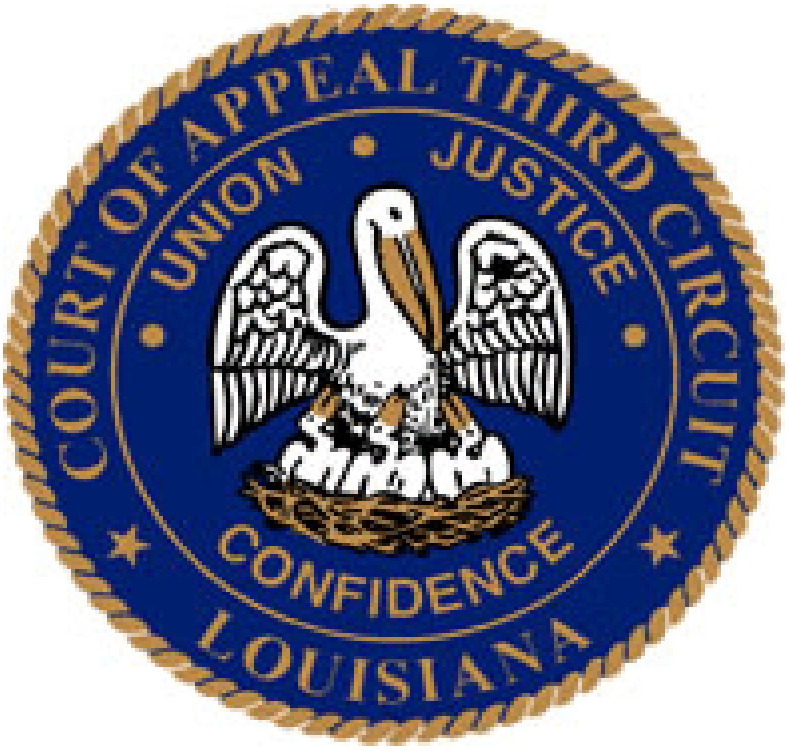
THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION
PROGRAM



AUGUST 17, 2018

THIRD CIRCUIT JUDGES

Chief Judge Gene Thibodeaux
Judge Sylvia R. Cooks
Judge John D. Saunders
Judge Marc T. Amy
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

THIRD CIRCUIT JUDGES' ASSOCIATION
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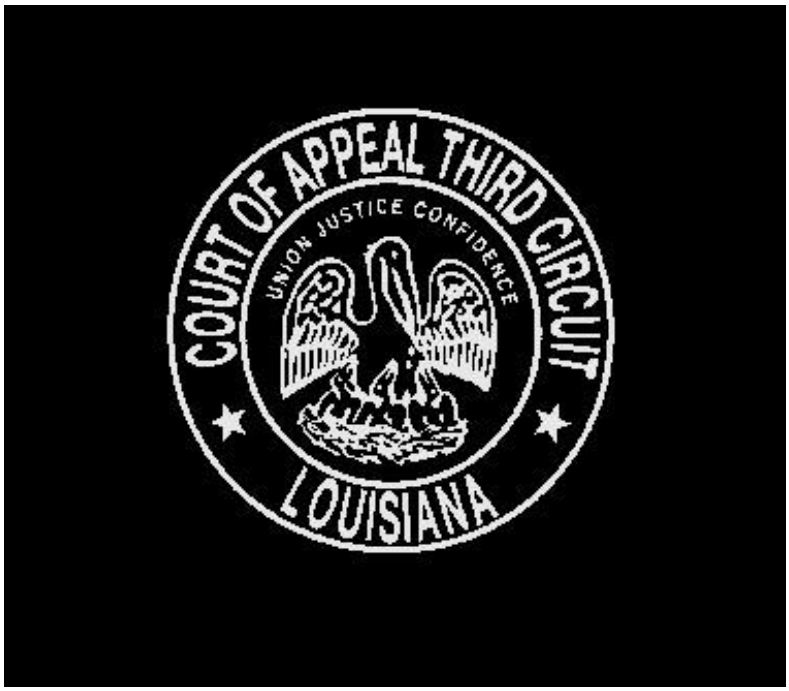

POST-CONVICTION RELIEF

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POST-CONVICTION RELIEF

*** <u>Denotes material added to the outline in 2018</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. *See Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309 (2012) - A procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

d. *State v. Deloch*, 13-1975 (La. 5/16/14), 140 So.3d 1167 - The supreme court held that *Martinez* 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."

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. Quoting *Strickland*, the Court held that "the reasonableness of counsel's challenged conduct ... viewed as of the time of counsel's conduct."

i. *Weaver v. Massachusetts*, 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), 2018 WL 3154627 - 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.

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.

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. *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.

e. 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.

*****f. *Currier v. Virginia*, 138 S.Ct. 2144, 86 USLW 4550 (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.

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.

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.

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*, __ U.S. __, 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."

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.

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 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.

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*, 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."

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."

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), __ So.3d __.

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.

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, 2019**, 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, 2019**, 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. La.Code Crim.P. art. 926.1(C) provides that 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.

4. *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.

5. *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.

6. *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.

7. *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.

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION
PROGRAM - 2018

CRIMINAL APPEALS AND SUPERVISORY WRIT APPLICATIONS

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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 (La.R.S. 46:1844(W)), 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* 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 of Louisiana 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 that the elements of the offense be proven so that every reasonable hypothesis of innocence is excluded. *State v. Schnyder*, 06–29 (La.App. 5th 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. Fulimante*, 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*, 664 So.2d 94 (La.1995).

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 the 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 pleas 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 of course, 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; 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, time limit for arraignment, and time period 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.* and

iv. Double jeopardy - *See* La.Code Crim.P. art. 591 *et seq.*) (*State v. Green*, 16-32 – 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/*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), ___ So.3d ___, 2018 WL 2187857, (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*, 16-0234 (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 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.

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 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.*

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 will order the trial date stayed.**

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).

i. 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. Please 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. *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 - If a stay is requested from this court, a stay must have 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.

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.

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 RulesBCourts 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 ADangers 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 of the 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
            ab. Priority order among other pretrial writs
            ac. 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
            ab. Priority order among other misdemeanors
            -Serving or stayed?
            -Sentence length
        iv. Probation Revocation writs
            aa. Usually placed after pretrials & misdemeanors
            ab. Placed before PCR writs
        v. General Writs
            aa. Placed in cabinet by order of docket number
            ab. 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 - 2018

ERRORS PATENT

Presentation and Written Materials by:
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Beth Fontenot, Dustin Madden, Charlotte Cravins,
and Chastity Swinburn - 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. 882, 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. *See 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.

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; *State v. Chandler*, 09-1286 (La.App. 3 Cir. 5/5/10), 36 So.3d 1086; *State v. Allen*, 09-1281 (La.App. 3 Cir. 5/5/10), 36 So.3d 1091; *State v. Guidry*, 11-695 (La.App. 3 Cir. 12/7/11), 79 So.3d 1242.

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), __ So.3d __ (2017 WL 6348016).

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 (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. 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. 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; *State v. Bell*, 13-1443 (La.App. 3 Cir. 6/4/14), 140 So.3d 830.

In *State v. Cooley*, 15-40 (La.App. 3 Cir. 6/3/15), 165 So.3d 1237, this court 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.

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.

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.

In *State v. Hypolite*, 13-1365 (La.App. 3 Cir. 5/14/14), 139 So.3d 687, *writ denied*, 14-1242 (La. 1/23/15), 159 So.3d 1056, the defendant claimed on appeal that the trial court erred in allowing him to be convicted by a less than unanimous verdict on a charge of aggravated rape. This court held that *State v. Goodley*, 398 So.2d 1068 (La. 1981) is no longer controlling since the legislature has enacted a hybrid capital/non-capital aggravated rape statute. This court found a unanimous jury was not required because there was nothing in the record to suggest that the state pursued the death penalty and the death penalty was not an option pursuant to *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641 (2008).

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.

In *State v. Price*, 17-520 (La. 6/27/18), __ So.3d __ (2018 WL 3149782), the supreme court held that a verdict of simple kidnapping is not responsive to a charge of second degree kidnapping.

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. 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. Romero*, 17-636 (La.App. 3 Cir. 2/21/18), 238 So.3d 537; *State v. Guillory*, 17-403 (La.App. 3 Cir. 10/11/17), 229 So.3d 949, *writ denied*, 17-1964 (La. 6/1/18), 244 So.3d 437.

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; *State v. Dossman*, 06-449 (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. Ayala*, 17-1042 (La.App. 3 Cir. 4/18/18), 244 So.3d 519; *State v. Washington*, 11-490 (La.App. 3 Cir. 11/2/11), 76 So.3d 1264; *State v. Hurst*, 10-1204 (La.App. 3 Cir. 4/13/11), 62 So.3d 327, *writ denied*, 11-975 (La. 10/21/11), 73 So.3d 383.

C. 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), __ So.3d __ (2017 WL 6347813); *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. Domingue*, 17-786 (La.App. 3 Cir. 4/18/18), 244 So.3d 489; *State v. Thibeaux*, 17-293 (La.App. 3 Cir. 10/11/17), 229 So.3d 967; *State v.*

Ervin, 17-18 (La.App. 3 Cir. 12/13/17), __ So.3d __ (2017 WL 6347813).

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. 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.

D. The trial court fails to establish a sufficient payment plan for amounts to be paid as a condition of probation. 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." When the trial court is silent or imposes an inadequate payment plan (e.g., "over the duration of the supervised probation"), this court may remand the case for establishment of a payment plan by either the trial court or by the Office of Probation and Parole and approved by the trial court. *See State v. Buteaux*, 17-877 (La.App. 3 Cir. 3/14/18), 241 So.3d 1094; *State v. McAdory*, 17-571 (La.App. 3 Cir. 1/4/18), 237 So.3d 539; *State v. Mace*, 17-220 (La.App. 3 Cir. 12/6/17), __ So.3d __ (2017 WL 6029835); *State v. Stevens*, 06-818 (La.App. 3 Cir. 1/31/07), 949 So.2d 597. This has been required for the payment of fines, court costs, and other fees imposed as conditions of probation as well. *See State v. Tall*, 12-280 (La.App. 3 Cir. 10/24/12), 100 So.3d 388.

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, the trial court may impose a periodic payment plan consistent with the defendant's financial ability to pay.

The trial court must also impose a probation supervision fee when it places a defendant on probation.

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; *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), __ So.3d __ (2017 WL 6347813); *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. 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. Thomas*, 16-578 (La.App. 3 Cir. 4/19/17), 217 So.3d 651; *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

CASE #_____

NAME_____

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 the 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

_____ 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.)

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

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 Marc T. Amy
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

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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

ACT 312

***State of Louisiana, et al. v. The Louisiana Land and Exploration Co., et al.,* 17-830 (La.App. 3 Cir. 3/14/18), __So.3d__, 2018 WL 1312208 (Panel: Conery, Judge writing; Thibodeaux, Chief Judge, Gremillion, Judge; Chief Judge Thibodeaux dissents and assigns written reasons).**

The Vermilion Parish School Board (VPSB) manages property owned by the State of Louisiana, including the marsh-land property at issue in this case, which has historically been leased to oil companies for oil and gas exploration and production and to individuals for use as hunting and fishing camps. In this case, VPSB filed suit against UNOCAL, a company that had previously but no longer held a lease for oil and gas exploration and production on the property. VPSB alleged UNOCAL caused environmental damages to the property and sought cleanup of the property pursuant to La.R.S. 30:29.[1] UNOCAL conceded that it had caused environmental damage to the property. After a public hearing. the Louisiana Department of Natural Resources (LDNR)

[1] Louisiana Revised Statutes 30:29 governs how monetary awards for environmental damages are spent. It requires a defendant to place the funds required for remediation into the registry of the court and requires judicial oversight and approval before those funds are spent. The purpose of the statue was to make sure that plaintiffs who were awarded money for environmental damage to their property actually spent those sums on remediating the property to statutory standards, since there is a public policy in favor of having clean land.

crafted a "most feasible plan" for the remediation of the property. Because it had questions about the LDNR plan, VPSB sent twenty-seven questions seeking clarification from LDNR. LDNR responded in writing.

The trial court adopted LDNR's plan as the court's "most feasible plan" and attached to its judgment the twenty-seven questions and answers resulting from VPSB and LDNR's post-plan communication for clarification purposes only. One provision of the judgment and LDNR's plan was that UNOCAL would be responsible for implementing the remediation and additional evaluation required by the plan.

