

No. _____

STATE

v.

BERNARD NOBLE

On Writ to Review an Order from the Fourth Circuit Court of Appeal, No. 2013-KA-1109,
Affirming Mr. Noble's Sentence Ordered by the Honorable Judge Franz Zibilich, Section L,
Orleans Parish, Louisiana, Case No. 501-594

PETITION FOR WRIT OF CERTIORARI TO REVIEW FOURTH CIRCUIT COURT
OF APPEAL'S AFFIRMANCE OF TRIAL COURT'S CONSTITUTIONALLY
EXCESSIVE SENTENCE

VOLUME I

Derwyn Bunton
Chief Defender

Jee Park*, Bar No. 31522
Special Litigation Counsel

Orleans Public Defenders
2601 Tulane Avenue, Ste 700
New Orleans, LA 70119
504-827-8187 (office)
504-821-5285 (fax)
504-224-0963 (cell)
ipark@opdla.org

*Counsel for Appellant

SUPREME COURT
OF LOUISIANA
2014 APR 16 P 2:08
CLERK

SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO. _____

TITLE TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

State _____ VS. _____
Applicant: Bernard Noble
Have there been any other filings in this Court in this matter? ☐ Yes ☒ No
Bernard Noble Are you seeking a Stay Order? No
Priority Treatment? No
If so you MUST complete & attach a Priority Form

LEAD COUNSEL/PRO SE LITIGANT INFORMATION

APPLICANT: _____ RESPONDENT: _____
Name: Jee Park Name: Scott Vincent
Address: OPD Address: DA's Office
2601 Tulane Avenue, NOLA 70115 619 S. White Street, NOLA 70115
PhoneNo: 504-224-0963 Bar Roll No. 31577 PhoneNo: 504-822-2414 Bar Roll No. 14478

Pleading being filed: ☐ In proper person, ☒ In Forma Pauperis
Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

☒ Civil, ☒ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other
☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No. _____
Judge/Commissioner/Hearing Officer: _____ Ruling Date: _____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Orleans Parish Criminal District Court Docket Number: 501-594
Judge and Section: Judge Franz Zibilich, Section L Date of Ruling/Judgment: May 7, 2013

APPELLATE COURT INFORMATION

Circuit: 4th Circuit Docket No. 2013-KA-1109 Action: Affirmed
Applicant in Appellate Court: Bernard Noble, Appellant Filing Date: Sept. 25, 2013
Ruling Date: Feb. 12, 2014 Panel of Judges: Tobias, Lombard, Ledet En Banc: ☐

REHEARING INFORMATION

Applicant: Bernard Noble, Appellant Date Filed: Feb. 26, 2014 Action on Rehearing: Denied
Ruling Date: March 17, 2014 Panel of Judges: Tobias, Lombard, Ledet En Banc: ☐

PRESENT STATUS

☐ Pre-Trial, Hearing/Trial Scheduled date: _____, ☐ Trial in Progress, ☒ Post Trial
Is there a stay now in effect? No Has this pleading been filed simultaneously in any other court? No
If so, explain briefly _____

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

4/16/14
DATE


SIGNATURE

TABLE OF CONTENTS

I.	STATEMENT ADVISING WRIT CONSIDERATIONS.....	3
II.	ASSIGNMENT OF ERROR.....	4
III.	STATEMENT OF THE CASE.....	5
IV.	SUMMARY OF ARGUMENT.....	12
V.	LAW AND ARGUMENT.....	13
VI.	CONCLUSION.....	24
VII.	VERIFICATION AND CERTIFICATION.....	25
VIII.	COPY OF THE FOURTH CIRCUIT COURT OF APPEAL RULING	
IX.	DENIAL OF APPLICATION FOR REHEARING	

STATEMENT ADVISING WRIT CONSIDERATIONS

This Court has broad jurisdiction to hear applications for writs. Pursuant to Rule X of the Supreme Court, one of the enumerated grounds must ordinarily be present for this Court to grant an application for writs. In this case, the fourth enumerated ground is applicable:

4. **Erroneous Interpretation or Application of Constitution or Laws.** A court of appeal has erroneously interpreted or applied the constitution or a law of this state or the United States and the decision will cause material injustice or significantly affect the public interest.

Supreme Court Rule X, Sec. 1.

The Fourth Circuit Court of Appeal erroneously interpreted the laws of this state and the United States Constitution. The Fourth Circuit Court of Appeal upheld a sentence that is constitutionally excessive in violation of Louisiana Constitution, Article I, Section 20 which prohibits imposition of excessive punishment. As such, this Court must take corrective action in order to prevent manifest injustice.

ASSIGNMENT OF ERRORS

- I. Mr. Bernard Noble was sentenced to thirteen and one-third years without the benefit of probation, parole or suspension of sentence for possessing less than 3 grams of marijuana or two marijuana cigarettes. Mr. Noble's only prior convictions are for simple possession of marijuana and two convictions for simple possession of crack cocaine – one from twenty years ago, another from 8 years ago. Mr. Noble is 47-years-old, has seven children whom he diligently supports through honest employment, and has been working continuously since graduating from high school thirty years ago for municipal governments and private businesses as a commercial driver. Given Mr. Noble's character, family life and support, consistent employment history, business acumen and entrepreneurial undertakings, age and nature of prior contacts with the criminal justice system, and the facts of the instant case, did the trial court abuse its discretion when it sentenced Mr. Noble to thirteen and one-third years in violation of the Louisiana Constitution, Article I, Section 20, which prohibits imposition of excessive punishment?

STATEMENT OF THE CASE

On May 17, 2011, Mr. Noble was found guilty of one count of possession of marijuana third and subsequent in violation of La. R.S. 40:966(E)(3). Mr. Noble had less than 3 grams of marijuana, an amount equivalent to two marijuana cigarettes. On June 20, 2011, the state filed a bill of information charging Mr. Noble as a third multiple offender having two prior simple possession of cocaine convictions: one from 1991 and another from 2003. Following a multiple bill hearing, on November 7, 2011, Judge Terry Alarcon found Mr. Noble to be a third multiple offender. As a triple offender, Mr. Noble faced a mandatory minimum sentence of thirteen and one-third years and could face up to forty years in prison without the benefit of parole, probation or suspension of sentence. *See* La. R.S. 15:529.1.

At the sentencing hearing on December 15, 2011, Judge Alarcon departed from the mandatory minimum sentence of thirteen and one-third years and sentenced Mr. Noble to five years of imprisonment at hard labor without the benefit of parole, probation or suspension of sentence. His decision to depart was based on the evidence presented at the sentencing hearing. At the sentencing hearing Mr. Noble demonstrated by clear and convincing evidence that yes, he may have three prior felony convictions, but these nonviolent, simple drug possession convictions do not define who he is. Mr. Noble, as a father, son, employee, businessman, neighbor, is more than the sum of his prior convictions. The following facts were presented at the sentencing hearing before Judge Alarcon and, as noted by the Judge in his ruling, were uncontested by the state.¹

Mr. Noble is now 47 years old. He was born and raised in New Orleans. He is the eldest of six. He is a high school graduate and earned his Commercial Driver's License (CDL) at the age of 21. While many of his childhood friends turned to the streets to make a living, Mr. Noble always sought honest employment. Upon high school graduation, he worked for Wrands Tonti, a company specializing in venetian blinds on Prytania Street. Then he worked as a part-time cook on the Mississippi Queen. With his savings, he invested in a small, janitorial services business named Top to Bottom. After earning his CDL, he drove commercial vehicles for Jefferson Parish Streets Department, City of Kenner, Missouri Department of Transportation, Kansas City Airport, parcel delivery company DHL, and Witley Auto Company. While working for Witley Auto Company, Mr. Noble tried again to own and operate his own business. He opened a New

¹ R. 269.

