies in the original article 893.1 through the revisions of 1988, it did not by any means solve all of the problems that are likely to arise in connection with the article. One question left unresolved by the new legislation is whether either or both parties may appeal the trial court's "finding" that the defendant did (or did not) use a firearm in committing the crime. For two reasons it appears to this writer that either party may seek appellate review. First, the "finding" arguably becomes part of the final judgment imposing sentence. Since the firearm sentencing provision applies to felony cases and the judgments in such cases are "appealable," the defendant, at least, should be able to appeal. Second, under article 882 an "illegal" sentence is reviewable on the appeal of the directing party. If a sentence rests upon a finding that is not adequately supported by the evidence or that is clearly erroneous in light of the evidence, that sentence arguably is "illegal." If so, article 882 would allow review of the sentence on the application of the defendant or of the state.

HOME INCARCERATION

During the 1988 Regular Session, the legislature enacted Louisiana Code of Criminal Procedure article 894.2, which provides for "home incarceration" in certain cases, in lieu of supervised probation or traditional incarceration in a jail or prison.[26] Home incarceration, as the term implies, involves "incarceration" as opposed to "probation." This new form of incarceration, however, differs radically from traditional incarceration. One sentenced to home incarceration is required to remain in one's home at all times except for certain designated hours during which one must engage in employment. Thus, home incarceration is simply a newer and expanded version of the "workday release" program,

25. See State v. Collins, 370 So. 2d 533 (La. 1979); State v. Curtis, 363 So. 2d 1375 (La. 1978); State v. Martin, 351 So. 2d 90 (La. 1977). The amendment removes restrictions on the full exercise of trial court discretion and should be given full "retroactive effect."

26. 1988 La. Acts No. 321 was introduced as House Bill 1353 by Representative Miller, Chairman of the House Committe on the Administration of Criminal Justice. The bill was part of the "Governor's package."

which was established by Revised Statutes 15:708 D. Under the "workday release" program, the convicted misdemeanant reports to the sheriff for an eight to ten hour workday and remains at home at night. Both programs impose the same kind of restriction on the convict: "confinement to quarters" except when "on the job."

Availability of Home Incarceration

New article 894.2 A provides that "notwithstanding any other provision to the contrary" the court may incarcerate a defendant at home if "the defendant is eligible for probation *or* was convicted of a misdemeanor or felony punishable with or without hard labor."[27] The "notwithstanding" clause is, of course, designed to assure that the article supercedes penalty provisions that might otherwise mandate incarceration. The latter part of the provision, which concerns persons "convicted of . . . misdemeanor[s] or felon[ies] punishable with or without hard labor," expressly makes the home incarceration option available in all misdemeanor and "relative" felony[28] cases. In such cases, the court is free to select the option even if the defendant would not otherwise be eligible for probation or a suspended sentence. The new statute also applies to felonies that are punishable at hard labor only, but in such cases the rules are somewhat different. These felonies are brought within the ambit of the article by the phrase "if the defendant is eligible for probation." Thus, in order for one convicted of such a felony to be eligible for home incarceration, he must first be eligible for probation.

There is one other significant limitation on the availability of home incarceration. According to article 894.2 A(2), the home incarceration sentence is not available to the sentencing court in felony cases unless the probation division of the Department of Corrections recommends it.[29] The division therefore can prevent home incarceration by simply not recommending its use. If the probation staff is not satisfied that the particular defendant will respond well to a program of home incarceration, they can, in effect, force the judge to choose between straight probation and traditional incarceration.

This feature of the new statute seems reasonable, even though it permits corrections officials to keep the home incarceration option out of the judge's reach. If the experience of the probation staff, whose perspective should be neutral and nonadversarial, indicates that the

27. La. Code Crim. P. art. 894.2, as enacted by 1988 La. Acts No. 321 (emphasis added).

28. The term "relative" felony is used to describe felonies that are punishable with or without hard labor, such as theft, La. R.S. 14:67 (1986), and fogery, La. R.S. 14:72 (1986).

29. La. Code Crim. P. art. 894.2 A(2).

defendant will not adhere to the regime, then the defendant probably would violate the conditions of his home incarceration sentence and therefore would eventually end up serving a term in jail.

