THIRD CIRCUIT JUDGES' ASSOCIATION CONTINUING LEGAL EDUCATION PROGRAM

AUGUST 16, 2019

THIRD CIRCUIT JUDGES

Chief Judge Gene Thibodeaux
Judge Sylvia R. Cooks
Judge John D. Saunders
Judge Elizabeth A. Pickett
Judge Billy H. Ezell
Judge Shannon J. Gremillion
Judge Phyllis M. Keaty
Judge John E. Conery
Judge D. Kent Savoie
Judge Van H. Kyzar
Judge Candyce G. Perret
Judge Jonathan W. Perry

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION
PROGRAM – August 16, 2019

CRIMINAL APPEALS AND SUPERVISORY WRIT APPLICATIONS

Presentation and Written Materials by:
Sandi Aucoin Broussard, Criminal Staff Director,
and Robin Anderson, Research Attorney

Central Staff Director – Dianne Tynes

Central Criminal Staff:

Sandi Aucoin Broussard - Director

Jeff Slade and Reba Green - Senior Research Attorneys
Melissa Sockrider, Bobbie Kirkland, Robin Anderson, Beth Fontenot, Dustin Madden, Chastity Swinburn, and Charlie Draughter - Research Attorneys

TABLE OF CONTENTS

I. APPEALS

A. Jurisdictional examination 1
1. Appealable? 1
i. Rulings that are appealable 1
ii. Rulings that are NOT appealable 2
2. Triable by jury? 2
3. Timely? 3
4. Rule to Show Cause 3
5. Juvenile appeals 3
B. Review by Criminal Staff 4
C. Errors Patent 4
D. Standards of Review 4
1. Sufficiency of the evidence 4
2. Abuse of discretion 5
3. Harmless error 5
4. Sentencing Review 5
a. La.Code Crim.P. art. 881.2 6
b. La.Code Crim.P. art. 881.1(E) 6
c. Despite art. 881.1(E) 6
d. Reasons for sentencing insufficient 6
e. La.Code Crim.P. art. 779 6
E. Rehearings 7
F. Finality of judgments 7

II. SUPERVISORY WRIT APPLICATIONS

A. Deficiency review 7
1. Procedural Bars 7
a. Timeliness - post-conviction relief applications 7
b. Repetitive 7
c. Sentencing claims 7
d. Waiver 7
e. Timeliness – Uniform Rules—Courts of Appeal, Rule 4-3 7
2. Contents 8
3. Priority of handling writs 8
a. Bail 8
b. Pretrial 8
c. Juvenile 8
d. Misdemeanor or Probation revocation 8
e. Any request for expedited consideration 8
f. Post-conviction relief 8
B. Review of the merits 8
1. Nature of Pleading 8
2. Typical issues 8

a. Pre-trial 8
b. Misdemeanor convictions 10
c. Probation revocation 10
d. Production of Documents 10
f. Post-conviction relief 10
C. Oppositions 10
D. Emergency/Expedited Writ Applications 10
1. Timing 10
2. FAX AND E-FILING 10
3. Last Minute Filing 11
4. Form and Content 11
5. Service Upon All Interested Parties 11
6. Opposition Brief 11
7. Request for a Stay of Proceedings 11
E. Process 11
F. Rehearings 11
G. Finality of judgments 12

III. MISCELLANEOUS 12

IV. APPENDICES
1. Jurisdictional Review Checklist 13
2. Deficiency Review Procedure 15
3. Deficiency Review Checklist 21

CRIMINAL APPEALS AND SUPERVISORY WRIT APPLICATIONS – THE BASICS

I. APPEALS

A. Jurisdictional examination - New criminal appeal records are reviewed by a paralegal or staff attorney to determine if the case is properly presented by appeal and if the appeal is timely. This court's checklist for jurisdictional examination is included at the end of these materials. (Appendix 1) In addition to appealability and timeliness, the following are reviewed: prematurity, contents of the appellate record, whether the record is a confidential record because it involves a sex offense (La.R.S. 46:1844(W)) or domestic abuse (La.R.S. 46:1844(W)(5)(a)), and whether the defendant is represented by counsel.

1. Appealable?

a. Identify the ruling that is being reviewed. Only a final judgment or ruling is appealable. The most common criminal appeal is the review of a conviction and sentence in a felony case. Of course, there are instances where the State may appeal.

b. Appealable rulings are set out in La.Code Crim.P. art. 912 and 912.1. The list in article 912 is not exclusive.

i. Rulings that are appealable:

aa. Conviction and sentence (defendant) La.Code Crim.P. art.912(C)(1).

bb. Imposition of illegal sentence (defendant) & (State; La.Code Crim.P. arts. 881.2 (B) & 882 (1))

cc. A ruling granting the State's motion to declare the defendant insane. (defendant) La.Code Crim.P. art.912(C)(2).

dd. A juvenile adjudication and disposition (juvenile; La.Const. art. V, § 10(B)(2); La.Ch.Code art. 330(B))

ee. Granting of a motion to quash the indictment or any count in the indictment (State) La.Code Crim.P. art.912(B)(1). Caveat: If a motion to quash is granted in a misdemeanor case, the State must seek review by writ because the case was not triable by a jury. La.Code Crim.P. art. 912.1(B)(C).

ff. Granting of a plea of time limitations (where case is dismissed under La.Code Crim.P. arts. 571-583; not when a motion for release is granted under La.Code Crim.P. art. 701) (State) La.Code Crim.P. art.912(B)(2).

gg. Granting of plea of double jeopardy (State) La.Code Crim.P. art.912(B)(3).

hh. Granting of motion in arrest of judgment (State) La.Code Crim.P. art. 912(B)(4).

ii. Granting of defendant's motion to change venue or denial of the State's motion to change venue (State; La.Code Crim.P. art. 627) La.Code Crim.P. art. 912(B)(5).

jj. Granting of a motion to recuse (State; but compare La.Code Crim.P. arts. 912(B)(6) & 684; La.Code Crim.P. art. 684 states "If a judge or a district attorney is recused over the objection of the State, or if an application by the State for recusation of a judge is denied, the State may apply for a review of the ruling by supervisory writs. The defendant may not appeal prior to

sentence from a ruling recusing or refusing to recuse the judge or the district attorney.")

kk. Granting of a motion for post-verdict judgment of acquittal (State; La.Code Crim.P. art. 821(D))

ii. Rulings that are NOT appealable:

aa. Verdict of acquittal (La.Code Crim.P. art. 912(B))

bb. Refusal to adjudicate child a delinquent (La.Ch.Code art. 331(B))

cc. Probation revocation La.Code Crim.P. art. 912.1(C)

dd. Denial or granting of a motion to suppress (however, a denial can be appealed once Defendant is sentenced)

ee. Denial or granting of application for post-conviction relief (La.Code Crim.P. art. 930.6)

ff. Denial or granting of habeas (La.Code Crim.P. art. 369)

gg. Convicted but not yet sentenced

hh. Granting of a motion to quash habitual offender adjudication. *See State v. Cass*, 44,411 (La.App. 2 Cir. 8/19/09), 17 So.3d 486 (the State has no right of appeal from a ruling quashing a bill of information charging the defendant under the Habitual Offender Law but nonetheless the court examined the merits of the State's argument under its supervisory jurisdiction as there was no adequate remedy on appeal.)

ii. Denial of motion for new trial, where no sentence imposed

jj. Denial of motion for change of venue (defendant, La.Code Crim.P. art. 627)

kk. Denial of a motion to correct illegal sentence such as those filed pursuant to *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012) and *Montgomery v. Louisiana*.

2. Triable by jury?

a. Appellate courts have appellate jurisdiction only in cases triable by a jury. La.Const. art. V, § 10 (A)(3). *See* La. Code Crim.P. art. 912.1(B)(1).

b. To determine if the case was triable by jury, the courts of appeal consider the penalty that is possible under the statute, not the actual sentence imposed. Even if the defendant waived the right to a jury trial, if he had the right, the case is triable by jury for jurisdictional purposes.

c. For the most part, felony offenses are triable by jury. *See* La.Code Crim.P. art. 782. "Felony" - an offense that may be punished by death or by imprisonment at hard labor. *See* La.Code Crim.P. art. 933(3). Most misdemeanor convictions are not appealable. *See* La.Code Crim.P. art. 912.1; La.R.S. 13:1896.

However, if a defendant is charged with a misdemeanor in which the punishment may be a fine in excess of $1,000 or imprisonment for more than 6 months, the case shall be tried by a jury of six jurors. *See* La.Code Crim.P. art. 779. When misdemeanor charges are charged by separate bills of information and the aggregate potential penalty of the offenses exceeds 6 months imprisonment or a fine of $1,000, the defendant is entitled to a jury trial. Whenever two or more misdemeanors are joined in the same bill of information, the maximum aggregate

penalty shall not exceed imprisonment for more than 6 months, a fine of more than $1,000, or both. *See* La.Code Crim.P. art. 493.1.

3. Timely?

a. Was the motion to appeal timely filed? The defendant has 30 days from the date he/she was sentenced in which to file a motion to appeal. *See* La.Code Crim.P. art. 914(B)(1). (Start counting on the day after sentencing. The deadline is the 30th day. If the 30th day is on a weekend or trial court holiday, go to the next day).

b. A defendant in a felony case has 30 days after sentencing, or within such longer period as the court may set at sentencing, in which to file a motion to reconsider sentence. If a motion to reconsider sentence is filed, the time delays for appeal start with the ruling on that motion. (Start counting on the day after the ruling). *See* La.Code Crim.P. art. 914(B)(2).

c. Untimely-filed motions for appeal are considered applications for post-conviction relief seeking out-of-time appeal. La.Code Crim.P. art. 930.2; *State ex rel. Moore v. State*, 17-60 (La. 4/6/18), 239 So.3d 279 (citing *State v. Counterman*, 475 So.2d 336 (La.1985)). Under La.Code Crim.P. art. 930.8, a defendant has two years to file such an untimely motion for appeal unless he can both allege and prove a listed exception to the time limitation.

4. Rule to Show Cause

a. If the appeal is taken from a non-appealable judgment, if the appeal is premature, or if the defendant did not timely seek an out-of-time appeal (La.Code Crim.P. art. 930.8), this court will issue a rule to show cause why the appeal should not be dismissed.

b. If the appeal is dismissed because the judgment was not appealable, the opinion dismissing the appeal will normally provide the defendant with a time period in which to file a writ application. We do not convert appeals to writs.

5. Juvenile appeals

a. When a juvenile is adjudicated a delinquent under Title VIII of the Children's Code, review is by appeal, which is filed as criminal. Even if the adjudication as a delinquent is based on a misdemeanor offense, the courts of appeal have jurisdiction over the appeal. *See* La. Const. art. V, § 10(A)(2). An appeal may be taken only after a judgment of disposition. The State may not appeal from a judgment refusing to adjudicate a child to be delinquent or from a judgment of acquittal. La. Ch. Code art. 331(B). If the ruling is that the family is in need of services (FINS), or that the child is in need of care, there is a right of appeal, but the appeal is civil. *See* La. Ch. Code art. 330(B).

b. Juvenile appeals shall be taken within 15 days from the mailing of the notice of judgment. If a timely application for new trial is made, the delay for appeal commences to run from the date of the mailing of notice of denial of the new trial motion (the delay for filing a motion for new trial is 3 days, exclusive of holidays, and shall commence to run from the mailing of the notice of judgment). A motion for new

trial shall be decided expeditiously and within 7 days from the date of submission for decision. *See* La. Ch. Code art. 332(A) & (C).

c. Juvenile appeals shall be accorded preference and shall be determined at the earliest practicable time. *See* La. Ch. Code art. 337 & Uniform Rules—Courts of Appeal, Rule 5-1.

B. An appeal is sent from the clerk's office to criminal staff for errors patent and merits review when the Appellant's brief is filed.

C. Errors Patent – See separate Errors Patent outline.

D. Standards of Review

1. Sufficiency of the evidence to uphold a conviction - (Sufficiency of the evidence and sentencing are two typical issues raised on appeal.) Standard of review - Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979).

When reviewing sufficiency, we must be mindful that the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Where there is conflicting testimony regarding factual matters, the resolution of which depends upon the determination of the credibility of witnesses, the matter is one of the weight of the evidence, not its sufficiency. On appeal, the court "will overturn a jury's credibility assessment only when a witness's own testimony demonstrates that the witness's ability to perceive events was impaired in some way." *State v. Hypolite*, 04-1658, p. 5 (La.App. 3 Cir. 6/1/05), 903 So.2d 1275, 1279, *writ denied*, 06-618 (La. 9/22/06), 937 So.2d 381.

When circumstantial evidence forms the basis of a conviction, La.R.S. 15:438 requires the elements of the offense be proven so that every reasonable hypothesis of innocence is excluded. *State v. Schnyder*, 06-29 (La.App. 5 Cir. 6/28/06), 937 So.2d 396, 400. "[T]he pertinent question on review [is] not whether the appellate court found that defendant's hypothesis of innocence offered a reasonable explanation for the evidence at trial but whether jurors acted reasonably in rejecting it as a basis for acquittal." *State v. Pigford*, 05-477, p. 5 (La. 2/22/06), 922 So.2d 517, 520 (per curiam). All of the evidence, both direct and circumstantial, must be sufficient to satisfy a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Schnyder*.

State v. Thacker, 14-418, p. 2 (La. 10/24/14), 150 So.3d 296, 297 – On appeal, this court noted a problem with sufficiency of the evidence but did not address it because it was not raised. Louisiana Supreme Court said, "When the state's case is devoid of evidence of an essential element of the charged offense, the conviction and sentence must be set aside 'regardless of how the error is brought to the attention of the reviewing court.'"

2. Abuse of discretion

The trier of fact is presumed to have acted rationally until it appears otherwise. *State v. Mussall*, 523 So.2d 1305 (La.1988). Only irrational decisions to convict by the trier of fact will be overturned. *Id.* at 1309.

3. Harmless error (La.Code Crim.P. art. 921)

Once an appellate court has determined that the trial court erred (abused its discretion), the harmless error analysis is utilized in certain situations. The proper analysis for determining harmless error is not whether, in a trial that occurred without the error, a guilty verdict surely would have been rendered but whether the guilty verdict actually rendered in the trial was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081 (1993).

The United States Supreme Court distinguished between "trial errors," which may be reviewed for harmless error, and "structural errors," which defy analysis by harmless error standards. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246 (1991). Trial error is error which occurred during presentation of the case to the jury and may, therefore, be quantitatively assessed in context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. "Structural error" is one that affects the framework within which trial court proceeds; structural defects include complete denial of counsel, adjudication by biased judge, exclusion of members of defendant's race from grand jury, right to self-representation at trial, right to public trial, and right to jury verdict of guilt beyond a reasonable doubt. *See State v. Johnson*, 94-1379 (La. 11/27/95), 664 So.2d 94.

4. Sentencing Review - This court has previously discussed the standard for reviewing excessive sentence claims:

[Louisiana Constitution Article] I, § 20 guarantees that, "[n]o law shall subject any person to cruel or unusual punishment." To constitute an excessive sentence, the reviewing court must find the penalty so grossly disproportionate to the severity of the crime as to shock our sense of justice or that the sentence makes no measurable contribution to acceptable penal goals and is, therefore, nothing more than a needless imposition of pain and suffering. The trial court has wide discretion in the imposition of sentence within the statutory limits and such sentence shall not be set aside as excessive absent a manifest abuse of discretion. The relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. *State v. Barling*, 00-1241, 00-1591, p. 12 (La.App. 3 Cir. 1/31/01), 779 So.2d 1035, 1042, *writ denied*, 01-838 (La.2/1/02), 808 So.2d 331 (citations omitted) (second alteration in original).

In deciding whether a sentence is shocking or makes no meaningful contribution to acceptable penal goals, an appellate court may consider several factors including the nature of the offense, the circumstances of the offender, the legislative purpose behind the punishment and a comparison of the sentences imposed for similar crimes. While a comparison of sentences imposed for similar crimes may provide some insight, "it is well settled that sentences must be individualized to the particular offender and to the

particular offense committed." Additionally, it is within the purview of the trial court to particularize the sentence because the trial judge "remains in the best position to assess the aggravating and mitigating circumstances presented by each case." *State v. Smith*, 02-719, p. 4 (La.App. 3 Cir. 2/12/03), 846 So.2d 786, 789, *writ denied*, 03-562 (La. 5/30/03), 845 So.2d 1061 (citations omitted). "[T]he trial judge need not articulate every aggravating and mitigating circumstance outlined in art. 894.1[;] the record must reflect that he adequately considered these guidelines in particularizing the sentence to the defendant." *State v. Smith*, 433 So.2d 688, 698 (La.1983).

a. La.Code Crim.P. art. 881.2 - The defendant may appeal or seek review of a sentence based on any ground asserted in a motion to reconsider sentence. The defendant also may seek review of a sentence which exceeds the maximum sentence authorized by the statute under which he was convicted and any applicable statutory enhancement. The defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea. This includes sentences imposed in accordance with bargained-for caps. *State v. Washington*, 07-852 (La.App. 3 Cir. 1/30/08), 977 So.2d 1060.

b. La.Code Crim.P. art. 881.1(E) – Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider may be based, including a claim of excessiveness, shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.

c. Despite art. 881.1(E), some panels of this court will review the defendant's sentence for bare excessiveness in the interest of justice. In a bare excessiveness review, we look at: applicable penalty range, where the sentence falls within the range, the trial court's reasons, nature of the offense, circumstances of the offender, a comparison of the sentences imposed for similar crimes, and benefit(s) received from plea bargain. *See State v. Debarge*, 17-670 (La.App. 3 Cir. 2/7/18), 238 So.3d 491.

d. Reasons for sentencing insufficient – To avoid remand, the sentencing records should reflect compliance with La.Code Crim.P. art. 894.1 and should be susceptible to a *State v. Whatley*, 03-1275 (La.App. 3 Cir. 3/3/04), 867 So.2d 955/*State v. Lisotta*, 98-648 (La.App. 5 Cir. 12/16/98), 726 So.2d 57, *writ denied*, 99-433 (La. 6/25/99), 745 So.2d 1183, analysis.

e. La.Code Crim.P. art. 779 - Defendants are entitled to a jury trial in misdemeanor cases where the aggregate penalty exceeds six months. This also applies to cases wherein the defendant is charged via multiple bills of information and the charges have been either consolidated or treated as if consolidated. *State v. Hornung*, 620 So.2d 816 (La.1993); *State v. Crooks*, 16-472 (La.App. 3 Cir. 7/12/16) (unpublished opinion); *State v. Thomas*, 98-231 (La.App. 3 Cir. 1/6/99), 735 So.2d 669; *State v. Suggs*, 432 So.2d 1016 (La.App. 1 Cir. 1983). In addition to the advisement of jury trial rights at plea hearings, the mode of trial, and the jurisdictional ramifications in

city courts, this affects whether the convictions and sentences should be appealed. Cases triable by jury are to be appealed. La.Code Crim.P. art. 912.1.

E. Rehearings – Uniform Rules—Courts of Appeal, Rule 2-18.7 – Rehearing can be sought when an appeal was dismissed or a decision on the merits of an appeal was rendered.

F. Finality of judgments– A decision/ruling by this court is final when the delay for applying for a rehearing, which is 14 days, has expired and no application therefor has been made. If a rehearing application has been filed, the decision/ruling becomes final when the application has been denied. If writs to the supreme court are sought, our decision/ruling becomes final when the supreme court denies the writ. *See* La.Code Crim.P. art. 922.

II. SUPERVISORY WRIT APPLICATIONS

A. Deficiency review – See Appendix 2.

1. Procedural Bars

a. Timeliness - post-conviction relief applications – La.Code Crim.P. art. 930.8

i. Date of finality of conviction and sentence – 30 days after sentencing, if no appeal filed. Appeal filed – date of opinion plus 14 days, if no rehearing filed. Rehearing filed - date rehearing was denied, if no writ to S.Ct. Writ to S.Ct. – date of denial/opinion plus 14 days. *See* La.Code Crim.P. art. 922(B).

ii. Date the application or post-conviction relief is filed with trial court

iii. Exceptions alleged – *See* La.Code Crim.P. art.930.8(A)(1)-(4).

b. Repetitive – was the issue(s) in the writ application disposed of in a prior appeal or writ. *See* La.Code Crim.P. art. 930.4(A).

c. Sentencing claims, including habitual offender sentencing issues, are not reviewable on pcr - *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172; *State v. Cotton*, 09-2397 (La. 10/15/10), 45 So.3d 1030.

d. Waiver – some guilty plea forms include a waiver of the right to file post-conviction relief.

e. Timeliness – Uniform Rules—Courts of Appeal, Rule 4-3 – This court applies the thirty-day time limit of Rule 4-3 to all writ applications (pro se and attorney-filed), **EXCEPT** pro se writs involving post-conviction relief. Postmark date controls. *See* Uniform Rules—Courts of Appeal, Rule 2-13. The untimeliness of a writ is always brought to the attention of the panel, but a panel may choose not to dispose of a writ on the basis of untimeliness. Rule 4-2 requires notice of intention to file writs be given to the trial judge whose ruling is at issue by requesting a return date to be set within the time period provided in Rule 4-3. In criminal cases, Rule 4-3 states the return date shall not exceed 30 days from the date of the ruling at issue, unless the trial judge orders the ruling be reduced to writing. If judge has ordered the ruling be reduced to writing, the return date shall not exceed 30 days from the date the ruling is signed. *But see State v. Goppelt*, 08-576 (La. 10/31/98), 993 So.2d 1188 (misdemeanor conviction), and *State v. Scott*, 12-2458 (La. 8/30/13), 123 So.3d 160 (pcr). Extensions – trial court or appellate court can extend the return date IF a motion for extension is filed within the original or extended return date.

2. **Contents -** See Appendix 3 for complete listing, but the important things needed for review of the merits are: pleading on which judgment is based; trial court's ruling, including reasons, if given; minutes of court; transcripts of any relevant hearings; and a copy of any exhibits introduced at those hearings. *See* Uniform Rules—Courts of Appeal, Rule 4-5; *and see* La.Code Crim.P. art. 912.1(C).

3. Priority of handling writs

a. Bail - this court tries to issue a ruling within 48 hours.

b. Pretrial

i. Next hearing date

ii. Trial date

iii. No date

iv. Stayed

c. Juvenile (according to any hearing or trial date or with preferential treatment per Uniform Rules—Courts of Appeal, Rule 5-1.)

d. Misdemeanor or Probation revocation

e. Any request for expedited consideration

f. Post-conviction relief

B. Review of the merits

1. Nature of Pleading – It is the substance, not the caption, that determines the nature of the pleading. *State ex rel. Lindsey v. State*, 99-2755 (La. 10/1/99), 748 So.2d 456.

2. Typical issues

a. Pre-trial

i. Bail (setting and reduction – *See* La.Code Crim.P. art. 311 *et seq.*);

ii. Habeas corpus (*See* La.Code Crim.P. art. 352 *et seq*. If a pleading alleges a true habeas corpus claim, the pleading must be filed in the parish where the petitioner is incarcerated. La.Code Crim.P. art. 352. The Louisiana Supreme Court has recognized that criminal habeas corpus proceedings essentially deal with pre-conviction complaints concerning custody. *State ex rel. Glover v. State*, 93-2330, 94-2101, 94-2197 (La. 9/5/95), 660 So.2d 1189, *abrogated in part on other grounds by State ex rel. Olivieri v. State*, 00-172 (La. 2/21/01), 779 So.2d 735, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566 (2001), *and cert. denied*, 534 U.S. 892, 122 S.Ct. 208 (2001). *See also* La.Code Crim.P. art. 351, official revision comment (c); *State ex rel. Lay v. Cain*, 96-1247 (La.App. 1 Cir. 2/14/97), 691 So.2d 135. Pro se litigants frequently label pleadings which pertain to art. 701 as habeas.);

iii. Speedy trial (*See* La.Code Crim.P. art. 701 – time limits for filing bill, arraignment, and for commencing trial after filing of motion for speedy trial. *See also State v. Varmall*, 539 So.2d 45 (La.1989) - if bill is filed prior to hearing on 701 motion, issue of pre-trial release is moot); motion to quash (time limitations - *See* La.Code Crim.P. art. 571 *et seq.*);

iv. Double jeopardy – (*See* La.Code Crim.P. art. 591 *et seq.*; *State v. Green*, 16-32 (La.App. 3 Cir. 5/13/16) (unpublished opinion), *writ denied*, 16-1126 (La. 11/18/16) – Defendants filed a motion to quash the charging instrument arguing they should be sentenced under the 2015 changes made to the possession of marijuana statute despite their offenses have been committed prior to the 2015

changes. This court, with one judge dissenting, stated, "Based upon the language 'on conviction',' the drastic reduction in the penalty for possession of marijuana, and the Legislature's intent to reduce costs associated with incarceration for the State as it relates to persons who commit the offense of possession of marijuana," Defendants should be sentenced in accordance with the new penalties.);

v. Motion to Suppress - (*See* La.Code Crim.P. art. 703); motion in limine/other crimes (*See State v. Prieur*, 277 So.2d 126 (La.1973); right to counsel (*See State v. Peart*, 621 So.2d 780 (La.1993); right to self-representation; and recusal (*See* La.Code Crim.P. art. 671 *et seq.*);

vi. Motion to Recuse - (*See* La.Code Crim.P. art.671 et seq. regarding recusal of judges and prosecutors);

In *State v. Daigle*, 18-634 (La. 4/30/18), 241 So.3d 999 (citations omitted), the supreme court discussed the standard of review for recusing judges on grounds of bias set forth by *Rippo v. Baker*, ___ U.S. ___, 137 S.Ct. 905, 907 (2017) and examined by *State v. LaCaze*, 16-234 (La. 3/13/18), 239 So.3d 807:

> [T]he United States Supreme Court recently ruled that "[r]ecusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (internal quotes omitted). . . . [U]nder *Rippo's* mandate, "evidence of actual bias is not necessary to require recusal." In other words, recusal may be required as a constitutional safeguard against the risk of bias . . . .
>
> . . . .
>
> . . . First, "[t]he *Rippo* standard clearly requires proof that an appearance of bias gives rise to a 'probability of actual bias,' also referred to as a 'risk of bias' or 'potential for bias.'" "Secondly, the defendant must prove that the probability of actual bias rises to a level that 'is too high to be constitutionally tolerable' under the circumstances."

vii. Failure to Rule on Pretrial Pro Se Motions - In *State v. Thibodeaux*, 17-705 (La. 12/6/17), 236 So.3d 1253, the supreme court revisited its ruling in *State v. Melon*, 95-2209 (La. 9/22/95), 660 So.2d 466. The supreme court adopted the rationale in *State v. Alexander*, 07-1236 (La.App. 3 Cir. 4/9/08), 980 So.2d 877, requiring a defendant to choose between representation by counsel and proceeding pro se. However, the supreme court maintained its requirement that trial courts rule on pretrial pro se motions unless certain conditions exist:

> That is not to say, however, that a hearing like that envisioned in *Alexander* will be necessary every time a represented defendant files a pro-se motion and defendant must in each instance necessarily be asked to choose between continued representation of counsel or having his pro-se motion considered. In many instances, counsel may simply wish to adopt the pro-se filing or the trial court can review the motion and assess its potential for confusion, disruption, or reversible error. Regardless, however, the trial court's use of a stamp to reflexively deny all pro-se filings by a represented

defendant is inadequate to safeguard the defendant's rights while ensuring the efficient and orderly administration of criminal justice.

Thibodeaux, 236 So.3d at 1255-56.

b. Misdemeanor convictions – typical issue raised is sufficiency of the evidence.

c. Probation revocation – *See* La.Code Crim.P. art. 900 *et seq.*;

d. Production of Documents - *State v. ex rel. Simmons v. State*, 93-275, 94-2630, 94-2879 (La. 12/16/94) – indigent defendants are entitled to copies of certain documents free of charge (transcript of guilty plea, bill of information or grand jury indictment, court minutes, document committing them into custody, and transcript of evidentiary hearings on pcr); otherwise, they must demonstrate a particularized need for a document to receive it free of charge; particularized need is demonstrated by filing a timely pcr which sets out specific claims of constitutional errors requiring the requested documentation for support. *State ex rel. Bernard v. Criminal District Court*, 94-2247 (La. 4/28/95), 653 So.2d 1174. If the time limit for filing pcr has lapsed and Relator does not prove an exception, he/she is not entitled to documents. *State ex rel. Fleury v. State*, 93-2898 (La. 10/13/95), 661 So.2d 488. The right to request documents can also be waived as a condition of a guilty plea.

e. Motion to Correct Illegal Sentence - An illegal sentence may be corrected at any time. La.Code Crim.P. art. 882. Inmates often title their pleadings "Motion to Correct Illegal Sentence," but usually the pleadings are in the nature of an application for post-conviction relief. Only those claims relating to the legality of the sentence itself under the applicable sentencing statutes may be raised in a motion to correct illegal sentence. *State v. Gedric*, 99-1213 (La.App. 1 Cir. 6/3/99), 741 So.2d 849 (per curiam), *writ denied*, 99-1830 (La. 11/5/99), 751 So.2d 239. *See also* La.Code Crim.P. art. 881.5. If the filing does not point to a claimed illegal term in the sentence, the claim is not cognizable in a motion to correct illegal sentence and may be raised through an application for post-conviction relief. *State v. Parker*, 98-256 (La. 5/8/98), 711 So.2d 694.

f. Post-conviction relief ("pcr") – will be addressed in pcr section of this session.

C. Oppositions – if the respondent wishes to file an opposition to the writ, he/she/it must notify this court, and a deadline for filing such will be given. Staff encourages parties to file oppositions. *The typical response time for filing an opposition is ten days from the filing of the writ application, unless the expedited nature of the writ requires a shorter response time.*

D. Emergency/Expedited Writ Applications – (ex. - trial or hearing date upcoming)

1. This court makes every effort to render a ruling prior to the trial or hearing date and attempts to avoid staying a trial/hearing. **JUDGES, IF POSSIBLE, PLEASE SET A RETURN DATE FAR ENOUGH IN ADVANCE OF THE TRIAL DATE TO ALLOW THIS COURT TIME TO REVIEW THE WRIT APPLICATION. Otherwise, this court may issue a stay of trial.**

2. PERMISSION REQUIRED FOR FAX AND E-FILING - expedited or emergency writs can be faxed filed (337-491-2590 – Attention: Criminal Staff Director) or e-mailed (3rdfiling@la3circuit.org).

a. Permission to fax or e-mail file an emergency/expedited writ must be obtained from the Central Staff Director, the Criminal Staff Director (in the absence of the

Central Staff Director), or a senior research attorney (in the absence of the Central Staff Director and the Criminal Staff Director).

b. The court's main telephone number is 337-433-9403.

c. **The above-referenced e-mail address is not monitored or checked** unless this court has been notified of the anticipated filing of an emergency writ. If e-mailed, the writ must be submitted in pdf format.

3. Please do not create your own emergency by waiting until the last minute to file the writ. Such late filing may result in a delay in obtaining a ruling.

4. Form and Content

a. Status of the Case. Be sure to include the status of the case, the reasons for expedited consideration, and a specific time within which action is sought (as a separate page and properly noted in the index). **If the status of the case changes during the pendency of the writ, you must notify the court** of said change.

b. Cover Page - The request for expedited consideration must be on the cover page of the writ in **bold**.

c. The only information this court has on these cases is the information supplied by the parties, so the application must include any/all materials you want this court to consider.

i. See Uniform Rules—Courts of Appeal, Rule 4-5 and La.Code Crim.P. art. 912.1(C) for what a writ application must contain.

ii. Depending on the issue presented in the writ application, a transcript may be needed to resolve the issue. Although this court cannot require a transcript be provided, we can deny the writ on the showing made if the writ cannot adequately be considered without the transcript. *City of Baton Rouge v. Plain*, 433 So.2d 710 (La.), *cert. denied*, 464 U.S. 896, 104 S.Ct. 246 (1983).

5. Service Upon All Interested Parties - A copy of the writ application must be sent to the trial court and all parties at interest **by means equal to or faster than** the means used to file with this court, and such must be certified to this court. *See* Uniform Rules—Courts of Appeal, Rule 4-4.

6. Opposition Brief - A party interested in filing an opposition to such a writ must call and request a deadline for filing an opposition. The deadline for filing an opposition to an emergency/expedited writ application will depend on the time constraints.

7. Request for a Stay of Proceedings – To be able to request a stay from this court, a stay must have first been requested from the trial court.

E. Process – A staff attorney researches and prepares a memo (time permitting), which is submitted to a panel of 3 judges. There are no 5 judge panels in criminal cases. *See* La.Const. art. 5, § 8. The judges communicate their votes to criminal staff. When all votes have been received, staff prepares the ruling, which is then processed and issued by the clerk's office. In emergency writs, the parties are notified via phone and the ruling is faxed.

F. Rehearings – Uniform Rules—Courts of Appeal, Rule 2-18.7 – Rehearing can be sought when a writ was **granted on the merits**. We routinely receive rehearing applications on writ applications that were denied; a rehearing is not permitted in such situation except, pursuant to a conference decision, when the writ was denied as untimely pursuant to Uniform Rules—Courts of Appeal, Rule 4-3.

G. Finality of judgments – same as with respect to appeals. See p. 7.

III. MISCELLANEOUS

A. Trial judges should **read** the contents of all orders **before signing**.

B. Multiple pleadings filed, multiple forms of relief requested, etc. - judgment should specify the pleading that is being ruled upon and should clearly distinguish which relief is being granted/denied.

C. Memorialize off-the-record/in chambers discussions and agreements with the trial court for the record.

D. If a video or DVD admitted into evidence is not playable with a standard program, please provide this court with instructions on how the video or DVD can be viewed.

E. There are occasions when a judge is unavailable to sign an order, but the judge or the panel has authorized the issuance of the order. Therefore, when this court issues an unsigned order but indicates a signed order will follow, the order should be complied with.

APPENDIX 1

THIRD CIRCUIT'S CHECKLIST FOR JURISDICTIONAL REVIEW OF NEW CRIMINAL APPEALS

1. Determine whether the case falls within the purview of La.R.S. 46:1844(W)(1)(a), which prohibits the disclosure of the name, address, contact information, or identity of the victim who is under the age of 18 or the victim of a sex crime.

2. Determine whether the case falls under the purview of La.R.S. 46:1844(W)(5)(a), which prohibits the disclosure of the address or contact information of the victim (family members, household members, or dating partners, as defined in La.R.S. 46:2132 and La.R.S. 46:2151) in cases involving domestic abuse.

3. Determine whether the case falls within the purview of Uniform Rules—Courts of Appeal, Rule 5 which requires certain cases involving minors be handled expeditiously and requires the confidentiality of the minors be protected.

4. Make sure the defendant's name on the front of the record is spelled the same as it is in the charging instrument.

5. Check accuracy of the designation of appellant and appellee on the front of the record.

6. Check information on counsel of record on the front of the record for accuracy.

7. If the defendant is not represented by an attorney, check the record for a Dangers and Disadvantages of Self-Representation (D&D) hearing. If no D&D hearing was held (and the judgment is properly appealable), this court will remand the case to the district court for a D&D hearing.

8. Check all information provided by the district court on the Jurisdictional Index Sheet for accuracy. Make any necessary corrections and fill in any missing information.

9. Determine whether the judgment at issue is an appealable judgment.
   a La.Code Crim.P. art. 912A - only a final judgment is appealable.
   b. La.Code Crim.P. art. 912B - lists judgments from which state can appeal.
   c. La.Code Crim.P. art. 912C - defendant can appeal from judgment which imposes sentence or declares defendant insane.
   d. La.Code Crim.P. art. 912.1 - appeal to this court in a case triable by jury (*See* La.Code Crim.P. arts. 779, 782 and 933. *See also State v. Hornung*, 620 So.2d 816 (La.1993) - aggregate penalty of multiple misdemeanors charged in separate bills).
   e. Juvenile cases (ex. Delinquency) - La.Ch.Code art. 330 - an appeal may be taken only after a judgment of disposition. If judgment is not appealable, this court will issue to the appellant a rule to show cause why the appeal should not be dismissed.

10. Determine the timeliness of the appeal.
    a. La.Code Crim.P. art. 914 - motion for appeal (can be oral or written) must be made no later than:
        (1) Thirty days after rendition of judgment from which the appeal is taken.
        (2) Thirty days from the ruling on a motion to reconsider sentence. La.Code Crim.P. art. 881.1 requires, in felony cases, that motion to reconsider sentence be filed within 30 days following imposition of sentence or within such longer period as the trial court may set at sentence.

    (Use the original sentencing date NOT the habitual offender sentencing date.)

    b. Juvenile cases - La.Ch.Code art. 332 - Except as otherwise provided within a particular Title of this Code, appeals shall be taken within fifteen days from the mailing of notice of the judgment. However, if a timely application for new trial is made pursuant to Paragraph C, the delay for appealing commences to run from the date of the mailing of notice of denial of the new trial motion.

    If the motion for appeal is untimely under La.Code Crim.P. art. 914 AND the motion for appeal was not filed within the delay for seeking an out-of-time appeal set forth in La.Code Crim.P. art. 930.8, this court will issue to the appellant a rule to show cause why the appeal should not be dismissed.

11. If a motion to reconsider sentence was filed, check for disposition of the motion. If no disposition reflected in the record, this court will check with district court clerk's office regarding disposition. If the motion was not disposed of, this court will remand the case to the district court for disposition of the motion.

12. Check for imposition of sentence. If the sentence was not imposed, this court will issue to the appellant a rule to show cause why the appeal should not be dismissed as premature.

13. Check for missing items such as minutes, verdict forms, transcripts, etc. Request any necessary missing items from the district court.

14. If more than one record on the same defendant is received from the district court, check the record to see if the district court consolidated the cases.

15. Exhibits must be bound separately from the record.

APPENDIX 2

DEFICIENCY REVIEW PROCEDURE

1. **INITIAL EVALUATION OF WRIT**
   - A. Priority of the Writ Application
     1. Bail
     2. Pretrial
        a. Next hearing date
        b. Trial date
        c. No date
        d. Stayed
     3. Misdemeanor or Probation revocation
     4. Post-conviction relief
     5. Any request for expedited consideration
   - B. Case Details
     1. Name of Defendant
     2. Attorney-filed or pro se
     3. Docket number
     4. Parish/Judicial District
     5. Ruling Judge
     6. Trial court/District court docket number
     7. Judicial Recusals

2. **CASE HISTORY**
   - A. Charges
     1. Type (Information or Indictment)
     2. Offense date(s)
     3. Filing date
     4. Offenses/statutes/ordinances
     5. Amendments
        a. Date of Amendment
        b. Alteration of charges
   - B. Convictions
     1. Type of proceeding
        a. Jury trial
        b. Bench trial
        c. Plea
           1. Crosby reservations
           2. No contest/Alford
     2. Date of Proceeding
     3. Convictions
   - C. Sentences
     1. Bargained-for/PSI
     2. Date of Proceeding
     3. Sentences

D. Habitual Offender Proceedings
    1. Charges
        a. Date
        b. Number of offenses
    2. Adjudication
        a. Date of proceeding
        b. Adjudication
            1. What degree
            2. What convictions
    3. Vacating of original sentence
    4. Sentences

E. Appeal
    1. Was there an appeal?
        a. Third Circuit
        b. District Court (Local Ordinances only)
    2. Date
    3. Details of the Ruling
    4. Further action required?
    5. Results of any remand order

F. Certiorari
    1. Review sought?
        a. Louisiana Supreme Court
        b. Third Circuit (Local Ordinances only)
    2. Ruling of Louisiana Supreme Court
    3. Further action required?
    4. Results from any remand order

G. Supreme Court of the United States
    1. Review sought?
    2. Review granted?
    3. Further action required?
    4. Results

3. WRIT HISTORY

A. Initial Filing in the Trial Court
    1. Party filing
    2. Name of motion
    3. Date of filing
    4. Issues presented

B. Response by the Opposition
    1. Party filing
    2. Name of the pleading
    3. Date of filing
    4. Replies presented

C. Follow-up Pleadings
    1. Party filing
    2. Name of the pleading

3. Date of filing
4. Issues/Replies presented

D. Hearing(s)
1. Date of Hearing(s)
2. Witnesses
3. Exhibits introduced
4. Additional arguments/issues presented

E. Ruling
1. Date
2. Format
    a. Oral at the hearing?
    b. In writing
    c. Reasons for ruling

F. Notice/Return date/Extensions
1. Notice
    a. Date filed
    b. Party filing
    c. Timeliness
    d. Explanation for any untimeliness
2. Return Date Order
    a. Date set
    b. Date of order
3. Extensions Sought
    a. Date(s) filed
        i. filed within the original return date?
        ii. explanation provided for failure to do so
4. Extensions Granted
    a. Date(s) signed
    b. Date(s) set

4. WRIT APPLICATION

A. Inclusion of Necessary Documentation/ Preparation of Deficiency Sheet (*See* Uniform Rules—Courts of Appeal, Rule 4-5)
1. Certificate of Service
    a. Ruling judge
    b. Opposing counsel
    c. Attorney of record if writ by a pro se defendant
2. Affidavit of Correctness
3. Original Signature (no stamps allowed)
4. Status of the Case
5. Index/Table of Contents of All Items in the Writ Application
6. Statement of the Jurisdictional Grounds for the Writ Application
7. Statement of the Case
    a. Case History
    b. Writ History
8. Assignments of Error/Issues Presented/Legal & Factual Support

a. Claims presented
b. Scope under Uniform Rules—Courts of Appeal, Rule 1-3
    i. New issues/claims
    ii. Argue interest of justice?
c. Repetitive Claims
    i. Prior writ applications/appeal
    ii. Law of the case

9. Rulings
    a. The one complained of
        i. In writing
            aa. Order Format
            ab. Transcript or Oral Ruling
        ii. Reasons for Ruling
            aa. Order Format
            ab. Transcript or Oral Ruling
    b. Related Rulings
            aa. Order Format
            ab. Transcript or Oral Ruling
        ii. Reasons for Ruling
            aa. Order Format
            ab. Transcript or Oral Ruling
10. Filings with the trial court
    a. That on Which the Complained of Ruling is Based
        i. Motions
        ii. Responses
        iii. Supplements
        iv. Related Pleadings
    b. Related pleadings
        i. Motions
        ii. Responses
        iii. Supplements
        iv. Related Pleadings
11. A copy of charging instrument(s)
    a. The instant case
    b. Related cases
12. Minutes of Court
    a. The instant case
        i. Pertinent to the ruling & filings at issue
        ii. Showing case history
    b. Related cases
        i. Pertinent to the ruling & filings at issue
        ii. Showing case history
13. Notices of Intent
    a. Date Stamped Copies of the Original Notice
    b. Date Stamped Copies of all motions to extend
14. Return Date Orders

a. Signed Copy of Original Order
b. Signed Copies of All Extensions Granted or Denied

15. Transcripts
    a. Transcripts of hearings on the claims presented
    b. Transcripts of hearings resulting in complained of actions
    c. Related Transcripts
        i. On PCR - Boykin/Sentencing
        ii. On probation revocation
            - transcripts of all probation hearings.
    d. Exhibits introduced at the hearing(s)
16. Additional Documentation Reviewed by the Trial Court
    a. Any documents reviewed in reaching the ruling
    b. On PCR
        i. Plea forms,
        ii. Plea agreements, etc.
    c. On probation revocation -
        i. Rule to Show cause
        ii. Conditions of probation, etc.