Orleans-style restaurant in Missouri called New Orleans Style Sweet Shop. Although his small business ventures did not succeed, Mr. Noble's entrepreneurial spirit of pulling himself up by his own bootstraps and wanting a piece of the American dream – his own business – continued to motivate him.

Mr. Noble is the neighbor you see down the street going to work every morning, playing with his kids and washing his car on the weekends. Mr. Noble has seven beautiful children ranging now in the ages of 20 to 6. They did not all reside with him, but he provided them all with consistent, adequate financial support. He did not abandon his children when relationships with their respective mothers did not work out. He timely paid his child support and, as pointed out by Judge Alarcon, he even overpaid his child support at times.² He gave everything he earned and more to his children. He loves his children and would not do anything to harm or hurt them.

Not only financially, but emotionally, Mr. Noble is there for his children and for his former partners and current co-parents. He cares deeply for his children and wants to give them opportunities he did not have, surround them with encouragements and support he did not always receive that children need to flourish and prosper. Two of his younger children suffer from serious medical and developmental issues. His son, Weldon, suffers from autism, and his daughter, Spirit, suffers from junior rheumatoid arthritis for which there is no cure. These are life-long, life-changing conditions requiring heightened parental supervision and guidance. Although neither child lived with him, Mr. Noble provided support and care to Weldon and Spirit. Mr. Noble is the parent that you see at parent-teacher conferences and school holiday performances worrying about his children and being proud of their achievements.

In 1991, Mr. Noble pled guilty to simple possession of cocaine. He was 25 years old. He received a probated sentence. In 2003, Mr. Noble pled guilty to simple possession of cocaine. He was 37 years old. He received a sentence of 2 years of home incarceration. Mr. Noble has no prior convictions for crimes of violence, any crimes committed against persons, or property crimes. Mr. Noble has never been accused of producing drugs, selling drugs or possessing with intent to distribute drugs. Mr. Noble's criminal history clearly illustrates a very personal struggle with substance abuse and no signs of being a danger or a menace to society as a result of his addiction. Given the age and the span of time between his convictions, it is also clear that Mr.

² R. 269-70.

Noble is not debilitated by his addiction and that he has made substantial gains and in-roads toward rehabilitation enabling him to be a productive member of our society focused on meeting his many family obligations.

Judge Alarcon, at sentencing, was also very familiar with the facts of the instant case as he was the judge who presided over the trial. Mr. Noble was stopped while riding his bicycle in the early evening hours. Mr. Noble was not riding his bike in a dangerous manner nor did he appear intoxicated. The officer elected to stop him because Mr. Noble appeared nervous when he saw the police car. Mr. Noble stopped when asked by the police to do so, was polite and fully cooperated with the arresting officer. He did not attempt to evade contact with the officer, did not run, did not get angry, and did not make any misrepresentations about his identity or what was in his pocket. Less than three grams of marijuana was found in Mr. Noble's pocket in a small plastic bag.

A. Judge Alarcon Finds Mr. Noble to be Exceptional and Departs From the Mandatory Minimum Sentence

Judge Alarcon issued a written ruling providing his reasons why Mr. Noble is that exceedingly rare defendant deserving of a sentence less than the legislatively mandated mandatory minimum sentence. Judge Alarcon found Mr. Noble and his life circumstances exceptional. Judge Alarcon opined that Mr. Noble "is one of the few truly deserving of a downward departure and one for whom this sentencing range is constitutionally excessive."³ He continued:

The defendant is a father of seven children, whom he not only supports regularly, but has done so to the point that he has overpaid his child support to his children out of state. This alone may be enough to distinguish him from the average defendant, certainly the average defendant with children....Mr. Noble has met the obligations to those dependent on him through honest employment. Proof of these facts has been submitted by affidavits, birth certificates, payment stubs, juvenile court records, and other relevant documentation and evidence.....[His] record is....notable for the complete lack of violence of any kind.⁴

At the time of Mr. Noble's sentencing, Judge Alarcon had been a district court judge in Orleans Parish for fifteen years. At the end of 2011, Judge Alarcon retired. During his long tenure as a well-respected judge, he has sentenced hundreds of men and women convicted of drug possession offenses. Many of them undoubtedly were parents, employed and had nonviolent prior criminal records like Mr. Noble; but Judge Alarcon, rarely, if ever, found their

³ R. 269.

⁴ R. 269-70.

circumstances exceptional warranting a sentence shorter than the mandatory minimum.⁵ Mr. Noble offered something more, and provided uncontested evidence in support that he indeed is exceptional and is that rare defendant deserving of a downward departure. Judge Alarcon held that “facts raised by the defense and not apparently contested by the State”⁶ showed that Mr. Noble “is the rare exceptional situation and does not represent the type of individual contemplated by the legislature when assigning sentences.”⁷

B. Judge Zibilich, After a Thorough Review of All Facts and Circumstances Presented to the Trial Court, Finds Mr. Noble to be Exceptional

The state filed a supervisory writ application to the Fourth Circuit Court of Appeal on February 10, 2012, challenging Judge Alarcon’s sentence. Mr. Noble filed a response on February 23, 2012. On March 9, 2012, the Fourth Circuit Court of Appeal ruled that Mr. Noble “made a sufficient showing that the mandatory minimum sentence [applicable to him under La. R.S. 15:529.1] was constitutionally excessive.”⁸ The Fourth Circuit Court of Appeal, however, remanded the case to trial court for the trial court to articulate why the sentence imposed – five years of imprisonment at hard labor without the benefit of parole, probation or suspension of sentence – is the maximum sentence which could be imposed on Mr. Noble that is not constitutionally excessive.⁹

Upon Judge Alarcon’s retirement at the end of 2011, Judge Franz Zibilich was elected to Section L of the Orleans Parish Criminal District Court. As ordered by the Fourth Circuit Court of Appeal, Judge Zibilich held a sentencing hearing on April 5, 2012, and after a careful examination of “the entirety of the record,” including, but not limited to Mr. Noble’s prior criminal convictions, the age of those prior convictions, the non-violent nature of all of his convictions, the facts of this instant case, Mr. Noble’s age, his character, his background, his family circumstances and responsibilities, and his work history, Judge Zibilich determined that a

⁵ Counsel could not locate any published appellate decisions where Judge Alarcon departed from the mandatory minimum sentence for a defendant who was multiple-billed by the state under La. R.S. 15:529.1. Counsel, however, did find cases where Judge Alarcon found that the defendant failed to demonstrate by clear and convincing evidence that he is exceptional and that he presents the rare situation where downward departure from the mandatory minimum sentence under the habitual offender law, La. R.S. 15:529.1, was warranted. E.g. *State v. Daniel*, 2001-1736 (La. App. 4 Cir. 2/13/01), 811 So. 2d 84 (mandatory minimum sentence of 15 years as a second offender convicted of possession of intent to distribute cocaine not excessive despite evidence of defendant’s underprivileged upbringing, drug problem, stable marriage and caring for dependent young children); *State v. Bazile*, 99-2011 (La. App. 4 Cir. 4/26/00), 762 So. 2d 106 (“although the judge expressed sympathy for the defendant...defendant’s age, addiction and poor health” failed to constitute exceptional circumstances warrant a downward departure from the mandatory minimum sentence); *State v. Bentley*, 2002-1564 (La. App. 4 Cir. 3/12/03), 844 So. 2d 149 (a sentence of 20 years for defendant convicted of possession with intent to distribute cocaine with two nonviolent possession priors was not excessive).

