Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **9th day of July, 2020** are as follows:

BY Boddie, J.:

2018-KH-01012 STATE OF LOUISIANA VS. DERRICK L. HARRIS (Parish of Vermilion)

We granted this writ to consider whether relator Derrick Harris, who is serving a life sentence imposed pursuant to the Habitual Offender law, may litigate a claim of ineffective assistance of counsel at sentencing on post-conviction review. Given the fundamental right involved, after a review of the record, we hold relator's ineffective assistance of counsel at sentencing claim is cognizable on collateral review. Thus, we grant relator's writ, in part, and remand the matter to the trial court for an evidentiary hearing to consider his claim of ineffective assistance of counsel at sentencing.

Retired Judge James Boddie, Jr., appointed Justice ad hoc, sitting for Justice Clark.

Johnson, C.J., concurs for the reasons assigned by Crichton, J.
Weimer, J., concurs and assigns reasons.
Crichton, J., concurs with the result and assigns reasons.
Genovese, J., concurs with the result for the reasons assigned by Crichton, J.
Crain, J., dissents and assigns reasons.

07/09/20

SUPREME COURT OF LOUISIANA

No. 2018-KH-1012

STATE OF LOUISIANA

VERSUS

DERRICK L. HARRIS

ON SUPERVISORY WRIT TO THE FIFTEENTH JUDICIAL DISTRICT COURT, PARISH OF VERMILION

BODDIE, J., Justice ad hoc*

We granted this writ to consider whether relator Derrick Harris, who is serving a life sentence imposed pursuant to the Habitual Offender law[1], may litigate a claim of ineffective assistance of counsel at sentencing on post-conviction review. Given the fundamental right involved, after a review of the record, we hold relator's ineffective assistance of counsel at sentencing claim is cognizable on collateral review. Thus, we grant relator's writ, in part, and remand the matter to the trial court for an evidentiary hearing to consider his claim of ineffective assistance of counsel at sentencing.

FACTS AND PROCEDURAL HISTORY

On October 2, 2008, an undercover officer working with the Vermilion Parish Sheriff's Office located an individual on a street in Abbeville and inquired where he could purchase marijuana. The individual brought the officer to a residence where the officer purchased .69 grams of marijuana for thirty dollars. The officer identified

[1] *See* La. R.S. 15:529.1(A)(4)(b).

*Retired Judge James Boddie, Jr., appointed as Justice ad hoc, sitting for Justice Clark.

relator as the individual who sold him the marijuana. Based on this transaction, the state charged relator with distribution of marijuana. After a bench trial, he was convicted and sentenced to fifteen years imprisonment at hard labor. Trial counsel filed a motion to reconsider sentence, which the court denied. However, after the state filed a habitual offender bill, the court adjudicated relator a fourth-felony offender[2] and resentenced him on November 15, 2012, to the mandated term of life imprisonment without benefits.

Relator's trial counsel did not object to the life sentence nor did he file a motion to reconsider sentence following the habitual offender adjudication, and thus relator was limited to a bare claim of constitutional excessiveness on appeal. *See* La. C.Cr.P. art. 881.1 (E). Citing extensively to *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So.2d 672, the court of appeal concluded that although relator is an extremely minor offender with regards to his present crime, his life sentence is not constitutionally excessive because he committed numerous predicate felonies. The court found the state proved that relator's conduct fell within the conditions necessary to trigger a mandatory life sentence under the Habitual Offender law. *State v. Harris*, 13-0133, pp. 7-8 (La. App. 3 Cir. 12/11/13), 156 So.3d 694, 700-01. (Cooks, J., dissents).

Also on direct review, relator argued in a pro-se brief that both his trial and appellate counsel rendered ineffective assistance. *Id.*, 13-0133, p. 5, 156 So.3d at 699. Although he did not raise an ineffective assistance claim related to the failure to object to the life sentence or file a motion to reconsider sentence, relator did argue that trial counsel had failed to adequately conduct pre-trial discovery and

[2] Relator's prior felony convictions included: (1) distribution of cocaine; (2) simple burglary; (3) theft with a value between three and five hundred dollars; (4) two counts of simple robbery; and (5) distribution of marijuana.

investigation, and that police officers could have been called to narrate the DVD that had captured the alleged drug transaction, as no audio was available. *See id.*, 13-0133, p. 5, 156 So.3d at 699. As to appellate counsel, relator claimed that his attorney should have raised the Confrontation Clause argument that relator was raising in proper person. *Id.* The court of appeal declined to consider relator's claim and instead relegated it to post-conviction relief, as is done with most ineffective assistance claims, given that the adequacy of pre-trial discovery and decisions of representation regarding the calling of witnesses and lodging of arguments may require the testimony of those involved. *See id.*, 13-0133, p. 6, 156 So.3d at 700.

Judge Cooks dissented, finding the trial court had erred by imposing a life sentence on relator, who had honorably served his country in Desert Storm and, after returning from service, had suffered from a drug addiction for which he had been unable to receive assistance from the U.S. Veterans' Administration. While acknowledging that relator met the criteria requiring a life sentence under the habitual offender statute, she opined that he was not the type of individual the legislature had envisioned sending to prison for the remainder of his life when it had enacted La. R.S. 15:529.1(A)(4)(b). Judge Cooks noted it was clear from the record that the trial judge had been unaware of his authority and duty to deviate from the mandatory sentence if the court found justification for reducing the sentence. Judge Cooks also noted the habitual offender transcript reflected the trial judge's opinion that relator did not deserve a 30-year sentence for selling .69 grams of marijuana, let alone a life sentence as a habitual offender. She argued a remand was in order for further proceedings to evaluate the evidence presented at the sentencing hearing that supported a downward departure from the mandatory sentence. *Id.*, 13-0133, 156 So.3d at 703-05 (Cooks, J., dissenting).

The court of appeal denied rehearing on January 22, 2014. Relator's pro-se application seeking review of the court of appeal's affirmance was filed on February 27, 2014, six days too late in this Court. Notably, if it had been filed six days too late now, the application would have been treated as timely because the Court now affords pro-se prisoner litigants a 10-day grace period in an effort to honor the "mailbox rule" of *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L. Ed. 2d 245 (1988). In 2014, however, the Court treated late pro se applications on direct review as "untimely KOs." Under the "untimely KO" procedure, a late application, rather than being denied, was considered as if it were an application for post-conviction relief (albeit one that had bypassed the lower courts), which afforded late pro-se filers a limited form of review. *See State v. Jacobs*, 504 So. 2d 817, 818 n.1 (La. 1987). However, because in this case the sentencing claims raised by relator were not cognizable on collateral review, they were not addressed, and this Court denied his writ application *sub nom. State ex rel. Harris v. State*, 14-0476 (La. 11/7/14), 152 So.3d 169 (Hughes, J., would grant).