B. Examination of Prior Files
    1. Prior filings are examined to
        a. Fill in case history details
        b. Locate documents needed for review

C. Determination of Deficiency
    1. Missing documents necessary for review?
    2. Of the type we would request?
        a. YES - Documents request
            i. Attorney filed - from the attorney
            ii. Pro se - from the trial court
        b. NO - Prepare a Deficiency Memo to Panel

D. Timeliness
    1. La.Code Crim.P. art. 930.8
        a. Date of finality of conviction & sentence
        b. Date filed with the trial court
        c. Exceptions alleged for untimeliness
    2. Uniform Rules—Courts of Appeal, Rule 4-3
        a. Date of ruling
        b. Return date
        c. Date of post-mark or hand delivery

IV. PREPARATION TO PROCEED

A. Creation of a Cover Sheet (Attorney filed writs)

B. Case/Writ History Sheet
    1. Create summary
        a. Case history
        b. Writ History
        c. Issues Presented

d. Priority

2. Notes
    a. Note any procedural bars
    b. Note any deficiencies
    c. Include any helpful cites or information
3. Recusals (Judges who worked on the case before 3rd Circuit)

C. Attach Cover Sheet, Deficiency Sheet, and Case/Writ History Sheet to File

D. Forward the File

1. Paralegal Cases
    a. Alert Paralegal & Secretary of Assignment
    b. Email case notes
    c. Place the file in the Paralegal's work box
2. Attorney Cases
    a. Bail writs – given to Staff Director to assign
    b. Specific Assignments
        i. Alert the attorney & secretary
        ii. Turn over the file
        iii. Discuss any relevant procedure or case history
    c. General Work - not assigned to a specific attorney
        i. Place the file in the to-be-worked cabinet
        ii. Pretrial writs
            aa. Goes in front of drawer
            bb. Priority order among other pretrial writs
            cc. Email staff alert if it has a short date
        iii. Misdemeanor writs
            aa. Determine priority before placing in cabinet
            -Usually, behind pretrials but before other writs
            -Sometimes before stayed pretrial writs
            bb. Priority order among other misdemeanors
            -Serving or stayed?
            -Sentence length
        iv. Probation Revocation writs
            aa. Usually placed after pretrials & misdemeanors
            bb. Placed before PCR writs
        v. General Writs
            aa. Placed in cabinet by order of docket number
            bb. Behind Pretrials, Misdemeanors, & Probation

APPENDIX 3

DEFICIENCY REVIEW CHECKLIST

NAME: _____ KW / KM / KH _____

PROCEDURAL BARS: (For each, list A/E #, if not all, which is not properly before the court.)
PCR timely filed in lower court (C.Cr.P. art. 930.8): Yes _____ No _____
Sentence Date: _____ **or** Appeal Opinion Rendered: _____ (C.Cr.P. art. 922(B))
+ 14 days (if no rehearing filed): _____ **or** Rehearing Denied: _____ (C.Cr.P. art. 922(C) **or**
Writ to S.Ct.: Date of writ denial: _____ (C.Cr.P. art. 922(D)) **or** Date of opinion: _____
+ 14 days (C.Cr.P. art. 922(B))
Date PCR filed: _____
IF NO, IS AN EXCEPTION ALLEGED: _____
Timely filed writ (Uniform Rule 4-3): Yes ____ No ____ (NOT applicable on PCR)
IF YES TO ANY OF THE ABOVE, THEN PROCEED.
Repetitive: _____
Sentencing Claims on PCR: _____
Sought relief in trial court first: _____

WRIT DEFICIENCIES: (If not procedurally barred)
ITEMS CHECKED ARE NOT CONTAINED IN THE RECORD.

Certificate of Service: _____ Judge _____ Opposing Counsel (in same or quicker manner)
_____ If Pro Se - Pre-Trial then current counsel of record, if any

_____Affidavit of Correctness
_____Original signature.
_____Status of the case.
_____ (a)An index of all items contained therein;
_____ (b) A concise statement of the grounds on which the jurisdiction of the Court is invoked;
_____ (c) A concise statement of the case;
_____ (d) The issues and questions of law presented for determination by the Court;
_____ (e) The assignments or specifications of error and a memorandum in support of the application, in accordance with Rules 2-12.2 and 2-12.10, and a prayer for relief;
_____ (f) A copy of the judgment, order, or ruling complained of (if by written judgment, order, or ruling);
_____ (g) A copy of the judge's reasons for judgment, order or ruling (if written);
_____ (h) A copy of each pleading on which the judgment, order, or ruling was founded;
_____ (i) A copy of the indictment or bill of information (assess necessity on a case-by-case basis);
_____ (j) A copy of pertinent court minutes;
_____ (k) The notice of intent and return date order required by Rules 4-2 and 4-3. (Not necessary for PCR.)
_____ (l) A separate page entitled "Request for Expedited Consideration" and indexed as such if the applicant seeks expedited relief or a stay order
_____ Missing transcripts which are needed:
_____
_____

_____Sufficient number of copies for attorney filed writ.
_____Appellate Record needed from LSU.

Reviewer: _____ Date: _____

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION PROGRAM
August 16, 2019

ERRORS PATENT

Presentation and Written Materials by:
Melissa Sockrider and Beth Fontenot – Research Attorneys

Central Staff Director – Dianne Tynes

Central Criminal Staff:

Sandi Aucoin Broussard - Director

Jeff Slade and Reba Green - Senior Research Attorneys
Melissa Sockrider, Bobbie Kirkland, Robin Anderson,
Beth Fontenot, Dustin Madden, Chastity Swinburn,
and Charlie Draughter - Research Attorneys

ERRORS PATENT

An error patent is an error that is discovered by a mere inspection of the pleadings and proceedings and without inspection of the evidence. La.Code Crim.P. art. 920(2). When conducting an error patent review, the bill of indictment or information is reviewed, as well as the minutes, the verdict, and the sentence. Transcripts other than the sentencing transcript are consulted only to verify an error patent discovered in the minutes. The following is a description of the errors patent routinely searched for by this court.

PRESENCE OF THE DEFENDANT

Louisiana Code of Criminal Procedure Article 831 requires the defendant to be present at certain proceedings in felony cases. The minutes should affirmatively reflect the defendant's presence at each stage. *See State v. Pope*, 39 So.2d 719 (La.1949). The court minutes are reviewed to determine if the defendant was present at the mandatory proceedings. If the minutes do not reflect the defendant was present, the transcript of the proceeding is reviewed for any indication of his presence. If the transcript reveals the defendant was present, there is no error patent. If the transcript does not clearly reveal the defendant was present, remand for a contradictory hearing or reversal may be necessary.

In most cases, however, the defendant's presence is waived by the lack of a contemporaneous objection. *See State v. Broaden*, 99-2124 (La. 2/21/01), 780 So.2d 349, *cert. denied*, 534 U.S. 884, 122 S.Ct. 192 (2001). Furthermore, if the defendant is initially present for the commencement of trial and counsel is present (or the right to counsel has been waived), the defendant's voluntary absence or continued disruptive behavior will not prevent the further progress of the trial per La.Code Crim.P. art. 832.

Louisiana Code of Criminal Procedure Article 835 requires a defendant to be present when sentence is pronounced in felony cases. If a sentence is improperly pronounced in the defendant's absence, the defendant must be resentenced when his presence is secured. *See State v. Debarge*, 14-798 (La.App. 3 Cir. 3/18/15), 159 So.3d 526. The Defendant's presence cannot be waived at sentencing. *See State v. Granger*, 08-1531 (La.App. 3 Cir. 6/3/09), 11 So.3d 695. Imposing restitution in the defendant's absence has been found to violate La.Code Crim.P. art. 835. *State v. Baronet*, 13-986 (La.App. 3 Cir. 2/12/14), 153 So.3d 1112.

INDICTMENT BY GRAND JURY FOR OFFENSE PUNISHABLE BY DEATH OR LIFE IMPRISONMENT

Louisiana Code of Criminal Procedure Article 382 requires that the prosecution for any offense punishable by death or life imprisonment be instituted by grand jury indictment. *See State v. McElroy*, 17-826 (La.App. 3 Cir. 3/7/18), 241 So.3d 424. The prosecution for all other offenses may be instituted by grand jury indictment or by bill of information. The charging instrument alone is examined to determine if prosecution was properly instituted.

INDICTMENT SIGNED BY GRAND JURY FOREMAN, OR INFORMATION BY DISTRICT ATTORNEY

Louisiana Code of Criminal Procedure Article 383 requires an indictment be signed by the grand jury foreman and indorsed as a true bill. This signature and indorsement must be on the indictment. Louisiana Code of Criminal Procedure Article 384 requires a bill of information to be signed by the district attorney or the city prosecutor. A signature by an assistant district attorney is sufficient. *See State v. Refuge*, 300 So.2d 489 (La.1974).

ERROR IN FORM OF INDICTMENT

The charging instrument is reviewed to determine if it complies with the requirements of La.Code Crim.P. arts. 383 and 461, et seq. A grand jury indictment must be returned in open court. A bill of information, on the other hand, may be returned in open court or filed in the clerk's office. Both charging instruments are reviewed for the necessary contents - i.e., the court in which the offense is charged, the date of the charge, the name or description of the accused, the offense committed, the citation of the offense, and any other information necessary for the offense charged. Louisiana Code of Criminal Procedure Article 464 provides that an error in the citation of the offense or its omission "shall not be ground for dismissal of the indictment or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." *See also* La.Code Crim.P. art. 487.

Louisiana Code of Criminal Procedure Article 470 provides that "[v]alue, price, or amount of damage need not be alleged in the indictment, unless such

allegation is essential to charge or determine the grade of the offense." Value and/or grade of the offense is an essential element that must be charged for both simple arson and theft of a motor vehicle. *See State v. Toussaint*, 11-1404 (La.App. 3 Cir. 5/2/12), 94 So.3d 62, *writ denied*, 12-1211 (La. 11/16/12), 102 So.3d 30.

Louisiana Constitution Article 1 § 17(B) and La.Code Crim.P. art. 493.2 allow for offenses in which punishment may be at hard labor to be joined in the same charging instrument as offenses in which punishment is necessarily at hard labor provided that the joined offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Both articles require that cases so joined shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.

The failure to file a motion to quash waives most bill errors. *See State v. Wilson*, 07-365 (La.App. 3 Cir. 10/3/07), 968 So.2d 776; *State v. Ruiz*, 06-1755 (La. 4/11/07), 955 So.2d 81; *State v. C.S.D.*, 08-877 (La.App. 3 Cir. 2/4/09), 4 So.3d 204.

UNCONSTITUTIONALITY OF SUBSTANTIVE STATUTE

Louisiana Code of Criminal Procedure Article 872 states that the statute upon which a sentence is based must be valid. Thus, if the substantive portion or penalty provision upon which a sentence is based is found to be unconstitutional or otherwise invalid, the defendant's conviction and/or sentence must be set aside.

SANITY PROCEEDINGS

Louisiana Code of Criminal Procedure Article 642 states "[w]hen the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed." The minutes, as well as the table of contents in the appellate record are examined to determine if the defendant requested the appointment of a sanity commission to determine his capacity to proceed. If the record reveals the defendant requested a sanity commission and the trial court granted the request, the minutes and pleadings are examined to determine if any further steps, other than the institution of prosecution, took place.

If the minutes or pleadings indicate further steps took place, the proceedings are examined to determine if they were steps in "furtherance of prosecution" or if the occurrence of the proceedings prejudiced the defendant. *See State v. Francois*, 05-1385 (La.App. 3 Cir. 4/5/06), 926 So.2d 744, *writ denied*, 06-1048 (La. 1/12/07), 948 So.2d 138; *State v. Young*, 576 So.2d 1048 (La.App. 1 Cir.), *writ denied*, 584 So.2d 679 (La.1991). If the proceedings were steps in furtherance of prosecution and cannot be considered harmless, reversal may be necessary.

WAIVER OF RIGHT TO COUNSEL

Louisiana Code of Criminal Procedure Article 514 requires the minutes show the defendant was either represented by counsel or waived his right to counsel after being informed by the court of such right. All minutes are examined to determine whether the requirements of Article 514 have been met. If the minutes show the defendant was represented by counsel at each pertinent proceeding or entered a valid waiver of the right to counsel, no further examination is necessary.

If the minutes do not show that the defendant was represented by counsel or that the defendant waived his right to counsel, the transcript of the pertinent proceeding is examined. If the transcript does not clearly indicate the defendant was represented, or that he was unrepresented after an informed waiver, remand for an evidentiary hearing or possible reversal (of the conviction and/or sentence) is necessary. *See State v. Thomas,* 17-526 (La.App. 3 Cir. 12/13/17), 258 So.3d 708.

Arraignment has been found to not be a critical stage in a situation where counsel subsequently filed motions and participated in all phases of the trial and sentencing. *See State v. Tarver,* 02-973, 02-974, 02-975 (La.App. 3 Cir. 3/12/03), 846 So.2d 851, *writ denied,* 03-1157 (La. 11/14/03), 858 So.2d 416.

ATTORNEY CONFLICT OF INTEREST

When presiding over a trial wherein two or more defendants are represented by the same counsel, La.Code Crim.P. art. 517 requires the trial court to inquire about the joint representation and advise each defendant on the record of his right to separate representation. Although a violation of the article is an error patent, if the defendant does not allege a conflict of interest and a conflict is not obvious from the record, it is unlikely the error will require action being taken.

DEFENDANT PLED GUILTY

Guilty plea colloquies are not reviewed for errors patent. *See State v. Scroggins*, 18-1943 (La. 6/26/19), __ So.3d __ (2019 WL 2896838); *State v. Guzman*, 99-1753, 99-1528 (La. 5/16/00), 769 So.2d 1158. Additionally, pursuant to the supreme court's holding in *State v. Jackson*, 04-2863 (La. 11/29/05), 916 So.2d 1015, courts of appeal are no longer required to recognize, as error patent, a defendant's guilty plea to a non-responsive offense when the district attorney fails to file a written amendment to the bill of information.

LIMITED GUILTY PLEA IN CAPITAL CASES

Louisiana Code of Criminal Procedure Article 557 was amended in 1995 to provide for a limited guilty plea in capital cases. The court shall not accept an unqualified plea of guilty in capital cases. "However, with the consent of the court and the state, the defendant may plead guilty with the stipulation either that the court shall impose a sentence of life imprisonment without benefit of parole, probation, or suspension of sentence without conducting a sentencing hearing, or that the court shall impanel a jury for the purpose of conducting a hearing to determine the issue of the penalty in accordance with the applicable provisions of this Code." La.Code Crim.P. art. 557(A). If a sentencing hearing is held, a defendant could still receive the death penalty. Louisiana Code of Criminal Procedure Article 905 requires that if a sentencing hearing is to be conducted, the hearing shall not be held sooner than twelve hours after the verdict or plea of guilty, except upon joint motion of the state and the defendant.

WAIVER OF TRIAL BY JURY

Louisiana Code of Criminal Procedure Article 779 provides for a jury trial for all offenses punishable by imprisonment of more than six months or by a fine of more than $1,000.00. Louisiana Code of Criminal Procedure Article 782(B) provides for a knowing and intelligent waiver of a jury trial except in capital cases. If a defendant challenges his waiver on appeal, his waiver will be examined closely. For error patent purposes, however, the review is less stringent. If a defendant was entitled to a jury trial and no jury trial was held, the record is reviewed to determine whether there is a written waiver signed by defendant and his attorney (unless counsel has been waived) as required by La.Code Crim.P. art. 780.

When a written waiver is not executed, if the defendant and his attorney are in open court when the judge addresses the right to a jury trial and the waiver thereof, this court has held that the failure to obtain a written waiver is harmless error. *See State v. Loyd*, 18-968 (La.App. 3 Cir. 6/5/19), __ So.3d __ (2019 WL 2366706); *State v. McElroy*, 17-826 (La.App. 3 Cir. 3/7/18), 241 So.3d 424; *State v. Charles*, 15-518 (La.App. 3 Cir. 11/25/15) 178 So.3d 1157, *writ denied*, 16-4 (La. 1/13/17), 215 So.3d 240.

This court has remanded for an evidentiary hearing where the jury trial waiver was signed by only the defendant's attorney and there was no indication that there had been a discussion of the waiver in open court. *See State Bartie*, 18-913 (La.App. 3 Cir. 5/1/19) (unpublished opinion) (2019 WL 1929907); State *v. Cooley*, 15-40 (La.App. 3 Cir. 6/3/15), 165 So.3d 1237.

PROPER SEQUESTRATION OF THE JURY

Louisiana Code of Criminal Procedure Article 791 requires a jury be sequestered in capital cases after each juror is sworn (unless the state and the defense jointly move that the jury not be sequestered) and in noncapital cases, after the court's charge or at any time upon order of the court. The minutes are first examined to ascertain whether the jury was properly sequestered. If the minutes do not so reflect, the transcript of trial is examined. If the minutes or transcript simply states that the jury was sequestered at the proper times or that the jury retired for deliberations, no error patent is recognized. Usually, no error patent is recognized unless something in the minutes or transcript indicates the jury was not properly sequestered, in which case remand for an evidentiary hearing or possible reversal is necessary.

PROPER JURY SIZE AND VOTING FOR VERDICT

Louisiana Code of Criminal Procedure Article 782 provides for the proper number of jurors and proper concurrence for the verdict. The minutes of jury selection are examined to determine if the proper number of jurors was chosen. If polling of the jurors is requested upon their rendition of the verdict, the polling is examined to determine if the verdict was proper. If, however, no polling is requested, no further review is conducted.

Louisiana Constitution Article 1, § 17(A) and La.Code Crim.P. art. 782 now require that offenses committed prior to January 1, 2019, in which punishment is necessarily confinement at hard labor be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. However, for offenses committed on or after January 1, 2019, in which punishment is necessarily confinement at hard labor, the jury must be composed of twelve jurors, all of whom must concur to render a verdict. Regardless of the date of the commission of the offense, if the punishment may be confinement at hard labor, the jury shall be composed of six jurors, all of whom must concur to render a verdict.

Louisiana Constitution Article 1 § 17(B) and La.Code Crim.P. art. 493.2 allow for offenses in which punishment may be at hard labor to be joined in the same charging instrument as offenses in which punishment is necessarily at hard labor provided that the joined offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Both articles require that cases so joined shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.

In *State v. Jones*, 05-226, p. 6 (La. 2/22/06), 922 So.2d 508, 513, the supreme court held that a jury composed of a greater number of jurors (a unanimous jury of twelve) than constitutionally required (a unanimous jury of six) is no longer a "non-waivable jurisdictional defect subject to automatic reversal." In *State v. Brown*, 11-1044, p. 5 (La. 3/13/12), 85 So.3d 52, 55, the supreme court stated, "to the extent that respondent failed altogether to employ the procedural vehicles provided by law for preserving the error for review, he waived any entitlement to reversal on appeal on grounds that he was tried by a jury panel which did not conform to the requirements of La. Const. art. I, §17 and La.C.Cr.P. art. 782 because it included a greater number of jurors than required by law, although the error is patent on the face of the record." In a footnote, the court stated that it was not considering the issue of whether a trial by fewer jurors than required by law would retain its jurisdictional character as a structural defect.

VERDICT RESPONSIVE TO CHARGE; VERDICT AS TO EACH COUNT; VERDICT AS TO EACH DEFENDANT

Louisiana Code of Criminal Procedure Article 809 requires the trial judge to give the jury a written list of the verdicts responsive to each offense charged, with each separately stated. The jury is to take the list into the jury room for use during its deliberation. Louisiana Code of Criminal Procedure Article 813 provides that if the trial court finds the verdict is incorrect in form or is not responsive to the indictment, it shall refuse to receive it, and remand the jury with the necessary instructions. The trial court must read the verdict and record the reasons for refusal. The verdict form and minutes are examined to determine whether the verdict rendered is responsive to the crime charged. La.Code Crim.P. arts. 814 and 815.

The supreme court has held that a verdict of simple kidnapping is not responsive to a charge of second degree kidnapping. *See State v. McGhee,* 17-1951 (La. 9/21/18), 252 So.3d 895; *State v. Price,* 17-520 (La. 6/27/18), 250 So.3d 230 .

In *State v. Shupp,* 15-695 (La.App. 3 Cir. 2/3/16), 185 So.3d 900, this court held that unauthorized use of a motor vehicle cannot be considered a responsive verdict to the charged offense of theft of a motor vehicle over $1500.00. Thus, the jury's verdict of guilty of unauthorized use was reversed and the sentence vacated. An acquittal of the charged offense of theft of a motor vehicle valued over $1500.00 was entered.

Louisiana Code of Criminal Procedure Article 818 provides that if more than one defendant is on trial, the verdict shall name each defendant and a finding as to him. The minutes, verdict form, and/or transcript are examined to ensure a verdict was rendered separately for each defendant that is before the court on appeal. Likewise, La.Code Crim.P. art. 819 requires that if a defendant is being tried on more than one count, the jury must render a verdict on each count, unless it cannot agree on a verdict for each count. The minutes, verdict form, and/or transcript are reviewed to determine whether a separate verdict was rendered on each count and whether all counts have been disposed of. *See State v. Bartie*, 12-673 (La.App. 3 Cir. 12/5/12), 104 So.3d 735, *writ denied*, 13-39 (La. 8/30/13), 120 So.3d 256; *State v. Fobb*, 11-1434 (La.App. 3 Cir. 6/6/12), 91 So.3d 1235, where this court remanded for the proper disposition of offenses charged in the bill that had not yet been disposed of.

MOTION FOR NEW TRIAL, MOTION FOR POST-VERDICT JUDGMENT OF ACQUITTAL, MOTION IN ARREST OF JUDGMENT RULED ON BEFORE SENTENCE

Any motion for new trial, motion for post-verdict judgment of acquittal, and motion in arrest of judgment filed prior to sentencing, must be disposed of before sentence is imposed. La.Code Crim.P. arts. 853, 821, and 861. *See State v. Freeman*, 15-251 (La.App. 3 Cir. 10/7/15), 175 So.3d 1104, where this court vacated the defendant's sentence and remanded for disposition of the defendant's motion for judgment of acquittal, noting that if the motion is denied, the defendant is to be resentenced and his right to appeal his conviction and sentence is preserved.

PROPER DELAYS FOR SENTENCING

Louisiana Code of Criminal Procedure Article 873 requires that in felony cases, there be a three (3) day delay between conviction and sentence. If the defendant files a motion for new trial or a motion in arrest of judgment, sentence must not be imposed until at least twenty-four hours after the motion is overruled. Some cases have extended the delay to denials of motions for post-verdict judgment of acquittal. *See State v. Westmoreland*, 10-1408 (La.App. 3 Cir. 5/4/11), 63 So.3d 373, *writ denied*, 11-1660 (La. 1/20/12), 78 So.3d 140; *State v. Boyance*, 05-1068 (La.App. 3 Cir. 3/1/06), 924 So.2d 437, *writ denied*, 06-1285 (La. 11/22/06), 942 So.2d 553; *but see State v. Banks*, 503 So.2d 529 (La.App. 3 Cir.), *remanded on other grounds*, 503 So.2d 1007 (La.1987). Sentence may be imposed immediately if the defendant expressly waives the delay or pleads guilty. *See State v. Kisack*, 16-797 (La. 10/18/17), 236 So.3d 1201, *cert. denied*, __ U.S. __, 138 S.Ct. 1175 (2018); *State v. Guillory*, 10-1175 (La.App. 3 Cir. 4/6/11), 61 So.3d 801.

The date of conviction and sentence are examined to determine whether three days elapsed between the two. The minutes of sentencing are also examined to see if the trial court denied any pending motion for new trial or motion in arrest of judgment the same day the defendant was sentenced. If either delay was violated and there was no waiver, an error patent exists. If the defendant challenges his sentence on appeal, his sentence may be set aside and remanded for resentencing. *State v. Charles*, 18-222 (La.App. 3 Cir. 5/1/19), 270 So.3d 859. If, however, the defendant does not challenge his sentence on appeal and does not claim prejudice due to the lack of the delay, the error is considered harmless. *See State v. McCoy*, 16-948 (La.App. 3 Cir. 5/10/17), 219 So.3d 538, *writ denied*, 17-1151 (La. 5/25/18), 242 So.3d 1232. This error is also considered harmless if the defendant received a mandatory life sentence. *See State v. J.F.*, 05-1410 (La.App. 3 Cir. 4/5/06), 927 So.2d 614, *writ denied*, 06-1424 (La. 12/8/06), 943 So.2d 1060; *State v. Ware*,

07-968 (La.App. 3 Cir. 3/5/08), 980 So.2d 730, *writ denied*, 08-847 (La. 10/31/08), 994 So.2d 534.

SENTENCE IN COURT MINUTES

Louisiana Code of Criminal Procedure Article 871(A) requires the sentence to be recorded in the minutes of the court. Thus, the record is reviewed to determine if the sentence was recorded in the minutes. If there is a conflict between the minutes of sentencing and the transcript of the sentence imposed, the trial court is ordered to correct the minutes. *See State v. Washington*, 19-39 (La.App. 3 Cir. 6/5/19), __ So.3d __ (2019 WL 2366547); *State v. Harris*, 18-800 (La.App. 3 Cir. 6/5/19), __ So.3d __ (2019 WL 2366868); *State v. Romero*, 17-636 (La.App. 3 Cir. 2/21/18), 238 So.3d 537. This court has ordered correction of the Uniform Commitment Order in cases where it conflicts with the sentencing transcript. *State v. Walls*, 18-730 (La.App. 3 Cir. 3/7/19), 270 So.3d 701.

ILLEGAL SENTENCE

An illegal sentence is one not authorized by law. *See State v. Moore*, 93-1632 (La.App. 3 Cir. 5/4/94), 640 So.2d 561, *writ denied*, 94-1455 (La. 3/30/95), 651 So.2d 858. Courts *are authorized* to recognize illegally lenient sentences even if the state fails to complain of the error. *See State v. Williams*, 00-1725 (La. 11/28/01), 800 So.2d 790. La.Code Crim.P. art. 882. The following is a non-exclusive list of errors that commonly occur at sentencing.

> **A. The penalty provision mandates that all or a portion of the sentence be imposed without the benefit of probation, parole, or suspension of sentence and the trial court fails to comply.** If the trial court fails to impose the sentence without benefits and the benefits restriction is for a mandatory term, the sentence is deemed to contain the benefits restriction. *See* La.R.S. 15:301.1. This applies to habitual offender sentences as well. *State v. King*, 05–553 (La.App. 5 Cir. 1/31/06), 922 So.2d 1207, *writ denied*, 06–1084 (La.11/9/06), 941 So.2d 36.
>
> If the trial court makes an affirmative misstatement as to the benefits restriction, this court may choose to correct the sentence, or, if discretion is involved, remand the case for resentencing. *See State v.*

Mayeux, 06-944 (La.App. 3 Cir. 1/10/07), 949 So.2d 520; *State v. P.T.*, 07-665 (La.App. 3 Cir. 12/5/07), 970 So.2d 1255, *writ denied*, 08-26 (La. 5/30/08), 983 So.2d 895; La.Code Crim.P. art. 882; *State v. Gregrich*, 99-178 (La.App. 3 Cir. 10/13/99), 745 So.2d 694.

B. The trial court imposes restrictions on parole when it is not authorized to do so. A trial court is authorized to restrict or deny parole eligibility only if the penalty provision of the offense in question authorizes such restriction. Limitation of parole under La.R.S. 15:574.4 is within the discretion of the Department of Public Safety and Corrections, not the trial court. *See State v. Poirrier*, 04-825 (La.App. 3 Cir. 12/1/04), 888 So.2d 1123. When a habitual offender sentence is imposed (other than a life sentence on a third or fourth habitual offender), the penalty provision of the reference statute governs the restriction or denial of parole. *See State v. Tate*, 99-1483 (La. 11/24/99), 747 So.2d 519; *State v. Ford*, 16-869 (La.App. 3 Cir. 4/19/17), 217 So.3d 634, *writ denied*, 17-936 (La. 4/6/18), 239 So.3d 829; *State v. Dossman*, 06-449, 06-450 (La.App. 3 Cir. 9/27/06), 940 So.2d 876, *writ denied*, 06-2683 (La. 6/1/07), 957 So.2d 174.

When a trial court improperly limits or denies parole eligibility, the sentence must be corrected. An appellate court should not rely on the self-activating provisions of La.R.S. 15:301.1 when the trial court imposes "limits beyond what the legislature has authorized in the sentencing statute(s). . . ." *State v. Sanders*, 04-17 (La. 5/14/04), 876 So.2d 42. The sentence is amended to delete the improper denial of parole and the district court is ordered to make an entry in the minutes reflecting the change. *See State v. Cohen*, 18-297 (La.App. 3 Cir. 5/8/19), 272 So.3d 12; *State v. Piper*, 18-732 (La.App. 3/7/19), 269 So.3d 952; *State v. Mayfield*, 18-420 (La.App. 3 Cir. 12/6/18), 261 So.3d 101, *writ denied*, 19-46 (La. 5/28/19), 273 So.3d 316.

C. The trial court denied diminution of sentence. The trial court lacks authority to deny diminution of sentence (good time). If diminution is denied by the trial court, the sentence is amended to delete the restriction and the trial court is instructed to make an entry in the court minutes reflecting the amendment. *State v. Washington*, 19-39 (La.App. 3 Cir. 6/5/19), __ So.3d __ (2019 WL 2366547), *State*

v. Burton, 18-935 (La.App. 3 Cir. 6/5/19), __ So.3d __ (2019 WL 2366769).

D. The trial court imposes an indeterminate sentence. If the defendant is convicted of more than one count, a separate sentence must be imposed on each count. *See* La.Code Crim.P. art. 879; *State v. Carmouche*, 14-215 (La.App. 3 Cir. 7/30/14), 145 So.3d 1101, *writ denied*, 14-1819 (La. 4/2/15), 176 So.3d 1031

If a habitual offender sentence is imposed and the defendant has been convicted of multiple counts, the trial court must specify the sentence being enhanced. *See State v. Pierre*, 14-1333 (La.App. 3 Cir. 5/6/15), 165 So.3d 365, *writ denied*, 15-1149 (La. 4/13/16), 191 So.3d 1054; *State v. Gottke*, 14-769 (La.App. 3 Cir. 12/17/14), 154 So.3d 1250. Note: In *State v. Shaw*, 06-2467 (La. 11/27/07), 969 So.2d 1233, the supreme court held that multiple sentences arising out of a single criminal act or episode may be enhanced under La.R.S. 15:529.1.

When multiple sentences are imposed and the defendant is placed on probation, the trial court must specify on which count(s) the probation applies. The trial court must also specify on which count or counts the conditions of probation are being imposed. *See State v. Ervin*, 17-18 (La.App. 3 Cir. 12/13/17), 258 So.3d 677; *State v. Wallace*, 13-862 (La.App. 3 Cir. 2/12/14), 153 So.3d 1040 (fn 1); *State v. Morris*, 05-725 (La.App. 3 Cir. 12/30/05), 918 So.2d 1107.

If a sentence may be served with or without hard labor, the trial court must specify how the sentence is to be served. *See State v. Parker*, 18-797 (La.App. 3 Cir. 5/1/19), 270 So.3d 759; *State v. Domingue*, 17-786 (La.App. 3 Cir. 4/18/18), 244 So.3d 489; *State v. Ervin*, 17-18 (La.App. 3 Cir. 12/13/17), 258 So.3d 677.

Whether restitution is imposed as a condition of probation or as part of the principal sentence under La.Code Crim.P. art. 883.2, the trial court must specify the amount of the restitution ordered. *See State v. Loyd*, 18-968 (La.App. 3 Cir. 6/5/19), __ So.3d __ (2019 WL

2366706); *State v. Joseph,*16-763 (La.App. 3 Cir. 3/8/17), 215 So.3d 301; *State v. Baxley*, 14-48 (La.App. 3 Cir. 5/7/14), 139 So.3d 556.

When a defendant is convicted of armed robbery with use of a firearm (La.R.S. 14:64, 14:64.3) or attempted (La.R.S. 14:27) armed robbery with use of a firearm and the trial court fails to specify that the sentence includes the term required by La.R.S. 14:64.3, the sentence is vacated and the case remanded for resentencing. *State v. Roberts*, 18-832 (La.App. 3 Cir. 5/1/19), 270 So.3d 747.

E. The trial court fails to establish a sufficient payment plan for amounts to be paid as a condition of probation or as part of the principal sentence. Prior to August 1, 2019, if restitution is imposed as a condition of probation, La.Code Crim.P. art. 895.1 allows for the restitution payment to be made, "in [the] discretion of the court, either in a lump sum or in monthly installments based on the earning capacity and assets of the defendant." Effective August 1, 2019, if the trial court has determined, pursuant to the provisions of La.Code Crim.P. art. 875.1, that payment in full of the aggregate amount of all financial obligations imposed upon the defendant would cause substantial financial hardship to the defendant or his dependents, restitution payments shall be made pursuant to the provisions of Article 875.1.

If the trial court imposes restitution as part of the principal sentence pursuant to La.Code Crim.P. art. 883.2 and the defendant is found to be indigent, prior to August 1, 2019, the trial court could impose a periodic payment plan consistent with the defendant's financial ability to pay. Effective August 1, 2019, the article provides for the trial court to order a periodic payment plan pursuant to the provisions of La.Code Crim.P. art. 875.1 .

F. The trial court applies the firearm sentencing enhancement provision set forth in La.Code Crim.P. art. 893.3 without written notice to invoke such enhancement by the State.

If the trial court applies the firearm sentencing enhancement provisions set forth in La.Code Crim. P. art. 893.3 without a motion/notice by the State in accordance with La.Code Crim.P. art. 893.1, this court has vacated the sentence imposed and remanded for

resentencing. *State v. Bourg*, 18-435 (La.App. 3 Cir. 12/6/18), 260 So.3d 679, *writ granted*, 19-38 (La. 6/26/19), __ So.3d __ (2019 WL 2865198).

Effective June 11, 2019**,** if the State files a motion to invoke the firearm sentencing enhancement provision in compliance with La.Code Crim.P. art. 893.1, the specific findings of fact that must be made shall be submitted to the jury and proven by the State beyond a reasonable doubt. La.Code Crim.P. art. 893.2(A); 2019 La. Acts. No. 326, §1.

NOTICE OF TIME LIMITATION TO FILE AN APPLICATION FOR POST-CONVICTION RELIEF

Louisiana Code of Criminal Procedure Article 930.8 requires that notice of the time limitation for filing an application for post-conviction relief be given at sentencing or on a guilty plea form. If the minutes reflect that Article 930.8 notice was given and no transcript is available, no error patent is recognized. If the transcript is available, however, it may be reviewed to ensure the correctness of the minutes. If the defendant is not so advised, the district court is instructed to give written notice to the defendant and to file written proof in the record that the defendant received the notice. *See State v. Obrien*, 17-922 (La.App. 3 Cir. 4/4/18), 242 So.3d 1254, *writ denied*, 18-663 (La. 2/18/19), 265 So.3d 769; *State v. Cofer*, 16-871 (La.App. 3 Cir. 4/5/17), 216 So.3d 313, *writ denied*, 17-1150 (La. 5/11/18). However, if the defendant is to be resentenced, notice of the time limitation is to be given at resentencing rather than by written notice. *See State v. Ervin*, 17-18 (La.App. 3 Cir. 12/13/17), 258 So.3d 677; *State v. Bentley*, 15-598 (La.App. 3 Cir. 2/3/16), 185 So.3d 254.

A common error occurs when the trial court erroneously advises the defendant that he has two years from the *date of sentencing* to file for post-conviction relief. Louisiana Code of Criminal Procedure Article 930.8 states that a defendant has two years from the *finality of his conviction and sentence* to apply for post-conviction relief. When this error occurs, the trial court is ordered to correctly notify the defendant of the provisions of article 930.8 by written notification, or at resentencing if resentencing is required. *See State v. Parker*, 18-797 (La.App. 3 Cir. 5/1/19), 270 So.3d 759*; State v. Barconey*, 17-871 (La.App. 3 Cir. 3/7/18), 241 So.3d 1046; *State v. Vail*, 17-354 (La.App. 3 Cir. 12/28/17), 236

So.3d 644. This court has also required notification to the defendant when the trial court advises the defendant that he has two years to apply for post-conviction relief without stating that the two years begins to run from finality of the conviction and sentence. *See State v. Latigue*, 18-622 (La.App. 3 Cir. 2/20/19), 265 So.3d 93; *State v. Thomas*, 16-578 (La.App. 3 Cir. 4/19/17), 217 So.3d 651, *writ denied*, 17-1153 (La. 8/31/18), 251 So.3d 411; *State v. Toups*, 16-993 (La.App. 3 Cir. 7/5/17), 224 So.3d 990, *writ denied*, 17-1363 (La. 5/25/18), 242 So.3d 1230.

HABITUAL OFFENDER CLEANSING PERIOD

Louisiana Revised Statutes 15:529.1(C) requires the lapse of either a five or ten year cleansing period with respect to habitual offender adjudications. *See State v. Kisack*, 16-797 (La. 10/18/17), 236 So.3d 1201, *cert. denied*, __ U.S. __, 138 S.Ct. 1175 (2018).

ERROR PATENT CHECKLIST

An **error patent** is an error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence. La.Code Crim.P. art. 920(2). Look at court minutes and written pleadings, but not at testimonial or documentary evidence admitted at trial.

1. Presence of defendant (La.Code Crim.P. art. 831.)

_____ arraignment
_____ pleading
_____ jury selection
_____ at trial or plea
_____ judgment rendered
_____ sentencing (La.Code Crim.P. art. 835.)

_____ 2. Indictment by grand jury for offense punishable by death or life imprisonment (La.Code Crim.P. art. 382.)

_____ 3. Indictment signed by grand jury foreman, or information by district attorney (La.Code Crim.P. arts. 383 and 384.)

_____ 4. Error in form of indictment (La.Code Crim.P. arts. 383 and 461 et seq.)

_____ 5. Unconstitutionality of substantive statute (La.Code Crim.P. art. 872.)

_____ 6. Sanity proceedings (La.Code Crim.P. art. 642.)

_____ 7. Waiver of Right to Counsel (La.Code Crim.P. art. 514.)

_____ 8. Attorney Conflict of Interest, (La.Code Crim.P. art. 517; *State v. Browning*, 483 So.2d 1008, 1009 (La.1986).)

_____ 9. Defendant pled guilty (La.Code Crim.P. arts. 553, 556, 556.1, and 559.)

_____ 10. Limited "guilty" plea in capital case (La.Code Crim.P. art. 557.)

_____ 11. Waiver of trial by jury (La.Code Crim.P. art. 782 (B).)

_____ 12. Proper sequestration of jury (La.Code Crim.P. art. 791.)

13. Proper jury size and voting for verdict (La.Code Crim.P. art. 782 A.)

_____ capital - 12 out of 12
_____ hard labor - 10 out of 12; after 1/1/19 - 12 out of 12
_____ all others - 6 out of 6

_____ 14. Verdict responsive to charge (La.Code Crim.P. arts. 809 and 810.)

_____ 15. Verdict as to each count (La.Code Crim.P. art. 819.)

_____ 16. Verdict as to each defendant (La.Code Crim.P. art. 818.)

_____ 17. Motion for new trial, motion for post-verdict judgment of acquittal, or motion in arrest of judgment ruled on before sentence. (La.Code Crim.P. arts. 853, 821, and 861).

_____ 18. Proper delays for sentencing (La.Code Crim.P. art. 873.) [3 days after felony conviction, 24 hours after denial of motion for new trial or motion in arrest of judgment.]

_____ 19. Sentence in court minutes (La.Code Crim.P. art. 871 A.)

_____ 20. Illegal sentence (La.Code Crim.P. arts. 879 and 882.)

_____ 21. Advised of time limitation (La.Code Crim.P. art. 930.8)

_____ 22. Habitual offender cleansing period. (La.R.S. 15:529.1(C))

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION PROGRAM
August 16, 2019

POST-CONVICTION RELIEF

Presentation and Written Materials by:
Reba Powers Green, Senior Research Attorney,
and Dustin Madden, Research Attorney

Central Staff Director – Dianne Tynes

Central Criminal Staff:

Sandi Aucoin Broussard - Director

Jeff Slade and Reba Green - Senior Research Attorneys
Melissa Sockrider, Bobbie Kirkland, Robin Anderson,
Beth Fontenot, Dustin Madden, Chastity Swinburn,
and Charlie Draughter- Research Attorneys

POST-CONVICTION RELIEF

I. General Considerations 1
A. Definition 1
B. Petitioner Must be in Custody 1
C. Effect of Appeal 1
D. Venue 1
II. Form Requirements 2
A. La.Code Crim.P. art. 926 2
B. Uniform Application 2
C. Supplementation of PCR Application 3
III. Procedure 4
A. Answer 4
B. Dismissal Upon the Pleadings 4
C. Summary Disposition 4
D. Evidentiary Hearing 4
E. Right to Counsel 5
1. Discretionary 5
2. Mandatory 5
F. Burden of Proof 6
IV. Grounds 6
A. Grounds 6
B. Exclusive 7
C. Conviction Obtained in Violation of the Constitution 7
1. Sufficiency of the Evidence 7
2. Ineffective Assistance of Counsel 7
3. Guilty Pleas 10
4. Duty to Disclose Exculpatory Evidence 14
5. Sixth Amendment Right to Confrontation 15
6. Double Jeopardy 17
7. Court Exceeded Jurisdiction 18
8. Probation Revocation 18
9. Reinstatement of the Right to Appeal 19
10. Intellectual Disability. 21
11. Actual Innocence/*Jackson* Review 22
12. Jury Conduct 22
D. Issues Which May Not be Raised in a PCR Application 23
1. Excessiveness or Other Sentencing Errors 23
2. Habitual Offender 23
3. Non-jurisdictional Defects 24

V. Procedural Objections 26
A. Pending Appeal 26
B. Raised on Appeal 26
C. Failed to Raise in Trial Court 27
D. Failed to Pursue on Appeal 27
E. Successive Application 27
F. La.Code Crim.P. art. 930.4(F) 28
VI. Time Limitation 28
A. La.Code Crim.P. art. 930.8 28
B. Finality of Judgment of Conviction and Sentence 29
C. Date of Filing 30
D. Informing Defendant of Prescriptive Period 30
VII. Exceptions to the Time Limitation 31
A. La.Code Crim.P. art. 930.8(A) 31
B. Facts Not Known 31
C. New Ruling/Interpretation of Constitutional Law 33
D. Prejudice to the State 34
VIII. Miscellaneous 35
A. Judgment on PCR 35
B. A Pleading's Nature Determined by Substance Not Caption 36
1. Motion to Correct Illegal Sentence 36
2. Motion to Withdraw Guilty Plea 37
C. DNA Testing 38
D. Waiver of Post-Conviction Rights 39
E. *Post Conviction Procedure*, 41 La. L. Rev. 625 42

* **<u>Denotes material added to the outline in 2019</u>**.

POST-CONVICTION RELIEF (PCR)

I. GENERAL CONSIDERATIONS

A. Definition - Application for Post-Conviction Relief

An application for post-conviction relief is "a petition filed by a person in custody after sentence following conviction for the commission of an offense seeking to have the conviction and sentence set aside." La.Code Crim.P. art. 924.

B. The Petitioner Must be in Custody

1. Definition of custody - "[D]etention or confinement, or probation or parole supervision, after sentencing following conviction for the commission of an offense." La.Code Crim.P. art. 924; *State v. Smith*, 96-1798 (La. 10/21/97), 700 So.2d 493; *State v. Surus*, 13-903 (La.App. 3 Cir. 4/2/14), 135 So.3d 1236, *writ denied*, 14-882 (La. 2/6/15), 157 So.3d 1136.

2. "Offense" includes both a felony and a misdemeanor. La.Code Crim.P. art. 933(1).

3. *Once a sentence is satisfied, post-conviction relief is barred*. Use of the conviction can be challenged only if it is later used to enhance a penalty (*e.g.* under La.R.S. 15:529.1) or to serve as an element of a crime in a subsequent criminal prosecution (*e.g.*, La.R.S. 14:95.1). *See State v. Smith*, 96-1798 (La. 10/21/97), 700 So.2d 493.

a. Voluntary payment of a fine imposed as a misdemeanor sentence prior to applying for appellate review and without recording an objection to the fine renders any subsequent review of the conviction or sentence moot. *State v. Malone*, 08-2253 (La. 12/1/09), 25 So.3d 113.

C. Effect of Appeal

If the petitioner may appeal the conviction and sentence or if an appeal is pending, the petitioner is not entitled to file for post-conviction relief. La.Code Crim.P. art. 924.1.

D. Venue

"Applications for post conviction relief shall be filed in the parish in which the petitioner was convicted." La.Code Crim.P. art. 925.

II. FORM REQUIREMENTS

A. La.Code Crim.P. art. 926 provides:

"A. An application for post conviction relief shall be by written petition addressed to the district court for the parish in which the petitioner was convicted. A copy of the judgment of conviction and sentence shall be annexed to the petition, or the petition shall allege that a copy has been demanded and refused.

B. The petition shall allege:

(1) The name of the person in custody and the place of custody, if known, or if not known, a statement to that effect;

(2) The name of the custodian, if known, or if not known, a designation or description of him as far as possible;

(3) A statement of the grounds upon which relief is sought, specifying with reasonable particularity the factual basis for such relief;

(4) A statement of all prior applications for writs of habeas corpus or for post conviction relief filed by or on behalf of the person in custody in connection with his present custody; and

(5) **All errors known or discoverable by the exercise of due diligence**.

C. The application shall be signed by the petitioner and be accompanied by his affidavit that the allegations contained in the petition are true to the best of his information and belief.

D. The petitioner shall use the uniform application for post conviction relief approved by the Supreme Court of Louisiana. **If the petitioner fails to use the uniform application, the court may provide the petitioner with the uniform application and require its use.**

E. Inexcusable failure of the petitioner to comply with the provisions of this Article may be a basis for dismissal of his application."

B. Uniform Application

1. A copy of the Uniform Application for Post-Conviction Relief is found in Appendix A of the Uniform Rules—Courts of Appeal.

2. The petitioner must use the required form for application for post-conviction relief. *State ex rel. Lindsey v. State*, 99-2755 (La. 10/1/99), 748 So.2d 456. However, the trial court should look beyond the caption of pleadings in order to **ascertain their substance**, and pro se filings should be held to less stringent standards than formal pleadings filed by lawyers. *State ex rel. Egana v. State*, 00-2351 (La. 9/22/00), 771 So.2d 638.

a. *State ex rel. Morris v. State*, 15-1824 (La. 1/9/17), 208 So.3d 364 - "The district court's ruling summarily denying relator's post-conviction application is vacated, and the district court is directed to notify relator of any deficiencies in his application and afford relator the opportunity to correct them. *See generally 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 the overzealous application of form and pleading requirements or hyper-technical interpretations of court rules.')."

b. *State ex rel. McElveen v. State*, 15-1920 (La. 1/25/17), 209 So.3d 91 - The matter was remanded and the district court instructed to notify relator of any "deficiencies in his petition's form" and afford him a "reasonable opportunity to cure them."