⁶ R. 269.

⁷ R. 270.

⁸ R. 140.

⁹ R. 139-141.

sentence of five years at hard labor without the benefit of parole, probation or suspension of sentence was the maximum sentence which the court could impose on Mr. Noble that is not constitutionally excessive.¹⁰ Judge Zibilich compared Mr. Noble's case to Lemuel Dorthey's in *State v. Dorthey*, 623 So. 2d 1276 (La. 1993) where this Court held that judges maintain their power to review sentences imposed under the habitual offender law for constitutional excessiveness:

The Court has viewed *State v. Dorthey*[.] its progeny and the Court is left with the inescapable conclusion that the authors of the Dorthey case in what was a seven-zero decision must have had this exact type of factual scenario in mind when that decision was rendered. The Court takes notice that the decision in Dorthey involved a small amount of crack cocaine, and the Supreme Court allowed the District Court Judge to render a sentence another than the mandatory minimum. This Court finds that the drug involved here is much less serious than cocaine....And it's the Court's understanding from the review of the record that the marijuana involved is less than three grams of marijuana.¹¹

The state filed a supervisory writ application to the Fourth Circuit Court of Appeal on June 7, 2012, challenging Judge Zibilich's sentence. On July 26, 2012, the Fourth Circuit Court of Appeal denied the state's writ application stating that the trial court "articulated sufficient reasons to justify why the five-year sentence was the maximum sentence that is not constitutionally excessive."¹²

C. In a 4-3 *Per Curiam*, Louisiana Supreme Court Remands Mr. Noble's Case Back to the Trial Court for Resentencing

The State filed a writ application to the Louisiana Supreme Court on August 24, 2012. On April 19, 2013, this Court in a 4-3 split *per curiam* granted the state's writ application and reversed the ruling of the Fourth Circuit Court of Appeal. The majority held that the fact that Mr. Noble supports seven children, two of whom have special needs, and that his prior convictions are all nonviolent fail to place Mr. Noble in the rarified category of exceptional defendants worthy of a downward departure. In overruling the trial court, the majority held that the trial court abused its discretion when it set aside the thirteen and one-third sentence as excessive and sentenced Mr. Noble to five years without the benefit of parole, probation or suspension of sentence.

The 4-3 *per curiam* raised questions as to whether this Court's long standing legal precedents recognizing the broad discretion afforded to the trial court in sentencing still stands as

¹⁰ R. 121-130.

¹¹ R. 124-125.

¹² R. 142.

good law. See *State v. Williams*, 2003-3514 (La. 12/13/04), 893 So. 2d 7 (affirming that a trial court has wide discretion in imposing a sentence, and the sentence imposed by the trial court should not be set aside in the absence of manifest abuse of his discretion.). As pointed out by Judge Tobias in his concurrence, the Supreme Court's 4-3 *per curiam* "implicitly ignored or overruled its own precedent in *Dorthey*, *supra*, thus leaving this court and the trial court without guidance as to what, if anything remains of the discretionary authority of the trial and intermediate appellate courts to determine whether a sentence is constitutionally excessive as to a particular defendant or whether such judicial authority is now totally subsumed by the state's discretionary authority to multiple bill a defendant."¹³

Following the 4-3 *per curiam* reversal, Judge Zibilich resentenced Mr. Noble on May 7, 2013.¹⁴ At the resentencing hearing, Judge Zibilich made it clear, given the totality of the facts before him, that Mr. Noble is still undeserving of the mandatory minimum sentence of thirteen and one-third years because that sentence is constitutionally excessive as applied to Mr. Noble.¹⁵ The trial court, however, stated that it must sentence Mr. Noble to the mandatory minimum sentence because the 4-3 *per curiam* has ordered it to do so. The trial court stated:

This Court believes with all of its heart and all of its soul that this is injustice. This Court believes with all of its heart and all of its soul that if this case isn't right for Dorthey, Dorthey has just simply been overruled. This Court cannot imagine a set of facts historically and substantively wherein this sentence should not have been – the sentence of five years should not have been affirmed as was done quickly and simply by the Louisiana Fourth Circuit.

At the end of the day I think the Supreme Court mandates that I do something that I don't think I have any other choice but to do it. I am just hoping the Louisiana Supreme Court on its own some kind of way makes a reconsideration here....I know that this Court has reversed itself in the past and maybe this factual set of circumstances may be such that the Louisiana Supreme Court likewise reverses its decision.¹⁶

D. The Fourth Circuit Court of Appeal Reluctantly Affirms Mr. Noble's Sentence

Mr. Noble filed a motion to appeal his sentence. He timely filed his appellate brief before the Fourth Circuit Court of Appeal. In their opinion, the Fourth Circuit Court of Appeal pointed out how two trial court judges found the mandatory minimum sentence of thirteen and one-third years to be grossly disproportionate to the crime in this case of possessing two

¹³ Vol. 1, Ex. A, *State v. Bernard Noble*, 2013-KA-1109 (La. App. 4 Cir. 2/12/2014) (J. Tobias concurrence).

¹⁴ The transcript of the May 7, 2013 sentencing hearing is included in the third volume of the record. The third volume however does not continue the page numbering from volumes one and two. Therefore, to minimize confusion, references to volume three of the record will be cited to as "R. 3, ___." For all other pages in volumes one and two, citation to the record is referenced as "R. ___."

¹⁵ R. 3, 2-12.

¹⁶ R. 3, 10-11.

marijuana cigarettes and summarized the mitigating facts supporting Mr. Noble's exceptionalism as presented to the trial court.¹⁷ Judge Tobias in his concurrence also noted that Mr. Noble is not the case the "courts should be using as the poster child for harsh sentencing."¹⁸ In fact, eleven of the fifteen elected judges who have reviewed Mr. Noble's sentencing may hold similar sentiments. Additionally, Judge Tobias opined that the trial judge imposed the "draconian" sentence on Mr. Noble because the trial judge felt mandated to do so by the 4-3 *per curiam*, but the Supreme Court has the authority and discretion not to strictly adhere to its past *per curiams* under *State v. Tate*, 12-2763, p. 4 n.1 (La. 11/5/13), __ So. 3d __, __, 2013 WL 5912118, *2 n.1.¹⁹

This petition for writ of certiorari is timely filed before this Court.

¹⁷ Vol. 1, Ex. A, *State v. Bernard Noble*, 2013-KA-1109 (La. App. 4 Cir. 2/12/2014).

¹⁸ Vol. 1, Ex. A, *State v. Bernard Noble*, 2013-KA-1109 (La. App. 4 Cir. 2/12/2014) (J. Tobias concurrence).