Length of Home Incarceration

Article 894.2 G limits the length of a sentence of home incarceration to a maximum term of two years in felony cases and six months in misdemeanor cases.[30] Even when the defendant stands convicted of multiple counts, these limits should define the total maximum term. The periods represent the maximum terms that seem practical. Further, they reflect a legislative assumption that cases involving a more lengthy period of supervision or confinement are not appropriate for home incarceration. Consider, for example, the case of a thirty-two year old man who is convicted of the sexual battery of a twenty-four year old woman. If the circumstances of the case are severe enough to warrant sentencing the defendant to the full ten year maximum,[31] home incarceration obviously is inappropriate. However, if the defendant has a good prior record and did not inflict severe physical harm or emotional distress on the victim, then sentencing him to two years of home incarceration might be an appropriate punishment. The six month limit on home incarceration for misdemeanors reflects yet another legislative concern: the limit effectively forestalls any argument that one who is exposed to a sentence of home imprisonment is entitled to a jury trial under *Duncan v. Louisiana*.[32]

An interesting question raised by these limitations is whether the home incarceration option should apply to offenses for which the minimum term of imprisonment exceeds two years. Despite the "notwithstanding" clause in article 894.2 A, it does not appear that the legislature intended home incarceration as an alternative in such cases. For example, if an offender is convicted of forgery[33] (a felony punishable by ten years imprisonment with or without hard labor) and is then adjudicated a second offender in accordance with Louisiana Revised Statutes 15:529.1, the sentence, according to that statute, is without benefit of probation. Since the offense is punishable with or without hard labor, the defendant, at least at first blush, apparently would be eligible for home incarceration. However, the minimum sentence for such an offender would be one-third of the maximum, or three and one-third years.[34] The two year

30. Id. art. 894.2 G.

31. La. R.S. 14:43.1 (1986).

32. 391 U.S. 145, 88 S. Ct. 1444 (1968). See also Landry v. Hoepfner, 840 F.2d 1201 (5th Cir. 1988) (en banc).

33. La. R.S. 14:72 (1986).

34. La. R.S. 15:529.1 (A)1 (1981).

maximum for home incarceration is inconsistent with this statutory minimum sentence. Because the "notwithstanding" language of paragraph A is not found in paragraph G, which establishes the two year limit, the provisions of the latter paragraph arguably do not derogate from other sentencing statutes. If so, then the three and one-third year minimum sentence should apply to the hypothetical offender.

Conditions

Similar to suspended sentences with conditions of probation, the sentence of home incarceration "may be subject" to any of the conditions for probation prescribed in article 895.[35] That article gives the judge wide latitude to impose any condition "reasonably related to rehabilitation," in addition to any of several specifically enumerated conditions, such as restitution to the victim. Since a jail term is an appropriate condition of probation in felony cases, the judge should be able to force a felony defendant to serve a jail term without hard labor as a condition precedent to home incarceration.[36]

The new statute, in addition to subjecting home incarceration to the provisions of article 895, also provides for the imposition of conditions that are "reasonably related to implementing or monitoring" the sentence.[37] These are the conditions imposed to assure that the defendant stays at home when he is supposed to be there. If these conditions are not effective, the entire scheme will become little more than a farce, and the home incarceration experiment will quickly be abandoned.

Article 894.2 C lists several possible "monitoring conditions," including "electronic or telephonic monitoring" and "home visitation." The development and use of cost effective electronic monitoring devices seems critical to the widespread use and success of the program. However, such technology is not absolutely required for the program's implementation. Since the court may authorize anyone to conduct home visitation, visits could be made by community volunteers or retired law enforcement officers.[38] Employing such persons in home visitation would avoid putting an extra burden on corrections officials, who are already overworked. Funding for these "home visitors" could be derived from the "reasonable supervision fee" that the defendant must pay to the Department of Corrections to "defray the cost of supervision."[39] At any rate, the statute should provide state officials with ample impetus to experiment with various types of monitoring procedures to determine

35. La. Code Crim. P. art. 894.2 B.
36. Id. art. 895 B.
37. Id. art. 894.2 C.
38. Id.
39. Id. art. 894.2 E.

their effectiveness in different kinds of cases. One would hope that implementation will not await development of a statewide electronic monitoring system.