VPSB appealed that judgment arguing that although UNOCAL should have to fund the remediation and additional evaluation set forth in the LDNR plan, it (VPSB) should be allowed to implement the plan. VPSB's argument centered around the premise that although La.R.S. 30:29 did not establish which party should be responsible for implementing the LDNR plan, it only determined how the monetary awards should be spent. However, VPSB's assertions that it should be allowed to perform the work is not supported by statutory law, jurisprudence, or the LDNR plan and VPSB did not present any evidence to rebut the presumption that the LDNR plan was the most feasible.

We affirmed the trial court's judgment in its entirety, finding it correctly applied the provisions of La.R.S. 30:29. Chief Judge Thibodeaux dissented. In his written reasons, he categorized three trial court errors requiring reversal of the trial court's judgment: the LDNR plan contained too many contingencies and no estimate for the cost of the contingencies; the trial court judgment contained ambiguities, particularly about sums placed in the registry of the court for remediation purposes, that would "propagate needless litigation in the future[;]" and the trial court judgment "accepted UNOCAL's interpretation of the statute requiring the responsible party to perform the actual remediation work, and [ ] the statute contains no such requirement. The VPSB has applied for writs before the Supreme Court of Louisiana.

***Shirlene Britt, et al. v. Riceland Petroleum Company, et al.,* 17-941 (La.App. 3 Cir. 3/7/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Pickett, Judges).**

In this legacy lawsuit governed by La.R.S. 30:29 (Act 312), several landowners (plaintiffs) sued Riceland Petroleum Company (Riceland) and BP America Production Company (BP), seeking remediation of their property contaminated by historical oil and gas operations conducted by the defendants. Riceland subsequently filed a third-party demand against several of its insurers (Certain Insurers), all of whom denied coverage. The plaintiffs eventually settled all their claims against Riceland and BP and provided notice to the Louisiana Department of Natural Resources (LDNR) and the Attorney General (AG) of the settlement, as required by La.R.S. 30:29(J)(1). Receiving no objection therefrom, the plaintiffs moved for the trial court's approval, which the court ultimately granted after a hearing.

Affirmed. Interpreting the provisions of La.R.S. 30:29(J), we first found that all settlements governed by Act 312 must be approved by the trial court, but only after the LDNR and AG have been provided with notice of the settlement and given thirty days to review and provide any comments to the trial court. When no objections are raised by the state actors or another party with a vested interest, the settlement is then ripe for court approval. Accordingly, we found no merit in the argument advanced by Certain Insurers that La.R.S. 30:29(J) requires: (1) a contradictory hearing; (2) a finding concerning remediation; and, (3) a deposit of necessary funds for court approval in all settlements under Act 312 as the need for a contradictory hearing is clearly conditioned upon an objection.

Applying the statutory requirements herein, we then found that the settling parties had to and did seek court approval after first providing the LDNR and the AG with notice and allowing thirty days for their review and comments on the proposed settlement. Because no one raised any objection to the settlement, all the mandatory requirements for approval were satisfied. We, therefore, found no error in the trial court's judgment approving the settlement.

CAUSE OF ACTION

***J. Boone Development, LLC v. Milton Water System, Inc., et al.*, 18-0099 (La.App. 3 Cir. 6/6/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Amy and Pickett, Judges).**

Plaintiff, J. Boone Development, LLC (Boone), brought suit against Milton Water System, Inc. (MWS), Lafayette City-Parish Consolidated Government (LCG), and William Theriot (Theriot), alleging multiple causes of action in response to a dispute involving a Wholesale Water Agreement between LCG and MWS. LCG filed its peremptory exception of no cause of action or, in the alternative, no right of action. Boone subsequently amended its petition to further allege its causes of action against LCG, prompting LCG to amend its exception in response thereto. After a hearing, the trial court granted the exception, dismissing Boone's claims against LCG with prejudice.

Affirmed. Reviewing the petitions and the exhibits attached thereto in a light most favorable to the plaintiff and resolving every doubt in its favor to determine whether the petitions state any valid cause of action for relief against LCG, we found no valid cause of action had been pled against LCG as the petitions failed to allege facts sufficient to (1) connect any alleged actions taken by LCG to the damages or takings allegedly sustained by Boone, or (2) bind LCG for the alleged omissions or actions taken by MWS and/or Theriot. We further found that the facts alleged and the contracts incorporated into the petitions did not demonstrate any contractual obligations owed by LCG to Boone under any theory advanced by Boone. Although Boone challenged the trial court's refusal to allow further amendment to the petition, we noted that Boone had already filed an eighty-two-page amended petition to his original sixty-two-page petition and yet had still failed to plead sufficient facts to state a cause of action against LCG. Concluding that the grounds of the objection raised through the exception could not be removed by further amendment, we

affirmed the trial court's judgment granting the exception and dismissing Boone's claims against LCG with prejudice.

CIVIL SERVICE; PROCEDURE

***Dustin Bonial v. City of Alexandria*, 18-77 (La.App. 3 Cir. 6/27/18), __ So.3d __ (Panel: Amy, Judge writing; Thibodeaux, Chief Judge; Pickett, Judge).**

In a pre-disciplinary hearing, Dustin Bonial admitted using a racial epithet regarding a co-worker while in the employment of the City of Alexandria. The City terminated Mr. Bonial from his employment. Upon appeal to the Alexandria Civil Service Commission, the parties further stipulated during a hearing that Mr. Bonial called the co-worker by the epithet. When asked about the incident, the co-worker explained that he was walking in the breakroom when Mr. Bonial used the subject term. The co-worker stated that he felt disrespected and mad following the incident. The City also presented the testimony of the City's director of utilities, who explained that the use of racial epithets "destroys the morale" and "wedges the whole department." A majority of the Commission voted to affirm the termination. The Ninth Judicial District Court subsequently affirmed Commission's decision. Mr. Bonial then appealed to the Third Circuit, asserting that the Commission and the trial court erred in finding the termination of employment to be commensurate with the infraction and in failing to modify the disciplinary action.

Affirmed. The panel first noted that a reviewing court evaluates the imposition of a civil service disciplinary action to determine if it is both based on legal cause and commensurate with the infraction. As the panel explained, a commission's order should not be modified unless it is arbitrary, capricious, or characterized by an abuse of discretion. As to legal cause, the panel stated that such cause includes conduct prejudicial to the public service involved or detrimental to its efficient operation. The panel stated that, while the repugnant nature of the subject term required no further inquiry under this standard, the director of utilities also testified that the use of racial epithets destroys the morale within the department. As for whether the disciplinary action was commensurate with the offense, the panel noted that, by its termination letter, the City notified Mr. Bonial that his conduct violated civil service rules prohibiting "any [] act of omission or commission tending to injure the public service[,]" as well as "any act or failure to act that the Commission accepts as sufficient to show the offender is unfit or unsuitable for employment in the classified service." The termination letter further notified him that he had violated the City's Workplace Conduct policy, including various provisions from a section titled "Unacceptable Behavior," which lists "[t]ypes of job-related behavior . . . that may result in termination." The panel pointed out that the City also informed Mr. Bonial that his conduct violated the section of the policy addressing "Harassment." Considering those provisions, the panel found that the action of termination was commensurate with the offense. Accordingly, the panel determined that the Commission and the trial court had not acted arbitrarily, capriciously, or in abuse of discretion and upheld Mr. Bonial's termination.

***Foster v. City of Leesville*, 17-1106 (La.App. 3 Cir. 6/13/18), __ So.3d __ (Kyzar, J. writes):**

Plaintiffs, current and former firefighters for the City, filed suit seeking an accounting/payment for annual vacation time owed to them under the City's leave policy. Plaintiffs further alleged that the City, after it changed its vacation policy to accrue vacation time weekly rather than annually, deleted their accrued vacation time in violation of La.R.S. 33:1996. The City then moved for summary judgment, arguing that La.R.S. 33:1996 did not apply to it because its population was less than 13,000. The trial court denied the City's motion, finding that La.R.S. 33:1996 did apply to the City. Thereafter, plaintiffs requested that the trial court order the City to provide them with an accounting of each plaintiff's vacation time.

Once the City provided the accounting, the plaintiffs moved for summary judgment arguing that the City's accounting was incorrect because it placed a ceiling on the vacation time that plaintiffs could carryover each year, in violation of La.R.S. 33:1996. The City responded with a cross-motion for summary judgment. In response to this motion, plaintiffs argued that because the City's vacation policy excluded firemen, there was no City policy that placed a ceiling or cap on the amount of vacation time firemen could accrue. They further argued that the exclusive authority for establishing vacation leave policy for firemen rested with the City's civil service board and that the Board had no rule placing such a cap on their accrued time.

In response to the plaintiffs' argument regarding the Board, the City filed an exception of nonjoinder of a party needed for just adjudication, seeking joinder of the Board to the litigation. Plaintiffs opposed this exception. Following a hearing on the exception, the trial court denied the City's exception. The matter then proceeded to a hearing on the motion for summary judgment, after which the trial court granted summary judgment in favor of plaintiffs, denied the City's cross-motion for summary judgment, adopted the accounting provided by plaintiffs, which provided for unlimited accrual of vacation time, and awarded judgment in favor of those plaintiffs no longer employed by the City. The City appealed.

Reversed; Vacated; And Remanded. On appeal, the court reaffirmed a prior supreme court holding that La.R.S. 33:1996 is silent on the issue of accrued vacation leave; it neither grants nor denies firemen the right to accrue vacation leave from year to year. It then held that the trial court abused its discretion by denying the City's exception of nonjoinder. The Board's vacation policy clearly conflicted with the statutorily mandated annual leave because it provided less vacation than that required by La.R.S. 33:1996. The court further noted that the Board's rules were silent on the issue of accrued vacation, but that this silence did not, as argued by plaintiffs, grant them the right to carryover unused leave time. Thus, the court held that joinder of the Board was necessary concerning the intent and interpretation of its own rules regarding unused vacation leave time. Based on this finding, the court vacated the trial court's later grant of summary judgment in favor of plaintiffs and remanded the matter for further proceedings.

***Hewitt v. Lafayette City-Parish Consolidated Govt.*, 17-45 (La.App. 3 Cir. 4/4/18), ___ So.3d ___, 2018 WL 1614258 (Gremillion, Judge, writing, with Cooks and Kyzar, Judges. Cooks, Judge, dissented):**

In this civil service appeal, a Lafayette police officer was terminated by the City-Parish. His termination was upheld by the Lafayette Municipal Fire and Police Civil Service Board and by the district court on appeal. The actions for which he was terminated either occurred or were discovered while the officer was on administrative leave for other infractions. These included the discovery of at least eleven unprocessed citations, written reports, and evidence in his patrol cruiser; misuse of a department computer, on which was discovered a photo of a nude woman that had been emailed to him; failure to cooperate and untruthfulness with the examiner during a fitness-for-duty examination by a licensed psychologist; and violating department policy by engaging in outside employment as a "courtesy officer" at two apartment complexes in exchange for living accommodations.

We affirmed the trial court. Even if one did not consider the more minor infractions proven at the officer's hearing, his failure to process citations, reports, and evidence alone justified his termination.

COMMUNITY PROPERTY

***Carver v. Carver*, 17-1055 (La.App. 3 Cir. 4/18/18) ___ So.3d ___ (Saunders, J., writing; Thibodeaux, U.; Kyzar, V.)**

This case involves the partition of community property. The principal asset of the community is the former matrimonial domicile. The parties disagree as to its fair market value, and each retained an expert to determine its value. Defendant filed a motion to partition community property, followed by a Sworn Detailed Descriptive List of all Community Property. Plaintiff filed a separate Sworn Detailed Descriptive List of all Community Property to which Defendant filed a Traversal. Plaintiff responded by filing his own Traversal and finally, by filing a Traversal/Amended Sworn Detailed Descriptive List.

Following a trial on the traversals, the trial court found in favor of Plaintiff and (1) fixed the value of the community home; (2) denied Defendant retroactive rent; and (3) included as community property that which was inherited by and donated to Defendant from her ascendants. Defendant filed a Motion to Reconsider, to which Plaintiff filed a Peremptory Exception of No Cause of Action. The trial court denied Defendant's motion to reconsider.