¹⁹ *Id.*

SUMMARY OF ARGUMENT

Mr. Noble presented clear and convincing evidence - evidence uncontested by the state²⁰ - at his sentencing hearing that he is an exceptional individual who is a "victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case." *State v. Johnson*, 709 So. 2d 672, 676 (La. 1998). His original sentencing judge, Judge Alarcon, opined that Mr. Noble "is one of the few truly deserving of a downward departure and one for whom this sentencing range is constitutionally excessive."²¹ Finding Mr. Noble to be that exceedingly rare defendant deserving of a sentence less than the legislatively mandated mandatory minimum sentence, Judge Alarcon departed from the mandatory minimum sentence of thirteen and one-third years and imposed a sentence of five years without the benefit of parole, probation or suspension of sentence. The judge carefully and thoughtfully deliberated, and relied on the uncontested evidence presented before him about Mr. Noble: Mr. Noble's prior criminal convictions, the age of those prior convictions, the non-violent nature of all of his convictions, the facts of this instant case, Mr. Noble's age, his character, his background, his family circumstances and responsibilities, and his work history. As such, Judge Alarcon's sentence was not imposed in an arbitrary or capricious manner. Judge Alarcon's sentence was undone by this Court and Judge Zibilich followed this Court's 4-3 *per curiam* and sentenced Mr. Noble to the mandatory minimum sentence of thirteen and one-third years. That was an abuse of discretion for Judge Zibilich had to disregard substantial evidence of how that sentence was injustice as applied to Mr. Noble.

This Court has the authority to remand this case back to the trial court to resentence Mr. Noble to sentence that is not constitutionally excessive as applied to him. Mr. Noble's current sentence of thirteen and one-third years makes no measureable contribution to the acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering to Mr. Noble and his family, and is grossly out of proportion to the severity of the crime - possession of two marijuana cigarettes.

²⁰ R. 269

²¹ *Id.*

LAW AND ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. NOBLE TO THIRTEEN AND ONE-THIRD YEARS FOR POSSESSING LESS THAN THREE GRAMS OF MARIJUANA

a. Wide Sentencing Discretion is Vested in the Trial Court Because It is in the Best Position to Review the Circumstances of a Particular Case

A trial court has wide discretion in imposing a sentence and the sentence imposed by the trial court should not be set aside in the absence of manifest abuse of its discretion. *State v. Williams*, 2003-3514 (La. 12/13/04), 893 So. 2d 7; *State v. Thompson*, 2002-0333 (La. 4/9/03), 842 So. 2d 330, *State v. Washington*, 414 So. 2d 313 (La. 1982); *State v. Abercumbia*, 412 So. 2d 1027 (La. 1982). The abuse must be manifest: obvious, apparent, plain.²² A trial judge is in the best position to consider the aggravating and mitigating circumstances of a particular case, and, therefore, is given broad discretion in sentencing. *State v. Cook*, 95-2785 (La. 5/31/96), 674 So. 2d 957; *State v. Smith*, 93-0402 (La. 7/5/94), 693 So. 2d 237. The trial judge has the benefit of observing the defendant in court for many months, if not years, and can directly and immediately weigh the credibility of the evidence presented before it. There is no better judge to assess and weigh evidence than trial judges. On review, an appellate court does not determine whether another sentence may have been more appropriate, but whether the trial court abused its discretion. *State v. Humphrey*, 4456 So. 2d 1155, 1165 (La. 1984). When reviewing a sentence for excessiveness, an appellate court must consider the crime and the punishment in light of the harm to society and gauge whether the penalty is so disproportionate as to shock its sense of justice. *State v. Lobato*, 603 So.2d 739, 751 (La. 1992).

A trial court abuses its discretion when a conclusion is reached in an arbitrary or capricious manner. *Wise v. Bossier Parish Sch. Bd.*, 02-1525 (La. 6/27/03), 851 So.2d 1090; *Mathieu v. New Orleans Pub. Library*, 09-2749 (La. 10/19/10), 50 So. 3d 1259. An arbitrary conclusion is one resulting from a disregard of the evidence or its proper weight; a capricious conclusion is not supported by substantial evidence or that is contrary to substantiated competent evidence. *Wise*, 02-1525, p. 6 (La. 6/27/03), 851 So.2d 1090, 1094.

b. Judge Zibilich Believes the Sentence He Imposed on Mr. Noble is Arbitrary and Capricious

On May 7, 2013, Judge Zibilich sentenced Mr. Noble to thirteen and one-third years; however, he did so in protest. Judge Zibilich decried the sentence he was mandated to impose

²² Definition of manifest on Dictionary.com, see <http://dictionary.reference.com/browse/manifest>, and Merriam-Webster On-line Dictionary, see <http://www.merriam-webster.com/dictionary/manifest>.

by the 4-3 *per curiam* as unjust: “This Court believes with all of its heart and all of its soul that this is injustice.”²³ The court continued that it “believe[d] that this is an absolute horrific set of circumstances that justice is not served in any way, shape or form.”²⁴ The court also expressed disbelief that the Supreme Court would permit such injustice to occur: “I have to be honest. This Court is in shock, literal shock that two to four marijuana cigarettes mandates a sentence of 13 and two-thirds years as a triple offender. This Court is in absolute shock that the Louisiana Supreme Court would send this matter back to this Court and literally mandate that I give a sentence of 13 and two-thirds year.”²⁵

As a district court judge, Judge Zibilich believed his hands were tied: he had to impose the mandatory minimum sentence by the 4-3 *per curiam* although he believed the clear and convincing evidence presented during the sentencing hearing supported a sentence less severe and less harsh than the mandatory minimum. By disregarding the evidence to the contrary, the trial court reached an arbitrary and capricious decision abusing its discretion

c. An Appellate Court Must Not Substitute Its Judgment for That of the Trial Court When Reviewing Sentences

Two trial judges, Judge Alarcon and Judge Zibilich originally²⁶, carefully weighed the evidence presented before them about Mr. Noble: his prior criminal convictions, the age of those prior convictions, the non-violent nature of all of his convictions, the facts of this instant case, his age, character, background, family circumstances and responsibilities, and work history. After assessing these multitudes of factors, they both independently reached a conclusion that a sentence of thirteen and one-third years is constitutionally excessive as applied to Mr. Noble and that five years imprisonment without the benefit of parole, probation or suspension of sentence is the maximum sentence he can receive that is not constitutionally excessive. Their conclusions were grounded in evidence and reason. By reversing their decision in a 4-3 *per curiam*, this Court has rebuked the trial judges’ carefully reasoned and evidence-based judgments and has deemed their actions to be manifestly, clearly arbitrary and capricious. If what Judge Alarcon and Judge Zibilich did was an abuse of discretion then, as correctly noted by Judge Tobias in his concurrence, *State v. Dorthey*, 623 So. 2d 1276 (La. 1993) may have been implicitly overruled

²³ R. 3, 10.

²⁴ R. 3, 5-6.

²⁵ R. 3, 2-3.

