SUPREME COURT OF LOUISIANA

NO. 99-K-2207

STATE OF LOUISIANA

VERSUS

DWAIN MICHAEL JONES

MURRAY, Judge Ad Hoc, DISSENTS.

The majority is correct that the record herein provided a rational basis for the trial court's determination that Dwain Jones' decision not to seek medical attention for his daughter, Aspen, contributed to the neurological crisis that ultimately caused her death. He was aware that Aspen had a head injury while the couple was living in Michigan, and he was not satisfied with Amy's explanation of how that injury occurred. He also saw Amy throw his baby to the ground on two occasions, and knew that the child was not herself after the second occasion. Dwain Jones should have done something to protect Aspen from her mother, and should have sought medical attention for the child.

However, the trial court also found that Dwain Jones did not contemplate that his failure to act would cause the child serious harm, and that his criminal conduct resulted from circumstances that were unlikely to recur. The record supports both of these findings. In fact, the Avoylles coroner examined Aspen and ordered full-body x-rays, including x-rays of the child's head, just two months prior to

Aspen's death. Based on the examination and x-rays, he found nothing that would warrant intervention or follow-up. Additionally, Dwain's mother saw Aspen in the days between the second incident and the morning that the child suffered the blows that resulted in her hospitalization and ultimate death[1]. Although she had raised three children, she noticed nothing wrong with the child. It, therefore, was not unreasonable for the court to conclude that Dwain did not contemplate the serious consequences that could result from his inaction.

In light of those mitigating circumstances, I believe that sentencing Dwain Jones to twenty years violates the constitutional prohibition against excessive sentences provided by Article 1, Section 20. I do not attempt to minimize the seriousness of Dwain Jones' crime or ignore the fact that an innocent child is dead because he did not protect her. However, as this Court noted in *State v. Sepulvado*, 367 So.2d 762 (La. 1979), a sentencing judge does not "possess unbridled discretion to impose a sentence within statutory limits, regardless of mitigating facts." *Id.* at 770. A trial court's sentencing discretion should be exercised to impose sentences that are appropriate to the individual circumstances of the offense as well as to the offender.

The trial court herein assigned reasons for sentencing. In those reasons, it stated that the most important factor in its decision

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[1] The trial court found that the specific injuries that caused the child to be hospitalized on September 2 did not result from the incidents in which Dwain saw Amy throw the child.

to impose a twenty year sentence was the case of *State v. Sepulvado*, 655 So.2d 623 (La. App. 2d Cir. 1995), which it found to be very similar to Dwain Jones' situation.

Mrs. Sepulvado, like Dwain Jones, was found to have failed to aid her child in his time of greatest need, and, as a consequence, her child died. *Id.* at 629. That, however, is the only similarity between the circumstances of the offense or the offender in the two cases. Unlike Dwain Jones, Mrs. Sepulvado, who received a twenty-one year sentence for manslaughter in connection with the death of her six-year old son, actually physically abused her child. Although her actions paled in comparison to those of her husband, she admitted hitting her son, pulling his hair and striking him in the head several times. *Id.* at 625. In addition, she watched her husband, over a three day period,[2] tie a rope around her son's neck and threaten to hang him, beat him, put his head in the toilet and flush, refuse to feed him, kick him from one room to another, and, finally, put him in a tub of scalding water. *Id.* at 625-626. The circumstances of the offense and the offender in *Sepulvado* cannot be equated with Dwain Jones and the circumstances of this case.

Because Dwain Jones did not personally physically abuse his daughter or contemplate that his failure to act to protect her would cause her serious harm, and because his criminal conduct is unlikely to recur, sentencing him to twenty years serves no purpose other

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[2] This three day period of abuse was the culmination of a pattern of gradually escalating abuse inflicted upon the child by Mr. Sepulvado.

than the needless infliction of pain and suffering. I, therefore, agree with the court of appeal that the sentence was an abuse of the trial court's discretion.