Affirmed. The court found no abuse of discretion afforded the trial court in fixing a value for the community home, denying retroactive rent, and including property donated to Defendant as community. The court ruled that (1) pursuant to Louisiana Revised Statutes 9:2801 which sets forth the rules for partitioning community, when parties cannot agree to the value of a community

asset, it is within the trial court's discretion to fix the value, which it did after weighing the two competing experts' opinions as to the value. The court ruled that (2) pursuant to Louisiana Revised Statutes 9:374(c) "[T]he retroactive assessment of rent is extremely prejudicial to the occupying spouse," and it is within trial court's discretion to deny retroactive rent, which it did after considering the needs and best interest of the child, who resided with Plaintiff in the home for a considerable time, and after considering Plaintiff's time, labor and expense in maintaining the property. The court ruled that (3) pursuant to Louisiana Civil Code art. 2340 "Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property," and it is within the trial court's discretion to find that the items in the home were community property, which it did after reviewing the record and finding it devoid of any evidence that any of the items contained in the former matrimonial domicile at the time of separation were inherited by or donated to Defendant individually by her ascendants.

CRIMINAL LAW

***State of Louisiana v. Jackie Lynn Pruitt,* 17-1113 (La.App. 3 Cir. 5/30/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Keaty and Savoie, Judges).**

Defendant Jackie Lynn Pruitt was convicted of first degree murder of Sonya Ortego in violation of La.R.S. 14:30(A)(1) and sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. Defendant was tried by a twelve-person jury and convicted with an eleven-to-one verdict. Defendant now appeals sufficiency of evidence.

Affirmed. Under *Jackson v. Virginia*, the Supreme Court considers "whether there was sufficient evidence to justify a rational trier of the facts to find guilty beyond a reasonable doubt." 443 U.S. 307, 313 (1979). An appellate court may impinge on the factfinder's discretion and credibility only to "guarantee . . . due process[.]" *State v. Mussall*, 523 So.2d 1305, 1310 (La.1988). Further, the Louisiana Supreme Court finds when a "jury reasonably rejects the hypothesis of innocence presented by the defendant[], that hypothesis fails[] . . . unless there is . . . reasonable doubt." *State v. Captville*, 448 So.2d 676, 680 (La.1984).

The victim's body was found face down, covered in blood and partially clothed in a motel room that she was renting with her fiancé. Defendant was renting the motel room next door and was in DeRidder for a court appearance for a DWI. Several witnesses had seen Defendant drinking heavily the night before the murder and saw Defendant leaving the motel the morning of the murder. As Defendant loaded his truck while shirtless, witnesses noticed scratches on his torso and that he seemed hurried. Blood was discovered in both the victim's and Defendant's rooms. Deputies took Defendant in for questioning and he denied knowing the victim. After his court appearance that day, he was held overnight for a probation violation. The sheriffs searched his truck and hotel room during this time and found a duffel bag in the cab of his truck containing

debit cards and checks belonging to the victim and her fiancé, and the victim's cell phone with unread text messages from her fiancé.

The following day, Defendant told a detective that he had a sexual encounter with the victim and she was menstruating, which is why he had her blood on him and in his room. Defendant explained the scratches on his body were from his work with barbed wire fencing. Defendant testified before a grand jury and said he noticed the credit cards and phone in the bed of his truck while he was packing, but he was rushed so he placed them in his duffel. At trial, multiple witnesses testified that the victim's fiancé was at work and saw him leaving before the murder. The foreman of the fencing company that had previously employed Defendant testified that the company had not worked on jobs with barbed wire fencing in months. Further, forensic testing matched the victim's blood to a swab taken from a dried stain on Defendant's knee. Swabs taken from towels in Defendant's room matched the victim's DNA. The coroner and Sexual Assault Nurse Examiner testified that Defendant's scratches looked fresh and too thin to be from barbed wire. We conclude that the evidence is sufficient for a jury to have found Defendant guilty beyond a reasonable doubt of first degree murder.

***State v. Young*, 17-1108 (La.App. 3 Cir. 5/9/18), ___ So.3d ___, 2018WL2123867 (Gremillion, Judge, writing with Saunders and Pickett, Judges):**

The State appealed the sentence handed down for the Defendant, a third felony offender who pleaded guilty to two narcotics violations, despite the fact that at his *Boykin* hearing, the State announced its intention to bill Defendant as a habitual offender. The trial court originally sentenced Defendant to twenty years without benefit of probation, parole, or suspension of sentence. Defendant then moved for new trial and reconsideration of his sentence, which the trial court granted.

At the new trial on the habitual offender bill, the State introduced evidence to prove that Defendant had been convicted of previous offences. According to the testimony of Defendant's attorney at the time of his plea, the State regularly threatened defendants with being charged as habitual offenders if they rejected a plea offer, but Defendant's case was the first and only time he had actually seen the State carry through with such a threat following the entry of a guilty plea. Testimony was also adduced that Defendant had been charged with involvement in a homicide, but the State had dismissed the charges for lack of evidence. That attorney also testified that the State's offer of recommending a sentence of twenty years before the pleas were taken was so high because the State felt that Defendant "had beat a murder charge." Defendant also pointed out to the trial court that the relevant statute, La.R.S. 15:529.1, had been amended in 2017 to lessen the minimum sentence for a fourth and subsequent nonviolent offender from thirty years to twenty years. *See* 2017 La. Acts No. 82.

The minimum sentence before November 1, 2017, the trial court could have sentenced Defendant was twenty years. Defendant's adjudication hearing took place in September 2017. Nonetheless, the trial court sentenced Defendant to five years on each narcotics violation, to run

concurrently. The trial court may have been swayed by the argument that the State was motivated by malice arising from Defendant's reputed involvement in a homicide. Other factors, such as the recent birth of Defendant's son and Defendant's father experiencing significant health issues may also have played a role in the trial court's downward departure. Because we could not determine from the record which factors the trial court considered in sentencing defendant to such lenient terms of imprisonment, though, we vacated the sentences and remanded for resentencing with instructions that the trial court articulate with specificity its findings supporting any downward departure from the statutory minimum term.

***State v. Eckert*, 17-848 (La.App. 3 Cir. 5/2/18), ___ So.3d ___, 2018 WL 2041881 (Gremillion, Judge writing, with Amy and Perret, Judges. Perret, Judge, dissented):**

Defendant was convicted of the second-degree murder of his wife in February 2016. The couple had a stormy history and had a physical altercation on the night of the wife's death. According to their six-year-old daughter, Defendant seized his wife in a choke hold and held her for a "really long" time, until she stopped moving. At one point, the daughter stated that her father held her mother in this choke hold for ten seconds; however, at trial she testified that when she made that statement she had no real good conception of time. At trial, Defendant sought to offer the expert testimony of Mr. Matthew Larsen, who had served as a hand-to-hand combat trainer for the U.S. Army Rangers and had re-written the U.S. Army Field Manual for hand-to-hand combat, who Defendant offered for the proposition that he had not improperly applied a "rear naked" choke hold, used to incapacitate. The trial court excluded Mr. Larsen's testimony. It also excluded the testimony of an emergency room physician from whom Defendant sought to elicit opinions regarding "positional asphyxia" based upon hypothetical questioning only. The trial court excluded this doctor's testimony on the basis that it felt it would confuse the jury.

On appeal, Defendant contended that he was denied a fair trial because of the exclusion of these two experts' testimonies. Regarding Mr. Larsen's testimony, we noted that the forensic examiner, Dr. Terry Welke, had already confirmed in his testimony that a ten-second rear naked choke hold would not be lethal. Whether it was applied correctly was not the issue; the length of time it was applied was, and there was conflicting evidence on this point. Thus, Mr. Larsen's testimony that the hold was not applied incorrectly was not helpful to the jury, and the exclusion of his testimony was at worst harmless error. Given the lack of other evidence regarding positional asphyxia as a likely cause of death, we found no abuse of the trial court's discretion in excluding the emergency room physician's testimony.

***State v. Ficklen*, 17-995 (La.App. 3 Cir. 5/2/18), __ So.3d __ (Panel: Gremillion, Judge writing: Keaty and Savoie, Judges.)**

We affirmed the trial court's judgment denying Defendant's motion to quash the indictment in this writ opinion.

Writ denied. Defendant's claims center on whether a "criminal enterprise" existed and whether the bill on its face showed facts to show any claim that he was a member of a criminal enterprise was prescribed. The indictment alleged the enterprise commenced in March 2002 and remained active until the date of the indictment which listed 73 overt acts committed by 14 members with the last alleged overt act committed in January 2016. The indictment was sufficient to provide defendant adequate notice of the crime for which he is charged in order to prepare a defense. Further the crimes of racketeering and participating in a criminal street gang had not prescribed despite the last over act of March 2008 as the crimes were ongoing.

***State v. Dudley Melancon*, 17-943/944 (La.App. 3 Cir. 4/18/18). __ So.3d __ (Panel: Gremillion, Judge writing: Keaty and Savoie, Judges.)**

In this consolidated matter, Defendant appealed his current conviction for simple robbery (17-943) and his sentencing as a habitual offender (17-944).

Affirmed. Defendant was charged with first degree robbery but never contested the fact that he committed simple robbery when he robbed the victim of a bank bag. The trial centered around whether he led the victim to believe he was armed with a dangerous weapon thereby distinguishing the crime from first degree robbery. As no non-frivolous issues were presented for appeal, counsel's *Anders* motion to withdraw was granted.

In the companion case, we affirmed the trial court's sentencing of Defendant as third felony offender. He was convicted of three crimes of violence including the one above for simple robbery. He was sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence. Defendant's main argument was that his predicate offenses resulted in imposed sentences of no more than seven years at hard labor. He presented no witnesses at the hearing. La.R.S. 15:529.1 requires that defendant be sentenced to life imprisonment without benefits and Defendant, who had a long history of violent crimes, provided no reasons for downward departure from the mandatory life sentence for a third felony offender convicted of three crimes of violence.

***State of Louisiana v. Robbie Ray Frith*, 17-1004 (La.App. 3 Cir. 4/11/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Kyzar, Judges).**

Defendant Robbie Ray Frith appealed his sentences from his conviction of five counts of incest, in violation of La.R.S. 14:78.1. Defendant was sentenced to serve thirty-five years at hard labor with the first twenty-five years served without the benefit of probation, parole, or suspension of sentence on counts one and five; twenty-five years at hard labor without probation, parole, or suspension of sentence on counts two and three; and ten years and a $50,000 fine for count four. All sentences were to run concurrently. Defendant alleged that (1) the trial court erred in denying his motion to recuse without referring the motion to another judge; and (2) the sentences were unconstitutionally excessive. Defendant argued that the trial court committed reversible error when it denied his motion to recuse because (1) the trial court applied the Louisiana Code of Civil Procedure to a criminal proceeding; (2) the trial court's conduct demonstrated personal bias against

Defendant; and (3) the trial court failed to follow proper procedure in addressing the motion to recuse.

In a previous appeal, Defendant alleged three assignments of error: (1) that the trial court committed reversible error in denying Defendant's challenge for cause of Gilbert Blanchard; (2) that Defendant was incompetent to stand trial; and (3) that the trial court improperly interjected its religious beliefs into Defendant's sentencing hearing. We found the first two assignments lacked merit. We remanded for resentencing, finding the court failed to observe the twenty-four-hour delay between ruling on a motion for new trial and sentencing or obtaining a waiver of the delay. *See State v. Frith*, 15-630 (La.App. 3 Cir. 4/27/16) (unpublished opinion), *writ denied*, 16-1011 (La. 5/26/17), 221 So.3d 79. After remand, Defendant filed a "Motion to Recuse Trial Court Judge" under La.Code Crim.P. arts. 671(A)(1) and 671(A)(6), for when a trial judge is unable to conduct a fair and impartial trial. Defendant's motion alleged the trial judge repeatedly invoked God and Christian Scripture, revealing a personal, religious bias against Defendant. The bias was only made an issue at trial and, therefore, Defendant did not file the motion to recuse prior to trial pursuant to La.Code Crim.P art. 674. Defendant raised the issue on direct appeal. The supreme court denied Defendant's writ and Defendant immediately filed the motion to recuse. The trial court denied the motion and reinstated the exact same sentences. Defendant objected to excessiveness of sentence and filed a "Motion to Reconsider Sentence" because of his advanced age, and he suffered from physical and mental health issues. This motion was also denied.

Sentences Vacated and Case Remanded. This court vacated the Defendant's sentences and remanded the case to the trial court so that Defendant's motion to recuse may be heard by a randomly allotted judge pursuant to La.Code Crim.P. art. 675(B). We find Defendant's assignment of error has merit. "[T]he judge sought to be recused has a duty to stand aside and to appoint a judge ad hoc to pass upon the validity of the recusation." *Kidd v. Caldwell*, 371 So.2d 247, 252 (La.1979). At resentencing, the trial judge clearly and erroneously referenced La.Code Civ.P. art. 151 when discussing grounds for recusal in a criminal case. A judge is presumed impartial and a "party seeking the recusation must establish more than conclusory allegations." *State v. Anderson*, 96-1515, p. 4 (La.App. 3 Cir. 4/29/98), 714 So.2d 766, 768, *writ denied*, 98-1374 (La. 10/9/98), 726 So.2d 25. The trial judge repeatedly made religious references which is grounds for recusal. *See U.S. v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991). This court need not address excessiveness of sentence because the sentences are vacated, and the case is remanded.