²⁶ Referring to Judge Zibilich’s original sentence of five years without benefit of parole, probation or suspension of sentence imposed on Mr. Noble on April 2, 2012.

by this Court and trial judges everywhere in Louisiana are left with no guidance as to what constitutes an abuse of discretion.²⁷

The role of the appellate court is not to determine whether another sentence may have been appropriate but whether the trial court reached its decision in a non-arbitrary, non-capricious manner after having carefully assessed and weighed all of the evidence presented before it. *State v. Humphrey*, 4456 So. 2d 1155, 1165 (La. 1984). If the trial court did so, its decision must be upheld, even if the appellate court would have imposed a different sentence. *See State v. Morgan*, 96-0354, p. 4 (La. App. 4 Cir. 4/17/97), 673 So. 2d 256, 260 (“where the trial court provides adequate support for its decision to impose a sentence under *Dorthey*, and the record reflects that the sentence was imposed after careful consideration of the particular defendant and the facts of the case, this court will not reverse the sentence imposed by the trial court unless it finds that the trial court abused its broad discretion.”). This Court should not substitute its own judgment for that of the trial court which is best positioned to know what sentence to impose given the evidence presented before it. This Court should review the totality of evidence that was presented about Mr. Noble to Judge Alarcon and Judge Zibilich: Mr. Noble’s prior criminal convictions, the age of those prior convictions, the non-violent nature of all of his convictions, the facts of this instant case, his age, character, background, family circumstances and responsibilities, and his work history, and whether they abused their discretion after taking into careful consideration such evidence. And upon careful inquiry, this Court should conclude that Judge Alarcon and Judge Zibilich did not abuse their discretion when they sentenced Mr. Noble to five years without the benefit of parole, probation or suspension of sentence on December 15, 2011 and April 2, 2012, respectively.

II. MR. NOBLE’S SENTENCE OF THIRTEEN AND ONE-THIRD YEARS IS EXCESSIVE IN VIOLATION OF ARTICLE I SECTION 20 OF THE LOUISIANA CONSTITUTION

Louisiana Constitution, Article I, Section 20 prohibits imposition of excessive punishment. Courts have the power to declare a sentence excessive under Article I, Section 20 although the sentence falls within the statutory limits provided by the Legislature. *State v. Every*, 2009-0721, P. 7 (La. App. 4 Cir. 3/24/10), 35 So. 3d 410, 417; *State v. Sepulvado*, 367 So. 2d 762 (La. 1979) (“We thus find that the imposition of a sentence, although within the statutory

²⁷ Vol. I, Ex. A, *State v. Bernard Noble*, 2013-KA-1109 (La. App. 4 Cir. 2/12/2014) (J. Tobias concurrence).

limit, may violate a defendant's constitutional right against excessive punishment that is enforceable by this court on appellate review of his conviction.”). The power extends to sentences mandated by the Habitual offender Law. *State v. Dorthy*, 623 So. 2d 1276 (La. 1993); *State v. Johnson*, 709 So. 2d 672, 676 (La. 1998). A sentencing judge must always start with the presumption that a mandatory minimum sentence under the Habitual Offender Law is constitutional; however, a court may depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it that would rebut the presumption of constitutionality. *Johnson*, 709 So. 2d at 676.

A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. *State v. Ambeau*, 2008-1191, p. 9 (La. App. 4 Cir. 2/11/09), 6 So. 3d 215. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. *State v. Galindo*, 2006-1090, pp. 15-16 (La. App. 4 Cir. 11/3/07), 968 So. 2d 1102, 1113. There are several factors which are useful in determining whether the sentence by its excessive severity or length is disproportionate to the underlying offense. Some of these factors are the nature of the offense and the offender (i.e. the harm caused or threatened to the victim as well as the culpability and character of the offender) and the sentences imposed for the commission of the same crime in other jurisdictions. *State v. Lathers*, 444 So. 2d 96 (La. 1983).

If a sentencing judge finds by clear and convincing evidence that a downward departure from the mandatory minimum sentence under the Habitual Offender Law is justified, he is not free to sentence the defendant to whatever sentence he feels is appropriate under the circumstances. *Johnson*, 709 So. 2d at 676. Instead, the judge must sentence the defendant to the longest sentence which is not constitutionally excessive. *Id.* This requires a sentencing judge to articulate specific reasons why the sentence he imposes instead of the statutory mandatory minimum is the longest sentence which is not excessive under the Louisiana Constitution. *Id.*

a. By Clear and Convincing Evidence, Mr. Noble Has Rebutted the Presumption of Constitutionality of the Mandatory Minimum Sentence Under the Habitual Offender Law

The trial court must have sound reasons to depart from the sentence mandated by La. R.S. 15:529.1. Sound reasons may include “family history, prior criminal conduct in light of whether it was violent or nonviolent and whether it was similar or dissimilar to the conviction for which

the defendant is being sentenced, other aggravating and mitigating circumstances such as those provided in Code of Criminal Procedure article 894.1, and the impact of the crimes upon the victims.” *State v. Compton*, 96-2176, p.2 (La. App. 4 Cir. 10/23/96); 683 So. 2d 853, 854. A court must demonstrate that it carefully balanced all aggravating and mitigating factors and reasons in reaching its departure.

When Judge Alarcon and Judge Zibilich originally departed from the mandatory minimum sentence under La. R.S. 15:529.1, they carefully considered this particular defendant – Mr. Noble – and the facts of this case. All of the relevant factors were carefully weighed and contemplated: Mr. Noble had less than three grams of marijuana on his person. His two prior felony convictions are both for simple possession of cocaine, one in 1991 and the other from 2003. All of his prior criminal convictions are for nonviolent drug possession offenses.

Mr. Noble is father of seven children whom he steadily and diligently supports. Despite the fact that he does not reside with all of his children, he nonetheless is an active presence in all of their lives as a loving and caring father who ensures that they are supported emotionally and physically. Two of his children suffer from challenging, often debilitating, life-long conditions: autism and rheumatoid arthritis for which there is no cure. He does what any loving parent in his position would do for his two ailing children: provide constant support, encouragement and love.

In order to support his big family, Mr. Noble has always been gainfully employed in both skilled and unskilled trades. He takes pride in his skills and enjoyed working and earning an honest wage. Mr. Noble has a commercial driver’s license and has been driving commercial vehicles since his early twenties for various employers: a city sanitation and sewerage department, mail/package delivery company; an automotive/towing company; an airport shuttle bus company; and a company delivering medical services to nursing homes. Not only that, he has worked for a venetian blinds maker, as a cook, a janitor, and a laborer. There is no job too small or too big for Mr. Noble. As long as he has been able-bodied, he has been employed to support his family.

Both Judge Alarcon and Judge Zibilich referred to Mr. Noble’s family circumstances and employment history as well as the nature of the offense and his prior convictions to justify their departure. The uncontested evidence presented by Mr. Noble clearly and convincingly rebutted the presumption of constitutionality of the mandatory minimum sentence of thirteen and one-third years under the habitual offender law.

b. Mr. Noble's Sentence of Thirteen and One-Third Years Makes No Measureable Contribution to Acceptable Goals of Punishment

Goals of punishment are widely recognized to be retribution, rehabilitation, and deterrence. *State v. Lathers*, 444 So. 2d 96, 103 (La. 1983); *Johnson*, 709 So. 2d at 678-79. Mr. Noble's sentence of thirteen and one-third years for possessing less than three grams of marijuana makes no measureable contribution to these goals of sentencing.

First, retribution is punishment meted out on a person who has infringed on the rights of others and has harmed them. It is infliction of punishment that is considered to be fully deserved and morally right. Eye for an eye is a common biblical phrase that captures the sentiment of retribution.