The new statute contains several other stipulations regarding the imposition of conditions. Corrections officers are required to recommend conditions on home incarceration. The sentencing judge apparently neither is limited to those conditions nor is bound to impose them.[40] The judge must specify the conditions when he imposes the sentence, and the defendant "shall be given a certificate" that spells out those conditions.[41] Further, the defendant must "agree in writing" to abide by these conditions.[42]

Conditions imposed under the new article, it should be noted, are not set in stone. The judge may modify or change the conditions during the term of incarceration.[43] Presumably, a written copy of any such new conditions must be provided to the defendant. In the event that the intended modifications impose a more rigorous regime, the sentencing court should, in fairness to the defendant, notify the defendant of its intention to impose the change. The court should also conduct a contradictory hearing before imposing the more "severe" sentence. Such a modification is similar to the "revocation" procedure set forth in article 894.2 H and I and should be conducted in an analogous fashion.

Should the defendant violate any condition that the court properly places upon him, article 894.2 H provides for the remedy. Under that article, if the defendant "violates the conditions" of his home incarceration, the court may impose a sentence of imprisonment upon him. However, this step may be taken only upon the motion of the state or the court and following a contradictory hearing.[44] This requirement of notice and a hearing serves to guarantee the defendant his constitutional right to "procedural due process." The sentencing court, however, is not required to imprison the defendant simply because he has violated some of the conditions of his home incarceration. A variety of options are available to the court.[45]

In the event that the court modifies or revokes the sentence and imposes a term of imprisonment, article 894.2 I precludes the defendant from receiving any credit for time served as home incarceration.[46] How-

40. Id. art. 894.2 A(2).
41. Id. art. 894.2 D.
42. Id.
43. Id. art. 894.2 F.
44. Id. art. 894.2 H.
45. Article 894.2 H provides that the court "may" modify a sentence to imprison if a prosecution violation occurs. Thus "jailing" is not required and an added condition of a short term in jail under article 895 B might be appropriate.
46. La. Code Crim. P. art. 894.7 I, as enacted by 1988 La. Acts No. 321.

ever, the new term of imprisonment, in this writer's opinion, cannot exceed the term of the sentence of home incarceration. In other words, if a judge sentences a defendant to one year of home incarceration in a relative felony case and subsequently revokes the sentence because the defendant has violated some condition (for example, the defendant's regular unauthorized absence from home), the sentence cannot exceed a one year term of imprisonment. The judge should treat the term as fixed from the moment he imposes the sentence of home incarceration. This view is predicated on the writer's opinion, explained earlier, that home incarceration is available only in cases in which relatively brief terms of imprisonment would be appropriate.

Conclusion

It must be hoped that judges will use the new institution of home incarceration as an alternative to jail and not simply as an alternative in cases in which they would normally impose the traditional suspended sentence. If home incarceration can become a viable alternative to jail, then the public can be protected and the defendant punished at a comparatively low cost to the government.

RIGHT TO REBUT ADVERSE INFORMATION SUBMITTED TO SENTENCING COURT

In each of two cases decided last term, *State v. Taylor*[47] and *State v. Davis*,[48] the second circuit court of appeal held that the sentencing court erred in denying the defendant an opportunity to submit evidence contradicting prejudicial information that was contained in the defendant's presentence report. In each case, the court, prior to imposing sentence, disclosed to the defendant certain damaging information that it had received. When the defendant denied the accuracy of the allegations and sought to offer contradictory evidence, the court rejected the offer and stated for the record that it would not take the allegedly false information into account in determining the appropriate sentence. Nevertheless, in each case, the court imposed a severe sentence—a sentence which indicated that the court may have been swayed despite its good intentions.

In *Taylor*, the defendant was indicted for second degree murder, but was permitted by the district attorney to plead guilty to manslaughter.[49] The defendant and the victim had become embroiled in an argument over money that the latter allegedly owed to the former. During

47. 514 So. 2d 755 (La. App. 2d Cir. 1987).
48. 528 So. 2d 615 (La. App. 2d Cir.), writ denied, 531 So. 2d 472 (1988).
49. 514 So. 2d at 756.

the dispute, the defendant shot and killed the victim. Throughout the proceedings the defendant maintained that the shooting was "accidental." After the defendant entered his plea, the assistant district attorney told the probation officer who was conducting the presentence investigation that the defendant had received a "break" when he was allowed to plead to the lesser offense of manslaughter because the killing actually had been intentional. When the defendant learned that the probation officer had included this information in the report, he requested an evidentiary hearing so that he could offer evidence to prove that he accidentally killed the victim while trying to frighten him with the firearm.[50] The trial court denied the hearing on the basis that it had "already concluded . . . that the defendant did not have the specific intent to kill . . . ."[51] Thus, the trial court concluded that "there was no issue upon which defense counsel could submit rebuttal evidence. . . ."[52] The trial court then sentenced the defendant to eighteen years at hard labor.