C. Supplementation of a PCR Application

a. "The district court is ordered to exercise its discretion and determine whether the interests of justice require that relator be allowed to amend and supplement his timely filed application for post conviction relief. La.C.Cr.P. art. 930.8 does not take away from district judges the discretion to allow amendment and supplementation of timely filed pleadings. *See State ex rel. Edge v. Whitley*, 599 So.2d 1090 (La.1992) (Calogero, C.J., concurring)." *State ex rel. Duhon v. Whitley*, 92-1740 (La. 9/2/94), 642 So.2d 1273. *See also State ex rel. Foy v. Whitley*, 92-1281 (La. 10/6/95), 661 So.2d 455. "[T]he district court was acting within its discretion when it in effect ordered supplementation of the timely-filed application for post-conviction relief, even if the supplementation were not to arrive until after the expiration of the prescriptive period." *State v. Sampson*, 02-909 (La. 2/14/03), 841 So.2d 747. *See also State v. Thomas*, 08-2912 (La. 10/16/09), 19 So.3d 466; *State ex rel. Benn v. State*, 11-2418 (La. 6/22/12), 90 So.3d 1045.

b. *State ex rel. Sims v. State*, 16-540 (La. 8/4/17), 224 So.3d 355 - Because relator did not file the pleading styled a supplement to his initial timely-filed application for post-conviction relief until after the district court had ruled upon his first application, relator showed no error in the district court's dismissal of that pleading.

III. PROCEDURE

A. Answer

1. If an application alleges a claim which, if established, would entitle the petitioner to relief, the court shall order the custodian, through the district attorney in the parish in which the defendant was convicted, to file any procedural objections he may have, or an answer on the merits if there are no procedural objections, within a specified period not in excess of thirty days. If procedural objections are timely filed, no answer on the merits of the claim may be ordered until such objections have been considered and rulings thereon have become final. La.Code Crim.P. art. 927(A).

2. If the court orders an answer filed, the court need not order production of the petitioner except as provided in Article 930. La.Code Crim.P. art. 927(C).

B. Dismissal upon the Pleadings

The application may be dismissed without answer if it fails to allege a claim which, if established, would entitle the petitioner to relief. La.Code Crim.P. art. 928.

C. Summary Disposition

If the court determines that the factual and legal issues can be resolved based on the application, answer, and supporting documents submitted by either party or available to the court, the court can grant or deny relief without further proceedings. La.Code Crim.P. art. 929(A).

D. Evidentiary Hearing

1. An evidentiary hearing for the taking of testimony or other evidence shall be ordered whenever there are questions of fact which cannot be resolved pursuant to La.Code Crim.P. arts. 928 and 929. La.Code Crim.P. art. 930(A). *See* La.Code Crim.P. art. 930.8(A)(1).

2. "When there is a factual issue of significance to the outcome that is sharply contested, the trial court will not be able to resolve the factual dispute without a full evidentiary hearing. La.C.Cr.P. art. 929, Official Revision Comment." *State ex rel. Tassin v. Whitley*, 602 So.2d 721 (La.1992).

3. The petitioner is entitled to be present at said hearing unless his/her appearance has been waived or the only evidence to be received is authenticated records, transcripts, depositions, documents, or portions therefore, or admissions of fact, and the petitioner has been or will be provided with copies of such evidence and an opportunity to respond thereto in writing. La.Code Crim.P. art. 930(A)(B).

4. No evidentiary hearing on the merits can be held until the procedural objections have been ruled upon. La.Code Crim.P. art. 930(C).

5. A petitioner who is incarcerated may be present by teleconference, video link, or other visual remote technology. La.Code Crim.P. art. 930.9.

6. A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. *State v. Prudhomme*, 02-511 (La.App. 3 Cir. 10/30/02), 829 So.2d 1166, *writ denied*, 02-3230 (La. 10/10/03), 855 So.2d 324.

7. *State v. Lacaze*, 09-2472 (La. 5/12/10), 41 So.3d 479 - Relator could call the trial judge to testify at a PCR hearing seeking to recuse the trial judge from further involvement in the proceedings.

8. La.Code Evid. art. 507(D) provides that a lawyer may be called as a witness at a habitual offender proceeding for the purpose of identifying his client or former client or in post-conviction proceedings when called on the issue of ineffective assistance of counsel.

E. Right to Counsel

1. Discretionary appointment of counsel

a. "If the petitioner is indigent and alleges a claim which, if established, would entitle him to relief, the court may appoint counsel." La.Code Crim.P. art. 930.7(A).

b. If the court orders an evidentiary hearing, authorizes the taking of depositions, or authorizes requests for admissions of fact or genuineness of documents, when such evidence is necessary for the **disposition of procedural objections**, the court **may** appoint counsel for an indigent petitioner. La.Code Crim.P. art. 930.7(B).

c. *State v. Deloch*, 13-1975 (La. 5/16/14), 140 So.3d 1167 - The supreme court held that *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309 (2012), which announced a rule permitting federal courts conducting habeas corpus review of final state court convictions to consider the merits of a claim otherwise procedurally defaulted, did not apply to relator's post-conviction claims made in state court.

2. Mandatory appointment of counsel

a. When an evidentiary hearing on the merits is ordered or the court authorizes the taking of depositions, requests for admissions of fact or genuineness of documents, for use as evidence in **ruling on the merits**, the trial court **shall** appoint counsel for the petitioner. La.Code Crim.P. art. 930.7(C).

b. *State v. Robinson*, 07-145 (La.App. 3 Cir. 4/5/07) (unpublished opinion) - The trial court was ordered to appoint counsel for relator pursuant to La.Code Crim.P. art. 930.7(C). In lengthy reasons for ruling, the trial court said that it could

not comply with this court's order regarding appointment of counsel because there were no attorneys on either the panel of volunteer attorneys or non-volunteer attorneys. The trial court requested that this court "make its own appointment of counsel." In response, this court instructed the trial court to order the Indigent Defender Board to comply with its duties under La.R.S. 15:145.

F. Burden of Proof

1. The petitioner bears the burden of proof in post-conviction relief proceedings. La.Code Crim.P. art. 930.2. *See also* La.Code Crim.P. art. 930.8(A)(1).

2. *State v. James*, 05-2512 (La. 9/29/06), 938 So.2d 691 - The defendant alleged counsel interfered with his right to testify at trial. The court held the post-conviction claimant must "allege specific facts, including an affidavit from counsel" and point to record evidence to support his claim. The court further found that "mere conclusory allegations are insufficient" to rebut the presumption arising from a defendant's silence at trial that he waived his right to testify.

3. *State v. LeBlanc*, 06-169 (La. 9/15/06), 937 So.2d 844 - The court reinstated guilty plea conviction and sentence, finding that "unsubstantiated allegations of ineffective assistance of counsel, in the face of plea negotiations which resulted in the reduction of the charge from second degree murder to manslaughter and a 20-year recommended sentence, do not carry his burden of showing that he pled guilty involuntarily."

*****4. *State v. Trahan*, 15-848 (La.App. 3 Cir. 11/2/16) (unpublished opinion) - Relator's claim of ineffective assistance of counsel was denied because she failed to call her trial attorney to testify at the hearing on her application for post-conviction relief. In *State v. Trahan*, 16-2150 (La. 8/31/18), 251 So.3d 406 - Relator's claim that counsel provided ineffective assistance at trial in failing "to introduce any evidence in support of the hypothesis of innocence proposed by defense counsel [in opening remarks]" merited a full evidentiary hearing conducted in accordance with La.Code Crim.P. art. 930. No witnesses testified at the hearing held in the district court and no evidence was presented. Therefore, the supreme court was unable to adequately review relator's claim. Thus, the case was remanded to the district court to reconsider its ruling after conducting a full evidentiary hearing.

IV. GROUNDS

A. Grounds upon which Post-Conviction Relief may be Granted are:

"(1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana;

(2) The court exceeded its jurisdiction;

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

(4) The limitations on the institution of prosecution had expired;

(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.

(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." La.Code Crim.P. art. 930.3.

B. Exclusive

The list in La.Code Crim.P. art. 930.3 is exclusive. *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172.

C. Conviction Obtained in Violation of the Constitution

1. Sufficiency of the Evidence

a. A timely claim asserting insufficient evidence is cognizable on collateral review. *State ex rel. Montgomery v. State*, 12-2116 (La. 3/15/13), 109 So.3d 371.

2. Ineffective assistance of counsel

a. *State v. Webb*, 17-928 (La.App. 3 Cir. 6/4/18) (unpublished opinion) - The trial court erred when it held relator's claims of ineffective assistance of counsel were not valid grounds for post-conviction relief under La.Code Crim.P. art. 930.3(1).

b. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) - Petitioner must show that counsel's performance was deficient (errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment) and that the deficient performance prejudiced the defense, such that, petitioner was deprived of a fair trial. "Thus, a court deciding an actual ineffective assistance claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Conduct which falls within the ambit of "trial strategy" is not per se evidence of ineffective counsel. *State v. Schexnaider*, 03-144 (La.App. 3 Cir. 6/4/03), 852 So.2d 450 (citing *State v. Griffin*, 02-1703 (La.App. 4 Cir. 1/15/03), 838 So.2d 34, *writ denied*, 03-809 (La. 11/7/03), 857 So.2d 515).

c. It is unnecessary to address the issues of both counsel's performance and prejudice to petitioner if petitioner makes an inadequate showing on one of the components. *State v. Serigny*, 610 So.2d 857 (La.App. 1 Cir. 1992), *writ denied*,

614 So.2d 1263 (La.1993); *State v. James*, 95-962 (La.App. 3 Cir. 2/14/96), 670 So.2d 461.

d. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984) - Ineffective assistance of counsel can be presumed without a showing of prejudice in three situations: 1) there was a complete denial of counsel; 2) counsel entirely failed to subject the prosecution's case to meaningful adversarial testing; or 3) the likelihood that any lawyer, even a fully competent one, could provide effective assistance of counsel was so small that a presumption of prejudice was appropriate without inquiry into the actual conduct of the trial.

e. *State v. Mills*, 13-1901 (La. 3/21/14), 137 So.3d 8 - Claim that defense counsel was ineffective at a sentencing hearing because he encouraged the trial court to interject an improper consideration into its sentencing determination was reviewed by the supreme court, which noted that said claim would not be cognizable on post-conviction relief.

f. *Hinton v. Alabama*, 571 U.S. 263, 134 S.Ct. 1081 (2014) - The Supreme Court held that an attorney's ignorance on a point of law that is both fundamental to the case and could be resolved with a cursory investigation into the relevant state statutes represents inadequate assistance of counsel. Because Hinton's trial attorney was not aware that Alabama law allowed him to request and receive more funding for expert witnesses, his performance failed to reach the reasonableness standard set forth in *Strickland*.

g. *State ex rel. Shannon v. State*, 15-792 (La. 6/17/16), 194 So.3d 1105 - "The district court's ruling summarily dismissing relator's post-conviction application is vacated and the district court is directed to conduct an evidentiary hearing at which relator will be afforded the opportunity to present his claim of ineffective assistance of counsel with supporting evidence. Although only relator's *pro se* claims were raised in the district court (because relator filed his application before pro bono post-conviction counsel enrolled), and '[t]he general rule is that appellate courts will not consider issues raised for the first time,' *Segura v. Frank*, 93-1271 (La. 1/14/94), 630 So.2d 714, 725, the interests of judicial economy and justice warrant the consideration of both relator's *pro se* and counselled allegations at an evidentiary hearing. *See*, *e.g.*, *State v. Duncan*, 08-2244 (La. 1/22/10), 26 So.3d 148 (granting writs to remand the petitioner's post-conviction claims, including a claim not previously presented to the district court, for an evidentiary hearing). Following the hearing, the district court is ordered to determine whether trial counsel rendered ineffective assistance under the standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)."

h. *Maryland v. Kulbicki*, __ U.S. __, 136 S.Ct. 2 (2016) - Defense counsel's failure at trial to seriously probe a method of forensic analysis that was widely accepted at the time, although later discredited, did not amount to ineffective assistance of counsel. The Court held that the reasonableness of counsel's challenged conduct is viewed as of the time of counsel's conduct.

i. *Weaver v. Massachusetts*, __ U.S. __, 137 S.Ct. 1899 (2017) - A violation of the right to a public trial is a structural error. In the context of an error during jury selection, where the error is neither preserved nor raised on direct review but is raised later via an ineffective assistance of counsel claim, the defendant must demonstrate prejudice to secure a new trial.

j. *State v. Thomas*, 15-110 (La. 11/18/16), 206 So.3d 866 - A claim that a defendant received ineffective assistance of counsel on direct appeal is generally cognizable on collateral review. The district court erred in granting defendant an out-of-time appeal on his claims of ineffective assistance of appellate counsel and should have ruled on the merits of the claims. Because the district court declined to rule on the ineffective assistance claims, the court of appeal erred in considering the merits of the appeal.

k. *State v. Curley*, 16-1708 (La. 6/27/18), 250 So.3d 236 - Battered Woman's Syndrome (BWS) evidence is admissible in a justification/self-defense case, not solely in the insanity context, and is not limited to lay testimony. Defense counsel's failure to conduct any investigation into the proper presentation of a BWS defense was deficient performance, and defendant was prejudiced by that performance.

l. *State v. Johnson*, 17-514 (La. 5/11/18), 243 So.3d 563 - Defendant was not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel even though he accepted a plea offer which imposed harsher penalties than an earlier rejected offer. Counsel did not fail to present the plea offer to defendant, and defendant did not allege counsel advised him to reject the plea offer based upon an erroneous legal principle. Thus, defendant was not entitled to an evidentiary hearing, and the district court did not err in summarily rejecting the claim.

*m. *State v. Dressner*, 18-828 (La. 10/29/18), 255 So.3d 537 - When the substantive issue an attorney failed to raise has no merit, the claim that the attorney was ineffective for failing to raise that issue also has no merit.

*n. *State v. Cuccia*, 18-1726 (La. 5/28/19), 2019 WL 2277940 - Relator raised six claims of ineffective assistance of counsel. The district court denied one of the claims. The supreme court remanded the matter for a complete ruling on all claims, including specific detailed factual findings by the district court in support of its ultimate legal conclusions. The lack of factual findings rendered the one claim that was addressed unreviewable.

3. Guilty Pleas

a. "A valid guilty plea must be a free and voluntary choice by the defendant. A guilty plea will not be considered free and voluntary unless, at the very least, defendant was advised of his constitutional rights against self-incrimination, to a trial by jury and to confront his accusers. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). An express and knowing waiver of those rights must appear on the record, and an unequivocal showing of a free and voluntary waiver cannot be presumed. *Boykin*, *supra*; *State v. Keener*, 41,246 (La.App. 2d Cir. 8/23/06), 939 So.2d 510; *State v. Morrison*, 599 So.2d 455 (La.App. 2d Cir.1992)." *State v. Kennedy*, 42,850 (La.App. 2 Cir. 1/9/08), 974 So.2d 203.

1. *State v. Holden*, 09-1714 (La. 4/9/10), 32 So.3d 803 - Failure of the defendant to conclude the colloquy by stating "I plead guilty" does not render an otherwise knowing, intelligent, and voluntary guilty plea invalid.

b. Inadequate *Boykin* and other problems

1. Although a personal colloquy between a trial judge and the defendant is preferred, group guilty pleas are not automatically invalid. *State v. Richard*, 00-659 (La. 9/29/00), 769 So.2d 1177. The defendant must be aware of the nature of the charge and the elements of the crime; however, this constitutional requirement is satisfied where these things are explained to the defendant by his own competent counsel. *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398 (2005).

2. "*The Defendants all nodded*" - There is no way to review whether the defendant actually understood the advice/waiver being referenced.

3. Counsel representing multiple defendants at plea entry proceeding referring to "*my client*" or "*your client*" - The reviewing court has no way of knowing which client is being referenced.

4. Discussions and agreements among attorneys and the court prior to proceedings in open court - If relevant, memorialize the agreements for the record.

5. Exact docket numbers and a description of charges being dropped/reduced as part of any plea agreement must be clearly stated in open court.

6. Review plea entry forms to insure they are signed by all parties and that the terms and conditions on the form are **exactly the same** as those stated in open court.

c. Advice of Rights - *State v. Mendenhall*, 06-1407 (La. 12/8/06), 944 So.2d 560 - A trial judge's advisement to defendant that the State would have to prove its case beyond a reasonable doubt and that his attorney would have an opportunity to cross-examine the State's witnesses was deemed insufficient advice as to the right to confront one's accusers by the second circuit. The supreme court reversed,

finding that other factors, including an informed, educated defendant, rendered the advice constitutional.

d. Advice with respect to a defendant's sentencing exposure is not a part of the core *Boykin* requirements. *State v. Anderson*, 98-2977 (La. 3/19/99), 732 So.2d 517. This includes the fact that a guilty plea may be used as a basis for the filing of a future multiple offender bill. *State v. Lane*, 40,816 (La.App. 2 Cir. 4/12/06), 927 So.2d 659, *writ denied*, 06-1453 (La. 12/15/06), 944 So.2d 1283, *and writ denied*, 06-2502 (La. 5/4/07), 956 So.2d 599.

e. When a guilty plea is otherwise voluntary, there is no need to ascertain a factual basis for the plea unless the accused protests his guilt or for some other reason the trial court is put on notice that there is a need for such an inquiry. *State v. McCullough*, 615 So.2d 26 (La.App. 3 Cir. 1993). *But see North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970) - Guilty pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea.

f. "A guilty plea is invalid, or constitutionally infirm, when a defendant is induced to enter a plea of guilty by a plea bargain agreement, or what he reasonably or justifiably believes was a plea bargain agreement, and the terms of the bargain are not satisfied. *State v. Jones*, 546 So.2d 1343, 1346 (La.App. 3d Cir.1989); *State v. Taylor*, 535 So.2d 1229, 1230 (La.App. 3d Cir.1988) quoting *State v. Dixon*, 449 So.2d 463, 464 (La.1984). It is well settled that if a defendant's misunderstanding is not induced by or attributed to representations made by the district attorney or the trial court, there is no ground for invalidating the guilty plea. *State v. Malmay*, 548 So.2d 71, 73 (La.App. 3d Cir.1989); *State v. Jones*, *supra*.

It is also well settled that a misunderstanding between a defendant and counsel for defendant does not have the same implication as a breached plea bargain agreement, and this misunderstanding does not render the guilty plea invalid. *State v. Lockwood*, 399 So.2d 190 (La.1981); *State v. Johnson*, 533 So.2d 1288, 1292 (La.App. 3d Cir.1988), *writ denied*, 563 So.2d 873 (La.1990). In the absence of fraud, intimidation, or incompetence of counsel, a guilty plea is not made less voluntary or less informed by the considered advice of counsel. See, *State v. Johnson*, 461 So.2d 1259, 1261 (La.App. 1st Cir.1984)." *State v. Sigue*, 06-527 (La.App. 3 Cir. 9/27/06), 940 So.2d 812, *writ denied*, 06-2963 (La. 9/28/07), 964 So.2d 354 (citing *State v. Readoux*, 614 So.2d 175 (La.App. 3 Cir. 1993)). "The determination whether the conduct of defense counsel constitutes fraudulent misrepresentation sufficient to invalidate a guilty plea is based upon a weighing of the credibility of the witnesses against the remaining evidence, and the fact-finder's determinations will not be second-guessed." *State v. Moree*, 99-402 (La.App. 3 Cir.

10/4/00), 772 So.2d 155 (citing *State . Hidalgo*, 96-403 (La.App. 3 Cir. 11/6/96), 684 So.2d 26).

1. *State ex rel. Williams v. State*, 08-1059 (La. 2/6/09), 999 So.2d 1136 - Relator pled guilty to manslaughter and the parties agreed that he would receive a suspended sentence and probation. The supreme court vacated the sentence because the trial court lacked authority to impose such a sentence and remanded the matter for resentencing, at which time relator would be given the opportunity to withdraw his guilty plea.

2. La.Code Crim.P. art. 890.1, which became effective May 17, 2012, allows the waiver of minimum mandatory sentences. Effective August 1, 2014, this provision does not apply to sex offenses as defined in La.R.S. 15:541 or thirty-four listed crimes of violence.

3. *State v. Gobert*, 02-771 (La.App. 3 Cir. 11/12/03), 865 So.2d 779, *writ denied*, 03-3382 (La. 12/10/04), 888 So.2d 829 - Fundamental fairness dictated that relator, who knowingly and intelligently entered a plea that raised double jeopardy concerns to avoid the imposition of a mandatory life sentence, could not attack the validity of that plea.

4. *State ex rel. Morgan v. State*, 08-1082 (La. 3/4/09), 3 So.3d 456 - Erroneous advice of counsel regarding eligibility for diminution of sentence for good behavior is grounds for withdrawal of a guilty plea.

5. *State v. Jackson*, 13-1409 (La. 11/15/13), 129 So.3d 520 - Defendant maintained his innocence but entered an *Alford* plea. "Given the unique facts of this case relating to the veracity of the arresting officer which arose prior to sentencing, we find the district court abused its discretion in refusing to allow the defendant to withdraw his guilty plea."

6. *State in Interest of E.C.*, 13-2483 (La. 6/13/14), 141 So.3d 785 - Juvenile pled nolo contendere to delinquency charges. As part of the plea agreement, the juvenile agreed to obtain a trade or skill through a trade/vocational program offered and available at the facility upon his confinement or, alternatively, to make good faith efforts to actively participate in such a program. Although the juvenile contended that he had no realistic opportunity to participate in a program because he did not meet general requirements for participation, the court had used its authority to order the juvenile into the program, openings were available in the program, and the juvenile did not join the program or place his name on the waiting list for the program. The court found that allowing the juvenile to re-enter society without participation in vocational training would frustrate the spirit of the plea agreement. The juvenile was remanded to the facility to comply with the plea agreement.

7. *State v. Ducre*, 14-1295 (La. 3/16/15), 161 So.3d 628 - Defendant was advised that his sentence was deferred and he would receive the benefit of La.Code Crim.P. art. 893. The case was remanded to the district court for a determination of whether a mutual mistake regarding whether the defendant would receive the benefit of art. 893 occurred, which should be corrected in accordance with La.Code Crim.P. art. 881.1(A)(3). If no mutual mistake occurred, the district court was ordered to give the defendant the opportunity to withdraw his guilty plea.

8. *State ex rel. O'Keefe v. State*, 15-1101 (La. 6/17/16), 194 So.3d 1107 - Defendant alleged he pled guilty based on the representation that he would be eligible for parole consideration after serving two years of his sentence. The supreme court ordered the trial court to appoint counsel and conduct an evidentiary hearing to determine whether relator pled guilty involuntarily as a result of his misunderstanding of his eligibility for release on parole.

9. *State v. Babineaux*, 16-694 (La. 4/24/17), 217 So.3d 329 - In accordance with the parties' plea agreement, the district court sentenced relator pursuant to the version of the statute in effect at the time of his guilty plea, La.R.S. 14:43.3, which provided for a substantially harsher punishment than at the time of his offense. Because the plea agreement provided for the imposition of an illegal sentence, the agreement was null and void. Relator's conviction and sentence were vacated and the parties returned to the status quo ante.

10. *State v. Allah*, 17-785 (La. 1/9/18), 232 So.3d 554 - When a district court finds, even after sentencing, that a plea of guilty is constitutionally infirm, it retains the authority to vacate the sentence and set aside the plea. On remand, the district court should first ascertain whether defendant desires to withdraw his guilty pleas. If he so wishes, only then should the district court hold a contradictory hearing to determine whether the pleas were constitutionally infirm and decide whether the pleas were induced by what defendant justifiably believed to be a plea bargain which, as a matter of law, could not be kept.

11. *McCoy v. Louisiana*, 138 S.Ct. 1500, 86 USLW 4271 (2018) - Defendant insisted on a defense of innocence but trial counsel believed admitting guilty would help him avoid the death penalty and admitted defendant was guilty during trial. The trial court's allowance of the admission was a structural error, and defendant was granted a new trial without showing prejudice. The Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.

*12. *State v. Horn*, 16-559 (La. 9/7/18), 251 So.3d 1069 - Trial counsel's concession that defendant killed the victim over defendant's explicit objection constituted deficient performance and was a structural error.

g. Agreement not to prosecute

1. *State v. Cardon*, 06-2305 (La. 1/12/07), 946 So.2d 171 - A defendant's guilty plea to a crime committed prior to entering into an agreement not to prosecute was not a basis for termination of the agreement, as the agreement only prohibited the defendant from committing a "new" offense.

h. Plea colloquy is not part of the record for error patent review - *State v. Robinson*, 06-1406 (La. 12/08/06), 943 So.2d 371 - The failure of the trial court to inform the defendant of the right to trial by jury was not reviewable as error patent.

i. Sentence recommendation - If the plea agreement is for the State to recommend a specific sentence, the actual sentence imposed is still reviewable on appeal. *See State v. Thibeaux*, 11-40 (La.App. 3 Cir. 8/3/11), 70 So.3d 1094. *But see State v. Holmes*, 11-533 (La.App. 3 Cir. 5/30/12) (unpublished opinion), *writ denied*, 12-1606 (La. 11/16/12), 102 So.3d 32 - There was a joint sentencing recommendation. During the plea colloquy the trial court informed relator that it was not bound by the sentencing recommendation and later stated relator could not seek review of a sentence imposed in conformity with the plea agreement. Relator was then ordered to serve the recommended sentence. Relator subsequently sought an out-of-time appeal. The trial court denied relator's request for an out-of-time appeal, stating relator waived his right to appeal the issue of guilt, and the sentence received was imposed in conformity with a plea agreement. This court found no error in the trial court's ruling.

j. *Crosby* plea *vs*. *Alford* plea requirements - (**Not** to be used interchangeably.) For *Crosby*, ONLY errors specifically reserved may be appealed. For *Alford*, a DETAILED factual basis is mandatory.

4. Duty to disclose exculpatory evidence - *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963).

a. Components of a *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936 (1999).

b. *State v. Harper*, 10-356 (La. 11/30/10), 53 So.3d 1263 - The trial court abused its discretion in ordering production of allegedly exculpatory witnesses for an *in camera* interview by the trial court, as the State had satisfied its obligation under *Brady*, had not explicitly or otherwise directed the witnesses not to speak with

defense counsel, and defense counsel failed to present any exceptional circumstances or peculiar reasons why fundamental fairness dictated production of the witnesses or their contact information.

c. *State v. Weathersby*, 09-2407 (La. 3/12/10), 29 So.3d 499 - The State's witness list and the taped statements of victims and witnesses, which did not constitute *Brady* material, were not discoverable by the defense.

d. *Wearry v. Cain*, __ U.S. __, 136 S.Ct. 1002 (2016) - Wearry argued during state post-conviction proceedings that the prosecution failed to disclose three pieces of exculpatory evidence: that two fellow inmates of the State's star witness, Scott, had made statements that cast doubt on Scott's credibility; that, contrary to the prosecution's assertions at trial, Brown, another witness, had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry; and that medical records of Randy Hutchinson, who allegedly participated in the murder, showed that he likely could not have played the role in the attack Scott alleged. The Supreme Court found the Louisiana court erred in denying Wearry's post-conviction *Brady* claim, stating: "Beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction. The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi." The majority further stated: "[e]ven if the jury—armed with all of this new evidence—*could* have voted to convict Wearry, we have 'no confidence that it *would* have done so."'

5. Sixth Amendment Right to Confrontation - In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), the United State Supreme Court held that even if an out-of-court statement fits within a firmly rooted exception to the hearsay rule, that statement is inadmissible if it is testimonial in nature and has not been subject to confrontation and cross-examination, unless the witness is unavailable and the defense had a prior opportunity to cross-examine the witness, regardless of whether the statement is deemed reliable by the court.

a. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527 (2009) - Certificates of forensic analysis are testimonial, and the Sixth Amendment does not permit the State to prove its case via *ex parte* out-of-court affidavits.

b. *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705 (2011) - The surrogate testimony of a second forensic analyst who did not observe or review the original blood alcohol content results was inadmissible. The defendant had the right to be confronted with the analyst who made the certification, unless that analyst was unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

c. *Williams v. Illinois*, - 567 U.S. 50, 132 S.Ct. 2221 (2012) - The testimony of an expert witness that was based on a test the expert did not personally perform was admissible and did not violate the defendant's Sixth Amendment Confrontation Clause rights. The Court held that, because the evidence of the third-party test was not produced to prove the truth of the matter asserted but merely to provide a basis for the conclusions that the expert reached, the prosecution had not infringed on the defendant's rights. *See also State v. Bolden*, 11-2435 (La. 10/26/12), 108 So.3d 1159.

d. *State v. Simmons*, 11-1280 (La. 1/20/12), 78 So.3d 743 - The defendant waived his Sixth Amendment right to confrontation by failing to timely request a subpoena for the analyst who performed the test on the rocks of cocaine. Under the circumstances, the trial court properly admitted the analyst's certificate in lieu of live testimony. The supreme court noted that Louisiana's notice-and-demand statute, La.R.S. 15:501, was permissible under the Confrontation Clause.

e. *State v. Tate*, 14-136 (La.App. 3 Cir. 4/17/14), (unpublished opinion) - The trial court erred in finding the admission of statements made by the deceased during a recorded conversation with the defendant violated the confrontation clause, as the deceased's statements were reasonably required to place the defendant's statements into context.

f. *State v. Hawley*, 14-282 (La. 10/15/14), 149 So.3d 1211 - Admission of the Machine Recertification Form and Maintenance Technician Qualification Form did not violate the Confrontation Clause because they did not provide direct proof of any element of DWI. Additionally, the state had no duty under the notice and demand statute to produce the testimony of the person who prepared the forms.

g. *State v. Koederitz*, 14-1526 (La. 3/17/15), 166 So.3d 981 - The trial court erred in excluding the hospital records documenting the victim's initial treatment during which she identified her assailant and placed the incident in the context of domestic violence and the follow-up visit during which she elaborated on her prior statements and received counseling on ways to change her behavior. These statements were non-hearsay as a matter of La.Code. Crim.P. art. 803(4) and were admissible as substantive evidence because they were made for purposes of medical diagnosis and treatment, essential components under current medical practice in cases of domestic violence. The statements were also non-testimonial for the purposes of the Confrontation Clause because there were not procured for the primary purpose of creating an out-of-court substitute for trial testimony.

h. *Ohio v. Clark*, __ U.S. __, 135 S.Ct. 2173 (2015) - The Court held that the three-year-old's statements to his teachers were non-testimonial because the totality of the circumstances indicated that the primary purpose of the conversation was not to create an out-of-court substitute for trial testimony. In this case, there was an ongoing emergency because the child, who had visible injuries, could have been released into the hands of his abuser, and therefore the primary purpose of the teachers' questions was most likely to protect the child. Moreover, a very young child who does not understand the details of the criminal justice system is unlikely to be speaking for the purpose of creating evidence. Finally, the Court held that a mandatory reporting statute does not convert a conversation between a concerned teacher and a student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.

i. *State v. Mullins*, 14-2260, 14-2310 (La. 1/27/16), 188 So.3d 164 - Results of IQ test were testimonial in nature, and the admission of a letter containing the results thereof violated the confrontation clause in the absence of testimony by the technician who administered the test as to the results of the test or whether required testing protocols were followed.

6. Double Jeopardy

a. Double jeopardy protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *State v. Crandell*, 05-1060 (La. 3/10/06), 924 So.2d 122.

b. Additional fact test - *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932) - If conduct constitutes a violation of two or more distinct statutory provisions, the provisions must be scrutinized to confirm that each demands proof of an additional fact.

c. Same evidence test - This test depends upon the proof required to convict, not the evidence actually introduced at trial. *State v. Sandifer*, 95-2226 (La. 9/5/96), 679 So.2d 1324.

1. *State v. Frank*, 16-1160 (La. 10/18/17), 234 So.3d 27 - Louisiana courts need only apply the *Blockburger* test in analyzing double jeopardy claims and can dispense with the same evidence test.

d. *Currier v. Virginia*, __ U.S. __, 138 S.Ct. 2144 (2018) - Defendant was charged with burglary, grand larceny, and possession of a firearm after having been convicted of a violent felony. Defendant and the State agreed to sever the possession charge from the burglary and grand larceny charges to avoid evidence of his prior convictions during the trial for burglary and grand larceny, of which he was acquitted. Some of the same evidence was presented at the possession trial, where

defendant was convicted. Because defendant consented to the severance his second trial and resulting conviction did not violate the double jeopardy clause.

e. *State v. Thomas*, 07-446 (La.App. 3 Cir. 5/30/07) (unpublished opinion), *writ denied*, 07-1471 (La. 4/18/08), 978 So.2d 345 - Relator's double jeopardy claim was precluded from review, as it was raised more than two years after his convictions and sentences were final. *See also State v. Griffin*, 96-1562 (La.App. 3 Cir. 6/19/97) (unpublished opinion), *writ denied*, 97-2250 (La. 3/20/98), 715 So.2d 1201; *State v. Hardy*, 09-176 (La.App. 3 Cir. 6/3/09) (unpublished opinion), *writ denied*, 09-1532 (La. 4/16/10), 31 So.3d 1061; *State v. Davis*, 14-478 (La.App. 3 Cir. 9/10/14), 159 So.3d 482, *writ denied*, 14-2113 (La. 5/1/15), 169 So.3d 371.

f. Review of a double jeopardy claim where a plea of guilty was entered is limited to review of the charging documents and plea colloquy. *State v. Arnold*, 01-1399 (La. 4/12/02), 816 So.2d 289.

7. Court Exceeded Jurisdiction

a. *State v. Ervin*, 06-273 (La.App. 3 Cir. 4/11/06) (unpublished opinion) - Relator, a juvenile at the time of his arrest, was charged with one count of attempted first degree murder and two counts of false imprisonment. Subsequent to his plea of guilty to the charges, relator filed a pleading asserting the trial court lacked jurisdiction over the false imprisonment charges under La.Ch.Code art. 305, as false imprisonment is not one of the enumerated felonies in art. 305. The trial court interpreted relator's motion as an application for post-conviction relief, and denied it as untimely. This court stated, "[t]he trial court erred in denying Relator's 'Motion to Correct Illegal Sentence' as the trial court lacked jurisdiction to convict and sentence Relator on the two counts of false imprisonment. La.Ch.Code arts. 303 and 305."

8. Probation Revocation

a. *State ex rel. Clavelle v. State*, 02-1244 (La. 12/12/03), 861 So.2d 186 - "No appeal lies from an **order revoking probation** . . . and while supervisory review provides a direct means for contesting the trial court's action, we have recognized that post-conviction proceedings may also afford an avenue of relief." *Id.* at 187 (citations omitted) (emphasis added). The court noted that, at the close of the revocation hearing, the trial court advised the unrepresented relator that he had "two years from when the sentence becomes final to apply for post-conviction relief." Relator filed a post-conviction application within that time period and sought review from the court of appeal within the return date set by the trial court after the denial of his application. Thus, the supreme court concluded that relator attempted to comply with what he reasonably believed were the procedural requirements for preserving his claims for review.

b. Under Uniform Rules—Courts of Appeal, Rule 4-3, a defendant has thirty days from the ruling revoking his probation, unless the trial court grants an extension, to file a supervisory writ seeking review of his probation revocation.

c. **DO NOT mention post-conviction relief** or time limits at probation revocation proceedings.

d. *State v. Thurman*, 17-881 (La.App. 3 Cir. 11/27/17) (unpublished opinion) - Evidence of arrest, through the testimony of the probation officer, alone is insufficient to revoke probation. Revocation for a condition not imposed by the trial court is insufficient, and failure to determine whether relator was indigent when he failed to pay fees was improper.

e. *State v. George*, 18-472 (La.App. 3 Cir. 7/13/18) (unpublished opinion) - The provisions of La.Code Crim.P. art. 900 are not limited to felony probation.

*f. *State v. Jennings*, 18-831 (La.App. 3 Cir. 1/30/19) (unpublished opinion) - The trial court did not clearly state for the record under which trial court docket number Relator's probation was revoked. Mere reference to pages 67 and 69 of a document not described or admitted into evidence does not satisfy the trial court's burden under La.Code Crim.P. art. 900(D). Thus, the trial court's order revoking Relator's probation was vacated and the matter was remanded for further revocation proceedings, if so urged by the State.

9. Reinstatement of Right to Appeal (Out-of-Time Appeal)

a. There is a constitutional right to an appeal in Louisiana. The right to an appeal can only be waived by the defendant himself, and any waiver of the right must be an informed one. *State v. Simmons*, 390 So.2d 504 (La.1980).

b. *State v. Counterman*, 475 So.2d 336 (La.1985):

1. If the delay for seeking an appeal has expired, the appropriate procedural vehicle for seeking reinstatement of the right to appeal is an application for post-conviction relief.

2. The defendant must establish that he was not advised of the right to appeal or that his attorney was at fault in failing to timely file an appeal.

3. In deciding whether to grant an out-of-time appeal, the trial court may consider factors such as the length of the delay in defendant's attempt to exercise the right and the adverse effect upon the state caused by the delay.

4. The State must be given an opportunity to oppose the request.

c. *State v. Counterman*, 491 So.2d 86 (La.App. 1 Cir. 1986) - The first circuit certified to the supreme court the following question, "In the instant case, since the trial court failed to follow the Supreme Court's directive in *State v. Counterman*, 475 So.2d 336 (La.1985), to consider defendant's request for appeal as an

application for post conviction relief and to employ the proper procedures therefor, is this appeal properly before this Court?"

d. *State v. Counterman*, 501 So.2d 766 (La.1987) - The supreme court stated, "The appeal is properly before the Court of Appeal. It does not appear that the state has complained of the district court's failure to follow C.Cr.P. art. 927 or of the district court's granting of the out of time appeal."

e. *State v. S.J.I.*, 06-2649 (La. 6/22/07), 959 So.2d 483 - The supreme court remanded a case to this court stating the following, "The judgment of the court of appeal dismissing relator's appeal and remanding the case to the district court for further proceedings pursuant to *State v. Counterman*, 475 So.2d 336 (La.1985), is vacated and this case is remanded to the court of appeal to address relator's assignments of error on the merits. Given the trial court's granting of relator's pro se motion for appeal and its appointment of the Louisiana Appellate Project to represent relator on appeal, and given the state's failure to complain about any procedural irregularities in the ordering of the out-of-time appeal, dismissal of the present appeal and a remand to the district court to cure any defects under this Court's Counterman decision would only prolong the delay without serving any useful purpose."

f. *State ex rel. Thurman v. State*, 08-994 (La. 2/13/09), 1 So.3d 459 - Relator raised the issue of his entitlement to an out-of-time appeal within the parameters established by La.Code Crim.P. art. 930.8, **although he did not do so in the trial court**. The supreme court ordered the district court to hold a hearing to determine if relator was entitled to an out-of-time appeal under *Counterman* stating, "neither the prescriptive period of art. 930.8(A) nor the discretionary procedural bar of La.C.Cr.P. art. 930.4(E) should operate to deprive relator of his constitutional right to appeal."

g. *State v. Johnson*, 16-2232 (La. 3/9/18), 237 So.3d 1184 - The ruling ordering the evidentiary hearing on defendant's entitlement to an out-of-time appeal was reversed, as defendant pled guilty pursuant to a negotiated agreement, was sentenced in conformity therewith, and was informed at the time of his plea that he was waiving his right to appeal.

*****h. *State v. Ellison*, 18-2083 (La. 5/6/19), 268 So.3d 1026 - The district court's grant of an out-of-time appeal and appointment of appellate counsel was vacated for failure to comply with *State v. Counterman*, 475 So.2d 336 (La.1985), and La.C.Cr.P. arts. 924–930.7. The district court was directed to reconsider whether the applicant would be granted an out-of-time appeal after affording the State the opportunity to respond to the application.

*i. *State v. Burton*, 17-1915 (La. 1/14/19), 261 So.3d 769 - Relator was not entitled to an out-of-time appeal. By pleading guilty unconditionally, he waived all non-jurisdictional defects in the proceedings leading to his conviction, and he also failed to show that he was denied the effective assistance of counsel during plea negotiations.

*j. *Garza v. Idaho*, ___ U.S. ___, 139 S.Ct. 738 (2019) - "[N]o appeal waiver serves as an absolute bar to all appellate claims." *Id.* at 744. "[A] waived appellate claim can still go forward if the prosecution forfeits or waives the waiver." *Id.* at 745. Filing a notice of appeal is a simple, nonsubstantive act that is within the defendant's prerogative. *Id.* at 746. Simply filing a notice of appeal does not necessarily breach a plea agreement. The decision whether to appeal is ultimately the defendant's to make. *Id.* at 746. Where a defendant expressly requests an appeal, counsel performs deficiently by disregarding the defendant's instructions. *Id.* The defendant did retain a right to his appeal. "[H]e simply had fewer possible claims than some other appellants. Especially because so much is unknown at the notice-of-appeal stage . . . ." *Id.* at 748. "When counsel's deficient performance forfeits an appeal that a defendant otherwise would have taken, the defendant gets a new opportunity to appeal." *Id.* at 749. The presumption of prejudice applies regardless of whether a defendant has signed an appeal waiver. Where an attorney performed deficiently in failing to file a notice of appeal despite the defendant's express instructions, prejudice is presumed with no further showing from the defendant of the merits of his underlying claims. *Id.* at 750.

10. Intellectual Disability

a. *State v. Reeves*, 14-132 (La. 4/25/14), 137 So.3d 625 - The supreme court found the pre-evidentiary hearing ordering the defendant to provide the State with wide-ranging discovery and to submit to an examination conducted by an expert of the State's choosing was premature, as the court was not at the stage of the proceedings making the ultimate determination of whether the defendant was mentally retarded and therefore subject to execution but determining only whether reasonable grounds exited for making that inquiry.

b. *Brumfield v. Cain*, __ U.S. __, 135 S.Ct. 2269 (2015) - The trial court's decision that Brumfield did not present sufficient evidence of mental impairment was an unreasonable determination of the facts. Therefore, the federal district court could review the state court's decision. The state court's decision rested on its determination that Brumfield's IQ score was not low enough to prove that he had subaverage intelligence and that Brumfield did not show that his adaptive skills were impaired. However, an IQ test has a margin of error that, if applied to the score in this case, would place Brumfield in the category of subaverage intelligence;

therefore, the state court could not definitively preclude the possibility that Brumfield satisfied this criterion, and to hold otherwise was unreasonable. Additionally, the factual record presented to the state court provided sufficient evidence to question Brumfield's adaptive skills. Because Brumfield only needed to raise reasonable doubt regarding his intellectual capacity to be entitled to an evidentiary hearing, the state court's decision that Brumfield did not meet that low threshold was unreasonable.

c. *Moore v. Texas*, __ U.S. __, 137 S.Ct. 1039 (2017) - The non-scientific factors applied by Texas were inappropriate for determination of intellectual disability.

11. Actual Innocence/Jackson Review

a. *State v. Pierre*, 13-873 (La. 10/15/13), 125 So.3d 403 - The defendant was not entitled to a new trial based on the victim's post-conviction allegation made during the pendency of defendant's direct appeal that a male family member had been sexually abusing her during the same time period as the defendant. Assuming the defendant had a free-standing post-conviction claim of actual innocence based on the victim's allegation, the allegation went to the victim's credibility not to the defendant's actual innocence, and the defendant failed to show that he was deprived of the opportunity to file a motion for new trial based on newly discovered evidence due to the state's late disclosure of the victim's allegation to the defendant.

b. *State v. Edwards*, 14-1737 (La. 4/10/15), 164 So.3d 823 - *McQuiggin v. Perkins*, 569 U.S. 383, 133 S.Ct. 1924 (2013), in which the Supreme Court found that a credible showing of actual innocence allows a petitioner to pursue habeas corpus relief on the merits regardless of any procedural bar, "does not purport to govern state post-conviction proceedings conducted under state law . . . ."

12. Jury Conduct

a. *State v. Tyler*, 13-913 (La. 11/22/13), 129 So.3d 1230 - The matter was remanded for an evidentiary hearing at which relator would have the burden of proving that improper consultation with the Bible occurred during jury deliberations and it had a substantial and injurious effect in determining the jury's verdict. At the hearing, the testimony of jurors was admissible to show the nature and the circumstances of any reading of the Bible which took place during deliberations. However, under La.Code Evid. art. 606(B), no juror would be allowed to testify to the actual impact consultation of the Bible had on his mind or verdict or speculate as to the impact it had on the mind of another juror.

b. *Warger v. Shauers*, 574 U.S. 40, 135 S.Ct. 521 (2014) - Federal Rule of Evidence 606(b), which provides that certain juror testimony about events in the jury room is not admissible during an inquiry into the validity of a verdict, bars a federal court from considering evidence of a juror's comments during deliberations that indicated she lied during voir dire about her impartiality and ability to award damages.

c. *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017) - Where a juror makes a clear statement that indicates he relied on racial stereotypes or animus to convict a defendant, the Sixth Amendment requires that the no-impeachment rule, Fed. Rule 606(b), give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

D. Examples of Issues which may <u>NOT</u> be Raised in a PCR Application

1. Claims of excessiveness or other sentencing errors. *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172. S*ee also State v. Humphrey*, 13-481 (La. 11/8/13), 126 So.3d 1280.