***State of Louisiana v. Tanya Buteaux*, 17-877 (La.App. 3 Cir. 3/14/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Pickett, Judges).**

Defendant, Tanya Buteaux, appealed her jury conviction of three counts of theft of $1,500.00 or more, violations of La.R.S. 14:67. The trial court sentenced Ms. Buteaux to five years at hard labor on each count, to be served concurrently, with all but two years suspended, and five years supervised probation upon release from incarceration. The court also ordered Ms. Buteaux to pay restitution to the victims in the amount of $89,186.63.

Affirmed and Remanded with Instructions. The State presented evidence of theft perpetrated through a scheme whereby Ms. Buteaux manipulated daily store statements to short the cash deposits. Viewing the evidence in a light most favorable to the prosecution, we found that, though circumstantial, the evidence was sufficient for the jury to find the essential elements of the crime of theft perpetrated by Ms. Buteaux and that the State negated all reasonable hypothesis of innocence. Accordingly, we concluded that the evidence was sufficient to support an ultimate finding by the jury that the reasonable findings and inferences permitted by the evidence exclude every reasonable hypothesis of innocence, and, therefore, the evidence was sufficient to sustain the verdict of three counts of theft beyond a reasonable doubt.

S*tate of Louisiana v. Asahel Harvin*, 17-588, (La.App. 3 Cir. 2/15/18), ___ So.3d ___ (Panel: Cooks, Judge writing; Saunders and Perret, Judges).

Defendant was found guilty of second degree murder and sentenced, initially, to serve life imprisonment at hard labor without benefit of parole. Defendant was a minor at the time of the offense. Following Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455 (2012), Defendant sought to have his sentence modified. Ultimately, Defendant was re-sentenced to serve life imprisonment with benefit of parole. Defendant appealed asserting that he was not afforded a meaningful opportunity for release as required by Miller, that the Louisiana Supreme Court was without authority to craft penal provisions, and that the trial court failed to impose a sentence that was proportionate at the resentencing.

Affirmed. We found that under the pronouncements made in Miller, 567 U.S. 460 and State v. Montgomery, 13-1163 (La. 6/28/16), 194 So.3d 606, there is not a categorical bar on life without parole for juveniles who commit a homicide, but that courts must consider whether the crime reflected only transient immaturity or irreparable corruption in determining whether the sentence shall be imposed with or without the benefit of parole. Therefore, the current murder statute, La.R.S. 14:30.1 continues to provide a legal sentence and the legislature has provided other statutes relating to parole eligibility that are to be read in conjunction with the murder statutes. In fact, the Louisiana Supreme Court has rejected the suggestion that the proper remedy was resentencing under a lesser and included offense. Instead, Montgomery, 194 So.3d 606, only requires that juvenile homicide offenders be provided a hearing under La.Code Crim.P. art. 878.1 to determine whether the offense should be considered for parole eligibility. Thereafter, if parole is not denied, La.R.S. 15:574(E) provides the conditions under which an offender may be granted parole.

Defendant was granted an evidentiary hearing at which the sole question to be answered was eligibility for parole, and Defendant was resentenced to life with the benefit of parole. We agreed with the trial court and affirmed Defendant's sentence.

***State v. Cheley*, 17-538, c/w 17-696 (La.App. 3 Cir. 1/4/18), 237 So.3d 58 (Gremillion, Judge writing, with Amy and Keaty, Judges):**

Defendant was convicted of aggravated second-degree battery, a violation of La.R.S. 14:34.7. Defendant was arrested while in the act of beating his victim with his fists but had earlier used a pipe to strike and attempt to strangle the victim. The arresting officer found the victim unresponsive. The victim was noted by emergency room personnel to have sustained bruises, a mouth laceration, and a broken tooth. Personnel at the emergency room at Byrd Memorial Hospital in Leesville transported the victim to LSU Medical Center in Shreveport because she began to experience tachycardia.

Defendant was charged by bill and convicted by a six-person jury. The State then filed a bill of information charging Defendant as a third-felony habitual offender. The trial court adjudicated Defendant as charged. Defendant was sentenced to twenty-two and one-half years at hard labor but stated that the sentence was imposed without enhancement as a habitual offender.

We rejected Defendant's argument that the evidence was insufficient to support a conviction for aggravated second degree battery because there was no evidence of "serious bodily injury." *See* La.R.S. 14:34.7. The victim's facial injuries were extensive. She was almost rendered unconscious in the attack. One of her teeth was broken.

Defendant next complained that he was improperly adjudicated a habitual offender and improperly sentenced. The maximum penalty for second degree battery is fifteen years with or without hard labor and a fine of not more than $10,000.00. A sentence of twenty-two and one-half years would only be legal if it were enhanced by virtue of an adjudication as a third-felony habitual offender.

Further, one of the felony convictions used to adjudicate Defendant as a habitual offender was a guilty plea to possession of cocaine. It appeared from the exhibits the State introduced to prove this guilty plea that the judge in that matter had advised Defendant that he was waiving his right to trial but not that he was waiving his right to trial by jury. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). Despite Defendant's failure to object to these documents at his adjudication, he is entitled to collaterally attack the validity of a guilty plea on appeal. *See State v. Balsano*, 09-735 (La. 6/19/09), 11 So.3d 475. We vacated the sentence and remanded the matter for resentencing and to conduct an evidentiary hearing to determine whether Defendant's guilty plea to the cocaine possession charge was informed and voluntary.

CUSTODY & PARENTAL RIGHTS

***Starks v. Starks.*, 17-1139 (La.App. 3 Cir. 6/27/18). __ So.3d __ (Panel: Gremillion, Judge writing: Saunders and Pickett, Judges.)**

The trial court granted interim custody to the paternal grandparents with supervised visitation by the mother and the mother appealed.

Affirmed. The parents of the two minor children, Danae and Brad, had an ongoing bitter custody dispute. In February 2015, Danae was shot in the head and arm. In March 2015, she filed a petition for divorce but did not allege Brad was the shooter. Brad answered and requested full custody due to Danae's severe mental illness. Numerous proceedings followed with accompanying salacious details. Following a July 2015 hearing, all parties agreed to have a separate hearing on the issue of who shot Danae.

Following five days of trial relating to the issue, the trial court found that Danae's wounds were self-inflicted and that Brad proved "beyond a reasonable doubt" that the gunshot wounds were self-inflicted. That trial court judge thereafter recused herself and another hearing was held regarding custody with a judge presiding ad hoc.

At the custody hearing, the trial court, after considering the findings of the shooting hearing and the extensive testimony of experts at the custody hearing, found that neither parent was capable of properly parenting the children and maintained interim custody with the paternal grandparents. Danae's visitation with the children was changed from unsupervised to supervised.

On appeal, we affirmed the trial court's findings. Although this was a civil matter and the "beyond a reasonable doubt" standard was above and beyond what Brad needed to prove, we found that burden was nonetheless met. Cell phone evidence and the 911 call placed Brad away from the scene of the shooting, a suicide note was found next to Danae, Danae had previous suicide attempts, the investigating officers found that she shot herself, and the testimony of the parties all proved that she shot herself. Danae admitted to a detective while in the hospital that she shot herself. Moreover, the fact that Danae and Brad had consensual sex while she was hospitalized also tended to disprove the fact that he shot her. We found no abuse of discretion in the trial court's finding that neither party was fit to parent the children as they both had drug problems, put their needs to be at war above their children's needs, behaved immaturely, and tended to deny the serious nature of their problems.

***Tracy Alexander v. State of Louisiana, Department of Children & Family Services,* 18-154 (La.App. 3 Cir. 6/6/18), __ So.3d __ (Panel: Amy, Judge writing; Thibodeaux, Chief Judge; Pickett, Judge).**

Tracy Alexander was not present at the trial on the State's "Petition for Termination of Parental Rights and Certification for Adoption" concerning two of her minor children, and neither

her counsel nor counsel for the Department of Children and Family Services (DCFS) had an explanation for her absence. The trial court ultimately rendered judgment terminating her parental rights. Ms. Alexander filed a motion for new trial based on her absence. At a hearing on the motion, the DCFS caseworker testified that, prior to the termination trial, she received a letter from Ms. Alexander's attorney requesting that DCFS provide transportation. The caseworker said that she was unable to reach Ms. Alexander despite calling the phone number on file, as well as the places she reported to be living and working. The caseworker confirmed that she did not alert Ms. Alexander's counsel of her inability to contact Ms. Alexander. Ms. Alexander also testified, stating that she was aware of the trial date but unaware that she needed to attend. She indicated that she called the caseworker and her attorney in the days leading up to the trial and left voicemail messages asking for them to return her calls but did not receive return calls and had no other means to attend the trial. In this regard, the caseworker testified that she neither heard from Ms. Alexander nor received messages prior to the trial. The trial court denied the motion for new trial. Ms. Alexander then filed a petition for nullity and motion for summary judgment, asserting that she was deprived of her right to testify because DCFS committed fraud and ill practices by failing to arrange transportation and/or by failing to notify her counsel or the trial court of the inability to arrange transportation. The trial court dismissed Ms. Alexander's petition for nullity and denied her motion for summary judgment. Ms. Alexander appealed.

Affirmed. The panel first addressed Ms. Alexander's contention that DCFS's failure to arrange for transportation constituted fraud and ill practices. The panel explained that, while La.Code Civ.P. art. 2004 provides that "[a] final judgment obtained by fraud or ill practices may be annulled[,]" jurisprudence interpreting that article has clarified that an action for nullity is not the proper remedy for a loss that occurs because of a party's negligence or failure to act on its own behalf. The panel found that Ms. Alexander failed to act on her own behalf in that she did not provide DCFS with current contact information and failed to notify anyone, including her attorney, that she had been unable to arrange transportation with DCFS. Next, the panel addressed Ms. Alexander's argument that DCFS committed fraud and ill practices by failing to notify her attorney or the trial court of the inability to arrange transportation. Finding no merit in the contention, the panel explained that a judgment is not fraudulent when a party fails to disclose facts within its knowledge if the other party, with reasonable diligence, could have ascertained those facts. The panel determined that Ms. Alexander could have, with reasonable diligence, ascertained both that she would not be present at the trial and the reasons that she would not be present. Namely, she testified that she had no independent means of transportation and had not arranged transportation with anyone at DCFS. Accordingly, the panel found no merit in Ms. Alexander's assertion that DCFS committed fraud and ill practices.

***State in Interest of J.A.*, 17-500 (La.App. 3 Cir. 1/4/18), 237 So.3d 69 (Keaty, J.; Amy and Gremillion, JJ.)**

The Department of Children and Family Services filed a petition for termination of parental rights of the mother and father as to their minor child and for a certificate of adoption. The trial court terminated the parental rights and the mother appealed.

Affirmed. The third circuit held that the termination of the mother's parental rights was not manifestly erroneous and that it was in the child's best interest. The third circuit's holding was based upon the evidence and testimony which revealed that the mother continues to suffer from substance abuse and mental health issues, which render her unable to properly care for the minor child. The third circuit explained that the minor child has a paramount interest in remaining in the stable and loving environment provided by the foster mother, with the security and permanency her adoption will provide.

DAMAGES

***Randall Vincent, et ux. v. City of Iowa,* 17-951 (La.App. 3 Cir. 4/11/18), __So.3d__ (Panel: Amy, Judge writing; Gremillion and Perret, Judges).**

The plaintiffs filed suit after a City sewerage line discharged into their home in 2014, causing damage both to the home as well and to personal property. The City provided payment for certain repairs to their home, as well as relocation and cost of living expenses. However, the City denied the remaining aspects of the plaintiffs' claim for damages. The trial court found in the plaintiffs' favor, awarding damages for home contents, mental anguish, and loss of use. The City appealed. In an answer to the appeal, the plaintiffs sought an additional award for costs of replacing flooring in the home, as well as for certain household items.