Relator then timely filed an application for post-conviction relief in the district court, raising two claims. Claim I alleged trial counsel was ineffective for failing to: present an entrapment defense, inform relator of a seven-year plea offer, and file a motion to reconsider sentence. Claim II alleged the sentencing court was unaware of its authority to deviate below the mandatory life sentence required by the Habitual Offender law when such sentence would be constitutionally excessive.

On March 3, 2016, the district court[3] rendered judgment denying Claim II, regarding the trial court's sentencing error. The district court noted that, generally, courts have held that challenges to a multiple offender adjudication cannot be heard

[3] Judge Laurie Huelin of the Fifteenth Judicial District Court ruled on relator's application for post-conviction relief. Judge Durwood Conque, who had tried and sentenced relator, retired before the application was filed.

on post-conviction relief, citing *State v. Hebreard*, 98-385 (La. App. 4 Cir. 3/25/98, 708 So. 2d 1291; *State v. Daniels*, 00-3369 (La. 11/2/01), 800 So. 2d 770; *State v. ex rel. Brown v. State*, 03-2568 (La. 3/26/04), 870 So. 2d 976; and *State v. Shepard*, 05-1096 (La. 12/16/05), 917 So. 2d 1086. The district court also ordered an evidentiary hearing on the ineffective assistance of counsel claims. (Claim I).

The evidentiary hearing was held on February 10, 2017. The district court first considered whether counsel had erred by failing to convey a plea offer, based on a seven-year plea offer noted in counsel's file, which was signed by the assistant district attorney, but which relator contended had never been conveyed to him. Relator testified that he remembered having received a 10-year plea offer which was later followed by a 20-year plea offer. Relator also testified that his memory was faulty due to past abuse of crack cocaine, but he was sure he would have remembered a seven-year offer. The court found that his "selective memory challenges his credibility and ability to accurately recall past events[,]" *see* tr. ct. ruling, and that his self-serving testimony was insufficient to carry his burden of proof.

The district court then considered whether counsel had erred by failing to argue an entrapment defense. The court noted that relator failed to produce any new evidence at the hearing concerning this issue and therefore failed to establish that his counsel had not exercised reasonable professional judgment. The court further noted that relator failed to show he had been deprived of a fair trial as required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 674 (1984). Therefore, he failed to carry his burden of proof.

Lastly, the district court addressed whether relator's counsel was ineffective for failing to file a motion to reconsider sentence. Noting that the courts have generally held that challenges to a habitual offender adjudication cannot be heard post conviction, and that the defendant had failed to produce any new evidence

concerning this issue, the court declined to consider it. The district court rendered a judgment with written reasons on March 3, 2017, denying relator's application for post-conviction relief.

Relator then sought writs in the court of appeal. The court of appeal noted that defendant did not contest the trial court's ruling but rather argued a claim of ineffective assistance of counsel at the February 10, 2017[4] evidentiary hearing on relator's application for post-conviction relief. Because this issue had not been presented to or ruled upon by the trial court, the court of appeal observed that the issue was not properly before it, citing to Uniform Rules—Courts of Appeal, Rule 1-3. *State v. Harris*, 17-0545 (La. App. 3 Cir. 4/24/18) (unpub'd).[5]

Relator subsequently sought writs to this Court, wherein he asserts his underlying claims that his counsel was ineffective for failing to: inform him of a seven-year plea offer, raise an entrapment defense, and file a motion to reconsider sentence after the court had imposed the life sentence. He also claims he was denied due process because the trial judge who sentenced him was unaware that he had the authority to deviate below the statutorily mandated sentence of life imprisonment. Additionally, relator claims the court of appeal erred when it found that he did not contest the ruling of the district court, arguing that he inadvertently asked the appellate court to vacate the judgment of the third circuit when it was apparent that he was, in fact, seeking review of the district court's ruling. Lastly, relator claims post-conviction counsel erred at the evidentiary hearing by failing to call trial counsel to testify regarding the plea offer and defense strategies.

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[4] The court of appeal judgment erroneously states February 4, 2017 as the date of the evidentiary hearing.

[5] However, the appellate court construed the application too rigorously. *See State ex rel. Johnson v. Maggio*, 440 So.2d 1336, 1337 (La. 1983) (a pro-se petitioner "is not to be denied access to the courts for review of his case on the merits by an overzealous application of form and pleading requirements or hyper-technical interpretations of court rules.").

In response, the state argues that it is irrelevant whether defense counsel rendered ineffective assistance by failing to convey a 7-year plea deal because relator fails to show that the state would have also foregone recidivist sentence enhancement as part of that deal. As for relator's claim pertaining to ineffective assistance of counsel and excessiveness of sentence, the state argues this claim is barred from collateral review pursuant to *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So. 2d 1172 and La.C.Cr.P. art. 930.4(A)[6]. The state characterizes *Melinie* as "definitive" and argues that any change to it should be done legislatively.

Counsel with the Promise of Justice Initiative ("PJI") enrolled to represent relator pro bono and filed a reply brief. He contends that relator's life sentence for selling less than a gram of marijuana shocks the conscience, is excessive, and the result of ineffective assistance of trial counsel. He argues that *Melinie*, to the extent it holds a claim of ineffective assistance of counsel at sentencing is not cognizable on collateral review, precludes any remedy for a substantial number of Sixth and Fourteenth Amendment violations, even though a defendant has a constitutional right to the effective assistance of counsel at sentencing. He also asserts that direct review is ill suited to address most claims of ineffective assistance, particularly those involving sentencing, as those claims are not amenable to being decided based solely on the trial record, nor does direct review promote fairness or efficiency. Lastly, counsel contends relator's sentence should be vacated as constitutionally excessive, or, at the minimum, his claim of ineffective assistance of trial counsel at sentencing should receive meaningful review.

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[6] La.C.Cr.Pr. art. 930.4(A) provides:

> Unless required in the interest of justice, any claim for relief which was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence shall not be considered.

We granted relator's writ application[7], ordered briefs[8] and docketed the matter for arguments. We now consider whether his claim of ineffective assistance of counsel relating to his sentencing is cognizable on post-conviction review, notwithstanding *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172.