2. Habitual Offender

a. Generally, challenges to a multiple offender adjudication cannot be heard on post-conviction relief. *State v. Hebreard*, 98-385 (La.App. 4 Cir. 3/25/98), 708 So.2d 1291. *See also State v. Daniels*, 00-3369 (La. 11/2/01), 800 So.2d 770; *State ex rel. Brown v. State*, 03-2568 (La. 3/26/04), 870 So.2d 976; *State v. Shepard*, 05-1096 (La. 12/16/05), 917 So.2d 1086.

b. *State v. Cotton*, 09-2397 (La. 10/15/10), 45 So.3d 1030 - A habitual offender adjudication constitutes sentencing for purposes of *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172, and La.Code Crim.P. art. 930.3. A fortiori, relator's claim that he received ineffective assistance of counsel at his habitual offender adjudication was not cognizable on collateral review so long as the sentence imposed fell within the range of the sentencing statutes. *See also State v. Young*, 16-1003 (La. 12/15/17), 231 So.3d 619.

c. *State v. Quinn*, 14-1831 (La. 4/10/15), 163 So.3d 799 - The supreme court found the court of appeal erred to the extent it granted partial relief and vacated relator's habitual offender adjudication and sentence. Consideration of any habitual offender adjudication error is precluded.

d. A claim contesting the refusal to vacate a habitual offender ruling can be reviewed as an illegal sentence claim. *See State v. Singleton*, 09-1269 (La. 4/23/10), 33 So.3d 889.

e. *State v. Moore*, 14-1282 (La. 3/27/15), 164 So.3d 186 - Relator filed an application for post-conviction relief claiming he received ineffective assistance of counsel because counsel failed to object to the multiple bill on the basis that the

cleansing period had lapsed. The fourth circuit refused to consider the sentencing error. The supreme court remanded the matter for consideration of the claim because the fourth circuit's opinion on appeal specifically stated the issue was preserved and could be raised via application for post-conviction relief.

f. *State v. Francis*, 16-513 (La. 5/19/17), 220 So.3d 703 - Relator filed an application for post-conviction relief claiming that appellate counsel was ineffective for failing to raise an excessive sentence claim on appeal. The supreme court addressed the issue, stating: "Considering the facts that the 25-year sentence is substantial, the claim was preserved for review by filing a motion to reconsider sentence, and the district court failed to observe the sentencing delay—and in light of the dissenting view on appeal—this claim also merits further evidentiary development. Although La.C.Cr.P. art. 930.3 'provides no basis for review of claims of excessiveness or other sentencing error post-conviction,' *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172, relator's 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. Therefore, we grant relator's application in part to remand to the district court to conduct an evidentiary hearing on relator's claims that appellate counsel rendered ineffective assistance by failing to challenge . . . the sentence as excessive."

*****g. *State v. Harris*, 18-1012 (supreme court docket number) - On June 12, 2019, the supreme court issued an order for the State, in its opposition to relator's writ application, to address the following: 1) Whether *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172, was correctly decided; 2) Whether a claim of ineffective assistance of counsel related to sentencing is cognizable by application for post-conviction relief, motion to correct illegal sentence, or by any other means under Louisiana law; and 3) Whether an illegal sentence can include an excessive sentence or a sentence obtained in a proceeding in which there was a substantial violation of the Constitution of the United States or the State of Louisiana. The Louisiana Public Defender Board and the Louisiana District Attorney's Association were invited to file amicus briefs.

3. Non-jurisdictional defects

a. A guilty plea waives all non-jurisdictional defects in the proceedings leading to the plea. *State v. Starks*, 01-1078 (La. 3/28/02), 812 So.2d 638. *See also State ex rel. Nelson v. State*, 15-1990 (La. 2/3/17), 209 So.3d 695 - By pleading guilty, relator waived review of all non-jurisdictional defects in the proceedings prior to the plea. *State v. McKinney*, 406 So.2d 160, 161 (La.1981). This includes ineffective assistance of counsel that occurs prior to entry of the guilty plea. *State v. Holder*, 99-1747 (La.App. 3 Cir. 10/11/00), 771 So.2d 780. *See State v. Crosby*,

338 So.2d 584 (La.1976) for a list of jurisdictional defects. However, under *Crosby* a defendant's guilty plea can be expressly conditioned upon his right to obtain appellate review of pre-plea rulings urged as reversibly erroneous.

b. *State v. Jenkins*, 419 So.2d 463 (La.1982) - The defendant alleged defense counsel was ineffective for failing to call him as a witness at the motion to quash hearing. The supreme court held the defendant pled guilty, thus, waiving any non-jurisdictional defects such as the alleged ineffective assistance of counsel.

c. *But see State v. West*, 09-2810 (La. 12/10/10), 50 So.3d 148 - The supreme court stated: "The court of appeal erred to the extent that it implied that relator's claim of ineffective assistance of counsel was waived as a 'non-jurisdictional defect' by entering guilty pleas to the charged crimes. Established jurisprudence of this Court provides that the Sixth and Fourteenth Amendments and La. Const. art. I, § 2 and § 13 protect a defendant pleading guilty. 'When a defendant enters a counseled plea of guilty, this court will review the quality of counsel's representation in deciding whether the plea should be set aside.'"

d. *State ex rel. Slaughter v. State*, 16-372 (La. 5/26/17), 220 So.3d 723 - Relator pled guilty unconditionally, waiving all non-jurisdictional defects in the proceedings leading to his conviction. Relator also failed to show that he was denied effective assistance of counsel during plea negotiations. *See also State ex rel. Rainey v. State*, 16-1439 (La. 10/27/17), 228 So.3d 193.

e. *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399 (2012) - The Sixth Amendment right to effective assistance of counsel in criminal cases includes the right to notice from one's attorney of the terms of a plea offer from the prosecution. Failure to convey such terms to the defendant violates that right. To obtain relief, however, the defendant must still establish a reasonable probability that, had he received effective assistance of counsel, (a) the defendant would have accepted the plea offer, (b) the resulting plea agreement would have been entered by the court, and (c) that agreement would have resulted in a plea to a lesser charge or a lighter sentence than was actually imposed.

f. *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376 (2012) - A defendant who (a) rejects a plea offer based on legal advice so deficient that it violates the Sixth Amendment, and (b) is later convicted at trial and receives a harsher sentence can seek reconsideration of his sentence if he can show a reasonable probability that, but for the ineffective assistance of counsel, (1) the plea agreement would have been presented to and accepted by the court, and (2) the subsequent conviction and sentence (or both) under that plea agreement would have been less severe than the judgment and sentence that were actually imposed.

g. *State v. Birtha*, 10-2526 (La. 2/10/12), 81 So.3d 649 - The district court was ordered to appoint counsel to represent relator and to conduct an evidentiary hearing on his claims that he was constructively denied the representation of counsel when the trial court appointed counsel on the morning of trial and the day after relator's retained counsel failed to appear, and appointed counsel rendered ineffective assistance of counsel by pressing relator to plead guilty.

V. PROCEDURAL OBJECTIONS

A. Pending Appeal

If an appeal is pending, the person in custody may not file an application for post-conviction relief. La.Code Crim.P. art. 924.1.

B. Raised on Appeal

If a claim was fully litigated on appeal or in a prior PCR application, the claim **shall** be denied as repetitive. La.Code Crim.P. art. 930.4(A).

1. Although an appellate court may invoke the procedural bar in La.Code Crim.P. art. 930.4(A), the legislature directed the discretionary procedural bars of La.Code Crim.P. art. 930.4(B)-(E) to district court judges who, in appropriate cases, may, but need not, invoke them to deny relief or dismiss an application. *Carlin v. Cain*, 97-2390 (La. 3/13/98), 706 So.2d 968.

2. *State v. Ford*, 96-2919 (La. 5/30/97), 694 So.2d 917 (citations omitted) - "The trial court may not avoid the procedural bars of La.C.Cr.P. art. 930.4 and La.C.Cr.P. art. 930.8 by 'reconsidering' an application for post-conviction relief on which it has earlier ruled, especially when, as here, this Court has considered and rejected the claims."

a. *State ex rel. Washington v. State*, 15-1878 (La. 2/17/17), 211 So.3d 376 - Relator showed no error in the district court's refusal to reconsider his motion to withdraw his guilty plea because a district court may not reconsider an application for post-conviction relief on which it has earlier ruled.

b. *State v. Galle*, 15-1734 (La. 3/13/17) 212 So.3d 1164 - The district court's ruling denying post-conviction relief was vacated and the matter remanded for an evidentiary hearing to determine whether exclusion of the grand jury testimony at trial, which the state disclosed before trial pursuant to *Brady*, impeded relator's fundamental right to present a defense and whether trial counsel rendered ineffective assistance with regard to litigating the admissibility of this evidence and demonstrating its importance to the defense. Notwithstanding the court of appeal's finding on direct review there was no error in the trial court's ruling excluding the grand jury testimony and the procedural bar against repetitive claims, the **interest of**

justice required revisiting the issues in a case in which relator's defense was that the state's sole eyewitness misidentified him, and the state disclosed the testimony at issue because it directly contradicted that eyewitness account.

C. Failed to Raise in Trial Court

If the petitioner had knowledge of a claim and inexcusably failed to raise it in the proceedings leading to the conviction, the court **shall** deny relief. La.Code Crim.P. art. 930.4(B).

D. Failed to Pursue on Appeal

"If the application alleges a claim which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court **shall** deny relief." La.Code Crim.P. art. 930.4(C).

E. Successive Application

1. A successive application **shall** be dismissed if it fails to raise a new or different claim or raises a new or different claim that was inexcusably omitted from a prior application. La.Code Crim.P. art. 930.4(D)(E).

2. Beginning September 18, 2015, some Louisiana Supreme Court per curiams include language stating the post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.Code Crim.P. art. 930.4 and within the limitation period found in La.Code Crim.P. art. 930.8. The court points out that in 2013 the legislature amended art. 930.4 to make the procedural bar against successive applications mandatory. The court further states: "Relator's claims are now all fully litigated in state collateral proceedings in accordance with La.C.Cr.P. art. 930.6, and the denial of relief has become final. Hereafter, unless relator can show that one of the narrow exceptions authorizing the filing of a successive application applies, relator has exhausted his right to state collateral review." *State ex rel. Stevenson v. Cain*, 15-1084 (La. 9/25/15), 175 So.3d 392. As of October 30, 2015, those supreme court per curiam's order the district court to record a minute entry consistent with the per curiam. *See State v. Singleton*, 15-765 (La. 10/30/15), 178 So.3d 556.

*****3. *State v. Robertson*, 18-1006 (La. 5/20/19), 271 So.3d 190 - Applicant's claimed violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), overcomes the procedural bars of La.Code Crim.P. arts. 930.4(E) and 930.8(A) pursuant to the exception set out in La.Code Crim.P. art. 930.8(A)(1).

*4. *State v. Newton*, 17-926 (La. 2/11/19), 263 So.3d 421 - The discovery of new evidence excepting a claim from the prescriptive period of La.Code Crim.P. art. 930.8 would necessarily except a claim from the repetitiveness bars of La.Code Crim.P. art. 930.4

F. La.Code Crim.P. art. 930.4(F)

"If the court considers dismissing an application for failure of the petitioner to raise the claim in the proceedings leading to conviction, failure to urge the claim on appeal, or failure to include the claim in a prior application, the court shall order the petitioner to state reasons for his failure. If the court finds that the failure was excusable, it shall consider the merits of the claim." La.Code Crim.P. art. 930.4(F).

1. In *State ex rel. Rice v. State*, 99-496 (La. 11/12/99), 749 So.2d 650, the court stated, "[t]he Uniform Application thus in most cases both provides an inmate with an opportunity to explain his failure to raise a claim earlier and provides the district judge with enough information to undertake the informed exercise of his discretion and to determine whether default of an application under La.C.Cr.P. art. 930.4(B), art. 930.4(C), or art. 930.4(E) is appropriate. Proper use of the Uniform Application thus satisfies the requirements of La.C.Cr.P. art. 930.4(F) without the need for further filings, formal proceedings, or a hearing."

2. *State v. Office*, 15-171 (La.App. 3 Cir. 5/5/15) (unpublished opinion) - Relator did not use the Uniform Application and the matter was remanded for compliance with art. 930.4(F).

VI. TIME LIMITATION.

A. La.Code Crim.P art. 930.8 - An application for post-conviction relief, including one seeking reinstatement of the right to appeal (i.e., an out-of-time appeal), must be filed within two years of the finality of the judgment of conviction and sentence, unless an exception applies.

1. *State ex rel. Glover v. State*, 93-2330, 94-2101, 94-2197 (La. 9/5/95), 660 So.2d 1189, *abrogated in part on other grounds by State ex rel. Olivieri v. State*, 00-172, 00-1767 (La. 2/21/01), 779 So.2d 735, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566 (2001), *and cert. denied*, 534 U.S. 892, 122 S.Ct. 208 (2001), held:

a. The time limit in art. 930.8 does not violate the federal or Louisiana due process clauses, the federal or Louisiana habeas corpus clauses, the Louisiana guarantee to the right of access to courts, or the federal or Louisiana *ex post facto* clauses.

b. The untimeliness of an application for post-conviction relief can be recognized by an appellate court even if the trial court considered the merits of the application.

B. Finality of Judgment of Conviction and Sentence

1. No appeal filed - If no appeal is filed, the judgment of conviction and sentence becomes final upon the expiration of the time limitation for seeking an appeal (30 days after the rendition of the judgment or from the ruling on a timely filed motion for reconsideration of sentence). La.Code Crim.P. arts. 914(B).

2. Appeal filed - A judgment of an appellate court becomes final when the delay for applying for a rehearing (14 days from date of rendition of judgment) has expired when no application is filed or the date the rehearing is denied when a timely application for rehearing is filed. La.Code Crim.P. art. 922(A) - (C). "If an application for a writ of review is timely filed with the supreme court, the judgment of the appellate court from which the writ of review is sought becomes final when the supreme court denies the writ." La.Code Crim.P. art. 922(D). A writ of review to the supreme court must be filed within 30 days of the mailing of notice of the original judgment of the court of appeal, if a timely filed application for rehearing is not filed, or within 30 days of the mailing of notice of the judgment on a timely filed application for rehearing. Supreme Court Rules, Rule 10, § 5.

3. *State v. Ohlsson*, 16-1186 (La. 11/17/17), 229 So.3d 921 - Though the supreme court issued an order denying relator's writ after the court of appeal affirmed his convictions and sentences on direct review, his writ was untimely pursuant to La.S.Ct.R. X, § 5(a). In accordance with La.Code Crim.P. art. 922, his convictions and sentences became final 14 days after the Fifth Circuit affirmed them.

4. "Resentencing alone does not restart the . . . time period for applying for post-conviction relief." *State ex rel. Rushing v. Whitley*, 93-2722 (La. 11/13/95), 662 So.2d 464.

5. Although resentencing alone does not restart the prescriptive period for filing a post-conviction relief application, the prescriptive period does not initially begin to run until the judgment of conviction and sentence have become final. *State ex rel. Frazier v. State*, 03-242 (La. 2/6/04), 868 So.2d 9.

6. An out-of-time appeal restarts the time limit for applying for post-conviction relief. *State ex rel. Campbell v. Whitley*, 93-677 (La. 10/27/95), 661 So.2d 1367.

7. Extension of Time Limits - *State v. Celestine*, 04-1130 (La.App. 3 Cir. 2/2/05), 894 So.2d 1197, *writ denied*, 05-1401 (La. 2/17/06), 924 So.2d 1001 - This court dismissed an appeal when the application for post-conviction relief, which

sought an out-of-time appeal, was not timely filed under La.Code Crim.P. art. 930.8. This court found the time bar in art. 930.8 is jurisdictional; therefore, a trial court has no authority to extend the time limit provided therein.

8. *State v. Shelton*, 09-2071 (La. 1/29/10), 26 So.3d 745 - When the trial court denied the motion to withdraw plea, it necessarily denied the contemporaneously filed motion to reconsider the sentence that had been imposed as part of a plea bargain. Therefore, review of the motion to reconsider sentence by the trial court eight years later was improper.

9. *State v. Brumfield*, 13-2390 (La. 11/14/14), 152 So.3d 870 - Relator pled guilty on the same day in 1999 to six charges, including one count of armed robbery that was the basis of his habitual offender sentence. In 2008, he raised a conflict of interest claim attacking the guilty plea to armed robbery. The trial court determined the claim was precluded by La.Code Crim.P. art. 930.8(A). In 2011, on relator's motion, the district court imposed sentence for the first time on the five other convictions. In 2012, the district court resentenced relator on the armed robbery, re-imposing the same habitual offender sentence. Relator filed another application for post-conviction relief challenging all six convictions on the basis of conflict of interest. The supreme court found the time limits did not begin to run anew when the district court vacated the habitual offender sentence originally imposed in 1999 and resentenced him to the same term in 2012. Additionally, the window for attacking the armed robbery was not reopened when the district court imposed sentence on five counts in 2011.

C. Date of Filing

State ex rel. Egana v. State, 00-2351 (La. 9/22/00), 771 So.2d 638 - The court of appeal was directed to review the filing to determine if it was timely under the "mailbox rule" of *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379 (1988), which held that pro se prisoners' notices of appeal are filed at the moment of deliver to prison authorities for forwarding to the district court.

D. Informing Defendant of Prescriptive Period

1. At the time of sentencing, the trial court shall inform the defendant of the prescriptive period for seeking post-conviction relief. La.Code Crim.P. art. 930.8.

2. While art. 930.8 requires the trial court to inform the defendant of the prescriptive period for seeking post-conviction relief, it does not provide a remedy for an individual defendant who is not so advised. *State ex rel. Glover v. State*, 93-2330, 94-2101, 94-2197 (La. 9/5/95), 660 So.2d 1189, *abrogated in part on other grounds by State ex rel. Olivieri v. State*, 00-172, 00-1767 (La. 2/21/01), 779 So.2d

735, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566 (2001), *and cert. denied*, 534 U.S. 892, 122 S.Ct. 208 (2001).

a. The trial court cannot grant an extension for seeking post-conviction relief based on its failure to inform relator of the time limitations for filing same. *State v. Brumfield*, 09-1084 (La. 9/2/09), 16 So.3d 1161.

VII. EXCEPTIONS TO THE TIME LIMITATION

A. La.Code Crim.P. art. 930.8(A) provides:

(1) The application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicated were not known to the petitioner or his prior attorneys. Further, the petitioner shall prove that he exercised diligence in attempting to discover any post-conviction claims that may exist. "Diligence" for the purposes of this Article is a subjective inquiry that must take into account the circumstances of the petitioner. Those circumstances shall include but are not limited to the educational background of the petitioner, the petitioner's access to formally trained inmate counsel, the financial resources of the petitioner, the age of the petitioner, the mental abilities of the petitioner, or *whether the interests of justice will be served* by the consideration of new evidence. New facts discovered pursuant to this exception shall be submitted to the court **within two years of discovery**.

(2) The claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case, and the petition is filed within one year of the finality of such ruling.

(3) The application would already be barred by the provisions of this Article, but the application is filed on or before October 1, 2001, and the date on which the application was filed is within three years after the judgment of conviction and sentence has become final.

(4) The person asserting the claim has been sentenced to death.

B. Facts Not Known

1. Late realization that an error may have occurred at trial does not qualify as the discovery of a new fact for purposes of the exception in La.Code Crim.P. art. 930.8(A). *State v. Parker*, 98-256 (La. 5/8/98), 711 So.2d 694.

2. Due Diligence

a. In *State v. Obney*, 99-592 (La.App. 3 Cir. 8/11/99), 746 So.2d 24, *writ denied*, 99-2667 (La. 5/5/00), 760 So.2d 1190, relator filed an application for post-conviction relief asserting that "the testimony of a State forensic witness in his case, which was given during a 1991 action for civil damages resulting from the death of

the child victim in Relator's case, was at variance with the witness's trial testimony concerning the time of death." *Id.* at 26. The relator claimed the "documents detailing the 1991 civil trial testimony were 'obtained' by Relator's family members at an unspecified date and 'delivered' to certain attorneys 'in fall of 1997.'" *Id*. This court rejected relator's contention that there was no due diligence requirement in the discovery of the material. In denying the writ in *Obney*, the supreme court stated, "[r]esult is correct."

b. "The fact that relator discovered the new facts before the prescriptive period had run but did not file until after it had run does not make his application untimely. Instead, if delays caused by matters outside the control of the state have prejudiced the state, it may invoke La.C.Cr.P. art. 930.8(B) and demand a hearing on that issue." *State v. Lanieu*, 03-2640 (La. 10/1/04), 885 So.2d 512 (additional citations omitted). *But see* La.Code Crim.P. art. 930.8(A)(1)'s requirement that the PCR be filed within two years of discovery.

c. "Because the state makes a substantial showing that relator received the 1988 crime lab report before he entered his guilty plea, this Court remands the case to the district court to reconsider its conclusion that the state's withholding of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), vitiated the voluntariness of relator's pleas entered under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)." *State v. Kenner*, 05-1052 (La. 12/16/05), 917 So.2d 1081.

d. "Relator's discovery of arguably suppressed evidence allows his untimely filing without regard to his diligence in seeking the suppressed material. La.C.Cr.P. art. 930.8(A)(1); La.C.Cr.P. art. 930.8(B); *Carlin v. Cain*, 97-2390 (La. 3/13/98), 706 So.2d 968." *State ex rel. Walker v. State*, 04-714 (La. 1/27/06), 920 So.2d 213 (additional citations omitted). *But see* the two year filing requirement in La.Code Crim.P. art. 930.8.

1. Late discovery of *Brady* material warrants a hearing. *State v. Williams*, 09-1750 (La. 5/28/10), 35 So.3d 255. *But see State v. Singer*, 09-2167 (La. 10/1/10), 45 So.3d 171, in which the supreme court found that statements made by a co-defendant after he completed his sentence did not constitute "new, material, noncumulative and conclusive evidence, which meets an extraordinarily high standard, which undermine[s] the prosecution's entire case."

2. *State v. Duncan*, 08-2244 (La. 1/22/10), 26 So.3d 148 - An evidentiary hearing was mandated for a claim involving untimely discovery of a police report and alleged suppression of impeachment evidence. Also, judicial economy warranted review of other claims not originally presented to the trial court in the application for post-conviction relief.

3. An evidentiary hearing is not required for *Brady* claims where relator's own statement is inculpatory and would not "absolve Relator of the crime of which he was convicted." *State v. Matthews*, 09-493 (La. 12/18/09), 23 So.3d 898.

*4. *State v. Dietz*, 16-1538 (La. 1/28/19), 262 So.3d 278 - The district court erred in summarily dismissing an application for post-conviction relief asserting ineffective assistance of counsel which was based in part on a sealed videotaped interview with the victim, to which post-conviction counsel did not obtain access until 2016. The matter was remanded for an evidentiary hearing.

C. New Ruling/Interpretation of Constitutional Law

1. Relators who were under the age of 18 when they committed a homicide have recently filed applications for post-conviction relief based on the alleged retroactivity of the United States Supreme Court's recent opinion in *Miller v. Alabama*, 567 U.S. 460 , 132 S.Ct. 2455 (2012). In *Miller*, the Supreme Court held that a defendant under the age of 18 at the time he committed a homicide cannot automatically be sentenced to life imprisonment without parole. Instead, the Supreme Court held the sentencing court must hold a hearing to consider mitigating factors, such as the defendant's youth, before imposing the severe penalty.

2. *State v. Montgomery*, 13-1163 (La. 6/28/16), 194 So.3d 606 - Relator, who was convicted of murder and sentenced to life without parole for a crime he committed as a juvenile, moved to correct an illegal sentence. The Nineteenth Judicial District Court denied the motion, and the Louisiana Supreme Court denied his application for supervisory writ. Relator sought review in the United States Supreme Court, which found the holding in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012), announced a substantive rule of constitutional law that applied retroactively. *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718 (2016). On remand from the United States Supreme Court, the Louisiana Supreme Court vacated Relator's sentence and remanded the matter to the district court for resentencing pursuant to La.Code Crim.P. art. 878.1. The supreme court indicated the district court, in determining whether relator would be granted or denied parole eligibility, could deem as relevant the general sentencing guidelines set forth in La.Code Crim.P. art. 894.1 as well as other states' legislative enumeration of factors to be considered in sentencing a juvenile to life imprisonment. The supreme court directed the district court to issue reasons setting forth the factors it considered to aid in appellate review of the sentence imposed at resentencing.

3. *State ex rel. Hudson v. State*, 16-1731 (La. 1/9/17), 208 So.3d 882 - Appellate jurisdiction for review of a new sentence imposed under *Miller* is vested in the intermediate court of appeal.

4. *State v. Johnston*, 16-1460 (La. 6/5/17), 221 So.3d 46 - Juvenile was charged with aggravated rape and entered a plea to the reduced charge of attempted aggravated rape. On appeal, the juvenile argued his guilty plea was not intelligently entered because he was unaware that a juvenile non-homicide offender could no longer be sentenced to a term of life without parole eligibility. Under *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010), the juvenile would have been eligible for parole after 30 years of a life sentence if he had pled guilty to aggravated rape. However, his plea to attempted aggravated rape subjected him to a sentence without benefit of parole for the entire 50-year sentence. The supreme court remanded the matter to the district court for an evidentiary hearing, noting the juvenile was arguably worse off in the context of parole eligibility raising the possibility he was misadvised regarding his sentencing exposure. Additionally, the precise sentencing advisements he received were unclear.

5. *State v. Green*, 16-107 (La. 6/29/17), 225 So.3d 1033, *cert. denied*, __ U.S. __, 138 S.Ct. 459 (2017), - Defendant was adjudicated a third offender and sentenced under La.R.S. 15:529.1 to life without benefits for a home invasion committed as a juvenile. The court found *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010), was applicable to a defendant who was adjudicated and sentenced as a habitual offender to life without parole for an offense committed as a juvenile. The court held the sentence was illegal and could be corrected at any time and amended the sentence to delete the restriction on parole eligibility.

6. *State ex rel. Morgan v. State*, 15-100 (La. 10/19/16), 217 So.3d 266 - *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010), applied to the juvenile's 99-year sentence without parole insofar as it was the functional equivalent of a life sentence and denied him a meaningful opportunity for release. Because it was an effective life sentence, the sentence was rendered illegal and could be corrected at any time under La.Code Crim.P. art. 882.

D. Prejudice to the State

1. "An application for post conviction relief which is timely filed, or which is allowed under an exception to the time limitation as set forth in Paragraph A of this Article, shall be dismissed upon a showing by the state of prejudice to its ability to respond to, negate or rebut the allegations of the petition caused by events not under the control of the state which have transpired since the date of the original conviction, if the court finds, after a hearing limited to that issue, that the state's ability to respond to, negate, or rebut such allegations has been materially prejudiced thereby." La.Code Crim.P. art. 930.8(B).

2. *State ex rel. Medford v. Whitley*, 95-1187 (La. 1/26/96), 666 So.2d 652 - "[T]he district court is ordered to determine if the relator's claim based on the facts not known both 'allege[s] a claim which, if established, would entitle[] [relator] to relief' under La.Code Crim.Proc. art. 928 and also raises factual or legal issues which cannot 'be resolved based upon the application and answer and supporting documents' under La.Code Crim.Proc. art. 929. If relator's claim based on facts not known meets the threshold tests set out in Article 928 and Article 929, the district court must hold a hearing pursuant to La.Code Crim.Proc. art. 930.8 A(1) and B at which it will determine (1) whether relator has proved, or the state concedes, that his *Brady* claim rests on facts not disclosed to him or his attorney; and (2) if so, whether the state has been prejudiced in its 'ability to respond to, negate, or rebut the allegations of the petition . . . by events not under the control of the state which have transpired since the date of [relator's] original conviction . . . .' In this context, the withholding of exculpatory evidence under certain circumstances may constitute an event 'under the control of the state' for purposes of La.Code Crim.Proc. art. 930.8 B.

If the state does not show prejudice from the delay, the court must proceed to an adjudication on the merits of relator's *Brady* claim."

*****3. *State v. Colvin*, 17-1840 (La. 2/11/19), 263 So.3d 420 - The district court properly concluded the State was materially prejudiced in its ability to respond to, negate, and rebut the allegations of the petition as a result of events not under its control which transpired since the date of the original conviction. Therefore, the application for post-conviction relief was dismissed.

VIII. MISCELLANEOUS

A. Judgment on PCR

"A copy of the judgment granting or denying relief and written or transcribed reasons for the judgment shall be furnished to the petitioner, the district attorney, and the custodian." La.Code Crim.P. art. 930.1. However, the trial court is not required to assign reasons. *State ex rel. Foy v. Criminal District Court*, 96-519 (La. 3/15/96), 669 So.2d 393.

1. It would be helpful if the reasons for the denial or at least a citation to a code article were set forth in the ruling.

2. *State ex rel. George v. State*, 16-1167 (La. 10/9/17), 227 So.3d 797 - "The district court's minute entry provided sufficient notice of the court's denial of relator's application for post-conviction relief."

*3. *State v. Stewart*, 17-850 (La. 10/8/18), 253 So.3d 1289 - Relator received a letter signed by "Sec B" informing him that his motion to quash was improper because he had already pled guilty. The letter, which was not signed by the district court judge, did not constitute a ruling on the motion to quash.

B. A pleading's nature is determined by its substance and not its caption. *State ex rel. Lay v. Cain*, 96-1247 (La.App. 1 Cir. 2/14/97), 691 So.2d 135. *See also State v. Curry*, 17-737 (La. 8/3/18), 250 So.3d 261.

1. Motion to Correct Illegal Sentence - An illegal sentence may be corrected at any time. La.Code Crim.P. art. 882.

a. Inmates often title their pleadings "Motion to Correct Illegal Sentence," but usually the pleadings are in the nature of an application for post-conviction relief. Only those claims relating to the legality of the sentence itself under the applicable sentencing statutes may be raised in a motion to correct illegal sentence. *State v. Gedric*, 99-1213 (La.App. 1 Cir. 6/3/99), 741 So.2d 849 (per curiam), *writ denied*, 99-1830 (La. 11/5/99), 751 So.2d 239. *See also* La.Code Crim.P. art. 881.5. If the filing does not point to a claimed illegal term in the sentence, the claim is not cognizable in a motion to correct illegal sentence and may be raised through an application for post-conviction relief. *State v. Parker*, 98-256 (La. 5/8/98), 711 So.2d 694.

b. *State v. Edwards*, 13-2497 (La. 2/21/14), 133 So.3d 1261 - Petitioner presented a post-conviction claim of ineffective assistance of counsel regarding the imposition of an illegal sentence following his plea to indecent behavior with juveniles. The claim was dismissed as time barred. The supreme court remanded the matter to the trial court to be considered as a motion to correct illegal sentence, which, if meritorious, was an exception to the time limitation for post-conviction relief.

c. *State v. LeBlanc*, 14-163 (La. 1/9/15), 156 So.3d 1168 - Guilty pleas entered on the same day in 1993 were counted as two convictions for the purposes of La.R.S. 15:529.1 despite jurisprudence stating they should be counted as one. Relator subsequently complained that he received punishment far in excess of what the law prescribed at the time he committed the predicate offense. The supreme court held: "We recognize that in this unique convergence of grounds for post-conviction relief as a matter of La.C.Cr.P. art. 930.3(6) and for collaterally attacking a sentence as illegal under La.C.Cr.P. art. 882, relator has stated a claim upon which relief may be granted even years after finality of his conviction and sentence. He is entitled to the relief he seeks, which is no more than application to his case of the

settled rule in Louisiana that an offender's punishment is determined according to the law in effect at the time he committed his crime."

d. *State ex rel. Foster v. State*, 15-747 (La. 2/5/16), 183 So.3d 508 - Language to use when ruling on a motion to correct illegal sentence that is actually an application for post-conviction relief: "Relator does not identify an illegal term in his sentence, and therefore, his filing is properly construed as an application for post-conviction relief. *See State v. Parker*, 98-0256 (La.5/8/98), 711 So.2d 694. As such, it is subject to the time limitation set forth in La.C.Cr.P. art. 930.8. Relator's application was not timely filed in the district court, and he fails to carry his burden to show that an exception applies. La.C.Cr.P. art. 930.8; *State ex rel. Glover v. State*, 93-2330 (La.9/5/95), 660 So.2d 1189."

e. *State v. Holloway*, 15-1233 (La. 10/19/16), 217 So.3d 343 - The May 17, 2012 version of La.Code Crim.P. art. 890.1 applied by its plain language "upon conviction, in sentencing the offender" to the defendant convicted and sentenced in 2014 rather than the article pertaining to designation of crimes of violence in effect when the crime was committed in 2007. *See also State v. Henry*, 17-516 (La. 5/26/17), 220 So.3d 706, discussing the amendments to La.R.S. 40:966 in 2015 La. Act 295.

*f. *State ex rel. Esteen v. State*, 16-949 (La. 1/30/18), 239 So.3d 233 - Where application of La.R.S. 15:308 resulted in a defendant's sentence becoming illegal, the defendant could seek relief through a motion to correct illegal sentence.

2. Motion to Withdraw Guilty Plea - A motion filed after sentencing is in the nature of an application for post-conviction relief and must be filed timely under La.Code Crim.P. art. 930.8. *State ex rel. Chauvin v. State*, 99-2456 (La.App. 1 Cir. 1/28/00), 814 So.2d 1.

3. Motion for New Trial - *State ex rel. Jackson v. State*, 15-235 (La. 1/13/17), 206 So.3d 873 - The trial court did not err in summarily dismissing relator's motion for new trial because it was untimely under La.Code Crim.P. art. 853(B), and the motion was properly construed as an application for post-conviction relief. *See also State ex rel. Besse v. State*, 15-2297 (La. 4/24/17), 217 So.3d 341.

4. Writ of Habeas Corpus - *State ex rel. Guardado v. State*, 15-2050 (La. 2/17/17), 211 So.3d 1157 - Alternatively naming a filing an application for a writ of habeas corpus does not save relator from the procedural requirements for applications for post-conviction relief.

C. DNA Testing

1. Time Limitations

"(1) Prior to **August 31, 2024**, a person convicted of a felony may file an application under the provisions of this Article for post-conviction relief requesting DNA testing of an unknown sample secured in relation to the offense for which he was convicted. On or after **August 31, 2024**, a petitioner may request DNA testing under the rules for filing an application for post-conviction relief as provided in Article 930.4 or 930.8 of this Code.

(2) Notwithstanding the provisions of Subparagraph (1) of this Paragraph, in cases in which the defendant has been sentenced to death prior to August 15, 2001, the application for DNA testing under the provisions of this Article may be filed at any time." La.Code Crim.P. art 926.1(A).

2. La.Code Crim.P. art. 926.1(B), which relates to applications for DNA testing, provides, in pertinent part, that an application filed under this article shall allege all of the following:

"(1) A factual explanation of why there is an articulable doubt, based on competent evidence whether or not introduced at trial, as to the guilt of the petitioner in that DNA testing will resolve the doubt and establish the innocence of the petitioner.

(2) The factual circumstances establishing the timeliness of the application.

(3) The identification of the particular evidence for which DNA testing is sought.

(4) That the applicant is factually innocent of the crime for which he was convicted, in the form of an affidavit signed by the petitioner under penalty of perjury."

3. Relief should be granted when there is an articulable doubt based on competent evidence, whether or not introduced at trial, as to the guilt of the petitioner and there is a reasonable likelihood that the requested DNA testing will resolve the doubt and establish the innocence of the petitioner, the application has been timely filed, and the evidence to be tested is available and in a condition that would permit DNA testing. La.Code Crim.P. art. 926.1(C).

4. Relief shall not be granted when the court finds there is a substantial question as to the integrity of the evidence to be tested. La.Code Crim.P. art. 926.1(D). Relief should not be granted solely because there is evidence currently available for DNA testing but the testing was not available or was not done at the time of the conviction. La.Code Crim.P. art. 926.1(E).

5. Prior law provided that, for purposes of DNA testing, crime laboratories were to be accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). New law changes the accreditation for the crime laboratories to those accredited by an accrediting body that is a signatory to the International Laboratory Accreditation Cooperation Mutual

Recognition Arrangements for Testing Laboratories (ILAC MRA) and requires conformance to an accreditation program based on the international standard ISO/IEC 17025 with an accreditation scope in the field of forensic science testing in the discipline of biology, and that is compliant with the current version of the Federal Bureau of Investigations Quality Assurance Standards for Forensic DNA Testing Laboratories. La.Code Crim.P. art. 926.1(F)(H)(5).

6. *State v. ex rel. Williams v. Williams*, 04-637 (La. 1/28/05), 894 So.2d 324 - Because of the remoteness of the conviction, the court cautioned the trial court to pay particular attention to whether the evidence was available and in a condition that would permit DNA testing.

7. *State v. Williams*, 10-137 (La.App. 3 Cir. 6/11/10) (unpublished opinion), *writ denied*, 10-1630 (La. 2/25/11), 57 So.3d 1030 - There was no error in the trial court's ruling granting DNA testing regarding a 1983 conviction, as an affidavit from the DNA analyst stated it was highly likely that interpretable DNA profiles could be obtained.

8. *State ex rel. Jackson v. State*, 11-394 (La. 5/25/12), 90 So.3d 384 - The lower court erred when denying a post-conviction request for DNA testing based on the alleged failure of the testing to establish relator's innocence when the rape conviction rested largely on the victim's identification and relator presented a defense of misidentification at trial. The supreme court directed the district court to investigate the availability and integrity of the evidence and to order DNA testing in the event the results could tend to make relator's guilt more or less probable. *See also State ex rel. Tran v. State*, 12-1275 (La. 10/8/12), 99 So.3d 1005.

9. *State v. Debrow*, 13-1814 (La. 5/23/14), 138 So.3d 1229 - Relator's conviction rested on identification testimony and he presented a defense of misidentification. The supreme court directed the district court to investigate the availability and integrity of the physical evidence and to order DNA testing in the event that it determined the results **could tend to make** relator's guilt more or less probable.

D. Waiver of Post-Conviction Rights

Waiver of the right to post-conviction relief must be clear and unambiguous, including recitation of the waiver during the plea colloquy and inclusion of the waiver on the plea form signed by the defendant. Subsequent advice regarding post-conviction time limits may lead to a claim by the defendant that he did not waive the right to PCR after all; thus, the court should make it clear that informing a defendant of the time limits does not invalidate the waiver of PCR. When waiving the right to

a transcript of the plea colloquy, the court must determine whether the defendant can read and write the English language.

1. *State v. Davenport*, 11-221 (La.App. 3 Cir. 6/15/12) (unpublished opinion) - Relator waived his right to seek post-conviction relief and all claims of ineffective assistance of counsel. The plea form signed by relator contained the following language: "(3) By accepting this plea agreement, the defendant waives, releases and relinquishes any and all rights to appeal the conviction and sentence resulting from this plea agreement, whether on direct appeal or by application for post-conviction relief, motion to modify sentence, motion to correct sentence, application for habeas corpus relief, or otherwise. (4) By accepting this plea agreement, defendant asserts that he/she is fully satisfied with the services and assistance rendered by his/her counsel and has had sufficient time to confer with counsel concerning his/her case and this plea agreement. By accepting this plea agreement, defendant acknowledges that his/her counsel has performed adequately and competently, securing a satisfactory plea agreement and resolution of defendant's criminal case(s). By accepting this plea agreement, defendant waives, releases and relinquishes any claim or right to appeal this matter, whether on direct appeal or by application for post-conviction relief, motion to modify sentence, motion to correct sentence, application for habeas corpus relief, or otherwise on a claim of ineffective assistance of counsel."

Also included in the writ application was a form entitled "Determination of Understanding of Constitutional Rights, Nature of Charge and Consequences of Guilty Plea," which included the following language: "In exchange for the sentence received, I understand that his matter will be finalized and waive all rights to appeal my conviction and sentence, along with Motions to Reconsider Sentence, New Trial, amend Sentence and Post-Conviction Relief, including any claim for ineffective assistance of counsel, or any other available motion. Further, that because I was advised of the rights listed above, I waive my right to request a free transcript of my guilty plea unless I state a particularized need . . . ." The form further provided: "I, as attorney for the defendant, certify that I have informed the defendant of his/her rights, particularly the nature of the crime to which he/she is pleading guilty, the maximum sentence the Court could impose under the law, and the fact that the defendant, by entering this plea of guilty, is waiving his or her right to trial by jury, his/her right to confront and cross-examine his/her accusers, his/her right against self-incrimination and, his/her right appeal his/her conviction and sentence along with Motions to Reconsider Sentence, New Trial, Amend Sentence and Post-Conviction Relief, including any claim of ineffective assistance of counsel, or any other available motion. I have explained the contents of this form to the defendant. I am satisfied the defendant understands these constitutional rights, as set forth

above, and that the guilty plea is freely, voluntarily and intelligently made, with knowledge of the consequences of the plea." During the colloquy, the trial court further informed relator that he was waiving his right to appeal, post-conviction relief, and to assert claims of ineffective assistance of counsel.

2. *State v. Oxley*, 08-670 (La.App. 3 Cir. 1/9/09) (unpublished), *writ denied*, 09-1103 (La. 4/5/10), 31 So.3d 354 - Relator entered into an agreement with the State wherein the State agreed not to seek the death penalty and relator agreed not to seek post-conviction relief in state and federal court or review before the pardon or parole boards. Relator subsequently filed an application for post-conviction relief. The State objected to the filing and sought to have the application dismissed. Relator asserted counsel informed him that his waiver of the right to seek post-conviction relief was not a valid waiver. The trial court denied the State's motion to enforce the agreement. This court reversed the judgment of the trial court, finding that relator failed to present proof of his allegations and ordered the trial court to enter a judgment dismissing relator's application for post-conviction relief.

3. *State v. Crittenden*, 14-83 (La.App. 3 Cir. 6/4/14) (unpublished opinion) 2014 WL 2558202 - "'[P]ost-conviction relief is not required by the Due Process Clause of the United States Constitution and is, therefore, not a constitutionally protected right.' *State v. Davenport*, 33,961, p. 14 (La.App. 2 Cir. 11/1/00), 771 So.2d 837, 847, *writ denied*, 00–3294 (La.10/26/01), 799 So.2d 1150. Therefore, the right to post-conviction relief may be waived.

In *State v. Phillips*, 04–1687 (La.App. 3 Cir. 1/28/05) (unpublished opinion), this court held the right to post-conviction relief could be waived, and the written plea of guilty form signed by the defendant and filed in open court at the time he entered his guilty plea constituted a sufficient showing of the agreement on the record and of the defendant's waiver of his right to seek post-conviction relief. *See also State v. Green*, 06-1392 (La.App. 3 Cir. 4/5/07) (unpublished opinion); *State v. Oxley*, 08-670 (La.App. 3 Cir. 1/9/09) (unpublished opinion), *writ denied*, 09-1103 (La.4/5/10), 31 So.3d 354; and *State v. Love*, 09-723 (La.App. 3 Cir. 10/7/09) (unpublished opinion), *writ denied*, 10-1874 (La.9/16/11), 69 So.3d 1136."

4. *State v. Wyatt*, 13-458 (La.App. 3 Cir. 7/31/13) (unpublished opinion) Relator filed an application for post-conviction relief alleging he was denied his constitutional right to a transcript of his guilty plea. This court found no error in the trial court's denial of relator's application, as he waived his right thereto. In *State v. Wyatt*, 13-2061 (La. 4/11/14), 138 So.3d 611, the supreme court held: "If it has not already done so, the district court is ordered to provide relator with a copy of his guilty plea colloquy. *See State ex rel. Simmons v. State*, 93–0275 (La.12/16/94), 647 So.2d 1094. Because relator sought the document upon which his post-conviction

claim(s) may be based within the delay established by La.C.Cr.P. art. 930.8, the district court is also ordered to accept as timely any application filed within 60 days of relator's receipt of the materials requested. In all other respects the application is denied."

E. Cheney C. Joseph, Jr., *Postconviction Procedure*, 41 La. L. Rev. 625, 632-64, provides a discussion of the basics of post-conviction relief.

FIRST UNIFORM APPLICATION FOR POSTCONVICTION RELIEF

Please review La. C.Cr.P. Arts. 924 – 930.9 for the correct procedure for filing an application for postconviction relief. This form does not modify the law or requirements as stated in those articles.

For the **Time Limitations** for filing this application, please see Louisiana Code of Criminal Procedure (La. C.Cr.P.) Art. 930.8(A), which states in part that "No application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of Article 914 or 922 . . ."

See remainder of La. C.Cr.P. Art. 930.8 for the **Limited Exceptions** relating to the extension of this time period.

WHEN NOT TO USE THIS FORM

If you are trying to file a **motion to correct an illegal sentence** pursuant to La. C.Cr.P. Art. 881.5 or 882, **you must use the Uniform Motion to Correct an Illegal Sentence**. A motion to correct an illegal sentence must point to an illegal term or condition of your sentence, otherwise it will be construed as an application for postconviction relief subject to the time limits established in La. C.Cr.P. Art. 930.8.