Mr. Noble was convicted of possessing less than three grams of marijuana. Marijuana was in his possession for his own personal use. He was not selling it nor did he have it in his possession with an intent to later sell it. There is no victim to what Mr. Noble was found guilty of. The state may argue that Mr. Noble by possessing illegal drugs contributes to the continued proliferation of the illegal drug trade that is responsible for violence and health related epidemics in our community. That line of reasoning may well exist; however, positing the user of an addictive plant substance against society as victim proves too much.

In drug possession cases, the most concrete and real victim is the user himself and his family, particularly if the user has a protracted history of drug use and treatment to end his addiction. Mr. Noble's criminal history bears out the fact that he was a user and just a user. It is noteworthy that he has never attempted to sell drugs in order to feed his addiction and has never committed property offenses such as theft or burglary or other violent crimes such as robbery or aggravated assault in order to support his addiction. Mr. Noble is a user who has gone long periods sober but has turned to using at times of heightened stress. This trajectory is not uncommon amongst persons who suffer from substance abuse problems and addiction issues. As noted in the sentencing letter to the trial court and commented by Judge Alarcon in his ruling, Mr. Noble was experiencing acute family stress when he began using marijuana again that resulted in this instant case.²⁸

Also recognized by Judge Alarcon in his ruling, the greatest harm done in this case is to Mr. Noble's family, particularly to his young and special needs children. He has a young child with autism and another child with debilitating rheumatoid arthritis. Mr. Noble has never

²⁸ R. 270.

shirked his parental duties and responsibilities to any of his seven children. He has always provided for them materially and emotionally through honest work. Unlike many drug addicted parents who are incapable of providing for their young dependents, Mr. Noble has always strived to be there for his children in spite of his drug use. When imposing his sentence, Judge Alarcon stated that "Mr. Noble's inevitable incarceration will be a greater punishment for his children than himself."²⁹ A long sentence of thirteen and one-third years would mean that Mr. Noble will miss the critical developmental years of his young children, positing undue hardship and adversity to his children. In short, Mr. Noble's sentence of thirteen and one-third years for a victimless crime makes no measureable contribution to the sentencing goal of retribution.

Second, turning to the goal of rehabilitation: Mr. Noble will certainly take full advantage of rehabilitation services while he is incarcerated. He will enroll in substance abuse treatment and may earn or refine a vocational skill beyond what he already possesses. However, given Mr. Noble's strong family support system, employable skills, positive character and nonviolent criminal history, mandating that taxpayers feed, clothe and house Mr. Noble for well over a decade to meet the goal of rehabilitation seems fiscally imprudent and unnecessary burdensome to an already under-resourced, underfunded system.

Mr. Noble is a 47-year-old father who has earned a commercial driver's license, a business license to open a restaurant, and has held numerous skilled employments. He has been continuously working and supporting himself and his family since his late teens. Employers continued to hire him and trust him with responsibilities despite his interactions with the criminal justice system, which speaks to Mr. Noble's good work ethic, diligence and his trustworthiness. As such, sentencing Mr. Noble to well over a decade in prison for the purpose of rehabilitation seems improvident given that Mr. Noble is not someone who needs thirteen and one-third years to be restored through vocational or educational training.

Third and final goal of punishment is deterrence. Mr. Noble has never been sentenced to a substantial amount of time in prison. For his 1991 simple possession of cocaine convictions, he received a probated sentence and for his 2003 simple possession of cocaine conviction, he received a sentence of 2 years home incarceration. As someone who has never experienced total loss of liberty for a substantial period of time in a penal institution, being remanded to serve a prison sentence following his trial and sentencing was a new experience for Mr. Noble and his

²⁹ R. 269.

family. Seeing the disappointment and hurt he has caused his family by his conviction and incarceration deters Mr. Noble from future drug use and motivates him to be fully sober. Judge Alarcon saw that five years and every day of those five years – 1,825 days, 60 months – locked up and away from his family and children was the maximum days of punishment that is not constitutionally excessive. Additional 8 and 1/3 years in prison would constitute cruel and unusual punishment to Mr. Noble and would not contribute to the goal of deterrence. Moreover, sentencing Mr. Noble to thirteen and one-third years in prison, leaving no one to support his many young children, would constitute nothing more than purposeless imposition of pain and suffering.

c. Mr. Noble's Sentence of Thirteen and One-Third Years Is Grossly Out Of Proportion to the Severity of the Crime

Mr. Noble possessed less than three grams of marijuana. There was absolutely no violence involved. There were no aggravating factors making this offense more serious than it appears at first glance. As Judge Zibilich noted, the drug involved here is “much less serious than cocaine” and amounts to less than three grams of marijuana, the equivalent of two to four marijuana cigarettes.³⁰ To illustrate the disproportionality of the mandatory minimum sentence in this case, the court stated, “[i]f in fact it was two marijuana cigarettes then what we are talking about here is seven years per cigarette, without benefit of probation, parole, or suspension of sentence...If it were three hand rolled cigarettes we are talking about four plus years per marijuana cigarette. And if it were four cigarettes we are talking about nearly three-and-a-half years per marijuana cigarette. All of the sentences are nothing short of ridiculous for such volume of marijuana, such weight.”³¹

A broader perspective on courts’ treatment of marijuana cases across the board is instructive in considering how this crime is treated in other jurisdictions. According to the Bureau of Justice Statistics, in 2000, there were 734,000 marijuana arrests and approximately 41,000 felony convictions in state and federal courts.³² Only 1 of every 18 arrests resulted in a felony sentence.³³ Of those convicted of a felony possession offense for marijuana, less than one third were sentenced to jail or prison.³⁴ The average sentence for people convicted of a marijuana

³⁰ R. 121-130.

³¹ *Id.*

³² See Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, The Sentencing Project, 2 (2005),

http://www.sentencingproject.org/doc/publications/dp_waronmarijuana.pdf.

³³ *Id.* at 22.

³⁴ *Id.* at 23.

possession felony (including possession with intent to distribute) in state court in 2000 was 31 months and the median was 16 months.³⁵ Placing Mr. Noble in this broader perspective reveals the disproportionality of the sentence mandated by La. R.S. 15:529.1. Considering that the average sentence, even including possession with intent to distribute charges, which would likely contain far more than three grams, is 31 months, thirteen and one-third years or nearly 160 months without possibility of parole, probation or suspension of sentence is clearly disproportionate and grossly excessive. In short, Mr. Noble's sentence is grossly out of proportion to the severity of the crime and the nature of the offender.

III. THE JUSTIFICATIONS PROVIDED BY JUDGES ALARCON AND ZIBILICH WHEN THEY DEPARTED AND IMPOSED A SENTENCE OF FIVE YEARS ARE MUCH STRONGER THAN OTHER REPORTED CASES WHERE A SENTENCE UNDER STATE V. DORTHEY BEEN UPHeld

In *State v. Abbott*, 94-1046, p.8 (La. App. 4 Cir. 2/23/95); 650 So. 2d 1223, 1227, the defendant was adjudicated as a second felony offender and sentenced pursuant to *Dorthey* to serve seventeen and one-half years at hard labor instead of the mandatory minimum sentence of thirty-three years under La. R.S.15: 529.1. The defendant was nineteen years old at the time of the offense and committed an armed robbery in which he held a gun to the victim's head and fired at least one shot onto the ground. *Abbott*, 650 So. 2d at 1224. In justifying the downward departure, the court pointed to the defendant's youth, the facts of the instant case, and that the defendant's prior two convictions were for shoplifting. *Id.* at 1227. The appellate court found these reasons to be sufficient.