LAW AND DISCUSSION

In 1976, an ad hoc committee was appointed by the Louisiana Supreme Court to study habeas corpus in Louisiana. Cheney C. Joseph, Jr., *Developments in the Law: Postconviction Relief*, 41 La.L.Rev 632 (1981). The post-conviction reform measures undertaken pursuant to 1976 La. Acts 448 and 1980 La. Acts 429 were aimed at streamlining Louisiana's former habeas procedure by easing the burden of repetitive applications, unnecessary hearings, and administrative difficulties. *State ex rel. Glover v. State*, 93-2330, pp. 9-10, 660 So.2d 1189, 1195. "As a result of the *ad hoc* committee's study, legislation was adopted to curb repetitive writs and to authorize the supreme court to promulgate rules providing for an alternative method of handling the disposition of writ applications for persons subsequent to conviction." Cheney, *supra*. Act 448 amended La.C.Cr.P. art. 359 to authorize the Supreme Court of Louisiana to adopt rules relative to applications by convicted persons in custody. Cheney, *supra*, at n. 36.

While the original intent was to address concerns related to repetitive applications, unnecessary hearings, and administrative difficulties surrounding production of prisoners, nothing in the legislative record indicates that the committee intended to reduce the original criteria for post-conviction relief enumerated in

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[7] *State v. Harris*, 2018-1012 (La. 10/8/19), ___ So. 3d ___ , 2019 WL 5386321.

[8] In addition to the defense and state briefs, the Court had the benefit of amicus briefs from the Louisiana Public Defender Board, the Louisiana District Attorneys Association, and the Louisiana Center for Children's Rights.

La.C.Cr.P. art. 362. The original La.C.Cr.P. art. 362(9) provided relief from lack of due process situations.[9] As noted in La.C.Cr.P. art. 362(9), this provision was added to the overall article because "[s]tate habeas corpus should provide relief from lack of due process situations. If this is done adequately, federal intervention under 28 U.S.C. 2254 will be reduced considerably." *See* La.C.Cr.P. art. 362 (1967) (official revision comment (i)(4)). Further, "[i]t is impossible to draft an article which in detail covers all due process situations. Therefore, reliance must be placed upon the use of the 'due process' phrases as such." *Id.* Although La.C.Cr.P. art. 362(9) provided relief if "[h]e was convicted without due process of law" (and does not mention sentencing), the illustrative list of examples does include claims involving sentencing errors, including claims of ineffective assistance of counsel at sentencing.[10] In one example concerning "[l]ack of counsel, denial of counsel, and incompetent counsel," the comment cited to *United States ex rel. Marcial v. Fay*, 267 F.2d 507 (2d Cir. 1959). *See* La.C.Cr.P. art. 362 (1967) (official revision comment (i)(3)). *Fay* involved a petition for habeas corpus wherein the United States Second Circuit held that the evidence failed to establish that the absence of counsel when the sentence was imposed violated the requirements of due process. More specifically, his petition had attacked the validity of his habitual offender sentence and requested that he be resentenced as a first offender, as his first conviction was without due process of law. *Fay*, 267 F.2d at 508. Another example listed *United States ex rel. Sheffield v. Waller*, 126 F. Supp. 537 (E.D. La. 1954), *affirmed* 224

[9] The 1980 amendment deleted grounds which relate exclusively to post-conviction challenges, which are now found in La.C.Cr.P. art. 930.3. 1980 La. Acts 429 deleted former paragraph (9) which had read "[h]e was convicted without due process of law" while adding a new paragraph relating to holding prior to trial in violation of due process. *See* La.C.Cr.P. art. 362 pertaining to custody with court order, official revision comment-1980 and historical and statutory notes.

[10]Although the comment had noted that in most of the cases cited relief was denied because the applicant failed to support the facts alleged, it also stated that it is clear that if the applicant had, the courts would have granted habeas corpus.

F.2d 280 (5th Cir. 1955), *cert. denied*, 350 U.S. 922, 76 S.Ct. 217, 100 L.Ed. 807 (1955) based on "'[a] totality of events' including undue haste in prosecuting, failure of counsel to make proper objections or to reserve any bills of exception, failure to appeal a death sentence (and many other events) adding up to a denial of due process." La.C.Cr.P. art. 362 (1967) (official revision comment (i)(3)).

The legislature enacted the post-conviction code articles in 1980, *see* La.C.Cr.P. art. 924, *et seq*., and set forth the limited grounds for relief that may be urged in an application for post-conviction relief. *See* La.C.Cr.P. art. 930.3.[11] Louisiana statutory law now distinguishes post-conviction relief from habeas corpus relief. *See* La.C.Cr.P. art. 351; *State ex rel. Glover v. State*, 93-2330, p. 9, 660 So.2d at 1195. "[P]ost conviction relief, which is procedural in nature, and speaks to matters of remedy, is not criminal litigation *per se;* rather, post conviction relief proceedings, which are designed to allow petitioners to challenge the legality of their confinement, are hybrid, unique, and have both criminal and civil legal

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[11] La.C.Cr.P. art. 930.3 provides:

> If the petitioner is in custody after sentence for conviction for an offense, relief shall be granted only on the following grounds:
>
> (1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana;
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> (2) The court exceeded its jurisdiction;
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> (3) The conviction or sentence subjected him to double jeopardy;
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> (4) The limitations on the institution of prosecution had expired;
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> (5) The statute creating the offense for which he was convicted and sentenced is unconstitutional; or
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> (6) The conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana.
>
> (7) The results of DNA testing performed pursuant to an application granted under Article 926.1 proves by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted.

characteristics." *Id.*, 93-2330, p. 12, 660 So.2d at 1197. "The former post-conviction habeas corpus was, and the PCR petition is, a *collateral* action to test the detention of a criminal defendant *after* his sentence and conviction have become final." *Harrison v. Norris*, 569 So.2d 585, 590 (La. App. 2 Cir. 10/31/90) (citing to La.C.Cr.P. arts. 924-930.7 and Revision Comments).