Affirmed. The panel first addressed the plaintiffs' contention that the trial court awarded excessive damages for mental anguish to Mr. and Mrs. Vincent ($35,000 and $40,000 respectively). Finding no merit in the contention, the panel observed that the plaintiffs presented testimony regarding their respective difficulties and the disruption in their life associated with addressing the situation and in the two-month relocation from the home. Each plaintiff suffered physical consequences associated with the sewage overflow, which they witnessed. They also personally attended to the initial removal of the material, which was described as an accumulation of up to two inches in some areas. The panel also found no merit in the contention that the trial court's award for loss of use should be reversed as the City compensated the plaintiffs for their hotel stay during their relocation. The record instead supported an award for an inability to use the home, not only during their period of relocation, but also for their ongoing diminished use of the home. Notably, Mrs. Vincent testified that the home had a lingering smell, that she no longer enjoyed having guests, and that Mr. Vincent stayed outdoors more often. Addressing the final argument regarding contents damages, the panel maintained the trial court's award of $45,000.00. While the City asserted that the plaintiffs were entitled to receive only "restoration" of the contents, the trial court determined that the nature of the sewage undermined the contention that the items could, in fact, be repaired. The record supported the trial court's award of replacement costs as given the nature of the discharge and the fact that it was sufficiently damaging to warrant the removal of flooring, carpeting, and sheetrock. To the extent the City complained that the plaintiffs' valuation of the items was uncorroborated, the panel noted that they itemized spreadsheets of the subject property as well as photographic evidence.

By their answer, the plaintiffs sought an additional sum for replacement costs associated with wood flooring. However, the panel maintained the trial court's ruling upon a finding that the testimony lacked clarity on this point. Similarly, the panel rejected the plaintiffs' claim for additional damages for replacement of household items and noted that comparison of the receipts and the index for contents damages undermined the plaintiffs' contention that they were not compensated for those items.

***Villa v. Geico Cas. Ins. Co*., 17-608 (La.App. 3 Cir. 2/15/18), (Ezell, J.; Thibodeaux, Chief Judge, Savoie, and Kyzar, JJ.; Conery, J., concurs in part, dissents in part, with reasons)**

On December 10, 2013, Ms. Villa was injured when her vehicle was struck by a vehicle driven by Ms. Matte, who ran a stop sign. She was transferred to Lake Charles Memorial Hospital by ambulance. According to medical testimony and records, Ms. Villa suffered a head injury, worsening of neck pain, a displaced sternum fracture with three rib fractures, three herniated lumbar discs, a large hematoma on her right hip, a sprain of the left knee, a sprain and cartilage loss in the right knee, an avulsion fracture of her left ankle, and bruising and swelling of the right ankle. Additionally, Ms. Villa claimed that the deployment of the air bag, which hit her in the face, caused the lens implant in her right eye to shift, necessitating the need for surgery to replace the lens. Ms. Villa was hospitalized for four days, where she was placed on a Foley catheter and given Morphine for pain. Dr. Axelrad testified that Dilaudid was later prescribed to Ms. Villa because her pain was so intense. Upon her release from the hospital, Ms. Villa slept in a recliner at her house. Ms. Villa was dependent on others to take care of her, her house, and her yard. Three months after the accident, Ms. Villa returned to work at her family's business.

Ms. Villa filed suit against Ms. Matte and GEICO on February 11, 2014. A trial before a jury on the issue of damages was held on December 5-7, 2016. The jury found that Ms. Villa suffered damages as a result of the accident and awarded damages in the following amounts: 1) $32,500.00 for past and future pain and suffering; 2) $4,000.00 for past and future mental anguish; 3) $1,000.00 for past and future loss of enjoyment of life; 4) $45,740.00 for medical expenses; and 5) $6,480.00 for lost wages. On December 8, 2016, a bench trial was held on the issue of whether GEICO provided coverage to Ms. Matte for the accident at issue. Following trial on the issue, the trial court ruled that that even though there was sufficient evidence that GEICO mailed notice of cancellation, GEICO failed to provide the requisite ten-day notice as required by the law. Therefore, the policy issued by GEICO provided coverage for this accident.

Ms. Villa appealed the award of damages and the failure of the trial court to take corrective action when defense counsel alleged violated a stipulation in addressing the jury. Ms. Matte appealed arguing that Ms. Villa should not have been allowed to assert a lost wage claim and that an optometrist should not have been allowed regarding her need for surgery.

Reversed in Part; Affirmed as Amended. The optometrist's testimony was beneficial to the jury since he had been Ms. Villa's treating physician for many years before the accident and

knew the circumstances surrounding her eye issues. The award for past medical expenses was increased to include all medical expenses submitted by Ms. Villa.

After reviewing prior cases, the award of general damages was increased to $250,000. Ms. Villa was also entitled to an award of past lost wages as she earned the ability to take time off work and receive compensation due to her long-time employment and her employer made no claim for reimbursement of wages.

The trial court found that notice of cancellation was properly mailed pursuant to La.R.S. 22;1266(D)(1). However, the trial court erred in finding that notice was not timely mailed. Louisiana Revised Statutes 22:1266(J) (emphasis added) provides that: "Where written notice of cancellation or nonrenewal is required and the insurer elects to mail the notice, the running of the time period between the date of mailing and the effective date of termination of coverage **shall commence upon the date of mailing**." Pursuant to La.R.S. 22:1226(J), notice was timely mailed on July 25, which would be the start of the ten-day period. The tenth day would be August 3, which is clearly ten days before the cancellation date of August 5.

EMBEZZELMENT

***Daigle Oil Distribs. v. Istre*, 17-1069 (La.App. 3 Cir. 4/11/18), __So.3d__ (Ezell, J.; Pickett and Perret, JJ.)**

While working for Daigle Oil Distributors as a bookkeeper, Elizabeth Istre embezzled $4,363,376.79 in funds during her ten years of employment. The embezzlement was discovered by one of the owner's daughters when she was training to take over the books. It was discovered that Elizabeth was coding checks in QuickBooks as payable to certain accounts and then actually printing the checks payable to either her or her husband. She was able to sign the checks with a rubber-stamped signature of Brian Daigle that was provided to her when she first started working at Daigle Oil. The checks were then deposited into her personal accounts, including a joint account with her husband at MidSouth Bank.

On April 17, 2014, Daigle Oil filed suit against Elizabeth and her husband, Burton, for return of the misappropriated funds. After the Defendants filed answers, Daigle Oil filed a motion for summary judgment. A hearing on the motion was held on June 1, 2017. Judgment was signed on July 6, 2017, finding that Elizabeth was liable to Daigle Oil in the amount of $4,363,376.79. Burton was found liable in solido with Elizabeth for this amount. Only Burton appealed the judgment.

Affirmed. Burton first claimed that the trial court erred in denying an exception of prescription. He claimed that Daigle Oil should be denied the right to pursue damages for the fraudulent checks written by Elizabeth prior to April 17, 2013, because the thefts should have been

discovered long before suit was filed on April 17, 2014. Elizabeth filed the exception of prescription. Burton never filed an exception of prescription.

Finding that prescription can only be claimed by the party raising it as a personal defense, we found that Burton could not raise a defense he did not claim.

We further found that the trial court correctly held that Burton was liable in solido with his wife for the funds she embezzled. This was an obligation incurred by Elizabeth during the community property regime. Daigle Oil established that the stolen funds were used for the common interest of the spouses over the years, so that even though it was an intentional tort it was for the benefit of the community. La.Civ.Code art. 2363.

EMERGENCY VEHICLES

***Gerald Janise v. Acadian Ambulance Service, Inc., et al*, 17-1100 (La.App. 3 Cir. 4/25/18), __ So.3d __ (Panel: Amy, Judge writing; Cooks and Conery, Judges).**

This dispute arose from an automobile accident between the plaintiff and William Gerard, an operations supervisor for Acadian Ambulance Service, Inc., who was driving a company vehicle. Following the accident, the plaintiff filed a petition for damages against Mr. Gerard, Acadian Ambulance, and their insurer, Liberty Mutual Insurance Company. The defendants answered, arguing that they were entitled to statutory immunity due to the use of the vehicle's lights and siren, as well as the absence of gross negligence. The jury ultimately found in favor of the defendants, and, in accordance with the jury's verdict, the trial court issued a judgment dismissing the plaintiff's claims with prejudice. The plaintiff appealed.

Affirmed. The panel first addressed the plaintiff's contentions that the jury was clearly wrong in finding that Mr. Gerard was responding to an emergency call and that Mr. Gerard proceeded through a red light but only after slowing down as necessary for safe operation. Finding no merit in the contentions, the panel observed that La.R.S. 32:24 provides that, if the driver of an authorized emergency vehicle is responding to an emergency call and using audible or visual signals sufficient to warn other motorists of his approach, then the driver may "[p]roceed past a red or stop signal but only after slowing down or stopping as may be necessary for safe operation." The panel explained that, if the emergency vehicle driver's conduct adheres to La.R.S. 32:24, then the driver will be held liable only for actions which constitute reckless disregard for the safety of others; however, if the emergency vehicle driver's conduct does not comply with La.R.S. 32:24, then the driver's actions will be gauged by a standard of due care.

The panel determined that the record supported a finding that Mr. Gerard's conduct adhered to La.R.S. 32:24, and thus should be analyzed under the reckless disregard standard. In particular, Mr. Gerard testified that his dispatch center determines and instructs him whether a call is considered an emergency or "lights and siren" situation. He stated that, prior to the accident, he

received such a call from dispatch and activated his vehicle's lights and siren. A witness testified that, as he approached the intersection, he could hear the vehicle's sirens about a block away and saw the lights on the vehicle. Mr. Gerard explained that, as he arrived at the three-lane intersection, he stopped; observed that traffic in the first and second lanes had stopped; noticed that there was no vehicle in the third lane; began "creeping" through the intersection at about five to ten miles per hour; and collided with the plaintiff's vehicle in the third lane. A witness testified that Mr. Gerard "crawled through the intersection, slowly." Thus, the panel concluded that the record supported the jury's finding that Mr. Gerard was responding to an emergency call; proceeded past a red light but only after slowing down or stopping as necessary for safe operation; and made use of the vehicle's lights and siren sufficient to warn other motorists. The panel further determined that Mr. Gerard's conduct did not constitute reckless disregard for the safety of others. Accordingly, the panel found no merit in the plaintiff's contentions that the jury erred in failing to determine the degree or percentage of negligence attributable to Mr. Gerard and that the jury erred in failing to award general and special damages to the plaintiff.

ENGINEERS & CONTRACTORS

***City of Youngsville v. C. H. Fenstermaker and Associates, LLC*, 17-1065 (La.App. 3 Cir. 4/18/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders and Kyzar, Judges).**

The defendant engineer, C. H. Fenstermaker & Associates, L.L.C. (Fenstermaker), provided engineering services for the construction of a roadway in the City of Youngsville. Youngsville sued Fenstermaker for deterioration of the roadway. Fenstermaker filed a third-party demand against the construction company, Glenn Lege Construction, Inc. (GLC). GLC filed an exception of peremption, which was granted by the trial court. Fenstermaker appealed the trial court's judgment in favor of GLC.

Affirmed. Finding no error or manifest error in the trial court's judgment, we affirmed.

Fenstermaker filed its third-party demand against GLC approximately four months after Fenstermaker was served with Youngsville's petition in the main demand. We found that the 2012 enactment of La.R.S. 9:2772(A)(1)(c) applied in this case; it gave Fenstermaker ninety days to file its third-party demand; thus Fenstermaker's action was perempted.

We further found that La.R.S. 9:2772(C) did not apply to Fenstermaker's third-party demand because Fenstermaker has not been cast in judgment on the main demand and therefore has not yet suffered damages.

EXPERT TESTIMONY

***Sonnier v. Louisiana, DOTD*, 18-0073, c/w 18-0074, c/w 18-0075 (La.App. 3 Cir. 6/6/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Amy and Pickett, Judges).**

The plaintiff, Gaynelwyn Sonnier, appealed interlocutory judgments limiting her experts' testimony, along with a final judgment memorializing the jury's verdict in favor of the defendant, State of Louisiana, Department of Transportation and Development (DOTD), involving a single vehicle accident caused by an allegedly defective highway.

In this case, two young women in their twenties were killed in 2006 when the driver failed to negotiate a curve at night on Highway 10, a two-lane roadway in Allen Parish near Oakdale. The eastbound vehicle crossed the center line, the opposing lane, and its shoulder, and crashed into the ditch of the westbound lane, striking a tree stump leaning toward the ditch from its backslope. The plaintiff's daughter was a passenger in the vehicle. The driver of the vehicle had a blood alcohol level of .10% at the time of her death. The plaintiff sued the DOTD for cutting the stump on the backslope of the ditch to three feet instead of five inches after hurricane Katrina, for failing to widen the two-foot shoulders to four-foot-wide shoulders in the area, and for failing to revise the ditch's foreslope from a 1:1 pitch to a 3:1 pitch. After hearing eight days of testimony and presentation of evidence by the plaintiff and the DOTD, the jury rendered a verdict in favor of the DOTD, finding no defect creating an unreasonable risk of harm to the driving public.