The court of appeal wisely overturned the sentence and remanded for an evidentiary hearing. The court of appeal, given the apparent harshness of the sentence, was concerned that "[d]espite the trial judge's stated disregard of the remarks, . . . [he] may have been influenced by the [assistant district attorney's] statement . . ."[53] and may have "unconsciously given some weight to the prosecutor's comments . . . ."[54] The court of appeal based its decision on the notion of "minimal due process," a basic requirement of which is that the accused be afforded a hearing to "explain" and "counter" the prejudicial impact of adverse evidence.[55]

The case of *State v. Davis*[56] was virtually identical to *Taylor*. Glenda Davis pled guilty to the charge that she obstructed justice[57] by endeavoring to assist her husband in falsifying evidence of his involvement in drug dealing. During the sentencing hearing the trial court remarked that the defendant, while free on bond following her arrest on the current charge, sold a "PCP-laced cigarette" to a police informant. Defense counsel objected to this information on the ground that it was untrue and asked for an opportunity to offer evidence to rebut the allegation. The trial court, in denying the request, stated: "That's not the basis for my sentence on this charge anyway but—she indicates she

50. La. R.S. 14:31 (2)(a) (1986).
51. 514 So. 2d at 756.
52. Id.
53. Id.
54. Id. at 757.
55. Id.
56. 528 So. 2d 615.
57. La. R.S. 14:130.1 (1986).

had no knowledge of it. I just wanted to ask her about that . . . ."[58]

On appeal the court reversed the sentence and remanded the case for a new sentencing hearing. Judge Lindsay, writing for the court of appeal, explained: "It is clear that a defendant must be given an opportunity to rebut or explain misinformation upon which the trial court relies *or to which it was exposed* in its sentencing decision."[59] Thus, the trial judge's "exposure" to the information, and not his "reliance" upon it, entitled the defendant to the opportunity to rebut.

One may certainly argue that it is unnecessary to afford the defendant an opportunity to disprove what the sentencing judge has already indicated he will regard as unproved. Common sense however dictates a contrary result. Judges, like all human beings, are likely to be influenced in subtle ways of which they may not be fully conscious.

An accurate determination of the facts that are critical to the trial court's final assessment of the defendant's sentence is indispensable if the penal system is to remain fair. The need for such an accurate determination is particularly true when, as in these two cases, the trial court is exposed to information concerning offenses for which the defendant has not been convicted and which involve facts of a complex nature. Whether one who pleads guilty to manslaughter killed the victim intentionally or accidentally obviously should have a significant bearing on the determination of the sentence. Similarly, whether a person distributed drugs while free on bond for obstructing justice in a drug case should also be of critical significance in fixing his sentence. Because that is so, the procedures used to resolve such factual questions may be as important to the accused as the procedures used to determine the facts relevant to guilt.

By defending the results of *Taylor* and *Davis*, the writer does not suggest that consideration of the circumstances presented in those two cases was inappropriate in determining the proper sentences. The purpose of providing a broad range of sentences in criminal cases is to allow the trial court to impose an appropriate sentence given the character of the offender and the circumstances of the offense. There is no doubt that nonelemental facts (those not relevant to proving guilt of the particular offense charged) are relevant in sentencing. However, if those facts are to provide a reliable basis for imposing sentence, then the procedures used to determine their existence must afford the defendant an ample opportunity to put on evidence in an attempt to disprove them.

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58. 528 So. 2d at 619.

59. Id. (emphasis added). See also State v. Bosworth, 360 So. 2d 173 (La. 1978); State v. Trahan, 367 So. 2d 752 (La. 1978).