Furthermore, "[t]hese post-conviction relief rules are modeled on the American Bar Association Standards for Post-Conviction Remedies and the proposed (since modified and adopted) federal rules governing post-conviction applications by state prosecutors under 28 U.S.C. § 2254." *See State ex rel. Tassin v. Whitley,* 602 So.2d 721, 723 (La. 7/10/92); Cheney C. Joseph, Jr., *Developments in the Law: Postconviction Relief*, 41 La.L.Rev 632 (1981). The ABA standards for post-conviction remedies state:

> A postconviction proceeding should be sufficiently broad to provide relief:
>
> (a) for meritorious claims challenging judgments of conviction and sentence, including cognizable claims:
>
> (i) that the conviction was obtained or sentence imposed in violation of the Constitution of the United States or the constitution or laws of the state in which the judgment was rendered;
>
> (ii) that the applicant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of the state in which judgment was rendered, or that the conduct for which the applicant was prosecuted is constitutionally protected;
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> (iii) that the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;
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> (iv) that the sentence imposed exceeded the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law;

(v) that there exists evidence of material facts which were not, and in the exercise of due diligence could not have been, theretofore presented and heard in the proceedings leading to conviction and sentence, and that now require vacation of the conviction or sentence;

(vi) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence where sufficient reason exists to allow retroactive application of the changed legal standard;

(b) for meritorious claims challenging the legality of custody or restraint based upon a judgment of conviction, including claims that a sentence has been fully served or that there has been unlawful revocation of parole or probation or conditional release.

ABA Standards for Post-Conviction Remedies § 22-21 (1980).

Under La.C.Cr.P. art. 930.3, the first ground provides for relief if "[t]he conviction was obtained in violation of the constitution of the United States or the state of Louisiana." Due to its broad scope, most post-conviction claims fall into this category, because they implicate the constitutional rights to due process and a fair trial and concern the process by which the *conviction was obtained*. In 1996, this Court rendered the decision in *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172, finding that La.C.Cr.P. art. 930.3 provides no basis for review of claims of excessiveness or other sentencing error post-conviction.[12]

The principle that claims of ineffective assistance—whether at an original sentencing hearing or with regard to a habitual offender adjudication—are not

[12] In its entirety, *Melinie* provides:

> We grant the application in order to rule definitively on the issue of whether a person may raise the question of excessiveness of sentence in a post-conviction application. La.Code Crim.Proc. art. 930.3, which sets out the exclusive grounds for granting post-conviction relief, provides no basis for review of claims of excessiveness or other sentencing error post-conviction. *See State v. Gibbs,* 620 So.2d 296 (La.App. 3d Cir.1993); *cf. State ex rel. Glover v. State,* 93-2330, p. 7, 11-14 (La. 9/5/95), 660 So.2d 1189, 1194, 1196-98. Accordingly, relator's claim for post-conviction relief based on the excessiveness of his sentence is denied.

cognizable on collateral review originated in brief writ dispositions only, and was never the subject of a reasoned opinion of the Court. Based on the absence of the word "sentence" from the first ground for post-conviction relief provided in La.C.Cr.P. art. 930.3(1), *Melinie* concluded that sentencing claims are not cognizable post-conviction. In support, *Melinie* cited only a third circuit opinion, barely longer than a paragraph, which said essentially the same thing, and the Court's much more thorough prior opinion in *State ex rel. Glover v. State*, 93-2330 (La. 9/5/95), 660 So.2d 1189. In *Glover*, the Court found there was no ex post facto obstacle to creating a three-year post-conviction limitations period.

Glover, however, did not involve or address the issue of which claims are cognizable and which are not cognizable post conviction. From the pinpointed pages in the citation to *Glover*, it can be inferred that the Court in *Melinie* cited *Glover* for the proposition that the legislature is not constitutionally obligated to provide any post-conviction review. While it is one thing to find that the post-conviction review process is not constitutionally required, it is another to find that a particular class of claims is not included in that review process. In the more than two decades since *Melinie,* the Court has extended its holding in similarly brief per curiams to find that article 930.3 provides no basis for claims that counsel erred at sentencing, or during a habitual offender adjudication or at the sentencing following such adjudication.[13]

[13] *See State v. Cotton*, 09-2397 (La. 10/15/10), 45 So.3d 1030 ("[A] habitual offender adjudication . . . constitutes sentencing for purposes of *Melinie* and La.C.Cr.P. art. 930.3, which provides no vehicle for post-conviction consideration of claims arising out of habitual offender proceedings, as opposed to direct appeal of the conviction and sentence."); *State v. Thomas*, 08-2912 (La. 10/16/09), 19 So.3d 466 (claims of "ineffective assistance of counsel at sentencing are not cognizable on collateral review pursuant to La.C.Cr.P. art. 930.3 and *State ex rel. Melinie v. State*"); *but see State v. Francis*, 16-0513, p. 3 (La. 5/19/17), 220 So.3d 703, 704–05 (granting writs to remand for a hearing on, *inter alia*, claim of ineffective assistance of appellate counsel for failure to pursue an excessive sentence claim on appeal where claim was preserved by trial counsel: "Although La.C.Cr.P. art. 930.3 'provides no basis for review of claims of excessiveness or other sentencing error post-conviction,' relator's complaint that counsel erred by failing to challenge the

While the conclusion no sentencing claims are cognizable on collateral review purports to be grounded in the language of the post-conviction articles, several leaps of logic are necessary to get from what is actually written in those articles to the notion that ineffective assistance of counsel at sentencing is not cognizable on collateral review.

As a general matter, statutory interpretation begins "as [it] must, with the language of the statute." *Bailey v. United States*, 516 U.S. 137, 144, 116 S.Ct. 501, 506, 133 L.Ed.2d 472 (1995). Louisiana criminal statutes must be "given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." La. R.S. 14:3; *State v. Muschkat*, 96- 2922, pp. 4–5 (La. 3/4/98), 706 So.2d 429, 432. What "a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Norman J. Singer, Statutory Construction, 46:03, p. 135 (6th ed. 2000); *see also State v. Barbier*, 98-2933, p. 5 (La. 9/8/99), 743 So.2d 1236, 1239 ("[T]he first order of business is to look at the language of the statute itself.").

Notably, La.C.Cr.P. art. 934(3) indicates that "[e]xcept where the context clearly indicates otherwise, as used in this Code: 'Convicted' means adjudicated guilty after a plea or after trial on the merits." However, the revision comments from 1966 indicate that "[t]he definition of 'convicted' is stated as 'adjudicated guilty,' so that a definite point in time can be established to determine when a man is 'convicted.' This definition will be of some importance in dealing with bail, because the bail rules are different after a defendant has been convicted." La.C.Cr. P. art. 934 (1966) (official revision comment (c)). Furthermore, La.C.Cr.P. art. 930.3 references the word "sentence" in three separate subsections, specifically in

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sentence on appeal is cognizable post-conviction and, in fact, must be addressed on collateral review if it is to be addressed at all.") (internal citation omitted).

subsections 3, 5, and 6;[14] thus, it appears that the legislature to some extent was trying to differentiate between conviction and sentence. However, nothing indicates why the legislature chose to invoke both 'conviction' and 'sentence' in the provisions dealing with double jeopardy, the declaration of unconstitutionality of the specific statute, or the ex post facto application of law, but not in the seemingly equivalent provisions dealing with other constitutional violations.