If your complaint involves the **computation of time** you are serving or have served, **you must first file for administrative relief** with the Department of Corrections in accordance with R.S. 15:1172. Review of any unfavorable decision must be filed in the 19th Judicial District Court in East Baton Rouge Parish.

GENERAL INSTRUCTIONS – READ CAREFULLY

If this is your **First Application** for postconviction relief, please carefully review all of the following instructions:

1. **You must use this form or the District Court will not consider your application.** This could affect your ability to seek relief in accordance with the time limits established in La. C.Cr.P. Art. 930.8. Therefore, you must use this form or justify your failure to do so within the postconviction time limits.

2. This application must be clearly written or typed, signed by you or your attorney, and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for a criminal prosecution. Answer questions concisely in the proper space on the form. You may attach additional pages stating the facts that support your claims for relief. No lengthy citations of authorities or legal arguments are necessary.

3. When the application is completed, **you must file the original application in the District Court for the parish in which you were convicted and sentenced**, and you must also send a copy to the State.

4. You must raise all claims for relief arising out of a single trial or guilty plea in one application.

5. You are only entitled to file an application for postconviction relief to challenge a **habitual offender adjudication or sentence within very limited circumstances**. In most cases, you can only challenge a habitual offender adjudication or sentence in an appeal.

REQUIRED ATTACHMENT

A copy of **the Louisiana Uniform Commitment Order** of conviction and sentence **must** be attached to the application (if it is available), or the application must allege that it is unavailable.

Date of this Application:	____ / _____ / 20____	Name of Applicant:	
DOC Number:		Place of Confinement:	

District Court Case Number:		Parish of Conviction:	
Name of Trial Judge:			
Offense(s) for which you were convicted:			
Do any of the convictions involve a sex offense or a human trafficking related offense where the victim was a minor under the age of eighteen years (see La. R.S. 46:1842(1.1) and 46:1844(W)(2))? [Check One]			Yes ☐ No ☐

Date of Conviction:	____ / _____ / _____	Conviction by: [Check One]	Guilty Plea ☐ Trial by Jury ☐ Trial by Judge ☐
Date of Sentencing:	____ / _____ / _____	Sentence:	
Name of Counsel who represented you at the time of trial, sentence and/or conviction:			

Multiple Offender Proceeding: [Check One]	Yes ☐ No ☐
If yes, answer both of the following questions:	
Result of Proceeding: [Check One]	Pled ☐ Adjudicated to be a Multiple Offender ☐ Adjudicated No Bill ☐
Sentence on Multiple Offender Bill:	

Name of Counsel who represented you on appeal:			
Appeal of conviction and sentence: [Check One]	Yes ☐ No ☐	Appellate Case #:	
Appeal of Multiple Bill: [Check One]	Yes ☐ No ☐	Appellate Case #:	
Writ to Louisiana Supreme Court: [Check One]	Yes ☐ No ☐	Supreme Court Case #:	
Action by Supreme Court: [Check if Applicable]	Granted ☐ Denied ☐	Date of Action:	____ / _____ / _____

Rehearing to Supreme Court: [Check if Applicable]	Granted ☐ Denied ☐	Date of Action:	____ / _____ / _____

CLAIMS FOR RELIEF INSTRUCTIONS – READ CAREFULLY

You must include in this application **all allowable claims** relating to this conviction. If you do not, you may be **barred** from presenting additional claims at a later date. See La. C.Cr.P. Art. 930.4. You must **state the facts** upon which your claims are based. Do not just set out conclusions.

Please refer to La. C.Cr.P. Art. 930.3 (Grounds), which reads:

> "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;
> (2) The court exceeded its jurisdiction;
> (3) The conviction or sentence subjected him to double jeopardy;
> (4) The limitations on the institution of prosecution had expired;
> (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.
> (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."

Using a separate sheet of paper, provide the following information as it relates to claims available under La. C.Cr.P. Art. 930.3.

For each claim:

(A) You **must** state your **claim**, the **ground** on which it is based under La. C.Cr.P. Art. 930.3, and the **facts** that support your claim.

(B) If there are witnesses who could testify in support of your claim, you **must** list their names and current addresses. If you cannot do so, explain why.

(C) If you failed to raise this claim in the trial court prior to conviction or on appeal, you **must** explain why. This is your opportunity to state reasons for your failure before the court considers dismissing the application in accordance with La. C.Cr.P. Art. 930.4(F).

Wherefore, Applicant prays that the Court grant Applicant relief to which he/she may be entitled.

____ / _____ / 20____ [Day / Month/ Year]	_____ [Signature of Applicant or Applicant's attorney]

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF _____

_____ [Name of Applicant/Attorney], being first duly sworn says that he/she has read the application for postconviction relief and swears or affirms that all of the information therein is true and correct.

_____

[Signature of Applicant or Applicant's attorney]

SWORN TO AND SUBSCRIBED before me this

_____ day of _____, 20___.

_____

NOTARY or person authorized to administer oath

Case Name:	**JUDGMENT** [May be used by the Court in lieu of or in addition to written reasons]	Case Number:

lication for Postconviction Relief, this Honorable

Considering the fore

DENIES this application in accordance with La. C.Cr.P. Art.

926(E) ☐ 928 ☐ 929 ☐ 930.4 ☐ or 930.8 ☐ , or

ORDERS that the Applicant show cause in writing on or before the _____day of _____, 20_____ why the application should not be dismissed in accordance with La. C.Cr.P. Art.

926(E) ☐ 928 ☐ 929 ☐ 930.4 ☐ or 930.8 ☐ , or

ORDERS that the State be required to file a response to this application on or before the _____day of _____, 20_____.

Signed in _____, Louisiana, this _____day of _____, 20_____.

_____

JUDGE

SECOND OR SUBSEQUENT UNIFORM APPLICATION FOR POSTCONVICTION RELIEF

Please review La. C.Cr.P. Arts. 924 – 930.9 for the correct procedure for filing an application for postconviction relief. This form does not modify the law or requirements as stated in those articles.

For the **Time Limitations** for filing this application, please see Louisiana Code of Criminal Procedure (La. C.Cr.P.) Art. 930.8(A), which states in part that "No application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of Article 914 or 922 . . ."

See remainder of La. C.Cr.P. Art. 930.8 for the **Limited Exceptions** relating to the extension of this time period.

SECOND OR SUBSEQUENT APPLICATION INSTRUCTIONS – READ CAREFULLY

If this is **not** your **First Application** for postconviction relief, please carefully review all of the following instructions:

1. In accordance with La. C.Cr.P. Art. 930.4(D) or (E), you are entitled to file one application for postconviction relief after your conviction has become final and within the time limits provided in La. C.Cr.P. Art. 930.8.
2. If you are attempting to file a second or subsequent application, you **must use this form** and **justify your right to file a second or subsequent application** in accordance with La. C.Cr.P. Arts. 930.4 and 930.8. If you fail to use this form, your application may be automatically dismissed by the Court.

GENERAL INSTRUCTIONS – READ CAREFULLY

In addition to the above instructions, please carefully review all of the following instructions:

1. **You must use this form or the District Court will not consider your application.** This could affect your ability to seek relief in accordance with the time limits established in La. C.Cr.P. Art. 930.8. Therefore, you must use this form or justify your failure to do so within the postconviction time limits.
2. This application must be clearly written or typed, signed by you or your attorney, and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for a criminal prosecution. Answer questions concisely in the proper space on the form. You may attach additional pages stating the facts that support your claims for relief. No lengthy citations of authorities or legal arguments are necessary.
3. When the application is completed, **you must file the original application in the District Court for the parish in which you were convicted and sentenced**, and you must also send a copy to the State.
4. You must raise all claims for relief arising out of a single trial or guilty plea in one application.
5. You are only entitled to file an application for postconviction relief to challenge a **habitual offender adjudication or sentence within very limited circumstances**. In most cases, you can only challenge a habitual offender adjudication or sentence in an appeal.

REQUIRED ATTACHMENTS

A copy of **the Louisiana Uniform Commitment Order** of conviction and sentence **must** be attached to the application (if it is available), or the application must allege that it is unavailable.

You **must** attach a copy of **any judgment** by **any court** regarding prior postconviction applications, or this application may be dismissed by the district court. If you are unable to provide any judgments, please explain why.

Date of this Application:	____ / _____ / 20____	Name of Applicant:	
DOC Number:		Place of Confinement:	
District Court Case Number:		Parish of Conviction:	
Name of Trial Judge:			
Offense(s) for which you were convicted:			
Do any of the convictions involve a sex offense or a human trafficking related offense where the victim was a minor under the age of eighteen years (see La. R.S. 46:1842(1.1) and 46:1844(W)(2))? [Check One]			Yes ☐ No ☐

Date of Conviction:	____ / _____ / _____	Conviction by: [Check One]	Guilty Plea ☐ Trial by Jury ☐ Trial by Judge ☐
Date of Sentencing:	____ / _____ / _____	Sentence:	
Name of Counsel who represented you at the time of trial, sentence and/or conviction:			

Multiple Offender Proceeding: [Check One]	Yes ☐ No ☐
If yes, answer both of the following questions:	
Result of Proceeding: [Check One]	Pled ☐ Adjudicated to be a Multiple Offender ☐ Adjudicated No Bill ☐
Sentence on Multiple Offender Bill:	

Name of Counsel who represented you on appeal:			
Appeal of conviction and sentence: [Check One]	Yes ☐ No ☐	Appellate Case #:	
Appeal of Multiple Bill: [Check One]	Yes ☐ No ☐	Appellate Case #:	
Writ to Louisiana Supreme Court: [Check One]	Yes ☐ No ☐	Supreme Court Case #:	
Action by Supreme Court: [Check if Applicable]	Granted ☐ Denied ☐	Date of Action:	____ / _____ / _____

Rehearing to Supreme Court: [Check if Applicable]	Granted ☐ Denied ☐	Date of Action:	____ / _____ / _____

PRIOR APPLICATIONS INSTRUCTIONS – READ CAREFULLY

Please provide a list below of all prior applications for postconviction relief filed by you or on your behalf in connection with the judgment of conviction and sentence challenged in this application. If you have filed more than two prior applications, provide the information for each additional application on a separate sheet of paper.

District Court Case Number:		Parish of Conviction:	
Date of Filing:	___ / ____ / _____	Is this the same case challenged in this application? [Check One]	Yes ☐ No ☐
Claims Raised:	1. 2. 3. 4. [Use Additional Sheet if Necessary]		
Was relief granted or denied? [Check One]	Yes ☐ No ☐	Date of Disposition:	___ / ____ / _____
Did you receive an evidentiary hearing? [Check One]	Yes ☐ No ☐	Did you file a writ to the Court of Appeal? [Check One]	Yes ☐ No ☐
Which Circuit?[Check One]	1☐ 2☐ 3☐ 4☐ 5☐	Appellate Case #:	
Sought writ to Louisiana Supreme Court? [Check One]	Granted ☐ Denied ☐ Not Sought ☐	Supreme Court Case #:	
		Date of Ruling	___ / ____ / _____

District Court Case Number:		Parish of Conviction:	
Date of Filing:	___ / ____ / _____	Is this the same case challenged in this application? [Check One]	Yes ☐ No ☐
Claims Raised:	1. 2. 3. 4. [Use Additional Sheet if Necessary]		

Was relief granted or denied? [Check One]	Yes ☐ No ☐	Date of Disposition:	___ / ____ / _____
Did you receive an evidentiary hearing? [Check One]	Yes ☐ No ☐	Did you file a writ to the Court of Appeal? [Check One]	Yes ☐ No ☐
Which Circuit?[Check One]	1☐ 2☐ 3☐ 4☐ 5☐	Appellate Case #:	
Sought writ to Louisiana Supreme Court? [Check One]	Granted ☐ Denied ☐ Not Sought ☐	Supreme Court Case #:	
		Date of Ruling	___ / ____ / _____

CLAIMS FOR RELIEF INSTRUCTIONS – READ CAREFULLY

You must include in this application **all allowable claims** relating to this conviction. If you do not, you may be **barred** from presenting additional claims at a later date. See La. C.Cr.P. Art. 930.4. You must **state the facts** upon which your claims are based. Do not just set out conclusions.

Please refer to La. C.Cr.P. Art. 930.3 (Grounds), which reads:

> "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;
> (2) The court exceeded its jurisdiction;
> (3) The conviction or sentence subjected him to double jeopardy;
> (4) The limitations on the institution of prosecution had expired;
> (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.
> (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."

Using a separate sheet of paper, provide the following information as it relates to claims available under La. C.Cr.P. Art. 930.3.

For each claim:

(A) You **must** state your **claim**, the **ground** on which it is based under La. C.Cr.P. Art. 930.3, and the **facts** that support your claim.
(B) If there are witnesses who could testify in support of your claim, you **must** list their names and current addresses. If you cannot do so, explain why.
(C) If you failed to raise this claim in the trial court prior to conviction or on appeal, you **must** explain why. This is your opportunity to state reasons for your failure before the court considers dismissing the application in accordance with La. C.Cr.P. Art. 930.4(F).

In the following space, provide a brief summary of the reasons why you are legally entitled to file a second or subsequent application. If you fail to justify your right to file a second or subsequent application in accordance with La. C.Cr.P. Arts. 930.4 and 930.8, your application may be automatically dismissed.

Wherefore, Applicant prays that the Court grant Applicant relief to which he/she may be entitled.

____ / _____ / 20____ [Day / Month/ Year]	_____ [Signature of Applicant or Applicant's attorney]

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF _____

_____ [Name of Applicant/Attorney], being first duly sworn says that he /she has read the application for postconviction relief and swears or affirms that all of the information therein is true and correct.

_____
[Signature of Applicant or Applicant's attorney]

SWORN TO AND SUBSCRIBED before me this

_____ day of _____, 20___.

_____

NOTARY or person authorized to administer oath

Case Name:	**JUDGMENT** [May be used by the Court in lieu of or in addition to written reasons]	Case Number:

lication for Postconviction Relief, this Honorable

Considering the fore

DENIES this application in accordance with La. C.Cr.P. Art.

926(E) ☐ 928 ☐ 929 ☐ 930.4 ☐ or 930.8 ☐ , or

ORDERS that the Applicant show cause in writing on or before the _____day of _____, 20_____ why the application should not be dismissed in accordance with La. C.Cr.P. Art.

926(E) ☐ 928 ☐ 929 ☐ 930.4 ☐ or 930.8 ☐ , or

ORDERS that the State be required to file a response to this application on or before the _____day of _____, 20_____.

Signed in _____, Louisiana, this _____day of _____, 20_____.

_____

JUDGE

STATE OF LOUISIANA : **DOCKET NO. _____, DIVISION/SECTION _____**

: **_____ JUDICIAL DISTRICT COURT VERSUS**

: **PARISH OF _____**

_____ : **STATE OF LOUISIANA**

UNIFORM MOTION TO CORRECT AN ILLEGAL SENTENCE

For the **Time Limitations** for filing this motion, please see La. C.Cr.P. Art. 882(A), which states that an illegal sentence may be corrected at any time. A motion to correct an illegal sentence must point to an illegal term in your sentence; otherwise it will be construed as an application for postconviction relief subject to the time limits established in La. C.Cr.P. Art. 930.8 and the exclusive grounds for relief described in La. C.Cr.P. Art. 930.3.

WHEN NOT TO USE THIS FORM

1. A claim that a sentence is **excessive**, that is a sentence which falls within the sentencing limits but nonetheless violates the Louisiana Constitution, does **not** qualify as an illegal sentence for the purposes of obtaining relief under La. C.Cr.P. Art. 882. Please be sure to determine whether your sentence would qualify for relief for a different reason. *See, e.g., State ex rel. Morgan v. State*, 217 So. 3d 266 (La. 2016). If so, see instructions below.

2. If you are trying to file an **application for postconviction relief** pursuant to La. C.Cr.P. Arts. 924–930.9, you must use either the First Uniform Application for Postconviction Relief or the Second or Subsequent Unifor Application for Postconviction Relief.

3. If your complaint involves the **computation of time** you are serving or have served, you must first file for administrative relief with the Department of Corrections, then request review of any unfavorable decision in the 19th Judicial District Court in East Baton Rouge Parish. However, a request for credit for time served may be filed in the district court where you were convicted and sentenced.

GENERAL INSTRUCTIONS – READ CAREFULLY

Please carefully review and follow all of the following instructions:

1. Use this form for the filing of all motions to correct an illegal sentence. Make sure to indicate in the designated box whether this is the first or a subsequent motion to correct an illegal sentence.
2. A false statement of a material fact may serve as the basis for a criminal prosecution. All questions must be answered concisely in the proper space on the form. You may attach additional pages stating the facts that support your claim for relief. No lengthy citations of authorities or legal arguments are necessary.
3. When the motion is completed, the original motion must be filed in the District Court for the parish in which the mover was convicted and sentenced.
4. A copy of any filing sent by the mover to the Court must also be sent by the mover to the prosecutor.

CLAIMS FOR CORRECTION OF AN ILLEGAL SENTENCE
INSTRUCTIONS – READ CAREFULLY

You must point to a claimed "**illegal term**" in your sentence in order to receive relief. The currently recognize grounds for relief are listed below. Please check the applicable box or boxes.

□ The sentence is not authorized by the law or laws which govern the penalty.

□ The sentence is indeterminate.

□ A decision of substantive constitutional law prohibits the punishment for a type of crime or a class o offenders.

□ The sentence was imposed without counsel present and the presence of counsel was not waived.

□ The punishment ultimately imposed constitutes an *ex post facto* violation or a judicial decision violate the due process right of notice and fair warning.

Provide a brief summary of the reasons why you are entitled to relief in the following space.

REQUIRED ATTACHMENT

A copy of **the Louisiana Uniform Commitment Order** of conviction and sentence **must** be attached to the motion (if it is available), or the motion must allege that is unavailable.

Date of this Motion:	____ / _____ / 20____	Name of Mover:	
DOC Number:		Place of Confinement:	
District Court Case Number:		Parish of Conviction:	
Name of Trial Judge:			
Offense(s) for which you were convicted:			
Do any of the convictions involve a sex offense, a human trafficking-related offense, or an offense where the victim was a minor under the age of eighteen years (*see* La. R.S. 46:1842(1.1) and 46:1844(W))? [Check One]		Yes □ No □	

Date of Conviction:	____ / _____ / _____	Conviction by: [Check One]	Guilty Plea □ Trial by Jury □ Trial by Judge □
Date of Sentencing:	____ / _____ / _____	Sentence:	
Name of Attorney who represented you at the time of conviction, trial, or sentencing:			

Multiple Offender Proceeding: [Check One]	Yes □ No □
Stipulated (pled guilty) to multiple bill: [Check if Applicable]	Yes □ No □
Adjudicated after hearing: [Check if Applicable]	Yes □ No □
What grade of Multiple Offender: [Check if Applicable]	2nd □ 3rd □ 4th □
Sentence on Multiple Offender Bill: [If Applicable]	

Name of Counsel who represented you on appeal:			
Appeal of conviction and sentence: [Check One]	Yes □ N › □	Appellate Case #:	
Appeal of Multiple Bill: [Check One]	Yes □ N › □	Appellate Case #:	
Writ to Louisiana Supreme Court: [Check One]	Yes □ N › □	Supreme Court Case #:	
Action by Supreme Court: [Check if Applicable]	Granted □ Denied □	Date of Action:	____ / _____ / _____
Rehearing to Supreme Court: [Check if Applicable]	Granted □ Denied □	Date of Action:	____ / _____ / _____

PRIOR MOTIONS TO CORRECT AN ILLEGAL SENTENCE
INSTRUCTIONS – READ CAREFULLY

Please provide a list below of all prior motions to correct an illegal sentence filed by you or on your behalf in connection with the sentence at issue in this motion. If you are currently raising any issue that you have presented before, please also list that motion, no matter how the motion was titled. If you have filed more than one motion to correct an illegal sentence, provide the information for each additional motion on a separate sheet of paper.

District Court Case Number:		Parish of Conviction:	
Date of Filing:	___ / ____ / ____		
Illegal Term Alleged:			

Was relief granted or denied? [Check One]	Yes □ No □	Date of Disposition:	___ / ____ / _____
Did you receive a hearing? [Check One]	Yes □ No □	Did you file a writ to the Court of Appeal? [Check One]	Yes □ No □
Which Circuit?[Check One]	1□ 2□ 3□ 4□ 5□	Appellate Case #:	
Sought writ to Louisiana Supreme Court? [Check One]	Granted □ Denied □ Not Sought □	Supreme Court Case #:	
		Date of Ruling	___ / ____ / _____

You may use a separate sheet of paper to provide any additional necessary information as it relates to your motion to correct an illegal sentence.

Wherefore, Mover prays that the Court grant Mover relief to which he/she may be entitled.	
____ / _____ / 20____ [Day / Month/ Year]	_____ [Signature of Mover]

STATE OF LOUISIANA : **DOCKET NO. _____, DIVISION/SECTION _____**

: **_____ JUDICIAL DISTRICT COURT**

VERSUS

: **PARISH OF _____**

_____ : **STATE OF LOUISIANA**

ORDER

[For Use by the Court]

Considering the foregoing motion to correct an illegal sentence, this Honorable Court hereby:

□ DENIES this motion.

□ ORDERS that the State file a response to this motion on or before the _____day of _____, 20_____.

□ ORDERS that the motion be set for a contradictory hearing on the _____day of _____, 20_____ at _____ A.M./P.M.

The Court may choose to provide any additional reasons for its decision in the space below or in a separate document.

Signed in _____, Louisiana, this _____day of _____, 20_____.

_____
JUDGE

CLERK: PLEASE SERVE ALL PARTIES

2019 UPDATE

STATUTORY INTERPRETATION

State v Turner, 18-780 (La. 5/8/19), 2019 WL 2041361 - The portion of the aggravated flight statute requiring a defendant to have committed "at least two of the following" enumerated aggravating acts can be satisfied by a defendant's commission of one of the enumerated acts more than once.

DISCOVERY

State v. Harrison 19-411 (La.App. 3 Cir. 6/4/19) (unpublished opinion) - Ordering discovery before the institution of prosecution by indictment/bill of information was an abuse of the trial court's discretion.

ARTICLE 701

State v. Lightfoot, 19-253 (La.App. 3 Cir. 4/15/19) (unpublished opinion) - Affirmed the trial court's release of defendant under La.Code Crim.P. art. 701(D) before the lapse of 120 days because trial was set to commence beyond 120 days and the State failed to prove just cause. Judge Cooks dissented and would have remanded for a contradictory hearing because the State alleged it lacked notice of the contradictory hearing that was held.

MOTION TO SUPPRESS

State v. Nolan, 19-188 (La.App. 3 Cir. 6/12/19), 2019 WL 2442088 - Defendant may not retreat to the curtilage of his home to avoid arrest, and there is no reasonable expectation of privacy in a Vehicle Identification Number.

State v. Johnson, 19-114 (La. 4/29/19), 268 So.3d 292 - La.Code Evid. art. 510, which provides the health care provider-patient privilege, is not an exception to the warrant requirement.

State v. Scarborough, 18-1791 (La. 11/14/18), 256 So.3d 265 - Although a detective with pertinent knowledge was subpoenaed by both parties, he was out of state and unable to attend the suppression hearing. Thus, no officer who had any knowledge of whether defendant was given his *Miranda* warnings or was present when defendant was questioned testified at the hearing. The district court erred in finding the State carried its burden of proof and in denying defendant's motion to suppress. The matter was remand with instructions that the district court conduct a new

suppression hearing at which, at a minimum, the detective who was previously unavailable could testify.

State v. Lormand, 19-23 (La.App. 3 Cir. 3/21/19) (unpublished opinion) - Defendant was not arrested when taken into protective custody under La.R.S. 28:53.2. Thus, evidence seized from defendant was suppressed.

State v. Alexander, 18-1772 (La. 12/3/18), 257 So.3d 672 - A statement made after the detective assured defendant anything he said would stay in the interrogation room and that no one would need to know what he told the detective was a false promise of confidentiality, rendering his statement involuntary.

Mitchell v. Wisconsin, 139 S.Ct. 2525 (2019) - When a driver is unconscious and cannot be given a breath test, the exigent circumstances doctrine generally permits a blood test without a warrant.

JUVENILE

State in Interest of G.P., 18-675 (La.App. 3 Cir. 9/20/18), 255 So.3d 1130 - The trial court had authority to mandate the juvenile be held in a secure facility pending a review hearing.

SENTENCING

State v. Lyles, 18-283 (La.App. 5 Cir. 12/27/18), 263 So.3d 930 - Defendant argued he should have been sentenced under the 2017 legislative changes to La.R.S. 15:529.1, which applied to offenders whose convictions became final on or after November 1, 2017. The State argued the 2018 addition of La.R.S. 15:529.1(K) clarified the issue, and defendant should be sentenced under the statute in effect at the time he committed the underlying offense on February 1, 2015. The fifth circuit found the 2015 version of La.R.S. 15:529.1 applied. In *State v. Lyles*, 19-203 (La. 5/20/19), 270 So.3d 570, the supreme court granted defendant's writ application to determine whether his habitual offender adjudication and sentence are governed by La.R.S. 15:529.1 as it existed at the time of the commission of his instant offense, as it was amended by 2017 La. Acts No. 282, or as it was amended by 2018 La. Acts No. 542.

State v. Young, 18-858 (La.App. 3 Cir. 5/15/19), 271 So.3d 422 - Once the State selects the charges to be enhanced pursuant to La.R.S. 15:529.1, the trial court has no discretion to ignore that selection if the defendant is, in fact, determined to be a habitual offender.

State v. Dufrene, 18-1174 (La. 5/28/19), 2019 WL 2275894 - The trial court did not provide specific reasons for imposing consecutive sentences, but the first circuit found the record provided justification for imposition of consecutive sentences. The supreme court vacated the sentences and remanded the matter for resentencing in accordance with La.Code Crim.P. art. 894.1 and La.Code Crim.P. art. 883, including articulation of reasons for the sentences imposed.

Timbs v. Indiana, 139 S.Ct. 682 (2019) - The Eighth Amendment's prohibition of excessive fines is applicable to the states under the Fourteenth Amendment.

DOUBLE JEOPARDY

State v. Marchiafava, 17-1670 (La. 9/21/18), 252 So.3d 867 - Defendant's pre-trial claim of double jeopardy was premature. The supreme court cited *State v. Hall*, 12-601 (La. 6/29/12), 91 So.3d 302. The holding in *Hall* was based on the premise that the double jeopardy clause prohibits cumulative punishments for the same offense, a risk that arises only if the defendant is convicted of more than one crime. Absent multiple convictions, the double jeopardy clause is not implicated. A determination that depends on the defendant's guilt or innocence of the charged offenses cannot be made prior to trial. *See State v. Maughan*, 18-121 (La.App. 1 Cir. 6/4/18), 252 So.3d 502, for a discussion of *State v. Frank*, 16-1160 (La. 10/18/17), 234 So.3d 27, and *Hall.*

GRAND JURY

State v. Francis, 18-1395 (La. 9/21/18), 252 So.3d 857 - Disclosure of grand jury testimony must be closely confined to the limited portion of the material for which there is a particularized need.

DOCUMENTS REQUEST

Orellana v. 24th Jud. Dist. Ct. Par. of Jefferson, 18-1603 (La. 1/8/19), 259 So.3d 1018 - The judgement of the court of appeal ordering the district court to provide Relator with a copy of his *Boykin* transcript free of charge was vacated as relator had exhausted his right to state collateral review and his claim was time barred.

AMENDED STATUTES

La.R.S. 14:2(C) - Sets forth a universal definition of serious bodily injury.

La.R.S. 14:122 - The public intimidation and retaliation statute was found unconstitutionally overbroad in *Seals v. McBee*, 898 F.3d 587 (5th Cir. 2018). The statute was subsequently amended to include extortionate threats and true threats. "Extortionate threats" occur when a person communicates an unlawful threat to harm another person with the intention to obtain anything of value or any acquittance, advantage, or immunity of any description and the person would not otherwise be able to lawfully secure such advantage willingly from the victim. "True threats" occur when a person communicates a serious expression of an intent to commit an unlawful act of violence upon a person or group of persons with the intent to place such persons in fear of bodily harm or death. The person need not actually intend to carry out the threat.

La.R.S. 14:122.2 - Threatening a public official now includes law enforcement officers and requires communication of a true threat.

La.R.S. 15:257, La.R.S. 15:257.1 & La.R.S. 25:625 - Regulate the use of material witness warrants for victims of sex offenses and intimate partner violence and the reporting by the District Attorney of use thereof.

La.R.S. 15:529.1 - A conviction for a felony offense that is not a crime of violence as defined by La.R.S. 14:2 and that has been set aside and dismissed after deferred imposition of sentence pursuant to La.Code Crim.P. art. 893 shall not be considered as a prior conviction for enhancing a felony that is not a crime of violence under the habitual offender law, nor shall it be included in the computation of the five- or ten-year time period set forth for the same purposes. *See* changes to La.Code Crim.P. art. 893.

La.R.S. 18:1461(D) - As part of the penalty for bribery of voters, the court may now order restitution, which may include payment for any cost incurred, including reasonable attorney fees, by a candidate who brought an action contesting an election wherein the court found that one or more of the votes cast in the contested election were illegal based on the actions of the defendant and the court changed the result of the election or ordered a new election to be held.

La.R.S. 46:2135 & La.R.S. 46:2136 - TRO and Protective Orders - The copy of the Uniform Abuse Prevention Order sent to the chief law enforcement officer shall be reviewed by the law enforcement agency upon receipt. Upon filing of a petition for

TRO, regardless of whether the TRO is granted, the clerk of court shall inform petitioner of the right to initiate criminal proceedings and that granting of a TRO does not automatically file criminal charges against the defendant.

La.Code Crim.P. art. 163(C)(D) - If a search warrant is issued to search for and seize data or information contained in or on a computer, disk drive, flash drive, cellular telephone, or other electronic, communication, or data storage device, the warrant is considered to have been executed within the 10-day period allowed if the device was seized before the expiration of the 10-day period, or if the device was in law enforcement custody at the time of the issuance of the warrant. If the electronic device was seized before the expiration of the 10-day period, or if the device was in law enforcement custody at the time of the issuance of the warrant, any data or information contained in or on the device may be recovered or extracted at any time pursuant to the warrant.

La.Code Crim.P. art. 556.1(C)(2) - Requires the court to ask the defendant and his attorney whether the defendant has been informed of all plea offers made by the State.

La.Code Crim.P. art. 795(C) - No peremptory challenge made by the state or the defendant shall be ~~based solely upon~~ motivated in substantial part on the basis of the race or gender of the juror. If an objection is made that ~~the state or defense has excluded a juror solely~~ a challenge was motivated in substantial part on the basis of race or gender, and a prima facie case supporting that objection is made by the objecting party, the court ~~may~~ shall demand a satisfactory race or gender neutral reason for the exercise of the challenge, ~~unless the court is satisfied that such reason is apparent from the voir dire examination of the juror~~. Such demand and disclosure, ~~if required by the court~~, shall be made outside of the hearing of any juror or prospective juror. The court shall then determine whether the challenge was motivated in substantial part on the basis of race or gender.

La.Code Crim.P. art. 817 - Qualifying Verdicts - Any fact that increases the - maximum or mandatory minimum penalty for a crime, other than the fact of a prior conviction, may be submitted to the jury, and the verdict may include a specific finding of fact as to that issue.

La.Code Crim.P. art. 893.2 - The determination as to whether a firearm was discharged, used, or actually possessed during the commission of one of the specifically enumerated offenses is a specific finding of fact to be submitted to the jury and proven by the State beyond a reasonable doubt.

La.Code Crim.P. art. 893.3 - Significantly increased sentences for firearm enhancement.

La.Code Crim.P. art. 885.1 - Mandates an additionally 180 day extension to pay fines for those financially unable to do so or the offer to perform community service. Prohibits the court from suspending the driver's license of a defendant unless the court determines that the defendant is able but willfully refused to pay the fine or perform community service. The changes made to the statute by 2017 La. Acts No. 260 as amended by 2018 La. Acts Nos. 137 and 668 shall never go into effect.

La.Code Evid. art. 702(B) - Addresses testimony of expert witnesses on the issue of memory and eyewitness identification.

La.Code Evid. art. 801(D)(1)(e) - Adds to the existing list of hearsay exceptions statements made by the victim of a sexually-oriented criminal offense to a healthcare provider during the course of a forensic medical examination if the healthcare provider has documented that statement in writing during the course of the forensic medical examination.

La.Ch.Code art. 819 - The three-day period for holding continued custody hearings includes any day that is included as a legal holiday under La.Ch.Code art. 114. When the last day is a legal holiday, the hearing shall be held on the next business day that is not a legal holiday.

La.R.S. 15:1110; La.R.S. 15:609; La.Ch.Code arts. 814, 815, 815.1, 817 & 826 - Juvenile Detention - Secure detention shall be used only when it is determined to be necessary based on the child's assessed risk to public safety or to secure the appearance of the child in court. All juvenile detention facilities, including facilities owned or operated by any governmental, profit, nonprofit, private, or public agency, shall not be used to detain a child who is alleged to have committed a delinquent act for any of the following purposes or reasons: (a) To punish, treat, or rehabilitate the child. (b) To allow the child's parent, guardian, or legal custodian to avoid their legal responsibilities relative to the child. (c) Solely to satisfy a demand made by a victim, law enforcement, or the community that a child be detained. (d) To facilitate further interrogation or investigation. (e) To facilitate further assessment or evaluation. (f) The unavailability of a more appropriate facility. (2) Nothing in this Subsection shall prohibit the detention of a child who is charged with the commission of a serious offense or with a history of prior adjudications for the commission of delinquent acts based upon serious offenses.

THIRD CIRCUIT COURT OF APPEAL
CONTINUING LEGAL EDUCATION

RECENT DEVELOPMENTS

IN PROCEDURE AND PRACTICE IN THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL

THIRD CIRCUIT JUDGES

Chief Judge Gene Thibodeaux
Judge Sylvia R. Cooks
Judge John D. Saunders
Judge Elizabeth A. Pickett
Judge Billy H. Ezell
Judge Shannon J. Gremillion
Judge Phyllis M. Keaty
Judge John E. Conery
Judge D. Kent Savoie
Judge Van H. Kyzar
Judge Candyce G. Perret
Judge Jonathan W. Perry

Table of Contents

ADMINISTRATIVE RULES OF COURT 1

ATTORNEY FEES 1

BOND FORFEITURE 2

BUILDING RESTRICTIONS 3

CLASS ACTION 3

CRIMINAL LAW 5

CUSTODY & PARENTAL RIGHTS 11

DUTY & NOTICE 13

ELECTION LAW—TITLE 18 14

EXPROPRIATION & TAKING 15

IMMUNITY 16

INMATE SUITS 17

INSURANCE & INDEMNITY 17

LBCA—LOUISIANA BUSINESS CORPORATION ACT 20

MARITIME/JONES ACT 21

MEDICAL MALPRACTICE 22

NHWA—NEW HOME WARRANTY ACT 23

ORAL AGREEMENTS 24

PREMISE LIABILITY 25

PRESCRIPTION 27

PROCEDURE 31

PROTECTION ORDERS 31
REAL ACTIONS & LIS PENDENS 32
SECURED TRANSACTIONS & SURETYSHIP 32
SERVITUDES 34
SPOUSAL SUPPORT 35
SUMMARY JUDGMENT 36
TAXATION 43
TRUSTS 45
WORKERS' COMPENSATION 45

RULES

ADMINISTRATIVE RULES OF COURT

Internal Rule 28—Appellate Record Request by Email or CD

A party may request the appellate record by e-mail if the record contains two volumes or less. This service is complimentary. A party may also request an appellate record sent in PDF form on a CD. The fee for this service is $25.00. Exhibits separate from the appellate record cannot be e-mailed or sent on CD.

CASES

ATTORNEY FEES

***Camalo, et al. v. Estrada et al.,* 17-1184 (La.App. 3 Cir. 9/26/18) 257 So.3d 202 (Ezell, Judge).**

During the course of litigation involving a property dispute between three sets of neighbors, two of the parties, the Courtois and Giglios, stipulated to a preliminary injunction preventing either party from harassing the other or damaging the other's property. After Mr. Courtois deliberately violated this injunction by damaging drainage, trees, and shrubs on the Giglios' property, the Giglios filed a motion for contempt. The trial court found that Mr. Courtois "willfully disobeyed the order and judgment of the court," imposed a $500.00 fine, and later awarded the Giglios $11,587.50 in attorney fees, despite the fact that Mr. Giglio's father represented the couple free of charge.

Affirmed. *Goodrich v. Exxon Co., USA*, 608 So.2d 1019, 1034 (La.App. 3 Cir. 1992), *writ denied*, 614 So.2d 1241 (La.1993) and the line of older cases cited by the Courtois requiring an obligation to pay attorney fees be incurred in order to recover attorney fees did not deal with contempt of court, but rather contract disputes and various other civil matters designed to benefit a party to the suits pending in those specific cases. However, a proceeding for contempt for refusing to obey the court's orders is not designed for the benefit of the litigant, though infliction of a punishment may inure to the benefit of the mover in the rule. The object of a contempt proceeding is to vindicate the dignity of the court. *Howard v. Oden*, 44,191 (La.App. 2 Cir.

2/25/09), 5 So.3d 989, *writ denied*, 09-965 (La. 6/26/09), 11 So.3d 496. There was no abuse of discretion in the trial court's award of attorney fees related to the contempt of court proceeding below, even though the services had been volunteered. It is better in the eyes of the court that a generous attorney receive payment for work actually performed than to reward an intentional bad actor for openly defying a court order, especially when done in a willful and ongoing manner.

BOND FORFEITURE

***State v. Kading,* 18-341 (La.App. 3 Cir. 12/12/18), 260 So.3d 698 (Panel: Thibodeaux, Chief Judge writing; Cooks and Amy, Judges).**

In this bond forfeiture case, Mike Mullen L.L.C. D/B/A Mike's Bail Bonding Service (Agent) and Accredited Surety and Casualty Company, Inc. (Surety) posted bond for the criminal defendant, Jeffery Dale Kading Jr. When Mr. Kading failed to appear for his arraignment, a fugitive warrant was issued, and a Bond Forfeiture Judgment was ordered. The judgment was mailed to the parties on January 17, 2017, which began the running of the 180-day period under La.Code Crim.P. art. 349.8 for the Agent and Surety to find the defendant and surrender him to the Lafayette Sheriff. The Agent paid to have Mr. Kading listed on the National Crime Information Registry (NCIR). Mr. Kading was arrested in New Mexico on March 15, 2017. The Agent tried unsuccessfully to obtain an amount from the Sheriff for the transportation costs on having Mr. Kading returned to Lafayette. The costs were never paid.

On March 21, 2017, Mr. Kading was released in New Mexico. On August 18, 2017, the Agent and Surety filed a motion with the court to acknowledge the surrender of the defendant and to set the forfeiture judgment aside. They asserted that it was the Sheriff's fault for failing to give them transportation costs. The trial court denied their motion, stating that they could have obtained the reasonable transportation costs from the court, had they timely filed their motion and complied with necessary requirements. When the Agent apprehended the defendant in December of 2017, he finally surrendered Mr. Kading to the Sheriff in Lafayette. The Agent and Surety appealed the trial court's judgment denying them relief on their motion to acknowledge surrender of the defendant.

Affirmed. Finding no error in the trial court's judgment under the applicable statutes, we affirmed the judgment. Pursuant to La.Code Crim. P. art. 345(D), which provides the procedure for surrendering a defendant who has been incarcerated in a foreign jurisdiction, the Agent and Surety had to (1) file their motion with the court no later than July 16, 2017; (2) provide the court with a letter of incarceration or verification that the defendant was incarcerated within the 180-day period allowed for surrender; ***and*** (3) pay the transportation costs to have the defendant returned to Lafayette ***before*** the defendant was released in New Mexico. All three criteria must be met, and none were met in this case.

We further found that the Sheriff's failure to give the Agent transportation costs was not an unforeseeable "fortuitous event," as contemplated by La.Code Crim.P. art. 345(I), that made it impossible for the Surety to timely surrender the defendant and have the forfeiture judgment set aside. *See State v. Tabb*, 15-1129 (La.App. 3 Cir. 8/3/16), 200 So.3d 841, *writ denied*, 16-1695 (La. 11/29/16), 210 So.3d 805.

BUILDING RESTRICTIONS

***Aucoin v. Copper Meadows Homeowners Association, Inc.*, 18-811 (La.App. 3 Cir. 4/3/19), 269 So.3d 859 (Judge Kyzar writes):**

Plaintiffs purchased a home in a subdivision in 2010, which at the time prohibited the house trailers or mobile homes being parked on lots, the use of recreational vehicles as residences, or the parking of vehicles on the street in front of the residence for more than 24 hours. Plaintiff was a professional plumber and utilized a cargo trailer for his business. He parked the trailer in front of his home every evening and on weekends. Defendant attempted to fine plaintiffs in 2013, but withdrew the fine after plaintiffs protested. In 2014, defendant amended the subdivision restriction to prohibit the parking of trailers in front of the lots. Plaintiffs continued to park their trailer in front of their lot. They were fined once and cited numerous times in 2017. Plaintiffs filed suit to have their property declared free and clear of the restriction based on two years liberative prescription. Defendant reconvened alleging that plaintiffs owed $750 in fines. Following a trial on the merits, the trial court rendered judgment in favor of plaintiffs. Defendant appealed.

Affirmed. On appeal, the court affirmed the trial court's judgment finding that defendant had notice of the ongoing violation of the restriction for more than two years prior to its attempt to enforce the amended restriction.

CLASS ACTION

***Crooks v. State, Dept. of Natural Resources*, 17-750 (La.App. 3 Cir. 12/28/18), 263 So.3d 540 (Savoie, J. writing; Amy, dissenting, and Saunders, JJ.).**

This is a complicated class action case wherein the Plaintiffs filed suit, seeking to be declared owners of certain immovable property and to fix the boundary between their properties and State-owned property. The Plaintiffs further requested compensation for the inverse condemnation of the immovable property and repayment of royalties received by the State for oil, gas, and mineral activities that had taken place on the property. The trial court rendered judgment in favor of the Plaintiffs, awarding compensation and attorney's fees. The State appealed.

Affirmed in part, Vacated in part, and Rendered. We found that the landowners established that the Louisiana Constitution prohibited State and any of its political subdivisions from acquiring private property through acquisitive prescription; the evidence was sufficient to establish that area known as "Catahoula Lake" was actually a permanent river; the one-year prescriptive period for delictual actions, rather than the three-year prescriptive period for takings, applied to landowners' claims; the plaintiffs' claims constituted a continuing tort; the landowners were not entitled to attorney fees because La.R.S. 13:5111 does not apply in this case; and the trial court was not obligated to base damages on the 2006 value of the land instead of its 2014 value.

***Cajuns for Clean Water, LLC v. Cecilia Water Corp*., 18-185 (La.App. 3 Cir. 10/3/18), 257 So.3d 706, *writ denied*, 18-1789 (La. 1/14/19) 261 So.3d 787 (Cooks, Judge writing; Saunders and Pickett, Judges).**

Class action suit brought by local customers and non-profit group against local water supplier alleging damages resulting from poor water quality, no/low water pressure, arsenic contamination, bacterial contamination, insufficient water supply. Trial court granted Plaintiff's motion to certify class, defined class, and confirmed class representatives. Water Corp. appealed asserting class action not appropriate for this litigation and challenging the class definition. Third Circuit affirmed and supreme court denied writs.

We found the record fully supported trial court's judgment. Cecelia's own records and testimony of its representatives support the reasonableness of trial court's ruling. We rejected claims of Cecelia Water that the trial court failed to "perform a rigorous analysis of claims and defenses." Class action is clearly most appropriate procedural device to litigate this case where pervasive system-wide problems admittedly exist and affect all customers. Facts support trial court's findings of numerosity, commonality, typicality, and adequacy as set forth in La.Code Civ. P. art. 591. We rejected Defendants' assertion that Plaintiffs "cannot prove breach, causation, and damages on a class-wide basis." In accord with Louisiana Supreme Court and U.S. Supreme Court we held the only issue for trial court and appellate courts when ruling on class certification is "whether the case at bar is one in which the procedural device is appropriate. In determining the propriety of such action, the court is not concerned with whether the plaintiffs have stated a cause of action or the likelihood they ultimately will prevail on the merits, but whether the statutory requirements have been met." We further held the trial court's definition of the class sufficiently identifies an objectively definable class of claimants.

CRIMINAL LAW

***State v. Ellender*, 18-891 (La.App. 3 Cir. 6/5/19), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders and Keaty, Judges).**

Defendant, Ramon L. Ellender, was seen speeding up and down a residential street in a silver BMW just blocks from his trailer home. He ran into the back of a red truck, turned around and sped down the street again, hitting signs, damaging the front of his vehicle, and leaving car parts and debris in his wake. The witness called 911; the police found the damaged car still warm, with the keys in the ignition, and the gear still in drive. They found the door of the trailer home open and Defendant lying face-down and naked on the sofa. Within an hour, Defendant was identified by the witness and arrested. Subsequently, Defendant was convicted by a six-person jury for his fifth offense of driving while intoxicated (DWI). He was sentenced to fifty years at hard labor under the habitual offender statute.