On appeal, the plaintiff asserted that the trial judge erred in not allowing the plaintiff's experts in traffic engineering and accident reconstruction to opine on "unreasonable risk of harm" and on whether the subject roadway underwent a "major reconstruction" when it was overlaid with asphalt in 1959. The plaintiff asserted that just because "unreasonable risk of harm" is an ultimate issue for the jury to decide, under La.Code Evid. art. 702, that cannot be the sole reason for preventing expert testimony on the issue. The plaintiff further asserted that the asphalt overlay in 1949 was a "major reconstruction" that required the application of 1946 standards calling for the above-discussed corrections to the roadway, shoulders, and ditches. The plaintiff further asserted that the jury erred in failing to find defects creating unreasonable risks of harm and in failing to allocate a portion of the fault to the DOTD and a portion of the fault to the driver.

Affirmed. Finding no abuse of discretion on the part of the trial judge and no manifest error on the part of the jury, we affirmed the judgments of the trial court.

We found no manifest error by the trial judge in preventing the plaintiff's experts, Mr. Evans and Mr. Robert, from giving opinions on "unreasonable risk of harm" because La.Code Evid. art. 702 states that an ultimate issue for the jury cannot be the "sole" reason for precluding the testimony, and here, the trial judge stated several other reasons for precluding the testimony. A very important and well-articulated reason was that the plaintiff's experts were not offered or accepted as experts in highway design, construction, or maintenance. This fact distinguished the plaintiff's case from *Rosen v. State ex rel. Dep't of Transp. & Dev.*, 01-499 (La.App. 4 Cir.

1/30/02), 809 So.2d 498, *writ denied*, 02-605 (La. 5/10/02), 815 So.2d 842, which she attempted to analogize. We also noted that the plaintiff's experts were allowed to testify extensively about what defects they found at the accident site and the DOTD's responsibility to correct them. Only a few pages of the 160-page deposition of the plaintiff's expert were redacted because of the legal term "unreasonable risk of harm." The jury also heard testimony that the National Guard was cutting trees after the hurricane, and the witness who saw some of the cutting admitted that he did not see the DOTD crew cut the tree stump in question.

We further found no manifest error in the trial court's precluding the testimony of the plaintiff's experts regarding what DOTD considers a "major reconstruction." As the judge pointed out, the plaintiff's experts were traffic engineers and accident reconstructionists, not highway design or highway construction engineers. We found that the present case was on point with *Forbes v. Cockerham*, 08-762 (La. 1/21/09), 5 So.3d 839, and that the trial judge had followed that precedent.

Finally, we found no abuse of discretion on the part of the jury in finding no defect creating an unreasonable risk of harm to the motoring public. Over eight days of trial, the jury heard and saw ample evidence to support its verdict, including testimony that the curve was not severe; that the driver used the road on a regular basis and was familiar with it; that the driver had a ten-foot-wide westbound lane and a two-foot-wide shoulder to correct her path and get back into her east-bound lane of travel; that the driver made no attempt to break or steer to avoid the accident; and that the driver was not a reasonably prudent driver who was momentarily distracted; rather she had an alcohol concentration in her blood that was above the legal limit and that impaired her ability to negotiate the curve and take corrective measures to avoid crashing into the ditch. We found that the record supported the trial court's and the jury's findings and cited numerous cases supporting the jury's verdict. Accordingly, we affirmed same.

HEALTH CARE PROVIDERS

***George Raymond Williams, M.D., Orthopaedic Surgery, A Professional Medical LLC v. Bestcomp, Inc.* 17-478 (La.App. 3 Cir. 1/4/18), ___ So.3d ___(Gremillion, Judge, writing, with Amy and Keaty, Judges):**

Plaintiffs sought class action certification of claims by healthcare providers who rendered treatment to injured employees under the terms of the Louisiana Workers' Compensation Act. These plaintiffs subscribed to preferred provider organization (PPO) agreements with Bestcomp, Inc., which was allegedly insured by the defendant insurers. Plaintiffs allege that Bestcomp discounted their billing in accordance with the PPO agreements without the notice required by La.R.S. 40:2203.1. These discounts were determined utilizing software developed by StrataCare, L.L.C. The plaintiffs were appointed class representatives for purposes of settlement with StrataCare. The defendants were sued under the Louisiana Direct Action Statute in their capacities as the insurers of StrataCare.

In the class certification hearing, the principle exhibit was a corporate deposition of StrataCare, which included a Microsoft Excel spreadsheet itemizing the discounts recommended by StrataCare to Bestcomp. Defendants objected to the introduction of the disc on the basis that it was not properly authenticated, that it constituted a summary pursuant to La.Code Evid. art. 1006 for which the underlying documents had not been admitted, and that it only demonstrated the *recommended* discounts rather than the actual discounts. These, defendants contended, rendered the disc inadmissible and would require individual inquiries regarding the actual versus recommended discounts. The trial court relied upon the disc to determine that the numerosity requirement of La.Code Civ.P. art. 591 was met, as there were 49,988 claims to be adjudicated; it further found that it would be impractical to join all these claims. Commonality was established in that the determination of whether Bestcomp improperly applied PPO discounts by violating the terms of La.R.S. 40:2203.1 was an issue common to all claims. The class was certified, and defendants appealed.

We found that the disc data was properly authenticated. The office manager of one of the plaintiffs testified regarding her comparison of the data with Explanations of Benefits forms (EOBs) the office regularly received from workers' comp insurers and found the data consistent with those EOBs. Further, the Fee Schedule Compliance Analyst with StrataCare testified to the contents of the disc, which was attached to her deposition with no objection. She had examined "a majority" of the data and found it to reflect the discounts StrataCare recommended to Bestcomp. On this basis, we found that this sufficiently demonstrated that the disc was what Plaintiffs purported it to be. The disc did appear to meet the definition of a "summary" pursuant to La.Code Evid. art. 1006.

> When the source documents originate from the opponent of the summary, the article's requirement that the proponent of the summary to make the originals or duplicates of the source documents available to other parties "at a reasonable time and place" is obviated. *Id.* Further, there was no evidence presented at the hearing that Defendants had not been given an opportunity to examine the source documents. Accordingly, we find that the trial court did not err in admitting, for purposes of the class certification hearing, the data disc. (P. 7)

Turning to the merits, we found that while the trial court was impressed with the number of claims, we were more impressed with the number of claimants. The data disc showed that there were 349 potential claimants whose bills were recommended by StrataCare for discounting by Bestcomp. This satisfies the numerosity requirement.

We found that the facts were almost identical to *Gunderson v. F.A. Richard & Assocs., Inc.*, 07-331 (La.App. 3 Cir. 2/27/08), 977 So.2d 1128, *writs denied*, 08-1063, 08-1072 (La. 9/19/08), 992 So.2d 953, which certified a class against PPO for identical conduct:

> The defendants interposed the same arguments in *Gunderson* as the present defendants in this matter. This court rejected each of them. The claims involve

> liability that is imposed "solely in the failure to timely give notice." *Id.* at 1138. The imposition of penalties under La.R.S. 40:2203.1 in no way relies upon the amount of the bill that was discounted. The possibility of inconsistent results and considerations of judicial economy weighed greatly in favor of class treatment, as did the fact that defending individual suits would prove far more expensive to defendants than class treatment. The fact that some claimants' demands are far larger than others' was not of great moment. The fact that Wilson Chiropractic had settled its demands is no more an impediment to his class representation as was a similar situation in *Gunderson*. (Pp. 9-10)(footnote omitted)

Defendants asserted that the putative class representatives were not "typical" for purposes of La.Code Civ.P. art. 951 because they each had less that sixty-five instances of alleged discounts, while an average member of the putative class had claims that exceeded $200,000.00. "Typicality," though, is established when "a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." (P. 10, quoting *Baker v. PHC-Minden, L.P.*, 14-2243, p. 21 (La. 5/5/15), 167 So.3d 528, 543). The conduct arose from the same event, practice, or course of conduct that gave rise to the claims of the other class members and arose from the same legal theory. Therefore, despite the disparity between the sizes of the class representatives' claims and those of an average member, the claims were typical.

Lastly, defendants asserted that imposing a statutory penalty of $2,000.00 per infraction was constitutionally infirm given the relatively inconsequential discounts that were applied to certain bills. However, we rejected the contention that resolution of this issue would require an individual inquiry so as to preclude class certification. The evidence proving a violation of the penalty provision would be common to all claims. The State's interest deterring the prohibited conduct would be the same in all instances, and the remedy under the penalty statute is identical. "The only inquiry of an even remotely individual nature is the disparity between the harm or potential harm suffered and the penalty imposed, and we do not view this of a sufficiently individual nature to warrant not handling this on a class-wide basis." (P.11)

IMMOVABLE PROPERTY

***Zaveri v. Husers*, 16-866 consol. with 16-867 (La.App. 3 Cir. 6/21/17), 224 So.3d 389, *writ denied*, 229 So.3d 475 (La. 11/6/17) (Panel: Keaty, Judge writing; Saunders and Conery, Judges)**

The matter at issue in these consolidated appeals arose after the Zaveris built a large retaining wall between their lot and the neighboring lot of the Husers in conjunction with the Zaveris' construction of a home on Prien Lake in Lake Charles, Louisiana. By the time the Zaveris purchased their lot in 2005, several hurricanes had struck the Lake Charles area and FEMA required that all new homes be constructed at least 10 feet above the base flood elevation. As

originally designed, the retaining wall resembled an upside-down T, with "toes" on either side of the vertical wall; however, Zaveri altered the design to remove the toe on the Husers' side of the wall which allowed it to be installed closer to the property line. The parties filed competing petitions for declaratory relief regarding whether the wall violated any codes or zoning ordinances of the City of Lake Charles. The Husers also filed third party demands against the City and Champion Custom Home Builders, a construction company from Texas that assisted with the project. The Husers later requested that the trial court overturn the City's denial of their appeal of the Zoning Commission's decision to issue a zoning certificate and building permit to the Zaveris. After a bifurcated trial, the jury found that the wall was structurally unsound and that the project violated the City zoning ordinance, and it awarded the Husers damages totaling $538,200 for loss of value of property/stigma, costs of past and future repairs and remedial work, and future loss of landscaping. The trial court granted the Husers' administrative appeal, finding that the City erred in not overturning the Zoning Commission's decision to issue a zoning certificate and building permit to the Zaveris. Judgment was rendered in favor of the Husers and against the defendants as apportioned by the jury as follows: 1) 93% to the Zaveris, 2) 5% to Champion, and 3) 2% to the City. The Zaveris, the Husers, and Champion filed Motions for JNOV, all of which were denied. The Zaveris appealed and the Husers answered the appeal.

Affirmed: After review, we found no manifest error in the jury's finding that the wall was structurally unsound due to the fault of the Zaveris. We further found that the evidence supported an award of damages to the Husers. Taking into consideration the totality of the evidence, we found no manifest error in the trial court's denial of the Zaveris' motion for JNOV because a reasonable juror could have determined that the Husers proved their entitlement to $125,000 in damages for the stigma and lost property value suffered at the hands of the Zaveris. We upheld the trial court's grant of the Husers' administrative appeal, finding the issue moot because the jury likewise determined that the project violated the City zoning ordinance and because the jury apportioned damages against the City for its fault. Finally, we found no merit to the Husers' assertion that the jury erred in failing to award them damages for loss of use and enjoyment of their property and/or for mental anguish given the great discretion afforded a jury in assessing the credibility of witnesses and in awarding damages. We rejected the Husers' claim that the trial court erred in denying their motion for JNOV regarding those items of damages, finding that it applied the proper standard when considering the Huser's motion. Thus, we affirmed the trial court's judgment in its entirety.

INMATE SUITS

***Alvin Pete v. State of Louisiana, Department of Corrections, et al.*, 17-1131 consolidated with 17-1132 (La.App. 3 Cir. 5/9/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Keaty and Savoie, Judges).**

Plaintiff, Alvin Pete, filed suit against Ronald J. Theriot, in his official capacity as the sheriff of St. Martin Parish (Sheriff), seeking damages for an injury he sustained to his left eye

while incarcerated in the St. Martin Parish Jail, Breaux Bridge Substation 2 (jail). The trial court found in favor of Mr. Pete, awarding him $50,000.00 in general damages. Both parties appealed.