A defendant is entitled to the effective assistance of counsel during both the guilt and sentencing phases.[15] This principle is sacrosanct and is firmly ensconced in our federal and state constitutions. *See* U.S. Const. amends. VI and XIV; *see also* La. Const. art. I, § 13 ("At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment."). Thus, *Melinie* insulates a fair number of ineffective assistance claims by cutting off any recourse for the consideration of ineffective assistance at sentencing upon collateral review.

Under the standard for ineffective assistance of counsel set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), adopted by

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[14] Specifically, those subsections provide:

(3) The conviction or sentence subjected him to double jeopardy;

(5) The statute creating the offense for which he was convicted and sentenced is unconstitutional; or

(6) The conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana.

[15] *Cf. Lafler v. Cooper*, 566 U.S. 156, 165, 132 S.Ct. 1376, 1385-86, 182 L.Ed.2d 398 (2012) ("The precedents also establish that there exists a right to counsel during sentencing in both noncapital, and capital cases." (citations omitted)); *State v. Carpenter*, 390 So.2d 1296, 1299 (La. 1980) ("the sixth amendment right to counsel applies to all critical stages, including sentencing"), and the right to the effective assistance of counsel also applies, *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 1449, n.14, 25 L.Ed.2d 763 (1970) ("The right to counsel is the right to the effective assistance of counsel."); *see also Glover v. United States*, 531 U.S. 198, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) (error resulting in the increase of sentence of any amount can result in ineffective assistance).

this Court in *State v. Washington*, 491 So.2d 1337, 1339 (La. 1986), a reviewing court must reverse a conviction if the defendant establishes (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect. The *Strickland* test of ineffective assistance affords a "highly deferential" standard of review to the actions of counsel to eliminate, as far as possible, "the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.[16]

Sentencing is a critical stage of the proceeding, at which there is a right to the effective assistance of counsel, and direct review is ill suited to address such a constitutional violation because it will often require further evidentiary development. This Court recognized as much in *State v. Francis*, 16-0513 (La. 05/19/17), 220 So.3d 703, holding that a claim of ineffective assistance of appellate counsel (for failure to raise an excessive sentence claim on appeal) is cognizable on collateral review. In *Francis*, the Court remanded the petitioner's post-conviction claims for an evidentiary hearing, noting that "[a]lthough La.C.Cr.P. art. 930.3 'provides no basis for review of claims of excessiveness or other sentencing error post-conviction,' . . . [a] complaint that counsel erred by failing to challenge the sentence on appeal is cognizable post-conviction and, in fact, must be addressed on collateral review if it is to be addressed at all." *Id.*, 16-0513, p. 2, 220 So.3d at 704-05.

[16] *Strickland* involved a claim about whether the defendant received the effective representation at sentencing.

There are two primary routes to challenge a conviction and sentence. A direct appeal is limited to the record, *see* La.C.Cr.P. art. 920, and, therefore, is not designed to address ineffective assistance of counsel claims. Claims presented on direct appeal are limited to issues which were submitted to the trial court. Because it is highly unlikely that a defendant's trial counsel would raise an ineffective assistance of counsel claim in the trial court as to his own performance, the issue is rarely submitted to the trial court (or subject to direct review on appeal). As noted in *Coleman v. Goodwin*, 833 F.3d 537, 542 (5th Cir. 2016), "[t]he Louisiana courts, as noted above, have likewise repeatedly held that ineffective assistance of trial counsel claims should typically be brought in collateral proceedings, and if a claim is brought on direct appeal and the court determines that it cannot be decided on the record, the court will direct that it be brought in a collateral proceeding" and cases that do not follow this procedure appear to be outliers. Further, "Louisiana's procedural system 'makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal....'" *Id.* at 543 (citations omitted). Additionally, appellate counsel rarely will be able to adequately present an ineffective assistance of counsel claim to an appellate court without first asking for a remand to have the record expanded and the issue first determined by the trial court, which, while possible, is not practical.

In contrast, an application for post-conviction relief allows for the presentation of claims that could not be addressed on direct review, including ineffective assistance of counsel, suppression of *Brady* evidence, juror misconduct, or any other cognizable ground that relies on evidence outside the trial record. Thus, even though ineffective assistance of counsel claims are more appropriately addressed in post-conviction proceedings, *Melinie* requires ineffective assistance of counsel at sentencing claims to be raised on direct review. *Melinie*, however, does

not explain how a defendant can raise such collateral, non-record based claims in an appeal that is limited by statute to record-based claims.

In the instant case, trial counsel did not object to the life sentence nor did he file a motion to reconsider sentence following the habitual adjudication proceeding, and thus, relator was limited to a bare claim of constitutional excessiveness on direct review. Due solely to the internal procedural rules of this Court in 2014, we considered relator's writ application to be untimely and treated it as a post-conviction relief application, thereby barring any review of his excessive sentence claim.

Notably, this Court granted a similar, timely, and counseled writ that same year to vacate the excessive sentence of another defendant who was punished harshly as a recidivist. *See State v. Mosby*, 14-2704 (La. 11/20/15), 180 So.3d 1274[17]. Mosby was a 72-year-old, wheelchair-bound female with a substance abuse problem. The Court vacated her 30-year habitual offender sentence for distribution of cocaine, having found it grossly disproportionate under the circumstances. *Id*. Like relator's trial counsel here, Mosby's trial counsel did not file a motion to reconsider the sentence. *See State v. Mosby*, 14-0215, p. 8 (La. App. 4 Cir. 11/26/14), 155 So. 3d 99, 106.

Relator complains that the ineffective assistance of his counsel at the habitual offender sentencing resulted in his constitutionally excessive life sentence. He also contends that counsel did not inform the trial court that it could deviate downward from a statutory minimum sentencing provision of the Habitual Offender law when warranted. [18] *See State v. Dorthey*, 623 So. 2d 1276 (La. 1993); *see also State v.*

[17] Justice Weimer and Justice Guidry dissented and would have denied the writ application. Justice Clark dissented with reasons.