In *State v. Taylor*, the court upheld the trial court's sentencing departure of eight years at hard labor instead of the mandatory minimum sentence of twenty years. 96-1843, p.8 (La. App. 4 Cir. 10/29/97); 701 So. 2d 766, 772. The defendant was twenty-four years old, was convicted of attempted possession of cocaine as a fourth offender, and his prior convictions included an attempted possession of cocaine, a theft conviction of between 100 and 500 dollars, a possession of cocaine, and a simple escape where he fled from municipal court. *Id.* The defendant ran from the police, and when they apprehended him, they found a rock substance and a pipe in his pocket. *Id.* The rock substance turned out to be negative for cocaine but the pipe contained cocaine residue. *Id.* The trial court considered the particular facts of the case, the defendant's age, his criminal history, and the nonviolent nature of the defendant's prior offenses in

³⁵ *Id.*

articulating its justification for the reduced sentence. *Id.* The appellate court upheld the sentence finding that the court did not abuse its broad sentencing discretion.

Also, in *State v. Bastian*, 96-0997, p. 3 (La. App. 4 Cir. 1996); 681 So. 2d 420, 422, the court upheld the downward departure. The defendant's present offense was forgery and his prior criminal history included unauthorized use of a movable valued in excess of \$1,000 and simple robbery. *Id.* The mandatory sentence under La. R.S. 15:529.1 was life in prison at hard labor without the benefit of probation, parole, or suspension of sentence. *Id.* at 421. In light of the facts and circumstances of the conviction and the defendant's background, the trial court sentenced him to six years, noting that there was no violence in the robbery case, he has no history of violence where weapons were used or victims were hurt, and that it was "unreasonable" and "ridiculous" to give him a life sentence given his background. *Id.* at 422.

This case is not only analogous to the above noted cases where appellate courts have held that the mandatory minimum sentences were excessive, but the evidence presented by Mr. Noble to demonstrate that the mandatory minimum is constitutionally excessive as applied to him is stronger. In both *Abbott* and *Taylor*, the defendants had a violent felony conviction and yet, departure from the mandatory minimum was upheld. There is absolutely no violence in Mr. Noble's background. His criminal convictions are all nonviolent possessory offenses of small amounts of drugs for personal use. In *Abbott* and *Taylor*, the underlying facts of the case involved discharging of a weapon and running from the police and yet the courts held that the mandatory minimum sentences were excessive. Mr. Noble was cooperative from the moment he was stopped by the police as he was riding his bike down a street to his arrest and booking. Judge Alarcon and Judge Zibilich were familiar with the facts of the underlying case when they sentenced him to five year without benefit of parole, probation of suspension on sentence. The thirteen and one-third sentence is grossly disproportionate to the nature and seriousness of the offense and shocks the sense of justice.

IV. THIS COURT'S SUPERVISORY REVIEW OF THE ISSUE DOES NOT BAR CONSIDERATION ON THE ISSUE ON APPEAL

A ruling adjudicating supervisory writs does not bar reconsideration of the issue on appeal and from the appellate court reaching a different conclusion. *State v. Alleman*, 03-1036 (La. App. 5 Cir. 1/27/04), 866 So. 2d 995 (citing to *State v. Wessinger*, 98-1234 (La. 5/28/99), 736 So. 2d 162). In *Alleman*, the appellate court denied the defendant's writ application

providing its reasoning in short four sentences. Recognizing that an appellate court's ruling on a writ application is not dispositive, the appellate court revisited the issue on appeal.

State v. Wessinger stands for the proposition that a ruling on supervisory writs does not preclude an appellate court or the Louisiana Supreme Court from considering the same issue on direct appeal. 98-1234 (La. 5/28/99), 736 So. 2d 162; *see also State v. Fontenot*, 550 So. 2d 179 (La. 1989).

In this case, the state sought supervisory writ application to the Fourth Circuit Court of Appeal and to the Supreme Court. The fact that the Supreme Court has reviewed the issue on supervisory writs does not preclude it from considering the issue on appeal. Additionally, as pointed out by Judge Tobias in his concurrence, the Supreme Court “recently called into question the appropriateness of citing one of their *per curiam* opinions as precedent for a proposition of law. *See State v. Tate*, 12-2763, p. 4 no. 1 (La. 11/5/13), __ So. 3d __, __, 2013 WL 5912118, *2 no. 1. [As such], [i]n the case at bar, certainly a reasonable argument can be made that how the Supreme Court ruled in *Noble, supra*, need not be strictly adhered to in light of *Tate, supra*.”³⁶

This Court has discretion to revisit the issue of the unconstitutionality of Mr. Noble's sentence. This Court should grant review and grant full briefing and oral argument given that there is confusion and concern that this Court may have implicitly overruled its precedent in *State v. Dorthey* and questions remain as to the breadth and scope of the discretionary authority of trial judges in determining whether a sentence is constitutionally excessive as applied to a particular defendant and his unique circumstances.

³⁶ Vol. 1, Ex. A, *State v. Bernard Noble*, 2013-KA-1109 (La. App. 4 Cir. 2/12/2014) (J. Tobias concurrence).

CONCLUSION

WHEREFORE, for all the reasons given above, and for any other reasons that may occur to this Honorable Court, appellant respectfully asks this Court to remand this case back to the trial court for resentencing for Mr. Noble's sentence of thirteen and one-third years is constitutionally excessive.

Respectfully submitted,



Jee Park
Bar No. 31522
Counsel for Appellant
Orleans Public Defenders
2601 Tulane Avenue, Ste 700
New Orleans, LA 70119
504-827-8187 (office)
504-821-5285 (fax)
504-224-0963 (cell)
jpark@opdla.org

VERIFICATION AND CERTIFICATION

COMES NOW Jee Park, being duly sworn, and deposes and states that she has reviewed the forgoing petition; that all the facts therein are true and accurate to the best of her information and belief; that she has notified or will immediately notify the parties listed below that this petition has been filed; and that she has caused, or will immediately cause, a true and accurate copy of this petition to be served forthwith on the parties listed below:

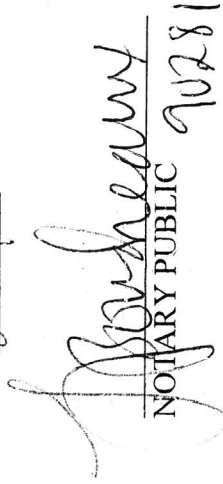
Hon. Franz Zibilich, Judge, Section L
Orleans Criminal District Court
2700 Tulane Avenue
New Orleans, LA 70119

Donna Andrieu
Scott Vincent
Orleans Parish District Attorney's Office
619 South White Street
New Orleans, LA 70119



Jee Park, Bar No. 31522

SWORN AND SUBSCRIBED TO BEFORE ME THIS 16th Day of April, in the
year 2014.