STANDARD FOR "HARMLESS ERROR" IN THE PENALTY PHASE OF A CAPITAL CASE

In *State v. Lee*,[60] the defendant, who stood accused of committing a brutal murder during the course of an aggravated rape, was convicted of first degree murder and was sentenced to death. During the presentation of the state's case, the trial court erred in permitting the prosecutor to introduce the defendant's confession. The police had obtained the confession in violation of *Edwards v. Arizona*,[61] which prohibits the reinitiation of custodial interrogation after the accused invokes his right to counsel, unless counsel is provided or unless the accused himself is responsible for the resumption of the interrogation. Without the confession the state's case consisted only of strong "circumstantial evidence" of guilt. The issue was whether admission of the confession was "harmless beyond a reasonable doubt" under the test developed in *Chapman v. California*[62] and *State v. Gibson*.[63]

On original hearing the supreme court concluded that because the state's case was so overwhelming, there was no reasonable possibility that the erroneously admitted confession contributed to the conviction. Thus, the court affirmed the jury's verdict at the "guilt phase." The majority recognized that this conclusion did not require the same result regarding the death sentence imposed at the "penalty phase." Nevertheless, the majority concluded that "no rational juror could have had a *semblance of doubt* about guilt that would influence the [death] penalty recommendation."[64] Thus, the court found that the error was "harmless" with respect to the penalty phase as well.

On rehearing, the supreme court, divided four to three, reaffirmed its finding of harmless error with regard to the verdict of guilt, but reversed its finding of harmless error with regard to the death sentence. The court, applying an "objective test of whether there is a reasonable possibility that the error . . . contributed to the jury's decision,"[65] focused on whether the error "might have contributed to at least one juror's decision"[66] to recommend death.[67] Thus, the issue that divided the court was not whether an error could be harmless for the guilt

60. 524 So. 2d 1176 (La. 1987), aff'd in part, rev'd in part on rehearing, 524 So. 2d 1190 (1988).

61. 451 U.S. 477, 100 S. Ct. 2915 (1981).

62. Chapman v. California, 386 U.S. 18, 87 S. Ct. 1228 (1967).

63. State v. Gibson, 391 So. 2d 421 (La. 1980).

64. 524 So. 2d at 1186 (emphasis added).

65. Id. at 1192.

66. Id.

67. In Louisiana, all twelve jurors must agree to recommend death. La. Code Crim. P. art. 905.6. If the jury cannot reach unanimity (or unanimously recommends life) a sentence of life imprisonment must be imposed. Id.

phase but not harmless for the penalty phase, but rather whether, in this case, there was a "reasonable possibility" that the error "contributed to the jury's decision."[68]

The majority based its conclusion primarily on two factors. First, the taped statement displayed an "apparent indifference" on the part of the defendant toward the horror of his crime. The court noted that "a juror listening to the confession" might well have concluded that the defendant "felt no remorse for his deeds."[69] The fact that his tone of voice reflected such remorselessness therefore, could have contributed to the death sentence. Furthermore, the court noted that in a circumstantial evidence case, a juror, although convinced "beyond a reasonable doubt" that the defendant is guilty, may nevertheless have "minor trepidations."[70] This small degree of "uncertainty, though not rising to the level of reasonable doubt regarding guilt, might have led such juror to hold out for a life sentence."[71] The confession, the court suggested, might well have calmed such trepidations.

The supreme court is certainly correct to recognize the difference between harmlessness on the question of guilt and harmlessness on the question of penalty. The court cannot and should not be faulted for being sensitive to the need to assure absolute fairness and rigid adherence to procedural safeguards in capital cases. In a case like *Lee*, the state is entitled to seek a death sentence at a new penalty hearing, a hearing at which the jury will be unaware of the inadmissible evidence.[72] The final test, and the fairest test, of the harmlessness of the error in a case like *Lee* is whether or not the second sentencing jury will likewise recommend death.[73]

CAPITAL CASES—REVIEW OF UNBRIEFED AND UNARGUED ERROR

In *State v. Bay*,[74] the supreme court articulated a new policy for the review of unbriefed and unargued objections in capital cases. As the court noted in *Bay*, objections in non-capital cases that the defendant neither briefs nor argues are deemed abandoned and are not considered by the appellate court (unless the error is "patent"[75]). This rule rests on the quite reasonable assumption that the defendant will forgo briefing an objection only when his counsel has determined that the objection

68. 524 So. 2d at 1192 (emphasis omitted).
69. Id.
70. Id.
71. Id.
72. La. Code Crim. P. art. 905.1 B.
73. In Lee's case, a new penalty trial was conducted and a death sentence was again imposed. The case is presently pending on appeal to the Louisiana Supreme Court.
74. 529 So. 2d 845 (La. 1988).
75. See La. Code Crim. P. art. 920.

either lacked merit or did not concern a ruling that resulted in significant prejudice to the defendant's case. The courts, however, have developed an exception to this general rule for capital cases. Because of the severity of the sentence, the supreme court engages in a much more extensive review of all stages of the case.