[18] As previously mentioned, relator claimed that the trial judge was unaware that he possessed the authority to deviate downward from the statutorily mandated life sentence, and therefore due

Johnson, 97-1906, (La. 03/04/98), 709 So. 2d 672. An objectively reasonable standard of performance requires that counsel be aware of the sentencing options in the case and ensure that all reasonably available mitigating information and legal arguments are presented to the court. Since Louisiana law prohibits excessive sentences, and requires that individual circumstances be considered, counsel acts unprofessionally when he fails to conduct a reasonable investigation into factors which may warrant a downward departure from the mandatory minimum. *See generally Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (holding that decision of counsel not to expand their investigation into petitioner's life history for mitigating evidence beyond PSI and department of social services records fell short of prevailing professional standards, and inadequate investigation prejudiced petitioner).

Counsel's failure to object to the sentence or file a motion to reconsider at the habitual offender proceedings deprived defendant of an important judicial determination by the trial court, and also failed to correct any inaccurate assumptions concerning the law and the court's capacity to deviate downward if warranted. This failure also deprived the appellate court of an opportunity to review the district court's decisions (or errors of law), as well as deprived it of the opportunity to review any evidence in support of defendant's excessiveness claim that he could have put into the record before the trial court.

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process mandates that his life sentence be vacated and the matter remanded for resentencing. Evidence of that claim would be of support in proving his ineffective assistance of counsel at sentencing claim, as trial counsel should have ensured that the court was aware of its responsibilities under *Dorthey*. *See* ABA Standards for Criminal Justice Standard on Sentencing 4-8.3 ("Defense counsel should become familiar with the client's background, applicable sentencing laws and rules, and what options might be available as well as what consequences might arise if the client is convicted."; "Defense counsel should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused.")

In *Francis*, this Court made an exception to *Melinie*, allowing the defendant to assert upon collateral review his claim that appeal counsel was ineffective for failing to challenge his sentence on appeal. In the interest of justice, we are compelled to do the same for relator Derrick Harris; otherwise, he would be left without a viable remedy for a possible constitutional violation depriving him of due process of law.

DECREE

Accordingly, for the above reasons, we grant relator's writ, in part, and remand the matter to the district court to conduct an evidentiary hearing on relator's claim that trial counsel rendered ineffective assistance at sentencing.

GRANTED IN PART AND REMANDED.

07/09/20

SUPREME COURT OF LOUISIANA

No. 2018-KH-1012

STATE OF LOUISIANA

versus

DERRICK L. HARRIS

ON SUPERVISORY WRIT TO THE 15TH JUDICIAL DISTRICT COURT, PARISH OF VERMILION

WEIMER, J., concurring.

During the defendant's sentencing hearing for the underlying offense of selling 0.69 grams of marijuana, the trial judge noted that the defendant was "not a drug kingpin" and is "not what we would think of as a drug dealer so far as I can tell." These were key reasons the trial court did not impose the maximum sentence of thirty years: "As I was saying, I think that the *maximum sentence is not what is called for here* … ."[1] Despite these remarks, when the state's multiple offender bill was later considered, the trial court imposed a life sentence.

The crux of the defendant's position is that in response to the state's multiple offender bill, his trial counsel made an insufficient evidentiary presentation and no legal argument to persuade the trial court that deviating from the statutory sentence was required because a life sentence is constitutionally excessive.[2] The state responds that in post-conviction proceedings, such claims are barred pursuant to **State ex rel.**

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[1] These quotes and a fuller narration of the trial court's views are available in **State v. Harris**, 13-133, p.2 (La.App. 3 Cir. 12/11/13), 156 So.3d 694, 703 (Cooks, J., dissenting).

[2] In the context of habitual offender sentencing, this court has emphasized the trial court's "control over the entire sentencing process" provides "the option, indeed the duty, to reduce such sentence to one that would not be constitutionally excessive." **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993).

Melinie v. State, 93-1380 (La. 1/12/96), 665 So.2d 1172 (per curiam). In **Melinie**, this court ruled: "La. Code Crim. Proc. art. 930.3, which sets out the exclusive grounds for granting post-conviction relief, provides no basis for review of claims of excessiveness or other sentencing error post-conviction." ***Id.***

However, **Melinie** did not address the present situation, in which the defendant argued that his trial counsel failed to respond to the trial court's obvious dismay at the prospects of imposing a maximum sentence. While lessening the sentence is certainly the defendant's endgame, the instant case is conceptually different because it is not the sentence *per se*, but the alleged non-involvement by defense counsel in the multiple bill proceeding that forms the basis of the defendant's claim. I agree with the majority that due process mandates that the merits of this claim must be actually considered by the trial court. Simply put, the procedural default proposed by the state would not satisfy the demands of justice to give meaningful review to these allegations that defense counsel's silence at a critical stage of the proceedings paved the way for a constitutionally excessive sentence.[3]

While I am not prejudging the merits as to whether the defendant was prejudiced by trial counsel's performance at the multiple bill sentencing, the interests of justice require consideration of the narrative appellate counsel emphasized to this court. According to the present narrative, the defendant developed a substance abuse problem after returning from his honorable military service in Desert Storm, and his prior offenses were nonviolent and related to his untreated dependency on drugs. Moreover, from the absence of scales and packaging at the defendant's home, it

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[3] The majority correctly observes that a sentencing hearing is a critical stage of a criminal proceeding for purposes of the right to effective assistance of counsel, as this court previously explained in **State v. Carpenter**, 390 So.2d 1296, 1299 (La. 1980) ("the sixth amendment right to counsel applies to all critical stages, including sentencing").

appears that the quantity of marijuana in this case is not indicative of involvement in the drug trade, but rather related to the defendant's individual use, as the total (0.69 g) obtained by police most likely sufficed for only one or two cigarettes.[4]

I also hasten to add that in no way do I advocate that courts should broaden the strictures of La. C.Cr.P. art. 930.3(1) (limiting relief to the situation whereby a "conviction was obtained in violation of the constitution") (Emphasis added.). As just noted, the strictures of Article 930.3(1) must yield here to the due process concerns that the defendant's life sentence allegedly was, at the very least, facilitated by defense counsel's failure to lodge a proper objection to the statutory sentence as being constitutionally excessive.[5] I further emphasize that I perceive the due process concerns of this case to be unique, with origins in defense counsel allegedly not responding to an obvious invitation from the trial court's comments to challenge a habitual offender sentence as constitutionally excessive. In light of the forgoing, I respectfully concur with the majority's remand for a hearing as to whether trial counsel rendered effective assistance based on the unique facts and procedural posture of this matter.