Conviction and Sentence Affirmed. Defendant's appeal focused on insufficiency of the evidence, excessive sentence, and an improper jury composition. Defendant contended there was insufficient evidence to prove his identity as the driver of the vehicle involved in the hit and run. We disagreed. The 911 caller, Mary Benson, identified Defendant in person, less than an hour after the incident, as the driver of the vehicle who had passed by her residence twice while she was outside. She saw him hit the truck and the signs and saw parts fall off of his car. She later identified him in a six-person photographic lineup and identified him again at trial.

The standard on a sufficiency issue is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). Because Defendant was charged as a multiple offender under La.R.S. 14:98.4, and he stipulated to the previous four DWI's, the DA only had to prove that Defendant was operating a vehicle while under the influence of alcohol or drugs. While no sobriety test was given, intoxication is an observable condition, and no blood or breath alcohol test is required if the observations of an arresting officer establish a defendant's guilt. *See State v. Iles*, 96-256, (La.App. 3 Cir. 11/6/96), 684 So.2d 38. Here, an aggregate of four police officers testified that Defendant was visibly intoxicated, smelled of alcohol, gave nonsensical responses to questions, including an incorrect birth year, and admitted to drinking two bottles of whiskey three hours before the incident. Thus, we found no merit to Defendant's contention that the evidence was insufficient for a conviction in his case.

We further found no error in the Defendant's trial by a six-person jury because the DWI crime of which he was charged is a relative felony under La.R.S. 14:98.4, punishable by imprisonment "with or without hard labor." Such relative felonies are triable by a six-person jury under La.Const. art. 1, § 17. Finally, we found no merit in Defendant's contention that his sentence was excessive. He was forty-six years old and had been in trouble with the law for

approximately thirty years, having been arrested and/or convicted in Louisiana, Texas, Mississippi, California, and Wyoming. He was arrested while driving under the influence approximately twelve times resulting in at least nine convictions. He was arrested and/or convicted of multiple drug and other offenses, including thirteen felonies and seventeen misdemeanors. Defendant's sentencing range under La.R.S. 15:529.1(A)(4)(a) at the time was thirty years to life. We found no abuse of discretion in the trial court's sentencing Defendant to fifty years, which was at the relatively low end of his potential sentencing range.

***State of Louisiana v. Edwin Albert Miller*, 18-639 (La.App. 3 Cir. 3/27/19), 269 So.3d 806 (Panel: Thibodeaux, Chief Judge writing; Gremillion and Kyzar, Judges).**

The State charged Defendant Edwin Albert Miller with stalking, second offense, a violation of La.R.S. 14:40.2(4). A jury of twelve unanimously found him guilty of the offense charged and the trial court ordered him to serve the maximum sentence of twenty years imprisonment without the benefit of probation, parole, or suspension of sentence, with credit for time served.

On appeal, Defendant argued that his defense counsel's failure to object to the impaneling of a twelve-person jury in the trial of a six-person jury offense constituted a claim for ineffective assistance of counsel, and thus required a reversal of his conviction. Defendant also asserted that the trial court erred in denying his challenges for cause and challenged his sentence as excessive.

Affirmed. We affirmed Defendant's conviction and sentence. At the outset, we found that the trial court erroneously tried Defendant's case before a jury of twelve members where the offense of stalking, second offense, is punishable with or without hard labor. La.R.S. 14:40.2(4). Because a twelve-person jury is only appropriate when the punishment is necessarily confinement at hard labor under La.Code Crim.P. art. 782, Defendant's case should have only been tried by a six-person jury. However, we found that this oversight on the part of the trial court did not constitute reversible error where the Louisiana Supreme Court has held that "the error in trying a six-person jury offense in a 12-person jury forum no longer constitutes a non-waivable structural defect in the proceedings, but 'falls within the vast category of trial errors which are subject to harmless error analysis and which warrant reversal only where the defendant is actually prejudiced.'" *State v. Brown*, 11-1044, p. 3 (La. 3/13/12), 85 So.3d 52, 53 (quoting *State v. Jones*, 05-226, p. 3 (La. 2/22/06), 922 So.2d 508, 511). In light of the unanimous verdict reached by the twelve-juror panel, Defendant had not been prejudiced in his case because any six of the twelve jurors in this case would have rendered a guilty verdict where all twelve jurors found Defendant guilty.

Next, Defendant asserted that the trial court erroneously denied five of his challenges for cause which caused him to exhaust all of his peremptory challenges. In reviewing the record, we could not find any instance in which the trial court erred in finding that any juror or potential

juror was not adequately rehabilitated, or that Defendant would otherwise be prejudiced by the denials.

Finally, in reviewing the trial court's sentence of twenty years at hard labor, we did not find "the penalty so grossly disproportionate to the severity of the crime as to shock our sense of justice[.]" *State v. Barling*, 00-1241, 00-1591, p. 12 (La.App. 3 Cir. 1/31/01), 779 So.2d 1035, 1042, *writ denied*, 01-838 (La. 2/1/02), 808 So.2d 331 (citations omitted). The record supports the sentence imposed by the trial court and demonstrates that Defendant was a most egregious offender.

***State v. Broussard*, 18-677 (La.App. 3 Cir. 3/13/19), __ So.3d __ (Judge Kyzar writing):**

Defendant was indicted on one count of indecent behavior with a juvenile and one count of molestation of a juvenile. In a single pleading on March 27, 2014, defendant filed eight motions, including a motion to suppress evidence and a motion for a preliminary hearing. During a June 18, 2014 hearing on six of the eight discovery motions, defendant informed the trial court that the discovery motions had been satisfied by the State. This hearing did not involve the motions to suppress and for a preliminary hearing. On April 5, 2017, defendant filed a motion to quash, alleging that the State failed to bring him to trial within the two-year limit provided by La.Code Crim.P. art. 578. Following a hearing, the trial court denied the motion to quash, finding that the motions to suppress and for preliminary hearing had never been disposed of and continued to suspend the time limitation for commencing trial. Defendant applied for and was granted a writ. In granting the writ and making it preemptory, the court held that defendant's motion either became moot on the date that defense counsel said that defendant's discovery motions were satisfied or were abandoned when defense counsel made no effort to have them set for hearing for approximately three and a half years. Thus, the court vacated the trial court's ruling and remanded the matter for rehearing on the motion to quash. On remand, the trial court, relying on the appellate court's ruling, granted defendant's motion to quash. The state appealed from this ruling.

Reversed and Remanded. On appeal, the court held that defendant never formally waived or withdrew his motions to suppress and for preliminary hearing. Further, his motions were never abandoned, as stated in the writ, because abandonment of a pre-trial motion is triggered by the commencement and/or conclusion of trial or the entering of a guilty plea by the defendant. This matter had not yet proceeded to trial and defendant had not entered a guilty plea. Because the motions to suppress and for preliminary hearing were still pending at the original hearing on defendant's motion to quash, the two-year trial limitation period was still suspended.

***State v. Prince Record*, 18-614 (La.App. 3 Cir. 2/27/19), __ So.3d __ (Judge Kyzar writes):**

Defendant was convicted of simple escape and transactions involving the proceeds of drug offenses and was later adjudicated a third felon offender. He was sentenced to two and a half years and ten years, respectively, with the sentences to run consecutively. Defendant

appealed his convictions.

Convictions Affirmed; Sentences Vacated; Remanded for Resentencing. On appeal, the court found two errors patent. After the jury retired to deliberate, one of the jurors became ill and was excused by the trial court. The trial court then designated the first alternate juror to take the excused juror's place. The record did not reflect that the trial court brought the jury back into the courtroom to reinstruct it prior to recommencing deliberations. La.Code Crim.P. art. 789 provides that if a principal juror is replaced with an alternate juror, the trial court shall order the jury to begin deliberations anew. In this case, the court held that any error caused by the trial court's failure to instruct the jury to begin deliberations anew was harmless error because the jury had only been deliberating eight minutes before the original juror became sick and that neither the State nor defendant objected to the trial court's failure to instruct the jury. The court further held that the trial court applied the wrong version of La.R.S. 15:529.1 when sentencing defendant. The crimes committed by defendant occurred in 2014, and the trial court applied La.R.S. 15:529.1, as amended in 2017. It is the habitual offender statute, which was in effect at the time of the commission of the crime, which applies to a defendant's conviction and sentence.

***State v. Cole*, 18-538 (La.App. 3 Cir. 2/6/19), ___ So.3d ___ (Gremillion, Judge, writing, with Cooks and Keaty, Judges):**

Defendant pleaded guilty to racketeering as a result of his methamphetamine sales on behalf of the Sinaloa cartel. The State recommended that he receive a sentence of fifteen years and would not be subject to civil forfeiture, in exchange for which agreed to testify truthfully against his co-defendants. Defendant argued that his cooperation helped bring down the largest methamphetamine ring in Vernon Parish history. The trial court sentenced Defendant to twenty years at hard labor, with credit for time served. Defendant argued on appeal that the trial court failed to comply with La.Code Crim P. art. 894.1 because the trial judge noted his belief that methamphetamine consumption caused a major crime problem in Vernon Parish. He also contended that his sentence was disproportionately harsh considering the sentences handed down to his co-defendants. However, he had failed to raise the issue of the trial court's opinions on methamphetamine consumption in Vernon Parish in a motion to reconsider the sentence. His arguments about other mitigating factors were also not properly before us, as they had not been raised in a motion to reconsider, either.

Defendant was well aware that the State's recommendation of fifteen years was simply that: a recommendation. The trial court is free to impose the sentence it considers appropriate. In terms of the proportionality of the sentence, Defendant received half the sentence imposed on one of his co-defendants and in line with sentences approved in unrelated racketeering cases.

State v. Bourg, **18-435 (La.App. 3 Cir. 12/6/18), 260 So.3d 679 (Panel: Thibodeaux, Chief Judge writing; Cooks and Amy, Judges) (Judge Amy concurs in the result and assigns reasons).**

"On June 1, 2014, David Bourg drove Michael Pitre home from target practice. While parked in front of Pitre's mother's house, Bourg shot Pitre in the head with Bourg's nine millimeter Ruger handgun, killing Pitre. Pitre did not have a gun." *State v. Bourg*, 16-915, p. 1 (La.App. 3 Cir. 6/21/17), 223 So.3d 26, 28, *writ denied*, 17-1504 (La. 11/17/17), 229 So.3d 932. David Bourg was charged with second degree murder, a violation of La.R.S. 14:30.1; but he was convicted of the responsive verdict of manslaughter under La.R.S. 14:31 by an eleven-to-one jury. The trial court granted Bourg a new trial. The State sought review by this court. We reversed and remanded for sentencing under La.R.S. 14:31. Mr. Bourg's motion for rehearing was denied, as was his writ application to the supreme court.

Applying a firearm enhancement statute on remand, the trial court sentenced Mr. Bourg to twenty years at hard labor without benefit of probation, parole, or suspension of sentence. Mr. Bourg now appeals his conviction and sentence, asserting (1) that this court committed legal error when it reviewed and reversed the trial court's granting of his motion for new trial; and (2) that the trial court erred in applying a firearm enhancement statute when the State did not give pre-trial notice that it was seeking enhancement.

Conviction Affirmed; Remanded for Resentencing: Finding that our previous ruling on the new trial was not error and was the law of the case, and finding that the firearm enhancement statute under La.Code Crim.P. arts. 891.1-893.3 was erroneously applied, we affirmed Mr. Bourg's conviction and remanded the case for resentencing, with instructions to the district court not to apply the firearm enhancement to Mr. Bourg's sentence.

Applying the firearm enhancement statute led the trial court to believe that a twenty-year minimum sentence was required and that the denial of parole was required. While conducting an errors patent review, we found that the trial court enhanced Mr. Bourg's sentence pursuant to La.Code Crim.P. art. 893.3 without any notation in the record that the State filed a notice of its intent to request such enhancement. We then sent an information request to the district court's clerk of court, who in turn submitted an affidavit stating that "no motion invoking the firearm sentencing enhancement provision pursuant to La.Code Crim.P. Arts. 893.1 through 893.3 has been filed by the state . . . ." While Mr. Bourg did not initially raise this assignment of error in his original brief, he apparently realized the error upon receiving notice of the affidavit from the district court's clerk of court. He then filed a supplemental brief to include the error.

The supreme court has held that absent pre-trial written notice by the State that it intends to invoke the sentencing enhancement provision under La.Code Crim.P. art. 893.1, the trial court shall not apply such firearm enhancement provision. *State v. Jackson*, 480 So.2d 263 (La.1985), *overruled on other grounds by State v. Allen*, 496 So.2d 301 (La.1986), *and overruled on other grounds by State v. Sanders*, 523 So.2d 209 (La.1988). After *Jackson*, the legislature amended

La.Code Crim.P. art. 893.1 to codify the notice requirement, and it enacted La.Code Crim.P. arts. 893.2 and 893.3 to set forth the procedure that must be followed in order to apply the enhancement.

***State v. Granado*, 18-485 (La.App. 3 Cir. 12/6/18), 261 So.3d 51 (Panel: Conery Judge, writing; Pickett and Gremillion, Judges)**

The defendant, Christopher Granado, was indicted as a principal to racketeering, in violation of La.R.S. 14:24 and 15:1353, for alleged offenses occurring from February 1, 2015 to March 9, 2016. The Defendant plead guilty to an open ended *Alford* plea to racketeering in exchange for which the State agreed to dismiss the charge of conspiracy to distribute a Schedule II controlled dangerous substance in violation of La.R.S. 40:967(A). The trial court ordered a presentence investigation report (PSI) and, prior to the sentencing hearing, reviewed the PSI and the State's sentencing memorandum. The trial court then sentenced the Defendant to forty years at hard labor with credit for time served, a $50,000 fine, and court costs. The trial court denied Defendant's pro se motion for amendment of sentence and to withdraw his plea, and further denied Defense counsel's motion to reconsider Defendant's sentence. The Defendant now seeks review of his sentence claiming it is excessive, as well as his motion to withdraw his plea, which he claims was not knowingly and voluntarily given. Defendant claims his counsel failed to properly explain the State's offer and he relied on the advice of counsel that he would only be given a seven year sentence.

Affirmed. The panel found that there was no need for an evidentiary hearing as the plea given by the Defendant was free and voluntary and that at no time did the Defendant indicate his disagreement with any portion of the plea agreement.

The Defendant also claimed his counsel was ineffective for advising him that he would be sentenced to seven years in prison. A claim of ineffective assistance of counsel is more appropriately addressed in an application for post-conviction relief, where an evidentiary hearing can be conducted by the trial court. Although this court may address the merits of the claim, in this case the record does not contain sufficient evidence for a ruling. Therefore, Defendant's claim was relegated to post-conviction proceedings.

The Defendant also claimed his forty-year prison sentence was grossly excessive. During the sentencing, the State presented an extensive factual basis for Defendant's Alford plea. The State claimed it would be able to prove that the Defendant led an operation to distribute methamphetamine which consisted of a pattern of money laundering and the large scale distribution of methamphetamine to other associates and co-conspirators operating in Vernon Parish, Louisiana and the surrounding areas. Based on the charges brought by the State, the Defendant was exposed to a sentence of imprisonment of up to fifty years and a fine of up to one million dollars. The panel found the record fully supported evidence of a massive enterprise to traffic methamphetamine in which the Defendant played a significant leadership role and affirmed Defendant's sentence.

CUSTODY & PARENTAL RIGHTS

***Carranza v. Carranza*, 18-971 (La.App. 3 Cir. 6/5/19), __ So.3d __ (Judge Kyzar writes):**

The father and mother, both members of the army, were divorced. Following a custody hearing, the trial court held that it was in the best interests of the two minor children that the parents be awarded joint custody, with the mother designated as the domiciliary parent. At the time of the hearing, the trial court noted that the mother was being transferred to Fort Lewis in Washington, and declined to rule on a custody plan. It held that this should more appropriately be dealt with closer to the time of mother's transfer. The mother filed a petition five months later, seeking to relocate the children's residence to Fort Lewis. The father opposed the relocation. He then filed a motion to prevent the relocation and, alternatively, to have himself designated the children's domiciliary parent. Following a hearing, the trial court rendered judgment, denying the mother's request to relocate the children. It held that her request to relocate the children to Fort Lewis was not made in good faith and that the proposed relocation was not in the best interests of the children. The trial court further held that the father failed to prove that a material change in circumstances had occurred that warranted him being designated the domiciliary parent. However, the trial court held that in the event the mother relocated to Fort Lewis, the father would have the legal authority to make all decisions regarding the children's educational and medical matters. The mother appealed from this judgment.

REVERSED IN PART AND RENDERED; AFFIRMED IN PART; VACATED IN PART; AND REMANDED. On appeal, the court held that the trial court's judgment was internally inconsistent in that the domiciliary parent, the mother, was denied the right to move pursuant to a military transfer order, effectively requiring a change of custody, yet the trial court denied the change of custody request by the father. It was further legal error for the trial court to make the father the de facto domiciliary parent, despite finding that he failed to meet the *Bergeron* standard in regards to his change of custody motion.

After performing a de novo review of the matter, the court held that the mother carried her burden of proving that her request to relocate to Fort Lewis was in good faith, as her transfer was based on a non-frivolous reason, her reenlistment in the army. The mother testified that she intended to retire from the army and that she sought the transfer to Fort Lewis to advance her career as a medic. The fact that the mother requested the transfer to the same post as her new husband, was insufficient proof of bad faith. After applying the twelve factors found in La.R.S. 9:355.10, the court further held that the proposed relocation was in the children's best interests based on a finding that six of the factors favored relocation, one factor did not favor relocation, two factors favored neither parent, and three factors were not relevant to the factual scenario. In applying the factors, the court noted that the trial court, in the prior custody hearing, was aware that the mother was being transferred to Fort Lewis when it designated her domiciliary parent. The court further held that the transfer to Fort Lewis would enhance the children's quality of life

because the mother would have the benefit of a family support system through her husband and her cousin and her cousin's family, who were also stationed at Fort Lewis.

In the Interest of M.S., M.B., and P.O., **19-5 (La.App. 3 Cir. 7/17/19), ___So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, Gremillion, Conery, and Savoie, Judges) (Judge Gremillion concurs; Judge Conery dissents and assigns reasons).**

L.N.S., the mother of three minor boys, M.S., M.B., and P.O., appeals the trial court's judgment terminating her parental rights and certifying the children for adoption.[1]

The Department of Children and Family Services (DCFS) received a report alleging the neglect of the mother for providing inadequate food and shelter in caring for the children. DCFS found that L.N.S. and the children lived with one of the father's and the maternal grandmother; they found a lack of food and utilities, inadequate living conditions, and some admitted drug use by the mother. The children were taken into custody, adjudicated children in need of care, and were subsequently certified for adoption.

Reversed and remanded. We found that the State had not proved by clear and convincing evidence the grounds for termination of parental rights under La.Ch.Code art. 1015(5) and (6); nor had it proved that termination was in the best interest of the children. We found that L.N.S. had passed almost all of her numerous drug screens and was no longer being recommended for drug treatment; that she had substantially complied with her case plan; that she had good relationships with her children, tried to find work in spite of a shoulder injury, and had found a better home for her children and her mother to reside in which included a bedroom for the children and beds for each child; and, that there were reasonable expectations that L.N.S. would significantly improve her circumstances in the near future.

We further found that most of L.N.S.'s problems were financial and that DCFS had not made reasonable efforts under La.Ch.Code art. 626(B) to help L.N.S. overcome the obstacles she faced in preparing for the return of her children, such as employment and low income housing. Accordingly, we remanded the case back to the trial court with instructions to give L.N.S. more time to fully comply with her case plan and to assist her with her financial issues, including finding employment, housing, food, and transportation

State in the Interest of M.J.F.**, 18-584 (La.App. 3 Cir. 12/6/18), 261 So.3d 879 (Conery, Judge writing; Pickett and Gremillion, Judges).**

The Department of Children and Family Services removed the minor child from the mother's care due to the mother's drug use and concerns regarding suitable housing, domestic

[1]The children have three different fathers; one of the fathers voluntarily terminated his parental rights; the other two fathers did not appeal the termination of their parental rights.

violence in the home, and the mother's need for mental health assistance. Also, the mother had made threats regarding placing the child in a dumpster. The child was placed with foster parents at the age of eight weeks. By the time of the underlying proceedings, the foster parents indicated a willingness to adopt the child. As the matter moved through periodic case reviews, the mother continued to demonstrate drug use, although she returned a negative drug screen in the months before trial. She was found to have failed to comply with various areas of her case plan. Given the mother's deficiencies and following a finding of the best interests of the child, the trial court terminated the parental rights of the mother, as well as the unknown father, by June 2018 judgment. The judgment freed the child for adoption. On appeal, the mother questioned the trial court's determination that she failed to comply with the case plans, that there was no reasonable expectation of significant improvement in the future, and that the best interests of her child required termination of her parental rights.

Affirmed. While the mother questioned whether parental rights could be terminated for the sole reason of poverty, the panel explained that the trial court found that the mother failed to comply with numerous aspects of her case plan. The record supported that determination. Namely, the mother never maintained employment; she failed to provide monetary contribution to the child's care; and she continued to use drugs during much of the length of the proceedings. Neither did the mother address the mental health component of her case plan. Although the mother complied with some aspects of the case plan, such as maintaining contact with the child, she complied only partially. For instance, although she periodically visited the child, she attended only thirteen of the fifty-two scheduled visitations. Her visits were identified as disruptive, resulting in the further requirement that she work with a visitation coach. Given those factors, the panel found no merit in the mother's claim that the State failed to prove that she failed to substantially comply with her case plan. The panel similarly found that the record supported the determination that there was no reasonable expectation of significant improvement in the mother's condition in the near future. As noted by the trial court, the mother had two years to address the issues that resulted in the State's custody of the child, yet she continued to manifest many of these same problems. Finally, the panel maintained the finding that the termination of parental rights was in the best interest of the child. Significantly, the minor child was thriving with his foster parents, who had cared for him for all but the first eight weeks of his life. The foster parents have indicated that they are able and willing to adopt him.

DUTY & NOTICE

***Norman v. Michael A. Shelton Enterprise, Inc., et al.*, 18-1000 (La.App. 3 Cir. 5/29/19), ___ So.3d ___, consolidated with *Norman v. Michael A. Shelton Enterprise, Inc., et al.*, 18-1007 (La.App. 3 Cir. 5/29/19), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge, writing; Gremillion and Conery, Judges). (Judge Conery concurs in part, dissents in part, and assigns reasons).**

In these consolidated appeals arising from a motor vehicle accident, Plaintiff, Daniel

Norman, challenges the trial court's grant of summary judgment in favor of Defendants, Michael Shelton Enterprise, Inc. and Simms Transportation Systems, Inc. (collectively, "MSE"), as well as the State of Louisiana, through the Department of Transportation and Development ("DOTD"). Mr. Norman sustained severe personal injuries while traveling on the favored highway when his motorcycle collided with a pickup truck driven by Trent Dubois that was attempting to enter the highway from the parking lot of Robbie G's Restaurant. The trial court found that neither MSE, the lessee and operator of Robbie G's Restaurant, nor DOTD owed a duty to Mr. Norman and thus dismissed his claims against them with prejudice.

On appeal, Mr. Norman relies on evidence introduced at the hearing on the motion that a vehicle was illegally parked along the State's right-of-way which obstructed Mr. Dubois's view at the time of the accident. Mr. Norman alleged that MSE, the operator of the restaurant, caused and/or contributed to the accident by its regular practice of permitting its patrons to illegally park along the shoulder, which thereby obstructs the view of its exiting patrons. He also asserted that DOTD had knowledge of this occurrence such that it should be held to have notice of this "defect" and, thus, a duty to remedy the situation.

Affirmed in part, reversed and remanded in part. After conducting a de novo review, we affirmed the trial court's grant of summary judgment in favor of DOTD after finding that there were no genuine issues of material fact suggesting the existence of a duty on the part of DOTD. For liability to attach under La.R.S. 9:2800, a public entity must have had actual or constructive notice of the condition, yet failed to take corrective action within a reasonable period of time. In light of the deposition testimony of several DOTD employees, the trial court was correct in finding that DOTD owed no duty to Mr. Norman where no genuine issue of material fact existed as to whether DOTD had notice of any defect. However, we reversed the trial court's grant of summary judgment in favor of MSE after finding that it erred in finding no duty on the part of MSE without engaging with the fact of MSE's conduct in contributing to the accident under the formal duty-risk analysis prescribed by La.Civ.Code art. 2315 or 2317. The deposition testimony of several patrons/witnesses demonstrates that many factual issues remain with respect to whether the actions of the restaurant's operator in maintaining its parking lot, or its failure to do so, caused or contributed to the accident. Therefore, the trial court erred in summarily disposing of MSE's liability where Mr. Norman presented evidence sufficient to create a genuine issue of material fact.

ELECTION LAW—TITLE 18

***Lestage v. Harris*, 18-842 (La.App. 3 Cir. 11/8/18), 261 So.3d 12 (Savoie, J. writing; Pickett and Ezell, JJ).**

James R. LeStage in His Official Capacity as District Attorney of the Thirty-Sixth Judicial District, Beauregard Parish, filed suit against Michael Dwayne Harris, alleging that Mr. Harris failed to meet the domicile and residency requirements of his office of councilman at

large for the city of DeRidder, Louisiana. The trial court found in favor of DA LeStage, declaring Mr. Harris's seat vacant. Mr. Harris appealed.

Affirmed. This case involved the interpretation of the city's charter and La.R.S. 18:671-675. We had to determine whether Mr. Harris met the legal domicile requirements *and* "actually resided" in the city a year before he filed his qualifying papers, pursuant to city charter Section 2-04(1), *and* whether he currently continues to meet the *legal domicile* requirement *and* the requirement to *actually reside* in the city of DeRidder, pursuant to Section 2-04(2) of the city's charter. After a review of the evidence, it was determined that Mr. Harris's legal domicile was not in the city of DeRidder.

EXPROPRIATION & TAKING

***Acadian Gas Pipeline Sys. v. McMickens*, 18-337 (La.App. 3 Cir. 2/13/19), 263 So.3d 524 (Kyzar, Judge writes):**

The plaintiff, owner of a gas pipeline, sought to expropriate a non-exclusive 19,000 foot right of passage over a 1,405 acre tract of land owned by the defendants. The plaintiff already owned a servitude over the southern-most portion of the defendants' property for its gas pipeline. After the pipeline was built, the plaintiff started using, with the defendants' permission, a non-improved route across the defendants' property in order to conduct twice-yearly maintenance on the cathodic protection test leads located on the defendants' property. On one occasion, the defendants denied access to the plaintiff's maintenance personnel based on the plaintiff's failure to settle an unresolved timber damages claim dating from the construction of the pipeline. Based on this denial, the plaintiff determined that it needed to acquire a second right of passage. Although it considered several routes, the plaintiff ultimately chose the defendants' unimproved route because it would be less expensive, safer, and more efficient to use the route already in existence. The other route under consideration, the route over the plaintiff's pipeline servitude, although it was less than a mile in length, would be more expensive because it would cross two water ways and would require permits to build bridging. Based on the possible expense, the plaintiff did no further research into using this route. Following a trial on the merits, the trial court held that the plaintiff acted arbitrarily, capriciously, and in bad faith in seeking a servitude over the defendants' property. The plaintiff appealed.

Affirmed. On appeal, the court affirmed the trial court's judgment. After reviewing the record in its entirety, the court affirmed the trial court's finding that the plaintiff simply wanted to take the easiest and least expensive route over the defendants' property and that the ultimate decision by the defendant was prompted by the timber damage dispute and not the actual need for a permanent route.

IMMUNITY

***Fortner v. Lewis*, 18-638 (La.App. 3 Cir. 2/27/19), 266 So.3d 552. (Panel: Conery, Judge writing; Ezell, Gremillion, Kyzar, and Perry Judges).**

This case involved an accident which occurred on January 24, 2014 at approximately five o'clock in the morning on a portion of Interstate 10 in Jefferson Davis Parish. Mr. Donald Fortner was traveling eastbound when allegedly due to an icy roadway, he lost control of his vehicle and crossed into the westbound lane where he was struck by an eighteen wheeler and killed. The National Weather Service had previously issued weather advisories and freeze warnings due to the likelihood of a major ice storm affecting the roadways in Jefferson Davis Parish. In response the Louisiana Department of Transportation and Development (DOTD) sprayed potassium acetate on Interstate 10 at Mile Post 62 at 12:10 a.m. and 1:43 a.m. in order to melt the ice on the roadway in accordance with DOTD's Operations Plan (OPLAN) 13-01, Winter Response, Phase III-Operations. After all other defendants were dismissed, the DOTD filed a motion for summary judgment based on the immunity pursuant to the provisions of the Louisiana Homeland Security and Emergency Assistance and Disaster Act (LHSEADA). The summary judgment was denied by the trial court and the DOTD sought supervisory relief.

Writ Granted and Made Peremptory. Summary Judgment Granted In Favor Of The Department Of Transportation and Development. Case Dismissed. The trial court denied the DOTD's motion for summary judgment on the basis that there were genuine issues of fact as to whether DOTD was entitled to immunity pursuant to La.R.S. 29:735, as the actual signing of a State of Emergency by the Governor did not occur until later in the day of the accident. This court found that the provisions of La.R.S. 29:735(A)(1) granted the DOTD immunity when the agency was "engaged in any homeland security and **emergency preparedness activities**." This court further found that there was no requirement in the statute that a State of Emergency must be declared by the Governor before immunity applied. This determination was based on La.R.S. 29:723(4), which defines "emergency preparedness" as "the mitigation of, preparation for, response to, and the recovery from emergencies and disasters." This court found that DOTD implemented its actual "emergency preparedness activities" in anticipation of the Governor's planned signing of the Declaration of a State of Emergency. DOTD was in fact following its emergency preparedness plan and was entitled to immunity pursuant to La.R.S. 29:735.

INMATE SUITS

***Bossier v. Garber,* 17-349 (On Remand) (La.App. 3 Cir. 12/28/18) 263 So.3d 576, *writ granted and judgment reversed*, 19-146 (La. 4/15/19), 267 So.3d 58 (En Banc: Cooks J. writing; Amy J. recused; Ezell and Perret, JJ. concurred; Saunders, Conery, and Kyzar JJ. dissented).**

Bossier, an inmate in Lafayette Parish jail sued Sheriff Garber and Lafayette Consolidated Government alleging he was injured when he slipped and fell in his jail cell because of water on the floor from nearby showers. Bossier asserted the Handbook governing rules for prisoners does not provide an administrative procedure for filing complaints regarding personal injuries. Sheriff Garber argued that the handbook language is broad enough to cover such complaints and Bossier's failure to timely exhaust his administrative remedy prior to filing suit precluded his ability to proceed in court. Trial court granted Garber's exceptions of prematurity and prescription. Bossier appealed. Third Circuit reversed. Supreme Court granted writs and remanded to Third Circuit for en banc consideration.

Third Circuit sitting en banc reversed the trial court, vacated lower court judgment, and remanded for further proceedings. We found that reference in administrative rule to "operations of the LPCC" plainly referred to actions of "a deputy." Language in rule is ambiguous and does not provide any administrative procedure by which inmate can assert a personal injury claim or seek redress for his injury.

INSURANCE & INDEMNITY

***Baltazar Ortiz v. MeadWestvaco Corporation, et al.*, 18-869 (La.App. 3 Cir. 6/5/19), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Keaty, Judges).**

Employees of JV Industrial Companies, Ltd. (JVI) filed suit against MeadWestvaco Corporation (MWV) for personal injuries arising from their alleged exposure to a high concentration of H2S gas and other dangerous chemicals while working in a MWV refinery. MWV settled these personal injury claims. Then well over three years after the first claim was filed and months after the claims were settled, MWV filed third-party demands against JVI and its insurers, Steadfast Insurance Company (Steadfast) and AIG Specialty Insurance Company (ASIC), seeking contractual indemnity and insurance coverage for the claims asserted against and settled by MWV. The parties then filed several motions for summary judgment.

The trial court granted summary judgment in favor of JVI, Steadfast, and ASIC, finding no contractual indemnity or insurance coverage, and dismissed MWV's claims against JVI and its insurers. In a supplemental judgment, the trial court granted MWV's motion for a new trial, but nevertheless still found MWV was not entitled to indemnity or to coverage under either insurance policy on various grounds and again dismissed, with prejudice, MWV's claims against

JVI and its insurers.

Affirmed. Under de novo review, we first examined the language of the indemnity provision at issue, specifically the first and third sentences. While the first required JVI to indemnify MWV for any claims arising from JVI's negligence, even if MWV was partially at fault, the third sentence expressly provided that MWV would only be entitled to indemnification for claims arising out of JVI's share of liability. Strictly reading the first sentence in conjunction with the third, we could not, therefore, find that the parties expressed, in unequivocal terms, an intent for JVI to indemnify MWV for MWV's own negligent acts or voluntarily assume liability as required by our jurisprudence. And in accordance with our comparative fault law, we further found that, when MWV settled with the plaintiffs, MWV only compensated the plaintiffs for damages resulting from MWV's own negligence, for which JVI owed no contractual obligation to indemnify MWV.

Next, pursuant to the unambiguous provisions of the insurance policies under which MWV sought coverage, we found that any insured seeking coverage under either policy was required to provide the insurer with immediate notice of any claim against the insured and could not voluntarily make any payment on a claim without the insurer's prior written consent. The undisputed facts conclusively established that MWV, as a tactical litigation strategy, intentionally breached its obligations under both policies by (1) settling with the plaintiffs before providing any notice whatsoever to the insurers, and (2) waiting well over three years to notify the insurers of the claims. And as no action taken by either insurer, i.e., denying coverage after settlement or raising policy exclusion defenses, would excuse MWV's intentional breach of the notice and consent provisions, we found that MWV's unilateral decision to settle the underlying claims without any notice to the insurers precluded its ability to recover from either Steadfast or ASIC. While not deciding whether a showing of prejudice was necessary, we nevertheless concluded that, even if a showing of prejudice would be required, Steadfast and ASIC were prejudiced, as a matter of law, by MWV's failure to notify either insurer of the plaintiffs' claims against MWV until years after the underlying claims were filed and months after the settlements were effected.

As these defendants were entitled to judgment as a matter of law on the issues of contractual indemnity and insurance coverage, we affirmed the trial court's judgment (1) granting summary judgment in favor of the third-party defendants on the issues of indemnity and insurance coverage, and (2) dismissing, with prejudice, MWV's claims against JVI, Steadfast, and ASIC.

***Shantanya Thibeaux v. GoAuto Ins. Co.*, 18-333 (La.App. 3 Cir. 3/27/19), 269 So.3d 843 (Conery, Judge writing; Cooks, Pickett, Savoie and Perret, Judges; Cooks, J., dissents and assigns reasons).**

The defendant, GoAuto Insurance Company, (GoAuto) appealed the trial court's partial summary judgment in favor of the plaintiff Shantanya Thibeaux which found GoAuto liable

under the collision portion of Ms. Thibeaux's policy for damages to her 2008 Ford Mustang. The Mustang was involved in a one car accident while being driven by her seventeen year old son, Jairi Thibodeaux. At the time of the accident Jairi was a named excluded driver under the terms of the GoAuto policy issued to his mother, Ms. Thibeaux.

Reversed. The five judge panel found, with one member dissenting, that La.R.S. 32:900(L)(1) expressly permitted named driver exclusions in a policy of automobile insurance in exchange for a reduced premium. The "Named Driver Exclusion Endorsement," (Endorsement) in Ms. Thibeaux's policy, issued by GoAuto, clearly provided there was no coverage under the policy for Jairi, in "consideration of the premium charged." Additionally, the GoAuto policy clearly defined a "Named Excluded Operator," as a person excluded from coverage by virtue of the Endorsement. Finally, the GoAuto policy specifically provided that coverage was excluded for Part E [collision coverage] for any person named as an excluded driver. Therefore, the policy was clear and unambiguous, not subject to any further interpretation, and clearly excluded collision coverage for the one car accident which did not involve third party fault.

***Lopez v. La. Citizens Prop. Ins. Corp.*, 18-841 (La.App. 3 Cir. 3/27/19), 269 So.3d 825 (Keaty, J., writing; Pickett and Perry, JJ.)**

This litigation arises from the theft of a tractor and its attachments from a storage building. The tractor belonged to the Lopezes and at the time of the theft, they had in effect a Dwelling/Builders Risk Policy issued by LCPIC. The Lopezes submitted two claims for the actual cash value of the tractor. LCPIC denied both claims on the basis that "theft" was not one of the named "Perils Insured Against" in the policy. As a result, the Lopezes filed a petition for damages against LCPIC. Both parties subsequently filed cross motions for summary judgment. The trial court granted summary judgment in favor of the Lopezes and denied the summary judgment filed by LCPIC. LCPIC appealed.

Affirmed. The third circuit held that the insurance policy was ambiguous as to whether it covered loss by theft, and thus, the Lopezes were entitled to coverage.

***O'Neal v. Foremost Ins. Co.*, 18-510, 18-599 (La.App. 3 Cir. 2/13/19), 265 So.3d 846 (Keaty, J., writing; Thibodeaux and Cooks, JJ.)**

A woman sustained injuries when her vehicle collided with a tree which had fallen across a road. Plaintiffs filed suit against RLN Investments, LLC, the owner of the property on which the tree was located, and its insurer, RLN Investments, LLC. RLN Investments filed third party demands against Messina Realty, its agent, Don Van Cleef, and Messina Realty's insurer, pursuant to a Property Management Agreement executed between Messina Realty and RLN Investments. Messina Realty filed a Motion for Summary Judgment, and Van Cleef filed a Petition for Declaratory Judgment, based on an indemnity clause in the contract. Following a hearing, the trial court granted both motions via separate judgments. RLN Investments appealed.

Reversed and Remanded. The third circuit held that the trial court erred in granting summary judgment because of conflicting witness testimony surrounding the knowledge and actions of Van Cleef regarding the tree. The third circuit found that there lacked language in the contract showing that RLN Investments intended to indemnify Messina Realty or its agents for damages arising from its own negligence. The third circuit held that Messina Realty and/or Van Cleef is not entitled to recover attorney's fees associated with establishing the right to indemnification based upon the terms of the contract.

***Latour v. Allstate Ins. Co.*, 18-395 (La.App. 3 Cir. 12/28/18), 262 So.3d 1088 (Gremillion, Judge, writing, with Cooks, Amy, Pickett, and Perret, Judges. Cooks, Judge, dissented, joined by Pickett, Judge):**

The Latours' fifteen-month-old child was bitten by another child while in the care of Ms. Derouen, who, in addition to caring for children in her home for compensation, also cared for her grandchildren. Whether the Latour child was bitten by Ms. Derouen's grandchild or by a paying charge was unknown. The Latours filed suit against Ms. Derouen and her homeowner's insurer, Allstate. The Allstate policy contained an exclusion for injuries "arising out of . . .business activities of any insured." The definition of "business" excluded daycare services for an insured's relatives.

Allstate was granted a summary judgment on the issue of coverage. On appeal, we found that whether the Latour's child was bitten by a paying customer's child or Ms. Derouen's grandchild was irrelevant. The policy covered Ms. Derouen for acts or omissions for which she is found legally liable. Thus, her allegedly negligent supervision of the Latour's child arose from her business activity or operating a daycare in her home. Coverage was not afforded under the Allstate policy.

LBCA—LOUISIANA BUSINESS CORPORATION ACT

***Kolwe v. Civil & Structural Eng'rs, Inc.*, 18-398 (La.App. 3 Cir. 2/21/19), 264 So.3d 1262 (Panel: Thibodeaux, Chief Judge, writing; Saunders and Savoie, Judges).**

These consolidated appeals presented this court with *res nova* issues of law interpreting the recently revised Louisiana Business Corporation Act ("LBCA"), La.RS. 12:1-101, *et seq*.

Plaintiff Joseph Kolwe, Jr. was a withdrawing shareholder of Defendant-Appellee, Civil and Structural Engineers, Inc. ("CASE"). He appealed a final judgment of the trial court which fixed the fair value of his shares at contradictory amounts of $871,817.00 and $587,187.00. The judgment was then amended *sua sponte* by the trial court to a decisive figure of $871,817.00. This Amended Judgment formed the basis of Mr. Kolwe's consolidated appeals (Docket No. 18-399), whereby he challenged its validity pursuant to La.Code Civ.P. art. 1951. Mr. Kolwe additionally contends the trial court erred in its conclusion of his effective date of withdrawal

from CASE and also in its failure to award interest on the amount of his shares as valued. CASE answered the appeal challenging the trial court's determination of the fair value of Mr. Kolwe's shares in the corporation. Specifically, it asserted that the trial court erred in declining to tax-effect Mr. Kolwe's shares, in including proceeds of a settled claim awarded to CASE in its valuation determination, and in allegedly refusing to consider evidence of undue burden pursuant to La.R.S. 12:1-1436(E).

Affirmed. We amended the original judgment to conform to the statutory framework contemplated by the LBCA and, as amended, affirmed the trial court's judgment valuing Mr. Kolwe's interest to be worth $871,817.00 as of November 29, 2015. Additionally, Mr. Kolwe was awarded interest on this sum as of the date CASE's obligation to pay him the fair value of his shares arose by virtue of the final judgment issued on December 22, 2017. We went on to interpret the meaning of "fair value" as contemplated by the LBCA, and in doing so, distinguished fair value from its counterpart, "fair market value," to hold that Louisiana's conception of fair value explicitly rejects any discounting at the shareholder level. Thus, we affirmed the trial court's decision to not "tax-effect" the value of the corporation, as well as its decision to include the settlement proceeds in the valuation. Finally, we found CASE's arguments with respect to the interpretation of La.R.S. 12:1-1436(E) to be without merit based on plain reading of the statute.

***Kolwe v. Civil & Structural Eng'rs, Inc.*, 18-399 (La.App. 3 Cir. 2/21/19), 264 So.3d 1262 (Panel: Thibodeaux, Chief Judge, writing; Saunders and Savoie, Judges).**

The Amended Judgment issued on January 3, 2018, formed the basis of Docket No. 18-399. Because it was declared an absolute nullity in Docket No. 18-399, we reversed the trial court's judgment and instead reinstated the original final judgment issued on December 22, 2017, as revised to conform with the LBCA and to remove any internal inconsistencies therein.

MARITIME/JONES ACT

***Don Caldwell and Sheronda Caldwell v. St. Charles Gaming Co. d/b/a Isle of Capri Casino-Lake Charles* (Saunders, J., writing, En Banc, Pickett, J., dissents with Gremillion, J., Kyzar, J., concurs with Perry, J.) 18-868 c/w 18-915 (La.App. 3 Cir. 7/3/19), ___So.3d__.**

This case involves injuries allegedly sustained while operating a scissor lift on a riverboat casino moored in Lake Charles. Plaintiffs filed suit against the defendant/employer under the Jones Act. The defendant/employer filed a motion for summary judgment on the basis that Plaintiff was not a Jones Act seaman at the time of the incident, because he had no connection to a "vessel in navigation" that was substantial in nature and was never exposed to the perils of the sea. Likewise, the Plaintiffs filed a cross motion for summary judgment on the basis that the

riverboat casino was a vessel at the time of the incident for the purposes of their Jones Act claim. Both motions were denied by the trial court.

Held: 18-868 ***Writ Denied*** and 18-915 ***Writ Granted and Made Peremptory***.

The court found the U.S. Supreme Court's decisions in *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 125 S.Ct. 1118 (2005), and *Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 133 S.Ct. 735 (2013) were controlling. As such, if found that the riverboat casino was a vessel at the time of the incident. Accordingly, the court granted the Plaintiffs' writ, and the defendant's writ was denied. The matter was remanded to the trial court for further proceedings in accordance with the court's ruling.

This case departed from decisions reached in *Benoit v. St. Charles Gaming Company, Inc.*, 17-101 (La.App. 3 Cir. 11/8/17), 230 So.3d 997, *writ denied*, 17-2051 (La. 2/2/18), 233 So.3d 615, *cert. denied*, ___ U.S. ___, 139 S.Ct. 104 (2018) and *Lemelle v. St. Charles Gaming Co., Inc.*, 11-255 (La.App. 3 Cir. 1/4/12), 118 So.3d 1, *writ denied*, 12-339 (La. 4/27/12), 86 So.3d 627, *cert. granted, judgment vacated*, 568 U.S. 1141, 133 S.Ct. 979 (2013). In *Benoit*, this Circuit found that the same riverboat casino was NOT a vessel under general maritime law based, in part, on how frequent the riverboat was used in navigation. Here, the court found especially relevant, as dissenting opinions did in *Benoit*, that the riverboat was designed for navigation, was capable of navigation, and had been used in navigation. The court here found especially poignant, the dissent in *Lemelle* wherein it was iterated that the main and binding authority on this issue is 1 U.S.C. § 3.