In *Bay*, the defendant had been convicted of first degree murder and had been sentenced to death. On appeal, the supreme court found merit to the defendant's contention that the proof of the "aggravating element" charged by the prosecution was not sufficient to sustain the verdict. The court found, however, that the evidence did support a conviction of second degree murder. Accordingly, the court remanded the case for entry of a judgment of guilty of second degree murder and for imposition of a life sentence.[76]

Once it reduced the verdict to the noncapital offense of second degree murder, the court refused to consider objections that the defendant had raised at trial but had neither briefed nor argued on appeal. Thus, the court carved out an "exception to the exception" for capital cases that are transformed on appeal into noncapital cases. The court concluded that the reason for the capital case exception—the court's increased concern in death sentence cases—no longer applies when the sentence is reduced from death to life imprisonment.

Justice Lemmon, concurring in the result, urged the court to look not only to the nature of the punishment, but also to the nature of the unbriefed or unargued error. In an earlier opinion in *State v. Hamilton*,[77] Justice Lemmon had urged the court to review any type of error that "renders the result unreliable."[78] The unargued error in *Bay* was the trial court's denial of a challenge for cause asserted by the defense against a prospective juror. Because the defense later peremptorily excused the juror, he did not actually serve on the jury. Under these circumstances, Justice Lemmon concluded, the error, if any, did not "affect the integrity of the fact finding process."[79]

APPELLATE REVIEW—SUFFICIENCY OF EVIDENCE & "UNREASONABLE CREDIBILITY CHOICES"

In *State v. Mussall*[80] the supreme court, for the first time since adopting the *Jackson v. Virginia*[81] standard for review of the sufficiency

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76. Id. art. 821 C.

77. 478 So. 2d 123 (La. 1985), cert. denied, 478 U.S. 1022, 106 S. Ct. 3339 (1986).

78. 478 So. 2d at 127 n.7 (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) for the standard of reviewing competent counsel).

79. 529 So. 2d at 852, (Lemmon, J., concurring).

80. 523 So. 2d 1305 (La. 1988).

81. 443 U.S. 307, 99 S. Ct. 2781 (1979).

of the evidence, sustained the reversal of a conviction on the ground that the trier of fact unreasonably accepted as "credible" the testimony of a certain witness.[82] The court's unanimous opinion, which was authored by Justice Dennis, provides a much needed clarification of the appellate court's role in reviewing credibility choices made by fact finders. Although *Mussall* does not overturn the rule that the trier of fact is entitled to great deference, it does establish that the trier's credibility findings are subject to review.

Mussall's case involved a strange set of facts. The victim testified that Mussall robbed him of $6,000 cash at gun point. According to the victim, Mussall, whom he had met only once before, called him at his place of employment and tried to interest him in purchasing a boat. The victim said that he at first refused, but finally agreed to the sale after Mussall phoned him several more times. Admitting that he had never seen the boat, did not know where it was located, and did not know much about its owner, the victim testified that he nevertheless gathered $4,000 cash from his savings and borrowed $2,000 more from his sister to make the purchase. With $6,000 cash in an envelope, he claimed, he met Mussall at a designated place in the French Quarter. According to the victim, Mussall then produced a pistol and demanded the cash.[83]

Mussall's version of the events differed widely from the victim's. Mussall testified that he, the alleged victim, and three other men had been partners in a scheme to purchase and resell marijuana. After they pooled their cash, he alleged, the money somehow was misplaced and the marijuana was never obtained. According to Mussall, the other four (including the victim) then accused him of taking the money. Mussall claimed that the victim fabricated the allegations of robbery in retaliation. In support of his testimony Mussall offered evidence that the victim sued him for $6,000 and for $100,000 in damages in connection with the robbery. Mussall also proved that the other three men named in the marijuana scheme sued him for $45,000 in damages, alleging that he had defaulted on a contractual obligation. The suits, Mussall established, were filed on the same day by the same lawyer. The victim, not surprisingly, denied knowing the other three men and, further, claimed that he had selected the lawyer from the phone book.

In a very lengthy discussion of the *Jackson* standard, Justice Dennis emphasized that the reviewing court must view the evidence in the record

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82. The court of appeal reversed the conviction. State v. Mussall, 514 So. 2d 505 (La. App. 4th Cir. 1987). The supreme court granted the state's writ on application, 515 So. 2d 1101 (La. 1987), and then affirmed the reversal, 523 So. 2d 1305 (1988) (on rehearing).