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[4] See Greg Ridgeway and Beau Kilmer, *Bayesian Inference for the Distribution of Grams of Marijuana in a Joint*, 165 Drug and Alcohol Dependence 175, 175-78 (Aug. 2016) (surveying arrestee records pertaining to 10,628 marijuana transactions between 2000 and 2010, researchers determined the average weight of marijuana in a "joint" to be 0.32 g. As a point of comparison, the typical cigarette contains approximately 1.0 g of tobacco.).

[5] It is a longstanding principle that "to the extent the legislative enactments deprive an accused of due process of law, then they must yield." **State v. Rideau**, 246 La. 451, 165 So.2d 282, 284 (1964).

07/09/20

SUPREME COURT OF LOUISIANA

No. 2018-KH-01012

STATE OF LOUISIANA

versus

DERRICK L. HARRIS

ON SUPERVISORY WRIT TO THE FIFTEENTH JUDICIAL DISTRICT COURT, PARISH OF VERMILION

Crichton, J., concurs and assigns reasons:

While I agree with the result reached by the majority, I write separately because I believe the importance of the issue decided here, and the impact of this decision, requires the Court to speak with absolute clarity. In my view, *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172, was wrongly decided and should be overruled to the extent it stands as an insurmountable obstacle to affording relief on collateral review when counsel has rendered ineffective assistance in a sentencing proceeding. The majority opinion, however, leaves it to the reader to surmise as to the impact of the majority's ruling and does not explicitly reveal that *Melinie* is overruled.

State ex rel. Melinie v. State is a three-sentence per curiam opinion that was issued by the Court without briefing or oral argument and in response to an unopposed writ application by a pro-se prisoner litigant. The issue addressed by *Melinie* was not assigned as error or addressed in the pro-se writ application at all. This Court arrived at its holding peremptorily and sua sponte. The effect of that holding, particularly as it has been expanded by *State v. Cotton*, 09-2397 (La. 10/15/10), 45 So.3d 1030, and *State v. Thomas*, 08-2912 (La. 10/16/09), 19 So.3d

466, has been sweeping and bars the defendant here from any relief in post-conviction proceedings. Defendant received a sentence of imprisonment for life without parole as a fourth-felony offender for selling 0.69 grams of marijuana to an undercover officer for $30. Counsel rendered textbook ineffective assistance by failing to object to the sentence, failing to file a motion to reconsider the sentence, and failing to correct the sentencing court's apparent unawareness of its authority to deviate below the mandatory life sentence required by the habitual offender law when such sentence would be constitutionally excessive, as it is here. Nonetheless, defendant is entirely without a remedy for this violation of his Sixth Amendment right to effective representation because of *Melinie* and the equally terse and unreasoned per curiams that followed it. The Court today correctly recognizes that simply cannot be.

A defendant is entitled to the effective assistance of counsel during *both* the guilt and sentencing phases. "At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment." La. Const. Ann. Art. I, § 13. This principle is firmly embedded in both the state and federal constitutions. The State has been unable to explain why the legislature would have decided that the Sixth Amendment somehow matters less during sentencing than it does during trial. Specifically, the State cannot explain why the legislature would have chosen to leave a defendant whose errors by counsel result in a constitutionally excessive sentence (and one that is shielded from full review on appeal) without a remedy—like the defendant here whose sentence was only reviewed for "bare excessiveness" because of counsel's failure to object or move to reconsider it. Furthermore, defendant and amici advocating on his behalf convincingly establish

that confining review of this one particular variety of ineffective assistance of counsel to direct appeal—despite the fact that review of all other forms of ineffective assistance occurs by way of post-conviction proceedings—eliminates any meaningful opportunity to review it at all. Such an approach is nonsensical, and the Sixth Amendment cannot be eviscerated in this fashion.

Based on the absence of the word "sentence" from the first ground for post-conviction relief provided in La.C.Cr.P. art. 930.3(1), *Melinie* concluded that sentencing claims are not cognizable post-conviction. In support, *Melinie* cited only a conclusory one-paragraph opinion from the Third Circuit Court of Appeal, which stated essentially the same thing, and this Court's much more thorough prior opinion in *State ex rel. Glover v. State*, 93-2330 (La. 9/5/95), 660 So.2d 1189. In *Glover*, the Court found that there was no ex post facto obstacle to creating a three-year post-conviction limitations period.

Glover did not address the cognizability of post-conviction claims. From the pinpointed pages in the citation to *Glover*, however, one can surmise that *Melinie* cited *Glover* for the proposition that the legislature is not constitutionally obligated to provide any post-conviction review. There are several logical steps missing between the proposition that post-conviction review is not mandated and the conclusion, which is actually a matter of statutory interpretation never explicitly performed in *Melinie*'s brief analysis, such as it is, that sentencing claims are not cognizable post-conviction. It is one thing to find that the post-conviction review process is not constitutionally required. It is quite another to find that a particular class of claims is not included in that review process. Here, the majority correctly performs that task of statutory interpretation and finds that violations of the Sixth Amendment are no longer barred from collateral review simply because they

occurred during sentencing rather than during trial. To the extent *Melinie* stands for the contrary proposition, today the Court appears to overrule it but does so only implicitly without admitting as much.

I recognize that *Melinie* has been applied many times over several years, and I do not seek to upset such a long-standing precedent lightly. For example, in *Ramos v. Louisiana*, 590 U.S. —, 140 S.Ct. 1390 (2020), the United States Supreme Court overruled long-standing precedent to find that the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense. In doing so, the Court found that stare decisis was not a sufficient reason to maintain a precedent that the court considered to be poorly reasoned and wrongly decided. It also found that the "reliance interests" urged by Louisiana and Oregon were outweighed by the need to preserve the Sixth Amendment itself:

> In its valiant search for reliance interests, the dissent somehow misses maybe the most important one: the reliance interests of the American people. Taken at its word, the dissent would have us discard a Sixth Amendment right in perpetuity rather than ask two States to retry a slice of their prior criminal cases. Whether that slice turns out to be large or small, it cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties. Indeed, the dissent can cite no case in which the one-time need to retry defendants has ever been sufficient to inter a constitutional right forever.