MEDICAL MALPRACTICE

***Thomas v. Reg'l Health Sys. of Acadiana*, 18-215 (La.App. 3 Cir. 2/27/19), 266 So.3d 354 (Kyzar, Judge writes; Saunders and Savoie, JJ; Keaty and Gremillion, JJ. dissent):**

Plaintiffs filed suit against a non-certified pediatric cardiologist and several hospitals following the premature birth of her daughter. During her daughter's hospitalization, the doctor ordered and interpreted eight echocardiograms, which revealed a large patent ductus arteriosus (PDA) with a large left to right shunt. Once the child was transferred to another hospital, the same doctor interpreted three more echocardiograms with the same findings, but took no action. After the child's discharge from the second hospital, she remained under the doctor's care. The doctor ordered another echocardiogram, which revealed a moderate PDA, with a left to right shunt. The child was readmitted to the second hospital, suffering from low oxygen saturation levels. While there, she was examined by a board certified pediatric cardiologist, who diagnosed artery hypertension. Because she was experiencing a pulmonary hypertensive crisis, the child was air-lifted to a New Orleans hospital, where was underwent a heart catheterization to close the PDA. Plaintiffs filed a medical malpractice suit against the hospitals and the non-certified cardiologist. They further filed suit against the hospitals based on negligent credentialing. The

hospitals filed exceptions of prematurity, asserting that plaintiffs' claims sounded in malpractice, not tort, which the trial court granted. Plaintiffs appealed.

Reversed and Remanded. On appeal, the court held that, based on statutory construction, decisions involving the hiring or retention of a physician are not included within the definition of malpractice and, thus, are excluded from the procedural framework of the LMMA. Also, credentialing was specifically excluded from the definition of malpractice. It held that the hiring and retention of a physician are the same as the credentialing and recredentialing of the physician. Thus, the court held that plaintiffs were not required to first submit their claim to a medical review panel. The court further held that five of the six *Coleman* factors weighed in favor of finding that plaintiffs' claims sounded in general negligence as opposed to medical malpractice. The court held that recredentialing was the same as credentialing, which encompassed the evaluation of a physician's personal, educational, and skills background in determining whether a physician should be allowed to care for patients within the walls of the hospital.

***Cooley v. Dr. Ernesto Kufoy,* 18-375 (La.App. 3 Cir. 12/6/18), 261 So.3d 68 (Thibodeaux, Chief Judge writing; Cooks, and Amy, Judges).**

Plaintiffs, June and Dwayne Cooley, filed suit against Dr. Ernesto Kufoy for his alleged malpractice in treating Ms. Cooley with excessive psychotropic pharmaceutical intervention. Dr. Kufoy filed a motion for summary judgment on the ground that Plaintiffs had no expert to carry their burden of proof. After twice continuing the hearing, the trial court ultimately granted Dr. Kufoy's motion, specifically noting that Plaintiffs presented no evidence in opposition.

Affirmed. Reviewing the record, we found Dr. Kufoy was entitled to judgment as a matter of law because, in the absence of expert evidence in support of their claims, Plaintiffs had not proven that they could meet their burden of proof at trial. Accordingly, we affirm the trial court judgment.

NHWA—NEW HOME WARRANTY ACT

***Betancourt v. Trahan*, 18-1002 (La.App. 3 Cir. 6/5/19), __ So.3d __(Panel: Keaty, J. writing; Thibodeaux and Saunders, JJ.)**

Plaintiff purchased a newly constructed home from Defendant, Marcus Trahan d/b/a Redmarque Construction, LLC, on January 3, 2011. She filed a Petition for Damages against Defendant in late 2011 under the Louisiana New Home Warranty Act (NHWA) alleging "various defects, including, but not limited to" a stain on the granite kitchen countertop. In a First Supplemental and Amended Petition filed in September 2015, Plaintiff sought to add a paragraph to her original petition regarding alleged defects in the home in addition to and unrelated to those involving the countertop. Plaintiff also sought to add a request for attorney

fees. Defendant filed an Exception of No Cause of Action and Peremption wherein it sought dismissal of Plaintiff's supplemental petition on the grounds that her claims were perempted by the express terms of the NHWA. The trial court granted the exception, dismissed the supplemental petition, and later designated the judgment as final and immediately appealable. Plaintiff appealed.

Affirmed as amended. The NHWA states that "[E]very builder warrants the following to the owner: (1) One year following the warranty commencement date, the home will be free from any defect due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards." La.R.S. 9:3144(A). The NHWA additionally provides, however, that:

> Before undertaking any repair himself or instituting any action for breach of warranty, the owner shall give the builder written notice, by registered or certified mail, within one year after knowledge of the defect, advising him of all defects and giving the builder a reasonable opportunity to comply with the provisions of [the NHWA].

La.R.S. 9:3145(A). The NHWA explicitly states that "[a]ny action to enforce any warranty provided in this Chapter shall be subject to a peremptive period of thirty days after the expiration of the appropriate time period provided in R.S. 9:3144." La.R.S. 9:3146.

Upon review, we found no error in the trial court's determination that the allegations of the supplemental petition regarding defects unrelated to the countertop were perempted as they had not been timely brought to the attention of the builder. Nevertheless, we amended the appealed judgment to the extent that it dismissed Plaintiff's entire supplemental petition rather than only the portion seeking damages for defects unrelated to the countertop.

ORAL AGREEMENTS

***Mason v. Mason*, 18-299 (La.App. 3 Cir. 11/7/18), 260 So.3d 609 (Keaty, J. writing; Ezell and Kyzar, JJ.)**

Former husband filed a motion to enforce a provision of his divorce judgment giving him a portion of his former wife's retirement. Former wife opposed the motion, arguing that they had entered into a subsequent oral agreement whereby former husband relinquished his interest in her retirement in exchange for her dismissal of an action against him to collect past-due child support. Following a hearing, the trial court rendered judgment denying former husband's motion. Former husband appealed.

Affirmed. Former wife proved by preponderance of the evidence that she and former husband entered into a valid subsequent verbal agreement modifying divorce judgment whereby

former husband relinquished his interest in her retirement account in exchange for her dismissal of an action against him to collect past-due child support. Although the former spouses offered conflicting testimony regarding terms of verbal agreement, former wife offered several exhibits in support of assertions, and former wife's mother's testimony corroborated former wife's account of former husband initiating the oral agreement because he was unable to obtain a loan. Thus, we found no manifest error in the trial court judgment.

We also found that former husband failed to preserve for appellate review his argument that verbal agreement modifying divorce agreement was unjust enrichment, where former husband raised argument for first time on appeal.

PREMISE LIABILITY

***Owens v. McIlhenny*, 18-754 (La.App. 3 Cir. 3/27/19), 269 So.3d 839 (Ezell, J. writing; Thibodeaux, Chief Judge and Conery, J.)**

John Owens went with wife and family to visit Jungle Gardens at Avery Island on February 16, 2016. After touring other areas of the gardens, the group went to the Palm Garden area. Mr. Owens stepped onto a concrete pad on a pathway and began to fall. He broke his fall be stretching out his hands. In the process, Mr. Owens severely injured both his wrists, which required surgery. He also alleged he injured his neck and back.

Mr. Owens filed suit against McIlhenny Company and Jungle Gardens on January 9, 2017. The Defendants filed a motion for summary judgment on May 24, 2018. A hearing was held on July 18, 2018. At the conclusion of the hearing, the trial court determined that the Defendants were entitled to summary judgment under La.Civ.Code art. 2317.1. Mr. Owens appealed the judgment.

Affirmed. The trial court concluded that the Defendants had no knowledge of the ruin, vice, or defect, or even that there was a defect. The trial court concluded that the Defendants did not fail to exercise reasonable care and that Mr. Owens tripped on his own accord. Therefore, the trial court found that Mr. Owens failed to provide proof of any of the elements other than custody of the concrete pad that Mr. Owens slipped on.

Mr. Owens' deposition testimony revealed that he had been to the gardens several times before this incident. On this particular day, the weather was nice. He noticed, as he walked on other concrete pads, that some of them would shift. He had no problem seeing the pads. His wife stepped on the pad before him with no problem. He testified that he put his left foot down on the back part of the pad and fell. He was injured when he braced his fall with his hands. He stated that he would not have fallen if he stepped on the middle of the pad as his wife did. Mr. Owens did not tell anyone at the gardens about his accident nor report that the pads had issues.

Mr. Owens acknowledged that he had stepped on previous concrete pads that wiggled, so he knew he had to be careful. He also agreed that if you stepped in the middle, the pad would not wiggle, yet he chose to step on the edge which is when he fell. These pads were located on walking trails in an outdoor natural environment where common sense dictates that that surfaces will be uneven. Even Mr. Owens acknowledged that it would have been "ridiculous" to report to the anyone that the concrete pads would wiggle. He did not even report the incident after he fell. As such, there is no evidence that the Defendants had any notice that the concrete pads would wiggle. Therefore, summary judgment was appropriate under La.Civ.Code art. 2317.1.

***Pierite v. DG Louisiana, LLC.*, 18-149 (La.App. 3 Cir. 11/7/18), 258 So.3d 901 (Savoie, J. writing; Ezell and Gremillion, JJ).**

Plaintiff Pierite alleged that he was injured at a Dollar General store when he slipped and fell in a liquid substance on the floor. After denying Dollar General's motion for involuntary dismissal, and proceeding with evidence, the trial court ultimately found Dollar General solely liable to Pierite and awarded $30,000 in general damages, as well as special damages. Dollar General appealed, arguing that the trial court erred in denying its motion for involuntary dismissal and in finding Dollar General liable.

Reversed and Rendered: In connection with an appeal the denial of a motion for involuntary dismissal under La.Code Civ.P. art. 1672(B), there is nothing for the court to review given that the denial is purely discretionary. However, the trial court was manifestly erroneous in concluding that Pierite sufficiently proved the existence of a condition or hazard that imposed an unreasonable risk of harm (i.e. liquid on the floor), or that Dollar General had actual or constructive notice of a hazard, as required by La.R.S. 9:2800.6(B). Mr. Pierite testified that he did not see anything on the floor at the time of the incident, but that when he stood up after falling, his clothing was wet and there were "skid marks" on the floor from his "slipper." However, the objective evidence in the record, namely, the video surveillance footage of the incident in question, was insufficient to establish the existence of a hazardous condition prior to the fall or constructive notice on the part of Dollar General. Specifically, the fifty-minutes of video footage prior to the fall fails to positively establish the presence or source of any liquid or slippery substance on the floor. While a child is shown carrying a cup in the area forty-five minutes prior to Pierite's fall, there was no indication that anything spilled from the cup, and nothing to suggest that any liquid left by the child's cup on the floor of the high-traffic area would still be on the floor forty-five minutes later. Similarly, the video footage fails to establish that anyone else slipped or attempted to clean the area during the fifty-minutes prior to the fall.

***Stelly v. City Club at River Ranch*, 18-560 (La.App. 3 Cir. 12/12/18), 261 So.3d 109 (Gremillion, Judge, writing, with Pickett and Conery, Judges):**

Mrs. Stelly alleged that on June 22, 2015, she drove to the City Club at River Ranch (CCRR) to receive a spa treatment. She parked at a space along the sidewalk adjacent to the spa's building. She removed some packages from her car and placed them on the sidewalk.

Noting obstructed Mrs. Stelly's view of the sidewalk, and she had been to the spa many times before. As she attempted to mount the curb, Mrs. Stelly's foot slipped and she fell.

The Stellys filed suit against CCRR. CCRR filed a motion for summary judgment in which they asserted that the sidewalk represented an open and obvious condition that did not pose an unreasonable risk of harm. In support thereof, CCRR attached Mrs. Stelly's deposition. The Stellys opposed the motion with the affidavit or Mr. Moran, a civil engineer, who opined that the sidewalk elevation violated the "Standard Practices for Safe Walking Surfaces," ASTM F1637, because the surface elevation change between the parking lot and the sidewalk was 8 ½" to 9", and was not delineated by visual cues such as signage, lighting, or contrasting paint. We held:

> Mr. Moran's opinion is that the elevation change was excessive and should have been differentiated by a visual contrasting paint or lighting or signage presents a genuine issue of material fact we are unable to ignore. Further, we were not assisted in our inquiry by the omission of any information regarding what cost would be incurred in installing contrasting paint, lighting, signage, or other means of drawing a pedestrian's attention to the elevation change.

Id. at p. 5. In the footnote, we rejected the Stellys' suggestion that any elevation change above that contained in the Standard Practices constitutes a *per se* unreasonable condition.

PRESCRIPTION

***Kevon Brooks v. Rachelle Meaux, M.D.,* 18-980 (La.App. 3 Cir. 6/12/19), _ So.3d _ (Panel: Conery, Judge; Thibodeaux, Chief Judge and Gremillion, Judge).**

The plaintiff filed a medical malpractice action against the defendant obstetrician following his wife's death in the thirty-eighth week of her pregnancy. The plaintiff alleged that the defendant failed to properly diagnose and treat his wife's fatal condition, Peripartum Cardiomyopathy, although she had complained of shortness of breath and swelling of her lower extremities at a visit on the day preceding her death. The defendant filed an exception of prescription, noting that the suit was not filed until more than one year after the plaintiff's wife's date of death. The plaintiff argued in opposition that the prescriptive period did not commence until after his receipt of an autopsy report and an attached article relating to cardiomyopathy. The trial court sustained the exception and dismissed the suit. The plaintiff appealed.

Reversed and Remanded. The trial court erred by finding that the matter was prescribed on the face of the petition. Rather, the allegations of the petition indicated that the plaintiff did not discover the malpractice cause of action until the delivery of the autopsy report approximately two months after the death. Specifically, an article accompanying that report allowed the plaintiff to correlate the symptoms of Peripartum Cardiomyopathy with complaints

that his wife made to the defendant the day before her death. It was not until that correlation, he alleged, that he had reason to suspect malpractice. The panel concluded that the delay in discovery was reasonable under the circumstances. Accordingly, pursuant to the supreme court's analysis in *Campo v. Correa*, 01-207 (La. 6/21/02), 828 So.2d 502, the plaintiff's discovery of malpractice, not the date of death, commenced the prescriptive period. The panel therefore found that the exception of prescription was without merit.

***Guidry v. ABC Trucking Co.*, 18-587 (La.App. 3 Cir. 3/7/19), 269 So.3d 965 c/w *La. Scrap Metal Recycling v. Larsen Intermodal Servs., Inc.*, 18-588 (La.App. 3 Cir. 3/7/19), 269 So.3d 965 (Panel: Thibodeaux, Chief Judge, writing; Gremillion, and Kyzar, Judges).**

Melvin and Triege Guidry filed suit against Larsen Intermodal Services, Inc. ("Larsen") seeking damages for injuries Mr. Guidry sustained while loading/unloading metal products from a tractor/trailer truck. Because the injury was sustained in the course and scope of his employment, Mr. Guidry also filed a workers' compensation claim against his employer, Louisiana Scrap Metal Recycling (Louisiana Scrap). The Guidrys' suit against Larsen was subsequently dismissed on Larsen's exception of prescription. Thereafter, Louisiana Scrap and its workers' compensation insurer, The Hartford Fire Insurance Company (Hartford), filed a petition of intervention, seeking to intervene in the Guidrys' dismissed suit and requesting reimbursement from Larsen for compensation paid to Mr. Guidry. At the same time, Louisiana Scrap/Hartford filed a separate suit directly against Larsen, likewise seeking reimbursement for compensation paid to Mr. Guidry. Larsen filed exceptions of prescription in both suits. After a hearing, the trial court granted the exceptions. Louisiana Scrap/Hartford appealed the judgment, dismissing their intervention, in docket number 18-587, and the judgment, dismissing their separate suit, in docket number 18-588. Upon Larsen's motion, this court consolidated the two appeals.

Affirmed. After reviewing the record and applicable case law, we found that the trial court did not err in granting Larsen's exceptions of prescription. According to the petition, the accident giving rise to Mr. Guidry's injuries occurred on August 2, 2012, but Louisiana Scrap/Hartford did not file their petition against Larsen until July 15, 2014, almost two years later. As a result, it was apparent from the face of the petition that prescription had run, and so Louisiana Scrap/Hartford had to show that their action had not prescribed. To do so, they argued that, because Louisiana Scrap and Larsen were solidarily obligated to Mr. Guidry, Mr. Guidry's timely-filed workers' compensation claim against Louisiana Scrap filed in April 2013 interrupted prescription on Louisiana Scrap's/Hartford's suit against Larsen. As authority, Louisiana Scrap/Hartford relied exclusively on *Williams v. Sewerage & Water Board of New Orleans*, 611 So.2d 1383 (La.1993), which we distinguished from the instant case in that the *Williams* court specifically held that the plaintiffs' timely-filed suit against an employer for workers' compensation interrupted prescription as to the plaintiffs' claim against a third-party tortfeasor. We further refused to extend the *Williams* holding to allow an employee's/plaintiff's timely-filed workers' compensation claim against his employer/defendant to interrupt prescription as to the employer's/defendant's claim for reimbursement against the third-party tortfeasor. Rather, in

accord with our holding in *Deculus v. Augenstein Construction Co., Inc.*, 425 So.2d 315 (La.App. 3 Cir. 1982), *writ denied*, 430 So.2d 658 (La.1983), we found that because neither the employee nor the employer properly asserted a claim against Larsen within the one-year prescriptive period that would serve to interrupt prescription, Louisiana Scrap's/Hartford's right to assert their claim for reimbursement against Larsen had prescribed. Based on this reasoning, we found the trial court properly dismissed Louisiana Scrap's/Hartford's separate suit against Larsen on the basis of prescription.

***Aiola v. State Farm Mut. Auto. Ins. Co.*, 18-524 (La.App. 3 Cir. 2/20/19), 264 So.3d 1205 (Gremillion, Judge writing, Cooks and Keaty Judges.)**

Plaintiff was injured in an automobile accident. He settled with the driver for the $50,000 policy limit. Plaintiff sued his own UM insurer but the trial court granted State Farm's exception of prescription. Plaintiff's UM insurer tendered the $5,000 med pay payments but nothing else.

Affirmed. Actions against UM carriers are subject to a 2-year prescriptive period. La.R.S. 9:5629. The payment of a med-pay payment does not interrupt prescription nor serve as acknowledgement and the plaintiff offered no other evidence to suggest that State Farm acknowledged his claim such that prescription would be interrupted. Accordingly, the trial court's judgment was affirmed.

***Porche v. Sutherlands Lumber & Home Ctr., Inc*., 18-551 (La.App. 3 Cir. 2/13/19), 265 So.3d 56 (Keaty, J. writing; Cooks and Gremillion, JJ.)**

Porche, the original plaintiff, was injured on September 8, 2008, and filed suit against the defendants on September 4, 2009. Porche died on May 23, 2012, and in January 2013, his mother, two sisters, and niece filed a motion to be substituted as parties plaintiff in Porche's personal injury lawsuit. In November 2017, the defendants filed peremptory exceptions of peremption and prescription in which they asserted that any potential wrongful death cause of action arising in favor of substituted party plaintiffs with regard to Porche had prescribed, as no such claim had been brought within one year of his May 2012 death. The trial court entered judgment granting defendants' exception of prescription and dismissing substituted party plaintiffs' wrongful death claims as prescribed. Substituted party plaintiffs appealed.

Affirmed and Remanded. The right to bring a wrongful death action "prescribes one year from the death of the deceased." La.Civ.Code art. 2315.2(B). Porche died on May 23, 2012; thus, any right of action pertaining to his wrongful death prescribed on May 23, 2013. When Porche's mother, died in 2014, she had not asserted a wrongful death claim in regard to her son. Accordingly, she possessed no wrongful death claim to assign to the remaining substituted party plaintiffs while she was alive or to transmit to the remaining substituted party plaintiffs by testament upon her death. In addition, the remaining substituted party plaintiffs admittedly did not file an amending and supplemental petition in which they attempted to set

forth any wrongful death claims until December 27, 2017, long after any such claims had already prescribed. Accordingly, the trial court did not err in determining that substituted party plaintiffs' wrongful death claims were prescribed. Because substituted party plaintiffs' survivor claims remained viable, we remanded the matter to the trial court for further proceedings.

***Fils v. Starr Indem. & Liab. Co*., 17-896 (On Rehearing) (La.App. 3 Cir. 2/4/19), 263 So.3d 1157 (Cooks, Ezell, Savoie, JJ).**

Plaintiff claimed injuries and personal damages as a result of an August 28, 2013 accident and filed suit on August 27, 2015, against the insurer seeking additional UM benefits. Plaintiff alleged his medical expenses alone exceeded the $45,000.00 amount tendered to him by the insurer. Asserting the insurer was acting in bad faith, Plaintiff sought penalties and attorney fees pursuant to La.R.S. 22:1973 and La.R.S. 22:1892 for the insurer's alleged bad faith refusal to pay his UM claim. The original petition had not included any allegations of bad faith on the part of the insurer.

In response, the insurer filed a peremptory exception of prescription, maintaining the bad faith claim was barred by the prescriptive period of one year from the time suit was filed seeking damages under the UM policy provisions. The trial court ruled in the insurer's favor granting the exception of prescription, dismissing the bad faith claims with prejudice. Because neither La.R.S. 22:1973 and La.R.S. 22:1892 set forth a specific prescriptive period, the cause of action must be governed by either La.Civ.Code art. 3492's prescriptive period of one year for delictual actions or La.Civ.Code art. 3499's prescriptive period of ten years for actions arising out of a contract between the parties. The jurisprudence was split on this issue.

On rehearing, this court examined the jurisprudence from both the state and federal courts on this issue. Of particular importance, the court in *Fils* noted La.R.S. 9:5629 provides that UM claims are subject to a two-year prescriptive period. Thus, to find that UM bad faith claims prescribe after one year from the first act of bad faith, would potentially force plaintiff attorneys to file suit in order to protect their client's interests against a UM carrier within the one-year period from the accident or the date the defendant possibly acted in bad faith, even though the two-year prescriptive period on the underlying claim has not run. The court in *Fils* determined that "bad faith" claims are derived from the obligations the insurer assumed by nature of the insurance contract between the two parties--a duty the Louisiana Supreme Court stated "is an outgrowth of the contractual and fiduciary relationship between the insured and insurer." *Theriot*, 694 So.2d at 187. Therefore, the court concluded the ten-year prescriptive period for personal actions provided in La.Civ.Code art. 3499 applies, and the trial court erred in dismissing Plaintiff's bad faith claims.

PROCEDURE

***The New Iberia Buddhist Temple v. Sikang*, 18-261 (La.App. 3 Cir. 11/7/18), 258 So.3d 865. (Pickett, J., writing.) Panel: Judges Saunders, Amy, Pickett.**

Following the appointment of a Special Master to hold an election for the board of directors of a non-profit corporation, the trial court determined that the election did not resolve the disputes between competing factions of the corporation. The trial court ordered the corporation dissolved and the assets liquidated for distribution to another charity at the discretion of the trial court.

***Reversed and remanded*:** La.R.S. 12:251 governs dissolution of non-profit corporations. "In this case, no member of the corporation has sought to institute dissolution proceedings, there are no allegations of any creditors, and the Special Master is not a receiver as set forth in La.R.S. 12:258-260. Thus, the trial court committed an error of law in dissolving the corporation involuntarily on its own motion."

PROTECTION ORDERS

***Jasea Ned v. Trenton Laliberte*, 18-999 (La. App. 3 Cir. 6/26/19), ____ So.3d _____ (Panel: Saunders, Judge writing; Pickett and Kyzar, judges)**

Ms. Ned filed for protective order against her husband, Mr. Laliberte, in St. Landry Parish. Mr. Laliberte resides in Fort Bragg, North Carolina, and the matrimonial domicile and household is located in North Carolina. The trial court issued a temporary restraining order and set a hearing to determine whether it should be converted to a protective order. At the hearing, evidence and testimony was given, and the trial court adopted the hearing officer's recommendation and issued a protective order in favor of Ms. Ned against Mr. Laliberte. Mr. Laliberte did not appear at the hearing; there is no evidence of service in the record; the testimony was not recorded; and the record does not contain a narrative of facts by the parties or a narrative of facts or reasons for judgment by the trial court. Mr. Laliberte appealed.

Affirmed. Mr. Laliberte contends that: (1) he is protected against default judgments under the Servicemembers Civil Relief Act (50 U.S.C.A. § 3931), and (2) that the trial court does not have personal jurisdiction over him. We found that the trial court appropriately issued the protective order. We held that when a judgment has been rendered and no note of evidence has been made, "it is incumbent on the party desiring to appeal to secure a narrative." La.Code Civ.P. arts. 2130 and 2131. We held that "in order to obtain a reversal of a default judgment appealed from, or to obtain a remand, defendant must overcome the presumption that the judgment was rendered upon sufficient evidence and that it is correct." Mr. Laliberte did not overcome this presumption, and therefore, we affirmed the trial court's decision.

REAL ACTIONS & LIS PENDENS

***Int'l Fid. Ins. Co. v. Durham*, 18-298 (La.App. 3 Cir. 11/14/18), 261 So.3d 30, *writ denied*, 18-2049 (La. 2/11/19) 263 So.3d 898 (Gremillion, Judge, writing, with Thibodeaux, Chief Judge, and Perret, Judge):**

Mrs. Durham operated a bail bonding company in Beauregard Parish. In June 2014, she and her husband purchased a home in Beauregard Parish. In December 2014, they entered into a court-approved agreement dissolving their community property regime, the terms of which recognized the home as Mr. Durham's separate property. In January 2015, International Fidelity Insurance Company obtained a judgment against Mrs. Durham in New Jersey. This judgment arose from her activities as a bail bondsperson. In April 2015, International Fidelity sought to have the New Jersey made executory in Louisiana. In September 2015, International Fidelity filed suit to annul the Durham's separate property regime. It did not file a notice of *lis pendens*. This suit to annul the separate property regime was resolved by compromise that essentially annulled the separate property agreement. In December 2015, the Durhams (jointly) sold the home to the Mayos. International Fidelity had the Beauregard Parish Sheriff seize the home, and the Mayos and their mortgagor intervened in the suit to make the judgment executory and petitioned the court to enjoin the sale.

The trial court determined that the seizure of the home was improper because International Fidelity had not filed a notice of *lis pendens*. The Mayos were recognized as the owners of the home, subject only to their conventional mortgage, and the sheriff was permanently enjoined from seizing the home as a result of the judgment in favor of International Fidelity, which the court ruled had no interest in it.

On appeal, we agreed that the separate property agreement, which had merely recognized the home as the separate property of Mr. Durham, was an act translative of ownership. By operation of the Public Records Doctrine, La.Code Civ.P. art. 3751, International Fidelity's failure to file a notice of *lis pendens* was fatal to International Fidelity's attempts to seek enforcement of the judgment against the home, regardless of the Mayos' knowledge of the pending suit.

SECURED TRANSACTIONS & SURETYSHIP

***Marks v. Motor City*, 18-548 (La.App. 3 Cir. 2/20/19), 265 So.3d 86 (Gremillion, Judge writing, and Keaty, Judges.)**

The plaintiff appealed the trial court's judgment in her favor relating to the illegal repossession of the vehicle she bought and never made a single payment toward. Plaintiff failed to make two consecutive payments. The day after the second payment was due, she wrote a bad check. Plaintiff was therefore in default under La.R.S. 6:965, and the vehicle was subject to

repossession. If a repossession is extra-judicial, the repossession must be made without a "breach of the peace." Breach of the peace occurs if the debtor contests the repossession. The trial court found that a breach of the peace had occurred, but the plaintiff was not entitled to treble damages under the Louisiana Unfair Trade Practices law because she produced no evidence that defendants had been put on notice by the attorney general.

Affirmed. A "breach of the peace" occurred when plaintiff disputed the taking via her attorney on the phone who told the repossessor that "if he repossessed the car that day, [she] would have a lawsuit filed by 12 noon." Despite defendant's argument that the debtor herself must dispute the taking, we found no error in the trial court's finding that the debtor's attorney can dispute the taking. Next, we found no error in the trial court's refusal to award treble damages when there was only a baseless claim made in appellant's brief that the plaintiff's attorney "testified that she received a carbon copy of the letter sent by the Attorney General to Motor City, putting them on notice that if they did not cease the activity complained of, Ms. Marks would be entitled to treble damages if successful in her action." This claim was completely unsupported by the record and further, there was no other evidence that defendants had been put on notice by the Attorney General before the repossession. Finally, both the dealer/seller and the repossession company were solidary obligors as they worked in concert to repossess the car because the repossessor called the dealership to inquire if he should still repossess the car after talking to the attorney.

***Fidelity Bank v. Vaughn*, 19-47 (La.App. 3 Cir. 6/5/19), ___ So.3d ___. (Panel: Pickett, Judge, writing; Ezell and Savoie, Judges).**

Guarantor appealed the trial court's grant of summary judgment in favor of the plaintiff that purchased assets of bank placed in receivership by the FDIC. The assets included a debt guaranteed by the defendant. In its motion for summary judgment, the plaintiff sought judgment against the defendant as guarantor for two promissory notes on which the maker had defaulted. The defendant did not dispute that he guaranteed the debt but argued the plaintiff engaged in actions that impaired the value of the real property securing the debt, violated its legal obligations of good faith and fairness, and thereby extinguished his suretyship.

Reversed. The defendant's defenses are not barred by *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, as codified in 12 U.S.C. § 1823(e), which provide that "a borrower [cannot assert] against the FDIC (or its assigns) defenses based upon secret or unrecorded 'side agreements' that altered the terms of facially unqualified obligations." *Bell & Murphy & Assocs., Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir.), *cert. denied*, 498 U.S. 895, 111 S.Ct. 244 (1990). As argued by the defendant, covenants such as good faith and fairness are inferred and implicit in every loan agreement and, therefore, "are not secret or unwritten in the the *D'Oench, Duhme* sense." *Texas Refrigeration Supply, Inc. v. FDIC*, 953 F.2d 975, 981 (5th Cir. 1992). The defendant's affidavit established genuine issues of material fact as to whether the plaintiff and its predecessor engaged in actions that extinguished his suretyship.

SERVITUDES

***Carpenter v. Guillory Investment, Inc.*, 18-571 (La.App. 3 Cir. 2/27/19), 266 So.3d 581. (Panel: Perry, Judge writing; Ezell and Kyzar, Judges; Kyzar, Judge, dissenting).**

Mr. Carpenter, a residential landowner, sued Guillory Investment ("Guillory"), an adjoining neighbor, seeking preliminary and permanent injunctions and a declaratory judgment finding a predial servitude by destination of the owner for a residential water line. The water line coursed underground from one of three water meters at the edge of Guillory's property 1100 feet across that property to Mr. Carpenter's residence. At one time both properties were owned by a single individual who extended the water line in question. After conducting a hearing, the trial court found the common predecessor in title of these two estates created a predial servitude, that by virtue of the presence of the water meter on Guillory's property this servitude was apparent under La.Civ.Code art. 741, that the common owner never disavowed the existence of this predial servitude, and thus, Guillory's property was burdened with a water utility service servitude in favor of Mr. Carpenter. Accordingly, the trial court issued a permanent injunction, enjoining Guillory from interrupting water service to Mr. Carpenter.

Affirmed and Remanded. We found no manifest error in the trial court's judgment. In our affirmation, we found the following facts pivotal: the water meter dedicated to the supply of water to Mr. Carpenter's property was visible and constituted a perceivable exterior sign as referenced in La.Civ.Code art. 707; Mr. Carpenter had received a water bill for service to his property from the time of his purchase and Guillory received a separate water bill for water service to his property; and Guillory produced no evidence it had paid for water supplied by the water meter associated with Mr. Carpenter's residence. Applying the provisions of La.Civ.Code art. 741 (creation of a servitude by destination of the owner), and *Comby v. White*, 98-1437 (LaApp. 3 Cir. 3/3/99), 737 So.2d 94, we rejected Guillory's contentions that he had no particularized knowledge that the water meter on his property serviced Mr. Carpenter's residence and that the water meter could not be considered a perceivable exterior sign because it was not located near the common boundary of the two properties. However, we remanded the case to the trial court to amend the judgment. We found that because predial servitudes are charges on estates, it was necessary for the trial court to specifically delineate by property description the servient and dominant estates so burdened.

***Joan Brunson, et al. v. Crown Brake, LLC, et al.*, 18-994 (La.App. 3 Cir. 6/19/19), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Gremillion, and Conery, Judges).**

Joan and Dana Brunson (the Brunsons) sought a declaratory judgment in response to allegations asserted by Crown Brake, LLC (Crown Brake) that a fifty-foot-wide predial servitude, running through the middle of the Brunsons' property in favor of Crown Brake's property, was created in a 2008 Act of Exchange. In response, Crown Brake filed a reconventional demand seeking confirmation of the existence of the predial servitude. Shortly thereafter, the Brunsons amended their petition, joining Cory Close (Close) to the litigation as a

possible party needed for just adjudication, as a landowner whose property could be affected by the alleged predial servitude. After hearing the merits, the trial court found that the Crown Brake property, as the dominant estate, did have servitudes of passage created by the 2008 Act of Exchange across both the Brunson property and the Close property.

Reversed and Rendered. Upon reviewing the record, we initially found that the resolution of the issues herein would be directed by our well-established property law and public records doctrine. As third parties to the 2008 Act of Exchange, the parties herein—the Brunsons, Crown Brake, and Mr. Close—were not allowed, under our public records doctrine, to rely on what was contained in the public record. They could, however, rely on the absence of those interests that, by law, had to be recorded, such as the predial servitude at issue. Moreover, because our public records doctrine denies the effect of certain unrecorded rights, we further reasoned these third parties could only possibly, if even, be bound by what was recorded—the 2008 Act of Exchange and its attachments, namely Exhibit A and the December 9, 2008 plat survey. Our resolution of the rights at issue, therefore, was likewise constrained to these recorded documents. After examining the documents, we found that the ambiguous and non-specific language contained therein was not sufficient to create a predial servitude of passage in favor of the Crown Brake property across either the Brunson property or the Close property. Finding the trial court legally erred in seeking to enforce, upon these third parties, what it determined to be the intent of the contracting parties, we reversed the judgment of the trial court and granted judgment declaring that the 2008 Act of Exchange, as recorded, did not create predial servitudes of passage in favor of the Crown Brake property over either the Brunson property or the Close property.

SPOUSAL SUPPORT

***Randall H. Broussard v. Linda Waggoner Broussard*, 18-635 (La.App. 3 Cir. 3/7/19), 269 So.3d 944 (Panel: Saunders, Judge writing; Keaty and Conery, judges)**

Ms. Waggoner filed for final spousal support against Mr. Broussard. At the close of Ms. Waggoner's case, Mr. Broussard moved for a directed verdict/involuntary dismissal contending that she failed to show any right to relief under the evidence presented. *See* La.Code Civ.P. art. 1672(B). The trial court granted the motion for directed verdict.

Reversed and Remanded. A court has the authority to award final periodic support to "a party who is in need of support and who is free from fault prior to the filing of a proceeding to terminate the marriage." La.Civ.Code art. 111. We noted that our courts have previously found that fault for the purposes of spousal support is synonymous with the fault grounds previously entitling a spouse to separation or divorce, including adultery, habitual intemperance or excess, conviction of a felony, cruel treatment or outrages, public defamation, abandonment, an attempt on the other's life, fugitive status, and intentional non-support. The court heard testimony from the parties and two other witnesses. Mr. Broussard asserted only two fault grounds to which he

attributed causation: abandonment and adultery, neither of which are supported by the record. At the close of Ms. Waggoner's case, when Mr. Broussard moved for involuntary dismissal, the trial court had: (1) Mr. Broussard's testimony that he suspects but does not know that Ms. Waggoner committed adultery and (2) Ms. Waggoner's testimony that she did not commit adultery, which was corroborated by her witnesses.

We disagreed with the trial court's ruling granting Mr. Broussard's motion for involuntary dismissal. We held that Ms. Waggoner made a prima facie showing that she was free from fault in the breakup of the marriage. We reversed the trial court's judgment and remanded the case to the trial court for further proceedings and the presentation of additional evidence, if any, in accordance with law.

SUMMARY JUDGMENT

***White v. Louisiana Dep't. of Transp. & Dev.*, 18-741 (La.App. 3 Cir. 3/13/19), 269 So.3d 1031, *writ denied*, 19-472 (La. 5/22/19), 273 So.3d 311; (Panel: Perry, Judge writing; Pickett and Savoie, Judges).**

Mr. White, who was driving on La. Hwy. 496 in Alexandria, Louisiana, was injured when a pecan tree located in the right-of-way maintained by DOTD fell on his truck during a violent thunderstorm. Mr. White sued DOTD for his personal injuries, contending DOTD had custody of the tree and had constructive notice the tree was defective. DOTD moved for summary judgment, urging that although it had custody of the tree, it could not be liable because it did not have constructive knowledge of the tree's defect. In support of its motion, DOTD submitted three affidavits: (1) from an expert arborist, stating the rot cavity of the tree was a hidden defect not visible from the highway; (2) another from its maintenance supervisor, who performed bi-weekly drive-by inspections of Hwy. 496; his testimony was that he observed no problems with the tree; and (3) excerpts of Mr. White's expert arborist who stated the healthy side of the tree faced the road and even if the tree was defective, it was not recognizable by a lay person. Mr. White opposed the motion with the deposition of his expert arborist and photographs of the tree which he contended showed the tree exhibited signs of disease visible from the road. The trial court granted DOTD's motion for summary judgment, finding: (a) DOTD only had a duty to perform a windshield inspection; (b) Mr. White's expert characterized the tree defect was not visible on the side facing traffic; and (c) any defect of the tree was not in the sight-line of DOTD. On appeal, Mr. White asserted there was a genuine issue of material fact relating to DOTD's constructive notice of the defect.

Reversed and Remanded. We found the trial court accepted the expert testimony of DOTD over the opposite opinion of Mr. White's expert arborist on the critical factual issue of whether the tree's disease was visible from the road. Applying well-recognized jurisprudence that on motions for summary judgment, a trial court is not to evaluate the weight of evidence; rather, its duty is to determine whether a genuine issue of material fact exists and to resolve all

doubts in favor of the non-moving party. Because there was conflicting expert evidence that was supported by the evidence, the trial court erred when it granted summary judgment on the issue of DOTD's constructive notice of the tree defect.

***Broussard v. Gulfport Energy Corp.*, 18-838 (La.App. 3 Cir. 6/5/19), __ So.3d __. (Keaty, J., writing; Cooks and Ezell, JJ.)**

In this personal injury matter, Broussard was working in Calcasieu Lake on a platform owned by Gulfport Energy Corporation. He was inspecting a navigational light on top of a pole when it broke, causing him to fall into the water below and sustain injuries. He filed a negligence action against Wet Tech Lighting, Inc., the service provider allegedly in charge of maintaining the light and pole. Wet Tech Lighting filed a motion for summary judgment, alleging it owed no duty to Broussard because the contract governing the work was executed between Gulfport and Wet Tech Energy, Inc., a separate and different entity from Wet Tech Lighting. The trial court granted summary judgment.

Reversed. The third circuit advised that La.Code Civ.P. art. 966(C)(1)(b) provides that notice of the hearing date on a motion for summary judgment "shall be served on all parties . . . not less than thirty days prior to the hearing." The third circuit held that the record shows that April 16, 2018 is when Broussard's counsel received notice of the hearing scheduled for May 14, 2018. The third circuit held that receipt of the notice was less than thirty days.

***Broussard v. Gulfport Energy Corp.*, 18-839 (La.App. 3 Cir. 6/5/19), __ So.3d __. (Keaty, J., writing; Cooks and Ezell, JJ.)**

Broussard was working in Calcasieu Lake on a platform owned by Gulfport Energy Corporation. He was inspecting a navigational light on top of a pole when it broke, causing him to fall into the water below and sustain injuries. He filed a negligence action against Wet Tech Energy, Inc., the service provider allegedly in charge of maintaining the light and pole. Wet Tech Energy filed a motion for summary judgment. The trial court granted summary judgment.

Reversed. The third circuit held that Broussard was not provided thirty days' notice of the hearing in accordance with La.Code Civ.P. art. 966(C)(1)(b). The third circuit held that Broussard did not agree to waive the thirty-day notice requirement.

***Broussard v. Gulfport Energy Corp.*, 18-840 (La.App. 3 Cir. 6/5/19), __ So.3d __. (Keaty, J., writing; Cooks and Ezell, JJ.)**

On January 21, 2015, Broussard sustained injuries while working on Gulfport Energy Corporation's platform in Calcasieu Lake. He filed a negligence action against Shamrock Management, L.L.C., a contractor. Shamrock filed a motion for summary judgment, alleging that it was not liable because it had no employees working for Gulfport on the date of the incident. The trial court granted summary judgment. On appeal, Broussard alleged that Terry

Benoit was employed by Shamrock on the date of the accident and that his negligent inspections rendered Shamrock vicariously liable. Alternatively, Broussard alleged that Benoit performed negligent inspections before December 2014, during his employment with Shamrock.

Affirmed. The third circuit held that the evidence reveals that Benoit worked for Grizzly—not Shamrock—on the date of the accident. The third circuit held that prior to the accident when Benoit was employed by Shamrock, he had no actual or constructive knowledge of a defect in the light pole.

DeHart v. Jones, M.D., **18-764 (La.App. 3 Cir. 3/27/19), 269 So.3d 801 (Thibodeaux, Chief Judge writing; Ezell and Conery, Judges).**

Plaintiffs Allen, Adrienne, Ashley, and Anissa DeHart appealed the judgment of the trial court granting Lafayette General Medical Center's (LGMC) and Amy Falconer's motions for partial summary judgment, which dismissed both defendants in the underlying civil action.

Vacated; Motion to Strike Granted; Remand. As documented in the record, Plaintiffs were not served with notice of the hearing date on LGMC's and Ms. Falconer's motions for partial summary judgment thirty days prior to the hearing as required by La.Code Civ.P. art. 966(C)(1)(b). Plaintiffs filed motions to strike the partial summary judgment motions for non-compliance with La.Code Civ.P. art. 966(C)(1)(b). The trial court denied the motions to strike, but in an attempt to comply with the notice requirement, it continued the hearing, without Plaintiffs' consent or waiver of notice.

Given the legislature's use of the term "shall" and the principles of procedural due process, we found, however, that the notice requirement set forth in La.Code Civ.P. art. 966(C)(1)(b) was clearly mandatory and that the trial court could not unilaterally dispense with the pre-hearing notice. Because Plaintiffs were not served with notice of the hearing date thirty days prior to the hearing as mandated by La.Code Civ.P. art. 966(C)(1)(b), we found that the trial court was procedurally barred from acting on the motions and vacated the judgment of the trial court granting LGMC's and Ms. Falconer's motions for partial summary judgment. In light of the procedural defect, we further granted Plaintiffs' motion to strike, without prejudice, both partial summary judgment motions and remanded the matter to the trial court. Additionally, in a footnote, we reasoned that although the trial court considered non-compliance with the thirty-day rule of La.Code Civ.P. art. 966(C)(1)(b) as "good cause shown" to continue the hearing, La.Code Civ.P. art. 966(C)(2) presupposes prior and valid compliance with La.Code Civ.P. art. 966(C)(1)(b), which was not done in this case. Therefore, the application of "good cause shown" would render nugatory the mandatory compliance with the thirty-day service requirement and would be too susceptible of arbitrary application by different trial courts.

***Guilbeau v. Liberty Mut. Fire Ins. Co.,* 18-230 c/w 18-231 and 18-232 (La.App. 3 Cir. 3/7/19), 269 So.3d 1002 (Conery, Judge writing; Cooks, Ezell, Savoie and Kyzar, Judges).**

This case involved an accident between three occupants of a St. Landry Parish maintenance dump truck allegedly injured during their employment due to the negligence of defendant. The three plaintiffs were sitting in the parish dump truck for about three minutes while stopped on a public roadway preparing to make road repairs. The dump truck was blocking its lane and partially blocking the adjacent lane of travel when they were struck from behind by the defendant. The three plaintiffs filed a motion for partial summary judgment only on the basis of liability, reserving the issues of medical causation and damages. The trial court granted the plaintiffs' partial motion for summary judgment on the issue of liability finding the defendant 100% at fault, and finding that the large dump truck was clearly visible and no flagman or signalman was required under the circumstances.

Reversed and Remanded. The Defendant appealed claiming there were numerous issues of material fact that precluded the granting of a partial summary judgment in favor of the plaintiffs on the issue of liability. The defendant testified by deposition introduced in opposition to the motion that the parish dump truck was parked on the road in his lane and partially blocking the passing lane. It was stopped with no flashing blinkers or signal and was in the shade at the beginning of a sharp curve when bright sunlight, suddenly appearing from behind the tall trees depicted in photos filed in evidence, suddenly blinded him such that he could not see the truck. Defendant claimed that contrary to their legal duty to do so, plaintiff employees failed to properly put out signs or have a flagman on hand to signal oncoming traffic. We found that the trial judge improperly weighed the evidence and assigned credibility. All contested facts and all inferences of fact must be construed against the non-moving party. See *Boyance v. United Fire and Cas. Co*., 18-886, (La.10/8/18), 253 So.3d 1274.