83. Id. If the facts were as recited by the victim, all elements of armed robbery have been established. This, of course, is assuming that the victim's version leaves no "reasonable doubt" regarding its accuracy or credibility in the mind of the fact finder.

"from the perspective of a hypothetical *rational* trier of fact."[84] The court does not direct the appellate courts merely to substitute their own assessments of credibility for those made by triers of fact. Indeed, judges know that without a "face to face" view of witnesses such credibility evaluation is practically impossible[85] and that our system of fact finding reposes great confidence in the capacity of fact finders to discern the truth. Thus, in "viewing the evidence in the light most favorable to the prosecution," the appellate court generally ought to accept the credibility determinations made by the fact finder.

Nevertheless, the writer suggests that under *Mussall* "viewing" the evidence from the "pro-prosecution perspective" does not require that the reviewing court accept every historical fact found by the fact finder. Certainly, once the historical facts are found, the reviewing court must determine whether a *rational* fact finder, relying on those facts, could draw the ultimate inference of guilt beyond a reasonable doubt.

Mussall simply stands for the proposition that the credibility choices made by the fact finder in determining the historical facts are not immune from review. The supreme court and the court of appeal both found "unreasonable" the fact finder's failure to entertain a reasonable doubt concerning the veracity of the victim's story. According to the court, "even a reasonably pro-prosecution rational trier of fact is driven to have a reasonable doubt by the numerous eccentricities, unusual coincidences and lack of corroboration."[86] The circumstances surrounding the victim's version of the incident, the court stated, simply created too many "furrows in any rational fact finder's brow"[87] to support guilt beyond a reasonable doubt.

It is certainly debatable whether the facts in *Mussall* represent a clear example of a case in which the credibility of an eyewitness is so effectively contradicted that a reasonable juror must entertain a reasonable doubt. Nevertheless, the writer applauds the supreme court for firmly establishing the principle that the fact finder's decision to credit a witness's testimony is subject to review using the *Jackson* standard and is not beyond the pale of appellate review.

APPELLATE REVIEW—SUFFICIENCY OF EVIDENCE TO ESTABLISH AFFIRMATIVE DEFENSE

In *State v. Brand*,[88] the defendant was convicted of public bribery.[89] The state alleged that the defendant, Brand, took money from a police

84. 523 So. 2d at 1310 (emphasis in original).
85. See Coy v. Iowa, 108 S. Ct. 2798 (1988).
86. 523 So. 2d at 1311.
87. Id. at 1312.
88. 520 So. 2d 114 (La. 1988).
89. La. R.S. 14:118 (1986).

informant in exchange for supplying confidential information to which she had access. Brand, a safety officer for the Office of Motor Vehicles, contended that the money accepted was not for the purpose of public bribery. Rather, she testified that she believed the money was a "loan," which she would be expected to repay. In addition to denying that she committed the offense, she also raised the defense of entrapment.

The court of appeal upheld the trial court's finding that the evidence was sufficient to support a conviction of public bribery. In addition, the court upheld the finding that the defendant's evidence failed to establish the defense of entrapment.[90] The supreme court granted certiorari to review the decision.

On review the supreme court noted that a defendant in Louisiana criminal proceedings can raise the defense of entrapment without being required to admit all elements of the offense. The supreme court held that entrapment is an affirmative defense that is not "element defeating"; thus, the defendant must prove the defense by a preponderance of the evidence.[91] After defining the defendant's burden of proof, the court went on to find that the evidence presented was not so persuasive that a reasonable fact finder must have found entrapment proven by a preponderance of the evidence.

The court's methodology is interesting. The court viewed the evidence in the light most favorable to the prosecution (as required by *Jackson*) to determine whether the defendant's evidence nevertheless was sufficiently strong such that no reasonable fact finder could fail to find that the defendant met his burden. Unlike the *Jackson*[92] review, in which the court determines whether the jury's *finding* is not reasonably supported by the evidence, the type of review conducted in *Brand* focuses on whether the jury's *failure to find* is unreasonable in view of the evidence. This sort of "reverse *Jackson*" approach has also been adopted by the supreme court in two other contexts.[93] In *State v. Roy*,[94] a case involving the insanity defense,[95] and in *State v. Lombard*,[96] a case

90. 506 So. 2d 702 (La. App. 1st Cir. 1987).