Ramos, 140 S.Ct. at 1408. Likewise here, the State warns of the administrative burden this court will place on it if it does not maintain the status quo under *Melinie*. That administrative burden is far outweighed by the need to preserve the Sixth Amendment right to effective representation and to guarantee that the violation of that right will have a remedy under law.

While I do not venture an opinion as to the wisdom of *Ramos* or address its

impact on Louisiana here, I do find its discussion of stare decisis to be instructive.[1] In addition, Justice Kavanaugh concurred in *Ramos* to address stare decisis at some length and noted that "the doctrine of stare decisis does not dictate, and no one seriously maintains, that the Court should never overrule erroneous precedent" but rather "applying the doctrine of stare decisis, this Court ordinarily adheres to precedent, but sometimes overrules [it]." *Ramos,* 140 S.Ct. at 1412 (Kavanaugh, J., concurring in part). Nonetheless, he noted that overruling precedent sometimes requires special justification, and he proposed that justification be evaluated with three broad factors:

> First, is the prior decision not just wrong, but grievously or egregiously wrong? A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it. In conducting that inquiry, the Court may examine the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed

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[1] While the doctrine of *jurisprudence constante* is an integral part of Louisiana's civilian heritage, the doctrine of stare decisis is part of the common law tradition that has continuously governed criminal law in this jurisdiction from the time it was a territory of the United States. On May 4, 1805, the territorial government of Orleans passed an "Act for the Punishment of Crimes and Misdemeanors" that contained the following provision:

> And be it further enacted, That all of the crimes, offences and misdemeanors herein before named, shall be taken, intended and construed, according to and in conformity with the common law of England; and that the forms of indictment, (divested however of unnecessary prolixity) the method of trial; the rules of evidence, and all other proceedings whatsoever in the prosecution of the said crimes, offenses and misdemeanors, changing what ought to be changed, shall be except as is by this act otherwise provided for, according to the said common law.

Acts Passed at the First Session of the Legislative Council for the Territory of Orleans, Ch. 50, Sec. 33 (1805). Subsequently, in 1844, the Louisiana Supreme Court construed this Act as incorporating the common law of England as it existed in 1805 (including any criminal statutes in effect at the time) into the criminal law of the Territory, which persisted when the State of Louisiana was created. *See State v. McCoy*, 8 Robinson (La.) 545 (1844). Previously, in 1840, this Court had also exercised its authority over the practice of law to declare that the common law is the source of law in criminal practice. *See* Warren M. Billings, *The Historic Rules of the Supreme Court of Louisiana, 1813–1879* (1985). Cases abound in which this Court has utilized the doctrine of stare decisis in criminal matters. *See, e.g., State v. Jenkins*, 36 La.Ann. 865 (1884). For a more thorough discussion of the formative role of the common law tradition in Louisiana's criminal law, *see* Warren M. Billings, *Origins of Criminal Law in Louisiana*, Part IV, Vol. 13, The Louisiana Purchase Bicentennial Series in Louisiana History (ed. Schafer & Billings 1997).

> facts, and workability, among other factors. A case may be egregiously wrong when decided, *see, e.g., Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944); *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), or may be unmasked as egregiously wrong based on later legal or factual understandings or developments, *see, e.g., Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), or both, *ibid.*
>
> Second, has the prior decision caused significant negative jurisprudential or real-world consequences? In conducting that inquiry, the Court may consider jurisprudential consequences (some of which are also relevant to the first inquiry), such as workability, as well as consistency and coherence with other decisions, among other factors. Importantly, the Court may also scrutinize the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system. *See, e.g.*, *Brown v. Board of Education*, 347 U.S. at 494–495, 74 S.Ct. 686; *Barnette*, 319 U.S. at 630–642, 63 S.Ct. 1178; *see also Payne*, 501 U.S. at 825–827, 111 S.Ct. 2597.
>
> Third, would overruling the prior decision unduly upset reliance interests? This consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors.
>
> In short, the first consideration requires inquiry into how wrong the precedent is as a matter of law. The second and third considerations together demand, in Justice Jackson's words, a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other." Jackson, 30 A. B. A. J., at 334.

Ramos, 140 S.Ct. at 1414–15 (Kavanaugh, J., concurring in part).

Melinie checks all three boxes. Its reasoning was nonexistent and it was egregiously wrong when it was decided. The consequences of it have been significant and negative, leaving defendants like this one with no real remedy for the denial of the Sixth Amendment right to effective representation during sentencing, a critical stage of the proceedings. In contrast, the consequences for the State of our ruling now, while not trivial, are not particularly great either. After today, if the majority opinion is read correctly, the State will simply lose a procedural bar and be required to respond to certain claims in post-conviction proceedings on the merits.

Given the importance of the Sixth Amendment right to counsel and the serious consequences that can result when a defendant is denied effective representation during sentencing, adherence to such basic constitutional protections does not seem insurmountable.

07/09/20

SUPREME COURT OF LOUISIANA

No. 2018-KH-01012

STATE OF LOUISIANA

VS.

DERRICK L. HARRIS

On Supervisory Writ to the 15th Judicial District Court, Parish of Vermilion

GENOVESE, J., additionally concurs for the reasons assigned by Justice Crichton.

SUPREME COURT OF LOUISIANA

NO. 2018-KH-1012

STATE OF LOUISIANA

VERSUS

DERRICK L. HARRIS

ON SUPERVISORY WRIT TO THE FIFTEENTH JUDICIAL DISTRICT COURT, PARISH OF VERMILION

CRAIN, J., dissenting.

The defendant's sentence was not reviewed by this Court on direct appeal because his writ application was untimely. Under the Court's current rules, however, the writ application would have been timely. Now relegated to post-conviction relief, defendant must rely on Louisiana Code of Criminal Procedure article 930.3, which provides no basis for review of claims of excessiveness or other sentencing error post-conviction. *See State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So. 2d 1172 (*per curiam*). Seeking to circumvent almost 25 years of established jurisprudence from this Court, defendant re-cast his excessive-sentence argument as a claim of ineffective assistance of counsel at sentencing, a semantical distinction that seeks the same relief: a reduced sentence. While the unique circumstances of this case may warrant relief, I would not provide it, as the majority does, by creating an additional basis for post-conviction relief under Article 930.3. Rather, in the interest of justice, this Court should exercise its plenary judicial power, review the constitutionality of the sentence, and leave any needed amendments to Article 930.3 to the legislature. *See* La. Const. art. V, §5(A); *State v. Wimberly*, 414 So. 2d 666, 670 (La. 1982) ("The constitutional grant of supervisory authority to this court is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court.").