***Stelly v. Nat'l Union Fire Ins. Co., et al.*, 18-293 (La.App. 3 Cir. 2/6/19), 266 So.3d 395 (Panel: Thibodeaux, Chief Judge writing; Gremillion and Perret, Judges) (Judge Gremillion concurs and assigns reasons; Judge Perret concurs and assigns reasons).**

Plaintiff Joseph Stelly Jr. appeals the trial court's grant of summary judgment in favor of Defendants, National Union Fire Insurance Company, Lexington Insurance Company, Emanuel J. Benoit, Brent C. Singleton, and American Eagle Logistics, LLC. Mr. Stelly was injured as a result of a rear-end collision between Mark Maras and Emanuel Benoit, after which Mr. Maras's vehicle spun into the lane in which Mr. Stelly was traveling as a guest passenger. The trial court found that the evidence presented of Defendants' negligence was insufficient to overcome the rebuttable presumption of Mr. Maras's liability as a following motorist and granted Defendants' joint Motion for Summary Judgment, thereby dismissing Mr. Stelly's personal injury claims against them.

Before the trial court, Mr. Stelly argued that genuine issues of material fact precluded a granting of summary judgment. As a defense to the rebuttable presumption of a following motorist's liability found in La.R.S. 32:81, Mr. Stelly invoked the sudden emergency doctrine which operates to relieve the following motorist of statutory liability upon proving that the driver of the lead vehicle negligently created a hazard which the following motorist could not reasonably avoid. *Leblanc v. Bouzon*, 14-1041 (La.App. 3 Cir. 3/4/15), 159 So.3d 1144. Mr. Stelly introduced evidence that the driver of the eighteen-wheel tractor-trailer, Emanuel Benoit, received a ticket for illegally cutting through a private lot in violation of La.R.S. 32:101(C) and presented expert opinion that had he had not unnecessarily slowed down to do so on the highway, that the rear-end collision could have been avoided. Mr. Stelly also presented evidence demonstrating that the tractor-trailer was not equipped with proper conspicuity devices, in violation of the Federal Motor Carrier Safety Regulations and the Louisiana Administrative Code. Therefore, Mr. Stelly reasoned that because a jury could find that the decreased visibility of the tractor-trailer, and thus the fault of Defendants, contributed to the rear-end accident, summary judgment was improper.

Reversed. Based upon our *de novo* review of the record, we find that reasonable minds could disagree as to whether the fault of following motorist should exclude Defendants' liability for Mr. Stelly's injuries. Given the various pieces of evidence at trial, ranging from conflicting witness testimony to expert accident reconstructions, we conclude that a jury ought to hear such evidence and that the instant case was improperly disposed of through summary judgment.

***Miller v. Shelter Ins. Co.*, 18-216 (La.App. 3 Cir. 1/30/19), 266 So.3d 347 (Savoie, J. writing; Cooks and Conery, JJ.)**

Mr. Miller alleges he was injured as he was walking out of a Lowe's store when a vehicle driven by Mr. Lance Carruth struck him. At the time, Mr. Carruth was reversing his vehicle in the entrance area of store after he had attempted to park there, but was signaled to move by a Lowe's employee operating a forklift. Mr. Miller alleged that his injuries were the result of Lowe's negligence. Lowe's sought a summary judgment dismissal of its claims arguing that Mr. Miller would not be able to prove any negligence on the part of Lowe's because Mr. Carruth's deposition testimony established he "assumed the risk of potentially harming a customer by looking backward and proceeding in reverse." Mr. Carruth testified that he would not have reversed his vehicle had he not been directed to do so, but that he did not rely on the Lowe's employees to determine whether it was safe to move and agreed that it was incumbent upon him to ensure the way was clear to reverse. The trial court granted Lowe's motion and dismissed Mr. Miller's claims, finding that no duty existed on the part of Lowe's.

Reversed and Remanded: Summary judgment on the issue of duty was improper as it was not raised in Lowe's motion. In addition, material issues of fact exist as to whether the Lowe's employees exercised reasonable care. Mr. Carruth's testimony could lead a reasonable factfinder to conclude that, under the circumstances, the Lowe's forklift driver was negligent in

signaling Mr. Carruth to reverse into the path of Mr. Miller, and/or that the efforts of the flagman accompanying the forklift in directing Mr. Carruth, or lack thereof, constitutes negligence. Further, material issues of fact exist as to whether the actions of the Lowe's employee(s) was a cause-in-fact of Mr. Miller's injuries. Mr. Carruth's testimony could lead a reasonable factfinder to conclude that Mr. Carruth's decision to reverse was based upon the actions of the Lowe's employees, and but for their actions, the accident would not have occurred. Similarly, a factfinder could conclude that Lowe's employees' failure to take more action in directing Mr. Carruth while in reverse was a cause-in-fact of the accident.

***Landry v. Joey's, Inc. d/b/a Joey's Specialty Food*, 18-441 (La.App. 3 Cir. 12/12/18), 261 So.3d 112 (Thibodeaux, Chief Judge writing; Cooks and Amy, Judges).**

Plaintiff Therese Landry appeals the trial court's grant of summary judgment in favor of Defendant food store, Joey's Inc. Ms. Landry alleged that she developed food poisoning after consuming a fried shrimp po-boy from Joey's, a lunchtime deli counter in Lafayette, Louisiana. Upon presenting to the emergency room several hours after eating the sandwich, a stool culture taken by Dr. Edward Lyons revealed the presence of the Campylobacter bacterium. As the sole treating physician, the deposition testimony of Dr. Lyons established that Campylobacter was the inciting agent of Ms. Landry's illness. However, when asked to identify the originating source of the bacterium, Dr. Lyons' responded that he has never been able to do such in Ms. Landry's case or that of another patient presenting with Campylobacter. He further opined that he was unaware of Campylobacter being transmitted from seafood, because the bacterium is most commonly present in raw or undercooked poultry, swine, and to a lesser extent, cattle.

Before the trial court, Ms. Landry sought to establish that 1) she consumed food from Joey's food store which was deleterious at the time of purchase, and 2) her consumption of the food caused to develop food poisoning. *See Foster v. AFC Enterprises, Inc*., 04-1014 (La.App. 3 Cir. 3/2/05), 896 So.2d 293. However, Ms. Landry's deposition testimony revealed that she received the wrong order; instead of a fried shrimp sandwich, Ms. Landry received a sandwich containing a mayonnaise-like mixture. Though noting that the sandwich "just didn't taste right," she nevertheless proceeded to eat the entire sandwich without attempting to take up the issue with the food store. Following its Answer, Joey's filed a Motion for Summary Judgment before the trial court, asserting that Ms. Landry failed to satisfy her burden of proving by a preponderance of the evidence either of the elements set forth above. After finding that she failed to present any evidence refuting the sole medical opinion on causation, the trial court granted the motion and dismissed Ms. Landry's claims with prejudice.

Affirmed. On appeal, Ms. Landry argues that there are genuine issues of material fact which preclude the grant of summary judgment. We affirmed the trial court's ruling in favor of Joey's. We find that Ms. Landry has again failed to present evidence of any genuine issue of

material fact. In attempting to establish the deleteriousness of the po-boy sandwich she consumed, Ms. Landry could neither establish the particular sandwich that she ate, nor present any evidence that she had in fact consumed food from Joey's at all. However, even if this court were to infer the deleteriousness of the sandwich per *Foster*, the evidence of any causal relationship between the po-boy sandwich and the Campylobacter found in Ms. Landry's system is notably absent in her analysis.

***Davidson v. Sanders*, 18-308 (La.App. 3 Cir. 12/06/18), 261 So.3d 889 (Gremillion, Judge writing; Thibodeaux and Perret, Judges.)**

The elderly plaintiff purchased a home that she had rented from the defendants for ten years for $174,265.00. The contract specifically set forth that that $50,000 of that price was for the replacement of the Spanish tile roof which the defendants were responsible for. The defendants hired two different companies to replace/repair the roof but it leaked to such an extent that the plaintiff had to leave the residence and move into an apartment. The plaintiff sued the sellers but the trial court found in favor of the defendants granting their motion for summary judgment based on redhibition. It further granted a defendant roofing companies' exception of no cause of action based on plaintiff's failure to follow the warranty.

Reversed. On appeal, we reversed. Plaintiff never claimed her actions were in redhibition; the defendant did. Plaintiff's claims were for breach of contract and rescission. We found that a motion for summary judgment is not the vehicle to change or challenge the nature of the plaintiff's allegations and therefore, summary judgment based on redhibition was inappropriate. Furthermore, redhibition was inapplicable to the facts at hand since both the buyer and seller knew of the defects in the roof prior to the sale.

Additionally, the roofing company's claim that plaintiff had no cause of action was erroneous when it claimed plaintiff voided the warranty when she called another roofing company who performed some of the work since the defendant roofing company contracted with the sellers. Moreover, we made mention of the roofing company's attempt to void the warranty given to the plaintiff who did not hire the two different roofing companies and who contacted the other roofing company at the seller's instruction.

***Vanek v. Robertson*, 18-321 (La.App. 3 Cir. 12/6/18), 261 So.3d 896 (Keaty, J. writing; Savoie and Kyzar, JJ.)**

Real estate broker brought action against commercial-property vendor for breach of contract due to vendor's alleged failure to pay a commission owed under a listing agreement. Vendor filed reconventional demand seeking a refund of commissions paid, and vendor filed a third-party demand against real estate agent once employed by broker. Agent then filed a cross-claim against broker alleging that broker had waived his right to any commission owed on the sale of the property in question. Thereafter, agent filed a motion for summary judgment against

broker and vendor. Following a hearing, the trial court entered partial summary judgment in favor of agent, dismissing broker's claim against vendor's and dismissing all third-party demands against agent as a third-party defendant. Broker appealed judgment, insofar as it dismissed his claim against vendor, claiming that the trial court committed a procedural error in dismissing his claims against vendor where vendor did not file a summary judgment against him.

Affirmed. Upon review, we concluded that the trial court exceeded its authority and committed legal error in dismissing broker's claims upon its granting of agent's motion and that portion of the judgment must be reversed. In all other respects, we affirmed the judgment. We based our decision on La.Code Civ.P. art. 966(F), which provides that "summary judgment may be rendered or affirmed *only as to those issues set forth in the motion under consideration by the court* at that time." (Emphasis added.) We noted that while La.Code Civ.P. art. 862 provides, in pertinent part, that "a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief[,]" Article 862 was not intended to confer jurisdiction on a trial court to decide controversies which the litigants have not raised, as due process requires adequate notice to the parties of the matters which will be adjudicated.

TAXATION

***Lafayette Parish School Board v. Imagine Management, LLC*, 18-531 (La.App. 3 Cir. 3/7/19), 270 So.3d 694 (Panel: Keaty, J. writing; Cooks and Gremillion, JJ.; Cooks, J. concurs)**

The Lafayette Parish School Board, through its Sales and Use Tax Division (the Collector), filed a "Petition for Rule to Show Cause in Summary Sales and Occupancy Tax Proceeding," pursuant to La.R.S. 47:337.61, against the Defendants, Imagine Management, LLC, Cajun Hostel, LLC, and Toby Dore. According to the petition, the Defendants failed to file monthly Lafayette Parish sales and occupancy tax returns and failed to remit any of the taxes collectible from their customers for taxable periods between June 2016 and September 2017. The matter came for hearing, at which the Collector was represented by counsel and Mr. Dore appeared pro se. As of the date of the hearing, none of the Defendants had filed any pleadings into the record. Nevertheless, over objection by the Collector, and despite his having not been sworn in, Mr. Dore was allowed to testify regarding the merits. Thereafter, the trial court remarked that the matter was "very confusing" before denying the judgment sought by the Collector. The Collector appealed.

Reversed and remanded. Louisiana Revised Statutes 47:337.61(2) provides, in pertinent part (emphasis added), that "**All defenses**, whether by exception or to the merits, made or intended to be made to any such claim, **must be presented at one time and filed in the court of original jurisdiction prior to the time fixed for the hearing, and no court shall consider any defense unless so presented and filed**." The record on appeal revealed that Mr. Dore did not follow the procedures outlined in La.R.S. 47:337.61(2), despite his admission that he was

personally served with the Collector's petition. As a result, the trial court should not have allowed him to testify at the hearing. Moreover, while, at first glance, the hearing transcript seemed to indicate that the trial court ruled against the Collector on the merits, upon further review, we were convinced that the trial court failed to issue a ruling on the matter before it, instead directing the Collector to appeal to this court to obtain a ruling on the merits. Because the trial court failed to issue a ruling on the merits, this court had no appellate jurisdiction, and we remanded the matter to the trial court for a rehearing.

***Avanti v. Robinson,* 18-750 (La.App. 3 Cir. 4/17/19), 268 So.3d 1093 (Thibodeaux, Chief Judge writing; Ezell and Conery, Judges).**

In this tax case, the plaintiff taxpayer, Avanti Exploration, LLC (Avanti), disputes additional severance taxes assessed against it by the defendant, Kimberly Robinson, Secretary, Louisiana Department of Revenue (Department). Avanti filed a petition with the Board of Tax Appeals (Board). Both Avanti and the Department filed motions for summary judgment, and the Board found in favor of Avanti. The Department appealed the Board's judgment granting summary judgment to Avanti.

Affirmed. Following our de novo review, we affirmed the trial court, finding no issue of material fact and finding that Avanti was entitled to summary judgment as a matter of law.

As a producer of oil who severed the natural resource from the ground, Avanti was subject to the Louisiana oil severance tax levied under La.R.S. 47:633(7). The statute bases the tax on the value of the oil at the time and place of severance on the lease in the field. The severance tax is calculated on the producer's gross receipts on sales or by the posted field price, whichever is higher. However, if a producer incurs transportation costs in getting his product to market, to a point of sale *off* the lease, he can subtract the transportation costs from his gross receipts and calculate the severance tax on the reduced amount.

After Avanti submitted its severance taxes, the Department audited Avanti and determined that Avanti had sold its oil to two purchasers, *on* the lease, without incurring transportation costs, but nevertheless had reduced its gross receipts by approximately $2.00 per barrel for transportation costs that it did not actually incur. The Department did not show a reduction in Avanti's gross receipts on the sale because there were no reductions. Instead, the Department argued that Avanti and the purchasers had conspired to create contracts that hid the transportation costs in the contract price, which was based upon an average of published oil indices "minus $2.00 per barrel." Thus, according to the Department, the amount that Avanti actually received for its oil was reduced, as was Avanti's tax liability, because Avanti had impermissibly taken the *producer's* transportation deduction that it was not entitled to take. After an exhaustive study of the percentages paid by Avanti for severance tax on the sale of oil from each of its leases, we disagreed, finding that Avanti paid severance taxes on the full amount of funds it received, and it did not impermissibly take the *producer's* transportation deduction. In so finding, we clarified:

> To the extent that a *purchaser* incurred a trucking expense and this became an element of the negotiated price of the oil in an arm's length transaction, that amount appears as just another fluctuating overhead expense in the cost of doing business.

TRUSTS

***In re: Harrier Trust*, 18-324 (La.App. 3 Cir. 1/30/19), 264 So.3d 526 (Judge Kyzar writes; Keaty, J.; Savoie J. dissents):**

The trustee of a trust filed a petition for declaratory action, alleging that her efforts to file an accounting for the trust were impeded by the beneficiary. The beneficiary then intervened in the suit. Subsequently, the trustee amended her petition in order to have the trial court declare that five co-trustees appointed by her were properly appointed in compliance with the provisions of the trust and Louisiana law. The trustee, along with two trustee, then moved for partial summary judgment to have the trial court validate the appointment of the five co-trustees. The trustee then withdrew from the motion and it continued under the two co-trustees. The beneficiary opposed the motion for summary judgment and filed an exception of no right of action, contesting the co-trustees right to join in the partial summary judgment motion. Following a hearing, the trial court denied the exception of no right of action and granted partial summary judgment in favor of the co-trustees. The beneficiary appealed.

Affirmed: On appeal, the court affirmed the trial court judgment, finding that based on the discretion afforded the trustee in the appointment of co-trustees, the beneficiary lacked authority to challenge her appointment of the co-trustees. It further held that there was no genuine issue of material fact as to the trustee's authority to designate the five co-trustees because the co-trustees satisfied La.R.S. 9:1783's requirements that they be natural persons, with the capacity to contract, and that they be citizens of the United States, and the Trust's only requirement that they be disinterested persons. The court further held that the issue of the co-trustees' compensation packages was not ripe for appeal because it was not decided by the trial court. Finally, the court held that the co-trustees did not, per se, become interested trustees just because the trustee provided them with compensation packages for serving as co-trustees.

WORKERS' COMPENSATION

***Burnett v. Village of Estherwood*, 18-846 (La.App. 3 Cir. 5/1/19), ___ So.3d ___. (Panel Pickett, Judge, writing; Keaty, and Perry, Judges).**

Workers' comp claimant sought treatment from a pain management specialist. The claimant had been previously dismissed by two different pain management specialists for misuse

of prescription medications. The trial court allowed the claimant to treat with his choice of pain management specialist, but specifically did not require the employer to pay for prescription medications. Claimant appealed.

Affirmed. We found no error in the trial court's finding that the claimant has a history of misuse of pain medication. Thus, the WCJ's decision was reasonably tailored to address the concerns raised by the employer.

***McCallon v. Key Energy Services, et al.*, 18-880 (La.App. 3 Cir. 4/24/19), 271 So.3d 249. (Panel: Pickett, Judge, writing; Keaty and Perry, Judges).**

Workers' compensation claimant and his employer appealed a workers' compensation judgment raising a number of issues. The employer hired the claimant to work in North Dakota and provided him air transportation from Baton Rouge to Williston, North Dakota and living quarters in North Dakota, as well as paying him compensation for eight hours on the days he traveled to and from North Dakota. The claimant had completed his hitch and was traveling by taxi to the airport in Williston when the taxi was involved in an accident and claimed he was injured the accident. The employer did not pay for transportation to and from the airport in Williston. After a trial, the workers' compensation judge determined, among other things, that the claimant suffered a back injury in the course and scope of his employment and entitled to indemnity and medical benefits, that the claimant waived all compensation benefits after settling a personal injury claim for a back injury caused by another automobile accident that occurred after he returned home without his employers' approval, that the employer was not entitled to a credit for health expenses paid by the claimant's health insurer.

Reversed in part; amended in part; affirmed as amended; and remanded with instructions. The workers' compensation judge did not err in finding that the claimant was injured in the course and scope of his employment because traveling to North Dakota was necessitated by and integral to the claimant's employment, the employer arranged for and paid the claimant's travel; the workers' compensation judge erred in holding that the claimant forfeited all future benefits in contravention of La.R.S. 23:1102(B) because he had the right to preserve his right to future benefits as provided therein. The employer was entitled to have the matter for calculation of the offset it was due for medical expenses paid by the claimant's health insurer.

***Espree v. Vanoil Completion Systems*, 18-932 (La.App. 3 Cir. 6/6/19), __ So.3d __ (Judge Kyzar writes):**

Plaintiff suffered pain at work over two days while lifting heavy sections of pipe. On the third day, he began experiencing debilitating pain and told his supervisor that he needed to see a doctor. At that time, he did not relate his pain to a work-related accident. After seeing a doctor, it was determined that he had suffered a rupture of a periumbilical hernia. Although he could point to no specific incident that caused his hernia, plaintiff related his injury to a big job that he

was working on the week of his injury. Further, although he thought that he had not overstrained at the time, his doctor told him that he had. In his deposition, plaintiff related that he thought that his injury was based on wear and tear of his body over the years of him doing repetitive work. Based on plaintiff's failure to identify an identifiable accident, his employer filed a motion for summary judgment. Plaintiff submitted his affidavit in opposition, which claimed that he suffered a knife-like pain in his lower abdomen and increased back pain while ramming a forty to fifty pound piece of iron into the entry slot of an 800-pound piece of pipe, and that shortly thereafter he was bent over in pain and told his supervisor that he needed medical care. Plaintiff also submitted the affidavit of his brother, a co-worker, who substantiated these facts. Following a hearing on the motion, the WCJ rendered judgment in favor of the employer based on the fact that plaintiff was unable to point to an identifiable accident that caused his hernia.

REVERSED AND REMANDED. On appeal, the court held that despite plaintiff's deposition testimony that his hernia was the result of gradual wear and tear on his body, his and his brother's affidavits presented evidence that he suffered an unexpected actual, identifiable, precipitous event, which happened suddenly or violently, and which directly produced objective findings of a periumbilical hernia. Despite plaintiff being unable to point to a particular incident as evidence of the accident, both he and his brother's affidavits indicate that he began experiencing debilitating pain while ramming a heavy piece of iron into a large pipe. Because this incident involved strenuous efforts on the part of plaintiff, although a usual or customary part of his job, it qualified as a work-related accident. This was true even if plaintiff's hernia preexisted the incident.

***LeBlanc v. Louisiana Department of Education*, 18-760 (La.App. 3 Cir. 3/27/19), __So.3d__, *writ denied*, 19-654, (La. 5/17/19), __So.3d__, (Panel: Conery, Judge, writing; Thibodeaux, Chief, and Ezell, Judges).**

This case involves a Disputed Claim For Compensation (Form 1008) filed by Ladessa Carol LeBlanc (Mrs. LeBlanc), seeking benefits for on - the - job injuries allegedly sustained on February 3, 2016 while she was returning her equipment and files at the Louisiana Department of Education's (DOE) request. The claimed injuries occurred subsequent to her termination by the DOE on November 22, 2015 as a Licensing Specialist II. Therefore, the issue before the Worker's Compensation Judge was whether Mrs. LeBlanc's injury occurred within a reasonable period of time after termination of her employment with the DOE. The WCJ found in favor of the DOE on the basis that Mrs. LeBlanc had been terminated on November 22, 2015 and was no longer in the course and scope of her employment with the DOE on February 3, 2016 based on the length of time between her termination and her claimed injuries.

Reversed and Remanded. Mrs. LeBlanc appealed the WCJ's ruling citing *Ardoin v. Cleco Power, L.L.C.*, 10-815, (La. 7/2/10), 38 So.3d 264. In that case, the supreme court listed the factors to be considered in determining whether an injury occurred within a reasonable time for winding up an employee's affairs: "the purpose that prompted [her] to return and the relationship between that purpose and the conditions surrounding [her] work." *Ardoin*, 38 So.3d

at 266. This court reversed the WCJ and remanded the case, finding that both *Ardoin* factors had been met. Mrs. LeBlanc had worked remotely for the DOE in Abbeville, Louisiana for eight years previous to her termination and had in her possession certain equipment and files that DOE demanded be returned after her termination on November 22, 2015. The record is clear that the "purpose" for Mrs. LeBlanc's presence at the DOE's Claiborne Office Building in Baton Rouge, Louisiana on February 3, 2016, was to return the equipment and files. The second factor in Ardoin, "the relationship between that purpose and the conditions surrounding [her] work," was also met by the DOE's demand that Mrs. LeBlanc return the equipment and files to Baton Rouge, as the DOE refused to send someone to Abbeville to retrieve the equipment and files, citing "security reasons."

***Chaisson v. Pellerin & Sons, Inc.*, 18-828 (La.App. 3 Cir. 4/3/19), 269 So.3d 868 (Judge Kyzar writes):**

Plaintiff alleged that he suffered an injury in the course and scope of his employment while working as a helper on a roll-off truck. He alleged that while he was under the truck, strapping the dumpster to the truck, the driver of the truck, who was a co-owner of defendant, drove the truck forward, causing him to fall to the ground and injure his back. After plaintiff stood back up, he refused to get back into the truck with the driver. The driver claimed that plaintiff was drunk at the time. Once they returned to defendant's office, plaintiff told the driver that he quit and he walked off the site. The driver's brother, who was also a co-owner, picked plaintiff up and took him to his vehicle. He claimed that plaintiff smelled like alcohol, but that he was not drunk. After quitting, plaintiff sought unemployment benefits. Approximately one month later, he sought medical treatment for his back injury. He then filed a workers' compensation claim, which defendant denied and alleged that plaintiff was drunk at the time of his accident. Following a trial on the merits, the WCJ held that plaintiff failed to prove that he suffered an injury during the course and scope of his employment. In doing so, it stated that it doubted the credibility of all the witnesses who testified. Plaintiff appealed.

Affirmed. On appeal, the court held that the WCJ was presented with conflicting views of the evidence and that his decision rested entirely on credibility determinations it made of all witnesses. Based on these findings, the court affirmed the trial court's judgment.

***Lenox v. Cent. La. Spokes, LLC*, 18-556, 18-101 (La.App. 3 Cir. 2/13/19), 265 So.3d 834 (Ezell, J.; Kyzar and Perry, JJ.)**

Debra Lenox went to work for Renegade Harley in Alexandria, Louisiana, in April 2014, as a store clerk/manager. On November 22, 2016, around lunchtime, Ms. Lenox went to the back to get a pair of boots for a customer. She located the boots about halfway down a shelf and bent over to get them. When she bent over, she experienced a weird sensation. She brought the boots to the customer and chatted with the customer for a while.

Ms. Lenox's husband came by the store to meet her for lunch. She told him that her back started "killing" her suddenly and pain was shooting down her right leg. She reported the incident to Gayle Stolzer, the human resources person at Renegade Harley. Ms. Stolzer told Ms. Lenox to go to Kisatchie Medical Center, a walk-in clinic, for treatment. She was diagnosed with lumbar strain and prescribed Ansaid and Flexeril. She then went home.

The next day, Ms. Lenox woke up in excruciating pain and could not get out of bed. An ambulance was called, and Ms. Lenox was taken to St. Francis Cabrini Hospital. A lumbar CT scan revealed changes at L4-5 and L5-S1, with a possible pars defect at L5. Dr. Gregory Dowd, a neurosurgeon, consulted on Ms. Lenox's case. Dr. Dowd opined that the back and leg pain was suggestive of radiculopathy caused by a compressed nerve. He ordered an MRI, which was performed on November 25, 2016.

The MRI indicated degenerative disc disease and a small focal disc protrusion at L5-S1. Dr. Dowd testified that the disc protrusion at L5-S1 caused significant impression on the nerve at that level and was likely responsible for the right-sided lumbar radiculopathy. Ms. Lenox received an epidural steroid injection on November 27, 2016. During her stay at St. Francis Cabrini Hospital, Ms. Lenox developed shoulder pain, so a medical neurologist consulted on her case. That doctor opined that Ms. Lenox needed a rheumatology evaluation. She was discharged from the hospital on December 1, 2016.

Continuing to suffer with pain, Ms. Lenox was taken by ambulance and admitted to Rapides Regional Medical Center on December 3, 2016. Dr. Dowd's associate, Dr. Michael Drerup, saw Ms. Lenox. Dr. Drerup noted his concern for sepsis. An MRI was performed that day with similar findings as the first MRI. Another MRI was performed on December 9, 2016. This time it was performed with and without contrast. The MRI indicated evidence of discitis, osteomyelitis, and possible epidural abscess. Dr. Dowd testified that Ms. Lenox developed an infection of the lumbar spine. She also demonstrated weakness in the form of foot drop. He stated that the infection caused left-sided compression whereas the original herniated disc caused right-sided compression. All issues were at the same L5-S1 level. Dr. Dowd performed surgery on December 11, 2016. Dr. Dowd testified that the surgery was targeted primarily to drain the infection and to decompress the affected nerve.

On March 9, 2017, Ms. Lenox filed a disputed claim for compensation. She alleged that she did not receive wage benefits and medical treatment was not authorized. The Defendants filed a motion for summary judgment. They contended that they accepted the accident as compensable but only paid for medical treatment up to the time Ms. Lenox developed the spinal infection. The Defendants dispute that the spinal infection was causally related to the original work accident.

A hearing on the motion for summary judgment was held on April 2, 2018. The workers' compensation judge (WCJ) held that the spinal infection was not causally related to the accident and granted the Defendants' motion for summary judgment. Ms. Lenox appealed the judgment.

Reversed and Remanded. Both Ms. Lenox and the Defendants relied on Dr. Dowd's deposition testimony. Dr. Dowd testified that the sepsis infection could be caused by a urinary tract infection or untreated pneumonia, both of which Ms. Lenox developed during treatment. However, he stated that an epidural steroid injection could also cause an infection and that patients sometimes develop infections when they receive injections for medical treatment. Dr. Dowd further stated that it is difficult to determine what caused the infection. He further stated that when Ms. Lenox was discharged from St. Francis Cabrini Hospital, which was four days after the injection, she had an elevated sedimentation rate and white blood cell count. This is an indication of an early brewing infection. Dr. Dowd opined that Ms. Lenox was demonstrating signs of infection at the time she was discharged from St. Francis Cabrini Hospital that were not present when she was admitted.

Furthermore, changes between the MRIs demonstrated a chronological development that the infection developed during the course of her treatment. Dr. Dowd stated that he believed Ms. Lenox "developed new symptoms, signs and findings of infection during her treatment." He also had no information that she had an infection before the accident. Finding a genuine issue of material fact as to whether Ms. Lenox's infection was contracted during her course of treatment for her workplace accident, we reversed the trial court grant of summary judgment and remanded for further proceedings.

***Nero v. Allied Was Servs.*, 18-501 (La.App. 3 Cir. 2/6/19) 265 So.3d 1129 (Gremillion, Judge, writing, with Cooks and Keaty, Judges):**

The workers' compensation insurer sought vocational rehabilitation services for the claimant. When the vocational rehabilitation counselor contacted the claimant's attorney to arrange an appointment, she was notified that she would be required to review a list of conditions under which the consultation would take place and initial those she would agree to before the interview would be allowed. The counselor refused to agree to any such condition. The insurer then sought to modify the benefits from temporary total disability (TTD) to supplemental earnings benefits (SEBs), reduction of the claimant's indemnity for refusal to cooperate in the vocational rehabilitation process, forfeiture pursuant to La.R.S. 23:1208, and sanctions against the claimant's attorney. The workers' compensation judge (WCJ) converted the worker from TD to SEB, halved his benefits pursuant to La.R.S. 23:1226(B)(3)(c), denied termination based on §1208, and denied sanctions against the worker's attorney.

The employee appealed. The employer answered and asserted that the WCJ erred in not terminating the benefits and in not sanction counsel for the employee.

With regard to modifying the award, the employee argued that there was no showing of a change in his condition that would allow for modification of the award; if the WCJ had erred in awarding him TTD, he argued, unless the employer could demonstrate that his condition had changed, the award could not be modified under La.R.S. 23:1310.8. We disagreed. A claimant

who is awarded TTD no longer requires treatment and whose condition has stabilized is not longer entitled to TTD. That stabilization of the claimant's condition satisfies La.R.S. 23:1310.8. "'Temporary total disability' means the disability is temporary; once the condition is not longer temporary or no longer a disability, a change in conditions had occurred."

On the issue of the vocational rehabilitation "conditions," we found that the refusal of the counselor to agree to those conditions does not give rise to a bona fide dispute over the counselor's services. By not agreeing to be interviewed by the counselor prior to counseling services, the worker violated La.R.S. 23:1226(B)(3)(c), and his benefits were properly reduced.

We affirmed the WCJ on the issue of not terminating the worker's benefits. While the employer may have made a proper showing that the employee had been released to work, it made no showing of job availability, which is a prerequisite to terminating SEBs under La.R.S. 23:1221. We also affirmed the WCJ's findings on not terminating his benefits under La.R.S .23:1208. There were a number of discrepancies between the employee's testimony and his posting on social media platforms. The WCJ found that these were credibility issues that did not rise to the level of violating §1208. Given the standard of review, manifest error, we could not reverse because there was a reasonable basis in the record for the WCJ's finding.

On the motion for sanctions, we again affirmed. Claimant's counsel was not subject to any order prohibiting him from presenting conditions to the vocational rehabilitation counselor. Though counsel's actions were in direct conflict with *Hargrave v. State*, 12-341 (La. 10/16/12), 100 So.3d 786, and *Allen v. Affordable Home Furnishings*, 14-338 (La.App. 3 Cir. 10/1/14), 149 So.3d 836, *writ denied*, 14-2285 (La. 1/16/15), 157 So.3d 1132, both of which flatly rejected the notion of imposing these conditions, and despite the fact that counsel for the claimant also represented the claimants in *Hargrave* and *Allen*, we found that holding counsel in constructive contempt would have a chilling effect on attorneys who might have legitimate grounds for arguing against precedent.

***Acosta v. Am. Pollution Control Corp.*, 18-348 (La.App. 3 Cir. 12/28/18), 262 So.3d 470 (Panel: Gremillion, Judge writing, Pickett and Conery, Judges.)**

The plaintiff-employee claimed his former employer owed him $27,057.75 in additional overtime pay for a five-month period in violation of La.R.S. 23:631. The trial court found the plaintiff was not entitled to any additional overtime pay.

Affirmed. First the FLSA was inapplicable to the case as the plaintiff only mentioned the FLSA for the first time on appeal. The trial court did not err in finding that plaintiff failed to limit his working hours to 100 per week even though he had been repeatedly told to limit his overtime hours. Plaintiff claimed that his supervisor told him to fabricate time cards to show he only worked 100 hours per week. The trial court reasonably found that the testimony indicated that the plaintiff was told on numerous occasions not to exceed 100 hours yet he refused to follow his employer's orders. Moreover, the plaintiff who earned $25.00 per hour had already

been paid for *over 8 hours of overtime pay every single day for five months straight.* Plaintiff's claims essentially had him working for more than 48 hours at a time without ever taking a lunch break. The facts revealed that Acosta chose to sleep on a cot at his workplace due to marital problems and would do menial jobs such as sweeping at overtime rates despite his employer's direction not to do so.

***Soileau v. Wal-Mart Stores, Inc.*, 18-284 (La.App. 3 Cir. 12/6/18), 260 So.3d 688, *writs granted and judgment vacated*, 19-40 (La. 6/26/19) __ So.3d __ (Pickett, J., writing.) Panel: Judges Cooks, Saunders, Amy, Pickett, Conery.**

After being notified by her employer, that she could only use "a Wal-Mart or Sam's Club Pharmacy" for her future prescriptions needs, workers' compensation claimant sought a court order compelling her employer to allow her fill prescriptions at other pharmacies. Claimant acknowledged that *Burgess v. Sewerage & Water Board of New Orleans*, 16-2267 (La. 6/29/17), 225 So.3d 1020, authorized her employer to require her to use a specific pharmacy but argued that the requirement that she use only pharmacies it owns and operates exceeds the scope of *Burgess* for a number of reasons, e.g., it created a conflict of interest for pharmacy personnel between its employer and her. The trial court denied the claimant's request.

Reversed. The employer's requirement created a "conflict of interest between "its self-interest and its duty to [the claimant that] prohibits it from designating itself or Sam's Club as the only pharmacy [the claimant] can use for her prescription needs."

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION PROGRAM
August 16, 2019

CRIMINAL CASE LAW UPDATE

Presentation and Written Materials by:
Jeff Slade, Senior Research Attorney

Central Staff Director – Dianne Tynes

Central Criminal Staff:

Sandi Aucoin Broussard - Director

Jeff Slade and Reba Green - Senior Research Attorneys
Melissa Sockrider, Bobbie Kirkland, Robin Anderson,
Beth Fontenot, Dustin Madden, Chastity Swinburn,
and Charlie Draughter - Research Attorneys

2019 Recent Developments

Flowers. 588 U.S. __, 139 S.Ct. 2228 (2019): A *Batson* case; record demonstrated the trial court in the defendant's sixth trial clearly erred by concluding that the State's peremptory strike of an African-American juror was not based on a racially-discriminatory intent.

Johnson, 18-1284 (La. 11/1/18), 255 So.3d 1033: District court required to appoint a new sanity commission before ruling on the State's motion to resume

proceedings against defendant who had previously been ruled incompetent.

G.P., 18-675 (La.App. 3 Cir. 9/20/18), 255 So.3d 1130: Adjudicating court had the authority to order that the juvenile be held in secure custody pending review hearing.

D.J.S., 18-239 (La.App. 3 Cir. 9/26/18), 255 So.3d 1177, *writ denied*, 18-1733 (La. 12/17/18), 259 So.3d 339: Juvenile adjudicated delinquent for telephone harassment against his principal; although petition listed subsection

involving single call, Juvenile had adequate notice that State would introduce evidence regarding multiple calls, as that was the nature of the discovery he received. Also, defense strategy questioned whether Juvenile made any calls at all.

Lewis, 18-924 (La. 10/29/18), 256 So.3d 978: Anonymous tip that the defendant was selling heroin lacked any indicia of reliability; although the defendant consented to the search, such consent must not be the result of exploitation of the illegality.

Jackson, 18-1135 (La. 11/20/18), 257 So.2d 179: Officers had reasonable suspicion to conduct a *Terry* stop; the defendant was part of a group that smelled strongly of burning marijuana at night in a high crime area.

Dotson, 18-29 (La.App. 3 Cir. 10/3/18), 257 So.3d 229, *writ denied*, 18-1821 (La. 4/22/19), 268 So.3d 296: Autopsy photos had probative value, even though graphic.

Anderson, 17-372 (La.App. 3 Cir. 12/13/17), 258 So.3d 44: The defendant's statement that he wished he had a lawyer was not an unequivocal request for a lawyer, even though police captain understood that the defendant wanted legal help. Also, the defendant spoke to a prosecutor separately in the midst of the interrogation.

Hughes, 17-458 (La.App. 3 Cir. 11/29/17), 258 So.3d 179, *reversed,* 18-06 (La. 6/26 /19), __ So.3d __: This court stated the evidence was insufficient to support conviction for possession of an illegal substance, as there was a

significant difference between weight/quantity of substance measured by sheriff's office and by crime lab. The discrepancy raised the specter of evidence tampering and thus reasonable doubt.

Thomas 17-526 (La.App. 3 Cir. 12/13/18), 258 So.3d 708: Testimony by co-defendant's ex-girlfriend regarding other bad acts by the co-defendant did not require mistrial.

Parker, 18-217 (La.App. 3 Cir. 11/7/18), 258 So.3d 883: Defendant's act of calling

his aunt and cousin to see if he was related to juror did not disqualify said juror, as there was no evidence that the defendant contacted her.

Faciane, 17-1112 (La.App. 3 Cir. 10/24/18), 259 So.2d 398: PSI report should have been part of record pursuant to La.Code Crim.P. art. 877 and was needed for review of sentence, in light of district court's lack of reasons. However, the defendant's appellate counsel was denied access to the PSI, as trial counsel had the opportunity to review and did not raise any objections.

Ducote, 18-60 (La. App. 3 Cir. 11/14/18), 260 So.3d 627, *writ denied*, 18-2026 (La. 4/22/19), 268 So.2d 298: Spousal privilege did not cover jail calls.

Kading, 18-341 (La.App. 3 Cir. 12/12/18), 260 So.3d 698: Bonding agent and surety were not entitled to a judgment setting aside bond forfeiture, as they failed to follow proper statutory procedure.

Andrews, 19-68 (La.App. 3 Cir. 1/14/19), 260 So.3d 1202: District court abused its discretion by granting mistrial due to

late discovery. State was ready to recall its witnesses for cross-examination in light of the new discovery. Also, as a practical matter, the defendant had time since the grant to prepare.

Lewis, 18-504 (La.App. 3 Cir. 12/6/18), 261 So.3d 87: The defendant was entitled to specific performance of his plea agreement. Judge Yeager had transferred case to another division for a D & D hearing. Judge Beard then encouraged further plea negotiations. Judge Beard set the case for Judge Doggett to take the plea after lunch;

Judge Doggett accepted the plea. Judge Yeager was not pleased.

Lewis, 18-353 (La.App. 3 Cir. 12/6/18), 261 So.3d 94: See above.

Dubroc, 18-142 (La.App. 3 Cir. 11/21/18), 261 So.3d 813: The defendant knowingly and intelligently waived his right to a jury trial , even though some of his responses were non-verbal. Verbally stated waiver itself. The defendant had previous experience in the system and later proceeded to bench trial without objection.

Lagos, 18-1724 (La.App. 3 Cir. 1/28/19), 262 So.3d 277: The defendant clearly and unambiguously invoked his right to counsel; detective had to stop asking questions.

Martin, 18-1722 (La.App. 3 Cir. 1/28/19), 262 So.3d 279: Probative value of the defendant's prior burglaries from six to eleven years ago outweighed prejudice in current case involving ten burglaries. Remoteness in time (age of crimes) is just one factor in weighing probative value against prejudicial effect.

State v. Eckert, 18-908 (La. 1/28/19), 262 So.3d 887: Writ denial with three dissents that all referred to Judge Perrett's dissent in the original appeal re: expert witness who wrote the book on hand to hand combat.

Miguel, 18-711 (La.App. 3 Cir. 1/30/19), 263 So.3d 873: Plain view exception to warrant requirement applied to seizure and search of a pill bottle found in a vehicle during a traffic stop. Incriminating nature of the pill bottle was readily apparent.

Hampton, 18-156 (La.App. 3 Cir. 2/13/19), 263 So.3d 1148: Remedy for a *Miller* violation is to permit the juvenile murder offender to be eligible for parole.

Latique, 18-622 (La.App. 3 Cir. 2/20/19), 265 So.3d 93: District court was correct in refusing to accept first verdict, resentencing jury, and sending jury back for further deliberation.

Eaglin, 18-822 (La. 3/18/19), 265 So.3d 761: District court erred by admitting an inflammatory photograph without any

probative value. Case remanded for court of appeal to apply the correct standard. The issue was whether the error contributed to the verdict. *After remand*, 17-657 (La.App. 3 Cir. 7/3/19), __ So.3d __.

Mock, 18-530 (La.App. 3 Cir. 2/6/19), 265 So.3d 1029: The defendant was under twenty-one when he was charged for a felony committed when he was sixteen. Therefore, he was a "child" pursuant to the Children's Code and the district court did not have jurisdiction.

Johnson, 18-523 (La.App. 3 Cir. 2/6/19), 265 So.3d 1034, *writ denied*, 19-312 (La. 5/28/19), 273 So.3d 314: Evidence did not show that the defendant was so intoxicated (or insane) that he could not form intent; his actions revealed linear thinking. For example, he left the scene and came back with a knife to cut screen door.

Andrews, 18-505 (La.App. 3 Cir. 2/6/19), 265 So.3d 1079, *writ denied*, 19-354 (La. 4/29/19), 268 So.3d 1035: The defendant claimed that his gun discharged accidentally, but he shot the victim four times.

Mayeux, 18-97 (La.App. 3 Cir. 2/6/19), 265 So.3d 1096: Evidence was sufficient to support conviction for second degree murder, even though COD was not clear.

Garnett, 18-61 (La.App. 3 Cir. 1/23/19), 266 So.3d 330, *writ denied*, 19-271 (La. 5/28/19), 273 So.3d 314: *Anders* case; the defendant filed a pro se *Jackson* claim, which was found not to have merit. Counsel was allowed to withdraw pursuant to *Anders*.

Record, 18-614 (La.App. 3 Cir. 2/27/19), 266 So.3d 592: Trial court did not err by denying challenge for cause against juror who was friends with an officer who testified. Juror stated she could be fair and impartial.

Cannon, 19-590 (La. 4/18/19), 267 So.3d 585: A software glitch excluded people born after June 2,1993; the defendant was entitled to quash general venire and commence new selection from a new venire.

Sant, 18-752 (La.App. 3 Cir. 4/17/19), 268 So.3d 1102: The confession outweighed subsequent recantation.

Mire, 14-2295 (La. 1/27/16), 269 So.3d 698: Murder during a hunt. 2016 opinion published in 2019.

Piper, 18-732 (La.App. 3 Cir. 3/7/19), 269 So.3d 952: Ad hoc judge did not abuse discretion in denying motion to recuse trial judge. Trial judge's comments merely signified that she was looking forward to conducting a jury trial.

Also, defense counsel was not ineffective for opening the door to testimony regarding other incidents between the defendant and the victim's boyfriend; the defendant was looking for the boyfriend when he confronted the victim, so the evidence was admissible.

Ross, 18-453 (La.App. 3 Cir. 3/13/19), 269 So.3d 1052. Attempted second degree murder with a Mercedes-Benz SUV. Under *Blockburger* test, convictions for both attempted second degree murder and aggravated battery constituted double jeopardy. One partial dissent did not agree with the double

jeopardy analysis; the other partial dissent took issue with the use of hearsay evidence at the sentencing hearing.

Farry, 18-721 (La.App. 3 Cir. 3/7/19), 270 So.3d 673: Retroactive application of subsection of the Habitual Offender statute stating that courts shall apply law in effect on the date of the offense.

Tutson, 18-738 (La.App. 3 Cir. 3/7/19), 270 So.3d 684: The defendant argued that defense counsel was ineffective for failing to file a motion to reconsider

sentence for manslaughter. As the trial judge stated he felt the defendant was guilty of murder, it was not likely that he would have reduced the sentence.

Parker, 18-797 (La.App. 3 Cir. 5/1/19); 270 So.3d 759: Failure by State to disclose that it had conducted a photographic line-up with two eyewitnesses on the morning of trial did not require mistrial. Mistrial is a drastic remedy. Also, any error was harmless due to victim testimony.

Charles, 18-222 (La.App. 3 Cir. 5/1/19), 270 So.3d 859: The district court failed to state an adequate basis for imposing the maximum sentence for possession of a firearm by a convicted felon.