NOTARY PUBLIC 90281

STATE OF LOUISIANA

*

NO. 2013-KA-1109

VERSUS

*

BERNARD W. NOBLE

COURT OF APPEAL

FOURTH CIRCUIT

*

STATE OF LOUISIANA

*

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 501-594, SECTION "L"
Honorable Franz Zibilich, Judge

Judge Edwin A. Lombard

(Court composed of Judge Max N. Tobias, Jr., Judge Edwin A. Lombard, Judge Rosemary Ledet)

TOBIAS, J., CONCURS

Leon A. Cannizzaro, Jr.
District Attorney
Scott G. Vincent
Assistant District Attorney
Parish of Orleans
619 South White Street
New Orleans, LA 70119

COUNSEL FOR APPELLEE/STATE OF LOUISIANA

Jee Park
ORLEANS PUBLIC DEFENDERS
2601 Tulane Avenue
7th Floor
New Orleans, LA 70119

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

FEBRUARY 12, 2014



The defendant, Bernard W. Noble, appeals his sentence, arguing that thirteen and one-third years in prison for possession of a small amount of marijuana is constitutionally excessive. After review of the record in light of the applicable law and arguments of the parties, the defendant's sentence is affirmed.

Relevant Facts and Procedural History



In May 2011, the defendant was convicted of a fourth offense possession of marijuana, a violation of La. Rev. Stat. 40:966(E)(3), and then adjudicated as a third felony offender. Although the mandatory minimum sentence under the Habitual Offender Law for a third offense is thirteen and one-third years, in a downward departure from the sentencing guidelines, the trial judge (Judge Terry Alarcon) sentenced the appellant to serve five years. Pursuant to the State's writ application, this court found that the trial judge failed to articulate sufficient reasons to justify for the downward departure and the matter was remanded to the trial court to amplify its reasons.

In April 2012, newly elected Judge Franz Zibilich adopted the reasoning of retired Judge Alarcon and again sentenced the defendant to a five year term of imprisonment. The State filed another writ application in this court, arguing that

STATE OF LOUISIANA

NO. 2013-KA-1109

VERSUS

COURT OF APPEAL

BERNARD W. NOBLE

FOURTH CIRCUIT

STATE OF LOUISIANA

* * * * *

Ward
TOBIAS, J., CONCURS.

I respectfully concur only because it is my understanding that this court is, and therefore I am, obligated to follow the 4-3 *per curiam* opinion of the Supreme Court in this case: *State v. Noble*, 12-1923 (La. 4/19/13), 114 So.3d 500.¹

Nevertheless, I do note that the Supreme Court has apparently and recently called into question the appropriateness of citing one of their *per curiam* opinions as precedent for a proposition of law. See *State v. Tate*, 12-2763, p. 4 n.1 (La. 11/5/13), __ So.3d __, __, 2013 WL 5912118,*2 n.1. This creates uncertainty for the courts of appeal, trial courts, lawyers, and others in trying to ascertain what the law of Louisiana is. In the case at bar, certainly a reasonable argument can be made that how the Supreme Court ruled in *Noble*, *supra*, need not be strictly adhered to in light of *Tate*, *supra*.

If *State v. Dorthey*, 623 So.2d 1276 (La. 1993) means anything, in this case it certainly was followed by Judge Alarcon before his retirement from the bench when he found that Mr. Noble should only be sentenced to five years imprisonment for the possession of a minimal amount (less than three grams) of

¹ Parenthetically, I am reminded of La. Const. art. X, § 30, which states in pertinent part, "I, ..., do solemnly swear (or affirm) that I will support the constitution and laws of the United States and the constitution and laws of this state and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ..., according to the best of my ability

marijuana instead of the statutory thirteen and one-third years.² A three-judge panel of this court,³ three of the seven justices of the Supreme Court, and Judge Ziblich (the judge who replaced Judge Alarcon on the trial bench) have concluded that a downward departure is warranted from the mandatory sentence formulated by the legislature.⁴ The majority herein accurately articulates many of the reasons why the lengthier sentence is out of proportion to the severity of the crime and imposes needless and purposeless pain on the defendant, aside from imposing upon the state the added cost of housing the defendant for potentially eight and one-third *more* years than it needs to.

The facts in this case are simple. The middle-aged defendant has no history of violence. He has an excellent work history and record of supporting his seven children. The trial judge reluctantly imposed the draconian (as it applies to this defendant and this offense) sentence mandated by the multiple offender statute. I point out (as did the trial judge at the resentencing hearing) that the *per curiam* issued in this case by the Louisiana Supreme Court implicitly ignored or overruled its own precedent in *Dorthey*, *supra*, thus leaving this court and the trial court without guidance as to what, if anything, remains of the discretionary authority of the trial and intermediate appellate courts to determine whether a sentence is constitutionally excessive as to a particular defendant or whether such judicial authority is now totally subsumed by the state's discretionary authority to multiple bill a defendant.

and understanding, so help me God." As I understand the oath, my first duty is to the constitution and laws of the United States and next to the constitution and laws of Louisiana.

² The state chose to exercise its discretion to multiple bill the defendant based upon two convictions from his youth, possession of cocaine in 1991 and 2003.

³ *State v. Noble*, 12-0186, unpub (La. App. 4 Cir. 3/9/12).

⁴ I thought that severe sentences were directed at *violent* offenders, not milquetoast offenders.

This is not to say that I approve of the use or distribution of marijuana, but, like the majority notes, the crimes of which Mr. Noble has been convicted have been related to harm that he primarily and directly has caused to himself.

In my view, this is not the case that our courts should be using as the poster child for harsh sentencing.



Office Of The Clerk
Court of Appeal, Fourth Circuit

State of Louisiana

400 Royal Street
Third Floor

Danielle A. Schott
Clerk of Court

Susan B. Hammer
Chief Deputy Clerk of Court

Mailing Address:
410 Royal Street
New Orleans, Louisiana
70130-2199
(504) 412-6001
FAX (504) 412-6019

**NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **02/12/2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

DAS/mcc

**DANIELLE A. SCHOTT
CLERK OF COURT**

2013-KA-1109

Scott G. Vincent
Leon A. Cannizzaro, Jr.
District Attorney
619 South White Street
New Orleans, LA 70119-

Jee Park
ORLEANS PUBLIC DEFENDERS
2601 Tulane Avenue
7th Floor
New Orleans, LA 70119-

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

410 Royal Street
New Orleans, LA 70130-2199

Clerk's Office, New Orleans, this March 17, 2014

To Whom It May Concern:

**REHEARING WAS THIS DAY REFUSED IN THE CASE
ENTITLED.**

STATE OF LOUISIANA VERSUS
BERNARD W. NOBLE

CASE NO. 2013-KA-1109

Sincerely,

DANIELLE A. SCHOTT
CLERK OF COURT



Office Of The Clerk
Court of Appeal, Fourth Circuit

Danielle A. Schott
Clerk of Court

Susan B. Hammer
Chief Deputy Clerk of Court

State of Louisiana
400 Royal Street
Third Floor

Mailing Address:
410 Royal Street
New Orleans, Louisiana
70130-2199
(504) 412-6001
FAX (504) 412-6019

NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING

I CERTIFY THAT A COPY OF THE REHEARING DISPOSITION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **03/17/2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

DAS/rmj

DANIELLE A. SCHOTT
CLERK OF COURT

2013-KA-1109

Scott G. Vincent
Leon A. Cannizzaro, Jr.
District Attorney
619 South White Street
New Orleans, LA 70119-

Donna M. Weidenhaft
ORLEANS PUBLIC DEFENDERS
2601 Tulane Avenue
Suite 700
New Orleans, LA 70119-

Jee Park
ORLEANS PUBLIC DEFENDERS
2601 Tulane Avenue
7th Floor
New Orleans, LA 70119-