Amended in Part; Affirmed as Amended. After reviewing the record, we first found no manifest error in the trial court's denial of the Sheriff's exception of prematurity as the evidence submitted by the Sheriff at the hearing on the exception could not refute Mr. Pete's assertion that he had filed a grievance pursuant to the applicable administrative remedy procedure. We further found no manifest error in the trial court's finding that the Sheriff was liable for Mr. Pete's injury, which occurred when another inmate threw a rock that struck Mr. Pete's eye. At issue was the presence of limestone aggregate in the trustee yard and the lack of supervision by the guards. Based on the expert testimony and evidence, we found that the record reasonably supported the trial court's conclusion that the Sheriff either knew or should have known that a rock could be thrown and result in injury to a trustee or a guard. Moreover, we found the evidence, particularly as to the presence of the limestone aggregate and the failure of the guards in their duties to supervise, also more than adequately supported the trial court's finding that the Sheriff, on that day, through the inaction of his deputies, failed to take the steps necessary to prevent the reasonably foreseeable injury.

However, we did find that the trial court erred in failing to apportion comparative fault to the inmate who threw the rock. But while his action was a contributing factor, we concluded, based on the evidence, that the injury would not have occurred (1) if the limestone aggregate had not been present in the trustee yard, and (2) if reasonable supervision would have been provided by the deputies. Therefore, we apportioned 80% fault to the Sheriff and 20% fault to the inmate, amounts that we found were the highest and lowest amounts the trial court could have reasonably allocated to them. Finally, we found that the general damages award was abusively low. After comparing the facts of this case, particularly Mr. Pete's permanent loss of his eye, with jurisprudence involving similar injuries, mainly loss of eyesight, we found the sum of $150,000.00 to be the lowest amount of general damages the trial court could have reasonably awarded Mr. Pete. Accordingly, we amended the judgment to correct these errors and affirmed the judgment as amended.

LAND RESTORATION

Grace Ranch, LLC v. BP America Production Company **(La. App. 3 Cir. 7/18/18), __So.3d __ (Panel: Keaty, Judge writing; Savoie, Judge, and Thibodeaux, Chief Judge)**

Grace Ranch filed suit in contract and tort for contamination of its property resulting from the gas exploration and production by multiple defendants. Grace Ranch sought and obtained assignment of rights from prior surface and mineral owners of property, General Mills and Leblancs, their heirs and assigns. Grace Ranch then filed an amended petition to assert its assigned

claims. Defendants filed motions for summary judgment and an exception of no right of action. The trial court granted the motions. This court affirmed.

Grace Ranch contends that *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp*., 10-2267, 10-2272, 10-2275, 10-2279, 10-2289 (La. 10/25/11), 79 So.3d 246, is inapplicable because it involved a surface lease whereas the present matter involves a mineral lease. We agreed that the subsequent purchaser rule does apply to mineral leases. Subsequent purchaser rule is a jurisprudential rule which provides that the property owner "has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted." *Id*.

Grace Ranch alleged that a mineral lease creates a real right by the landowner to sue for property damage that runs with the land. This court determined that a mineral lease creates a real right in favor of the mineral lessee rather than the lessor. (*Bundrick v. Anadarko Petroleum Corp.*, 14-993 (La.App. 3 Cir. 3/4/15) 159 So.3d 1137, *writ denied*, 15-557 (La. 11/16/15), 184 So.3d 24, *Minvielle v. IMC Global Operations, Inc.*, 380 F.Supp.2d 755 (W.D. La. 2004).

Grace Ranch contended that the mineral lessee owes an end of the lease restoration obligation to both the mineral lessor and surface owner, which could be enforced by any subsequent owner. Unlike in *Duck v. Hunt Oil Co.*,13-628 (La.App. 3 Cir.3/5/14), 134 So.3d 114, *writs denied*, 14-703, 14-709, 14-715, 14-735 (La. 6/13/14), 140 So.3d 1189, 1190, where there was a *stipulation pour autrui*, there is no implied duty to restore the surface. Grace Ranch does not have a right of action to sue for pre-acquisition damages based upon the legal principles governing limited personal servitudes and usufructs.

General Farms, the immediate past land and lease owner was a dissolved corporation at the time of the request for assignment of rights and incapable of assigning claims to Grace Ranch. And other previous owners did not assign rights until 2013, two years after original petition. Therefore, not exigible at the time of the original petition and cannot relate back.

Affirmed. The trial court's judgment granting the motions for summary judgment in favor of defendants and the exception of no right of action in favor of one of the defendants is affirmed.

***Black River Crawfish Farms, LLC v. Jack A. King, Jr., et al.*, 17-672 (La.App. 3 Cir. 2/7/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Gremillion and Conery, Judges).**

Black River Crawfish Farms, LLC (Black River) filed suit against several mineral servitude owners, asserting restoration claims pursuant to La.R.S. 31:22 (hereinafter "Article 22") for the contamination of its property resulting from historical oil and gas exploration activities. Thereafter, certain alleged servitude owners, John Martin King, Michael Todd King, Stephen Paul King, and Deborah Ann King Rudolph, as Trustees of the Billy D. King, M.D. Revocable Trust

(King Trustees), filed a peremptory exception of prescription of nonuse. The trial court granted the exception, dismissing Black River's claims with prejudice.

Exception of No Right of Action Granted; Dismissal Affirmed. Because no one disputed that the evidence clearly and reasonably showed that the mineral servitude owned by the King Trustees was extinguished by prescription of nonuse in January 2000, we found no error in the trial court's evaluation of the evidence and its conclusion as to the accrual of prescription. We noted, however, that, although styled as a peremptory exception of prescription of nonuse, the objection raised by the King Trustees was really one of no right of action, which we noticed on our own motion so to answer the question of whether Black River had the right to enforce the Article 22 restoration obligation against the King Trustees.

As a real obligation correlative to the real right of servitude, we found that the duty to restore could not exist in the absence of the mineral servitude, which, by operation of law, was extinguished by prescription in January 2000. Furthermore, upon extinguishment of the servitude, the mineral rights reverted to the landowner, Concordia Fisheries, Ltd., thus uniting the qualities of the obligee (the owner of the land) and the obligor (owner of the mineral rights) in the same entity and extinguishing the obligation by confusion. Consequently, we found that, by January 2000, all real rights and correlative obligations arising from the mineral servitude were extinguished by law. Because neither the real right nor the correlative obligation existed when Black River acquired the property from Concordia Fisheries, Ltd. in 2003, we concluded that Black River never acquired the right to enforce the real obligation to restore the surface and so had no right of action to seek restoration against the King Trustees.

LEGAL INTEREST

***Williams v. SIF Consultants of La., Inc.*, 17-694 (La.App. 3 Cir. 4/4/18), ___ So.3d ___ (Panel: Conery, Judge writing; Cooks, Amy, dissents and assigns reasons, Gremillion, dissents for reasons by Amy, and writes separately, and Keaty, Judges).**

Homeland Insurance Company of New York (Homeland) appealed the judgment of the trial court awarding legal interest to a plaintiff class, represented by George Raymond Williams, M.D., Orthopaedic Surgery, A Professional Medical L.L.C. in an action against, among other defendants, its insured CorVel Corporation (CorVel). The trial court's judgment awarded legal interest from December 22, 2006, the date the plaintiff class demanded arbitration in federal court against CorVel. Homeland claimed that legal interest was only owed from March 21, 2011, the date suit was filed in state court by the plaintiff class naming CorVel as a defendant and its insurer, Homeland, as a direct-action defendant.

Affirmed. The majority of the panel found that it was undisputed that the plaintiff class in both its demand for arbitration filed in federal court in 2006, and its state court suit, filed in 2009, amended in 2011, sought and prayed for legal interest. A prior opinion of this court in *Williams v. SIF Consultants of La. Inc*, 16-343 (La.App 3 Cir 12/29/16), 209 So.3d 903, *writ denied*, 17-39

(La. 4/13/17), 218 So.3d 629 (*Williams II*), specifically found that the December 22, 2006 arbitration claim constituted the first filed claim against CorVel. CorVel timely and properly reported the arbitration claim to its insurer Homeland, which triggered Homeland's 2006-2007 claims-made policy coverage of ten-million dollars on behalf of CorVel. Thus, pursuant to La.Civ.Code art. 2000 the maximum amount owed in legal interest on Homeland's ten-million-dollar policy was ascertainable in 2006, and therefore could be recovered by the plaintiff class "without having to prove any loss." The majority panel further found the 2007-2008 claims- made policy issued to CorVel by Homeland contained policy provisions that required Homeland to pay "prejudgment interest" as a "Loss." Therefore, Homeland was contractually bound to pay any prejudgment interest owed by CorVel regardless of whether it was required or allowed by law. Accordingly, Homeland was required to pay the plaintiff class the additional amount of legal interest which began to accrue on December 22, 2006, when the plaintiff class demanded arbitration in federal court against CorVel.

LEGAL MALPRACTICE

***Cupit v. Twin City Fire Ins. Co.*, 17-918 (La.App. 3 Cir. 3/14/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Pickett, Judges).**

In this legal malpractice case, the plaintiff, Shawn M. Cupit, appealed the trial court's granting of summary judgment in favor of the defendants, Roger G. Burgess and Baggett, McCall, Burgess, Watson & Gaughan, LLC (Baggett McCall), and attorney Joseph B. Moffett and his insurer, Twin City Fire Insurance Company.

The underlying case arose when Mr. Cupit's mother climbed out of a window at night while a patient at Professional Rehabilitation Hospital, LLC (PRH) in Concordia Parish, where she was hospitalized for wound care of a burned foot that had become gangrenous. Outside the facility, Ms. Cupit was struck and killed by a drunk driver on a nearby highway.

As Mississippi residents, Mr. Cupit and his father[2] hired Mr. Moffett, a Mississippi attorney, to bring wrongful death claims against the driver and the hospital. Mr. Moffett associated Roger Burgess and Baggett McCall to handle the Louisiana claims. The suit was ultimately abandoned and dismissed by the trial court. Following the dismissal, Mr. Cupit sued the attorneys for legal malpractice.

Affirmed. After a de novo review, finding no issue of material fact or law, we affirmed the trial court's grant of summary judgment in favor of the defendant attorneys.

The evidence revealed that the attorneys had investigated the case and obtained an expert medical opinion from Dr. Richard Williams, in addition to the medical review conducted by three

[2]The claims of Mr. James Cupit were subsequently dismissed from the suit.

panel physicians, all finding that the hospital had not breached the standard of care by failing to secure Ms. Cupit with a bed/chair alarm. Mr. Cupit's expert, a nurse-practitioner, opined that Ms. Cupit was at a high risk for falls, but Ms. Cupit did not fall. She climbed out of a window and was struck on the highway. Under the circumstances we found no duty on the part of PRH to protect Ms. Cupit against the risk involved. S*ee Smith v. State, through Dep't of Health & Human Res. Admin.*, 523 So.2d 815 (La.1988).

The record further revealed that Mr. Cupit's expert worked at an outpatient facility for homeless veterans, and she did not have any training or experience at a long-term, acute-care facility such as PRH. Nor did the expert give an opinion on causation. We found that the trial court did not err in finding that the nurse-practitioner in this case did not qualify as an expert on causation under La.Code Evid. art. 702.

Regarding other arguments of Mr. Cupit, we further found that Dr. Williams's opinion, attached to the affidavit of the attorney, was not an unsworn or unverified document under *Bunge North America, Inc. v. Bd. of Com. & Ind. and La. Dept. of Eco. Dev*., 07-1746, p. 24 (La.App. 1 Cir. 5/2/08), 991 So.2d 511, 527, *writ denied*, 08-1594 (La. 11/21/08), 996 So.2d 1106. We also found that the doctor's opinion letter fell under the hearsay exception of La.Code Evid. art. 804(B)(6). It was trustworthy, as it had been written in 2010, and Dr. Williams was unavailable, having passed away in 2016, a year before the motion for summary judgment was filed.