91. The supreme court, citing State v. Cheatwood, 458 So. 2d 907 (La. 1984), stated that "[A]n affirmative defense is one which, rather than negating an essential element of the crime, presents exculpatory circumstances that the prosecutor has proved all the essential elements beyond a reasonable doubt." 520 So. 2d at 117 n.5. See also Mathews v. United States, 108 S. Ct. 883 (1988); State v. Harrington, 332 So. 2d 764 (La. 1976) (plurality opinion).

92. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781 (1979); see also State v. Byrd, 385 So. 2d 248 (La. 1980); La. Code Crim. P. art. 821.

93. See Joseph, supra note 3, at 288-89; Joseph, Developments in the Law, 1982-1983—Post Conviction Procedure, 44 La. L. Rev. 477, 482 (1983).

94. 395 So. 2d 664 (La. 1981).

95. La. R.S. 14:14 (1986); La. Code Crim. P. art. 652 (requiring defendant to prove insanity by a preponderance of evidence).

96. 486 So. 2d 106 (La. 1986).

involving the claim that the defendant's "heat of passion" reduced second degree murder to manslaughter,[97] the court used essentially the same methodology.

The writer noted this distinction in discussing *Lombard* in this law review and applauded the court's extension of the *Jackson* rationale.[98] As was suggested in that article, if the reviewing court determines that the jury unreasonably failed to find that the defendant proved an affirmative defense, the court, in the interest of fairness and efficiency, should not hesitate to reform the verdict to reflect that finding, as the court did in *Lombard* when it reduced the second degree murder judgment to manslaughter. Similarly, if an appellate court in a future case determines that the jury (or judge in a bench trial) unreasonably rejected the entrapment defense, the court should enter a judgment of not guilty as opposed to remanding for a new trial, an action that would afford the state an unfair opportunity to strengthen its case.

APPELLATE REVIEW—RIGHT OF THE NON-APPEALING PARTY TO ATTACK THE LEGAL BASIS OF THE JUDGMENT OF THE LOWER APPELLATE COURT

In *State ex rel. Nicholas v. State*[99] the defendant was convicted of two counts of forgery in connection with the false making and false issuing of a single forged check. The court of appeal correctly set aside the conviction on one of the counts in conformity with the supreme court's holding in *State v. Smith*.[100] In *Smith* the court held that false making and false issuing of a single forged instrument was a single offense, and a defendant cannot be separately punished for both the making and the issuing.[101] Thus, the court of appeal in *Nicholas* affirmed the conviction on the false making count but set aside the false issuing conviction. Given the ground upon which the false issuing count was set aside—double jeopardy—the prosecution would not have been able to retry the defendant on that charge.

The defendant sought writs from the judgment of the court of appeal. Granting the writ, the supreme court felt that the false issuing conviction had been correctly set aside, but not on the ground on which the court of appeal relied. The false issuing conviction should have been set aside and the case remanded for a new trial because the defendant

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97. The *Lombard* case holds that "heat of passion" is a mitigating circumstance, which is an affirmative defense, and must be proved by the defendant by a preponderance of evidence.

98. Joseph, supra note 3, at 290.

99. 520 So. 2d 377 (La. 1988).

100. 475 So. 2d 331 (La. 1985).

101. La. R.S. 14:72 (1986) provides that the false making and false issuing are both means by which the offense of forgery may be committed.

was effectively deprived of his constitutional right to confront and cross-examine two of the prosecution witnesses. In addition, the court found that the false making count, which had been affirmed by the court of appeal, was not supported by sufficient evidence.

The court's ruling left it with an unusual situation, and in a well reasoned opinion by Justice Dennis, found no difficulty in correcting the error, despite the failure of the state to join in seeking the writ. The court rejected the defendant's argument that the court of appeal's mistake regarding the proper reasons for its judgment required his complete discharge.

The court held that despite the failure of the state to seek review when the defendant's application for review was granted, the state was allowed to attack the court of appeal's mistake in vacating the false issuing conviction, which was flawed only by trial error.[102] As Justice Dennis pointed out, even "without filing a cross-appeal or cross-petition, an appellee or respondent may rely upon any matter appearing in the record in support of the judgment below."[103] The court reversed the forgery conviction and remanded the case to the trial court for further proceedings. This result certainly seems to be logical and fair.

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102. 520 So. 2d at 382.
103. Id.