

STATE OF LOUISIANA

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NO. 2001-KA-0215

VERSUS

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COURT OF APPEAL

CALVIN D. RICE

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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MURRAY, J., CONCURS WITH REASONS

I concur in the result based on the trial judge's expressed doubts about the fairness of the legislatively mandated sentence and his belief that he had no discretion to depart from it.

The record reflects that during the multiple bill sentencing hearing, defense counsel argued that the mandated sentence was unconstitutional because defendant's predicate conviction of attempted sexual battery was not designated as a crime of violence by the legislature at the time the offense was committed, to which the trial judge responded:

Well, I understand your argument, and I tend to agree with it, the State Supreme Court has said that ex post facto doesn't apply in these types of situations. So, the legislature can designate something as a crime of violence today and even though the defendant was convicted of it nine years ago, it can serve as a basis to mandate a life sentence. [sic]

This statement, along with the statement of the trial judge quoted by the majority, indicates that although the trial judge had misgivings about the fairness of the sentence, he believed that he did not have the discretion to depart from it. Because of his misconception, I agree that the sentence should be vacated and the matter remanded for consideration under *Dorthey* and re-sentencing.