LOUISIANA ANTI-DRAM SHOP STATUTE

***Zaunbrecher v. Martin*, 17-932 (La.App. 3 Cir. 03/21/18), ___ So.3d ___ (Panel: Conery, Judge writing; Cooks, concurs and assigns reasons, and Kyzar, Judges).**

Supervisory writs were sought by Marissa Martin, Jeremy Ponthier and Nathan Ponthieux from the denial of their summary judgment based on the statutory immunity provided by La.R.S. 9:2800.1, the Louisiana Anti-Dram Shop Statute. The three individuals were employed by the Tunica-Biloxi Gaming Authority, d/b/a/ Paragon Casino Resort (Paragon). Ms. Martin, a bartender, and Mr. Ponthier and Mr. Ponthieux, security guards, were working at the Paragon the evening Mr. Leo J. David was a patron. After spending approximately twelve hours at the Paragon, in the early morning hours of the following morning, Mr. David was involved in a head on collision with plaintiff, Zachary Zaunbrecher's father, Michael. Both Mr. Zaunbrecher and Mr. David were killed in the accident. Plaintiff claimed that Ms. Martin negligently overserved an already intoxicated Mr. David, and that Mr. Ponthier and Mr. Ponthieux failed to take steps to prevent Mr. David from leaving the Paragon in an obviously intoxicated condition. Prior to the filing of the employee defendants' summary judgment, Paragon had been dismissed from the litigation based on the sovereign immunity of the Tunica-Biloxi tribe.

Writs Granted and Made Peremptory. We found that La.R.S. 9:2800.1(A) clearly provided that the "consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death and property

damage, inflicted by an intoxicated person upon himself or upon another person." We further found that La.R.S. 9:2800.1(B) also provided that "no person holding a permit," in this case Paragon, "nor any agent, servant, or employee of such person, who sells intoxicating beverages … to a person over the age for the lawful purchase thereof, shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served." Therefore, Ms. Martin, as a bartender and an employee of Paragon, the holder of the permit under La.R.S. 9:2800.1(B) clearly had statutory immunity. Although the two security guards, Mr. Ponthier and Mr. Ponthieux, did not directly serve alcohol to Mr. David, as "agent[s], servant[s], or employee[s]" of the permit holder Paragon, they were also entitled to statutory immunity provided under the Louisiana Anti-Dram Shop Statute. The opinion provides an analysis of the legislative history and jurisprudence interpreting La.R.S. 9:2800.1.

MEDICAL MALPRACTICE

***Ogbebor v. Lafayette Gen Med. Ctr.* 18-296 (La.App. 3 Cir. 8/1/18), ___ So.3d ___ (Gremillion, Judge, writing, with Judges Conery and Kyzar):**

In this medical malpractice case, two doctors sought supervisory writs from the trial court's decision to grant a new trial to the plaintiff, whose wife succumbed to a heart condition the day after undergoing a procedure to place an aortic balloon pump. Plaintiff first retained one expert but came to believe that her testimony would not be admitted under *Daubert*. He then sought another expert. After the medical review panel found that the defendants did not breach the standard of care, the doctors filed motions for summary judgment. In his opposition, plaintiff sought to introduce a letter from his new expert, which the trial court did not consider. Following the trial court's grant of summary judgment, plaintiff filed a motion for new trial, in which he asserted that he was unable to procure an affidavit from his new expert because there "was a national disaster," "so much of [a] national event, everyone in the country knows about it." This was the only identification of this unprecedented natural disaster given by the plaintiff in brief or at the hearing. The trial court granted the new trial, finding Dr. Korn's affidavit "to be new evidence and that it was beyond [Mr. Ogbebor's] control . . . to provide that." Given that the plaintiff in no way explained what disaster prevented him from obtaining his affidavit nor how such a disaster prevented him from obtaining the affidavit, we granted writs and reversed the trial court. The burden of proving that one is entitled to a new trial firmly rests with the mover.

***Hanagriff v. Preferred Professional Ins. Co.*, 17-1039 (La.App. 3 Cir. 4/18/18) ___ So.3d ___(Saunders, J., writing; Thibodeaux, U.; Kyzar, V.)**

This is a case involving a medical malpractice action. Plaintiff instituted an action against her physician and the physician's professional liability insurance carrier (collectively

"Defendants"), alleging that Defendants breached the applicable standard of care in the care and treatment of Plaintiff.

This case came before a jury, which rendered a verdict adverse to Plaintiff. Plaintiff filed a Motion for Judgment Notwithstanding the Verdict, Or in the Alternative, Motion for New Trial pursuant to La.Code Civ.P. art. 1811. The trial court denied Plaintiff's motion, as Plaintiff failed to carry the three-prong burden of proof to establish that Defendant violated the applicable standard of care pursuant to La.R.S. 9:2794.

Affirmed. The court found that pursuant to Louisiana Revised Statutes 9:2794, the jury correctly concluded that Plaintiff failed to carry the three-prong burden of proof: (1) to establish the standard of care ordinarily practiced by physicians within the specialty of dermatology; (2) a violation by the physician of that standard of care; and (3) a causal connection between the physician's negligence and Plaintiff's alleged injuries. The court ruled that "The rigorous standard for granting a motion for JNOV is based on the principle that "[w]hen there is a jury, the jury is the trier of fact." A motion for JNOV should be granted only when the evidence points so strongly in favor of the moving party such that reasonable men could not reach different conclusions. The jury was reasonable in its determination as the contemporaneous medical charting and witness testimonies reveal that Defendant did not violate the applicable standard of care.

***Thomas v. Drew*, 17-818 (La.App. 3 Cir. 3/7/18), __So.3d__(Ezell, J.; Savoie, J., Cooks, J., concurs and assigns written reasons)**

Dr. Otis Drew performed an outpatient procedure on Justin Thomas's right shoulder at Lafayette Surgicare. Mr. Thomas was eighteen years old at the time. Following the procedure, Mr. Thomas was released into the care of his parents.

Later that evening at 7:48 p.m., an ambulance was called to the Thomas home because Mr. Thomas was unconscious. The ambulance records indicate that Mr. Thomas's mom had given one Oxycodone. He was given Narcan but did not respond. He was intubated through his nose and transferred to the emergency room. According to the petition, Mr. Thomas fell into a coma for five days following his release and lost the use of his left side. A medical review panel opinion rendered on May 26, 2016, found that "[a]ll parties involved met the standard of care."

On August 26, 2016, Mr. Thomas filed suit against Dr. Drew. He also sued the anesthesiologist, Lafayette Surgicare, Lafayette Surgery Center, and The Regions Health System of Acadiana. Mr. Thomas claims the surgery and post-surgical care required extensive anesthesia and heavy narcotic medication. He claims that he was released too early following his surgery and went into a coma for five days causing a brain injury.

Dr. Drew filed a motion for summary judgment on February 15, 2017. A hearing on the motion was held on May 15, 2017. The trial court granted Dr. Drew's motion and dismissed all of Mr. Thomas's claims against Dr. Drew. Mr. Thomas then filed the present appeal.

Affirmed. Mr. Thomas claims that Dr. Drew failed to follow the proper procedural requirements for objecting to the admissibility of the opinion of his expert, Dr. Albert Gros, an anesthesiologist and pain management physician. Dr. Gros opined that "[t]he patient was not monitored long enough prior to discharge from the Recovery Room at Lafayette Surgery Center." Dr. Drew argued that Dr. Gros was not qualified to render an opinion on whether or not Dr. Drew breached the standard of care of an orthopedic surgeon in his treatment of Mr. Thomas.

Dr. Drew did challenge the qualification of Dr. Gros in objection to the affidavit in his reply memorandum as required by La.Code Civ.P. art. 966(D)(2) which provides that "[a]ny objection to a document shall be raised in a timely filed opposition or reply memorandum."

We did agree with Mr. Thomas that the *Daubert* standards should be considered by the trial court in determining whether the expert is qualified to render an opinion. However, the record indicated that the trial court conducted a *Daubert* analysis regarding Dr. Gros's qualifications "as an expert witness on the issue of whether the physician departed from accepted standards of medical care." La.R.S. 9:2794(D)(1).

We also agreed with Mr. Thomas that an expert in orthopedic surgery was not required because Mr. Thomas argued that the malpractice occurred in his post-operative care and release and the alleged malpractice did not involve any issue peculiar to orthopedic surgery. However, summary judgment was appropriate because affidavits that are conclusory with no supporting underlying facts are legally insufficient to defeat a motion for summary judgment. Dr. Gros never stated what standard of care was owed to Mr. Thomas by Dr. Drew post-operatively or that Dr. Drew breached any standard of care at all in his care of Mr. Thomas.

POLITICAL SUBDIVISIONS

***Brandi Billeadeau, et al., v. Opelousas General Hospital Authority, et al.,* 17-735 consolidated with 17-736 (La.App. 3 Cir. 02/07/18) ___So.3d ___ (Panel: Perret Judge writing, Ezell, and Kyzar, Judges).**

Veronica and Joseph Billeaudeau, individually and on behalf of Brandi Billeaudeau, appealed a trial court judgment that granted Opelousas General Hospital Authority's and Nautilus Insurance Company's Motion for Partial Summary Judgment finding that the Louisiana Governmental Claims Act is controlling with respect to Plaintiffs' claim of negligent credentialing of an ER doctor. Plaintiffs also appealed the trial court's judgment that denied their Motion to Declare La.R.S. 13:5201(B)(1) unconstitutional. We affirmed the trial court judgment.

Affirmed. On June 20, 2010, Brandi, a woman thirty-four years of age with Down syndrome, was taken to OGH by her parents, Veronica and Joseph Billeaudeau, after she collapsed at home. Upon arrival at the ER, Dr. Zavala diagnosed Brandi with focal motor seizure. Dr. Zavala ordered the administration of anti-seizure medication and a CT scan, which was reported

as normal. The Billeaudeaus who are both physicians disagreed with the ER doctor's diagnosis. Thinking their daughter had suffered a stroke, they asked that Brandi be given tPA (t-plasminogen activator), a treatment for stroke victims. However, according to Plaintiffs' allegations, Dr. Zavala informed them their daughter was not a candidate for tPA. The Billeaudeaus then requested Brandi be transferred to Our Lady of Lourdes (OLOL) in Lafayette. Dr. Zavala arranged for Brandi's transfer to OLOL, where she was given tPA over four hours after she suffered what was ultimately determined to be a stroke. Brandi survived the stroke but unfortunately suffered severe, irreversible brain damage.

Veronica, individually and as Brandi's curatrix, along with Joseph pursued a claim under the LMMA [Louisiana Medical Malpractice Act] and brought suit against OGH, among other defendants, for medical malpractice, including a claim of negligent credentialing of the ER physician.

The central argument in this case covers whether OGHA is a "political subdivision" of the State? Another issue presented by Plaintiff was the constitutionality of La.R.S. 13:5102(B)(1). La. R.S. 13:5102 (B)(1) defines a "political subdivision" as "any parish, municipality, special district, school board, sheriff, public board, institution, department, commission, district, corporation, agency, authority, or an agency or subdivision of any of these, and other public or governmental body of any kind which is not a state agency." La. R.S. 13:5106 establishes a $500,000 cap on general damage awards against all public entities.

In 1963, the St. Landry Parish Police Jury created Hospital Service District No. 2. This "District" by its founding authority was given the authority to incur debt, to issue bonds and to levy taxes.

In 1957, the District proposed a bond issue to voters in the amount of $1,000,000.00 and this was rejected by the voters. At this time, these individuals that comprised the "District" decided to utilize the Public Trust Act (La.R.S. 9:2341-2347) which authorized, the creation of expense trust, with a public body as the beneficiary, to finance public projects from self-generated funds or revenue.

The Trust created happens to be OGHA. We found that OGHA is a "political subdivision" of the State under the terms of LSA-R.S. 13:5102(B)(1) and 5106. The claims for negligent credentialing is limited with regard to liability.

Plaintiffs were successful in getting the trial court, this court, and the Supreme Court to make a finding that Plaintiffs' negligent credentialing claim sounds in general negligence and did not fall within the provisions of the LMMA.

On March 15, 2017, OGHA filed a Motion for Partial Summary Judgment relative to the applicability of the Louisiana Government Claims Act, setting forth why OGHA is subject to the single statutory cap on damages established by La.R.S. 13:5106.

Plaintiffs argued that OGHA is a Public Trust, not a political subdivision of the State.

We found that La.R.S.9:2341(d), as amended in 1978, clearly requires "all public trust created heretofore or hereafter should be subject to all of the reporting required by public corporations."

Plaintiffs relied on *Bertrand v. Sandoz* as a confirmation of OGHA as a Public Trust. We found that this trust is erroneously placed due to the fact that the Louisiana Governmental Claims Act was not enacted until four years after that case was decided.

We further found La. R.S. 5106 (B)(1) to be constitutional in reference to that issue that one need only look to the purpose of the Louisiana Governmental Claims Act and its intent to limit the recovery of damages of political subdivisions of the State as defined by La.R.S. 13:5102(B)(1).

PRESCRIPTION

***Baxter v. Lewis*, 18-72 (La.App. 3 Cir. 6/6/18). __ So.3d __ (Panel: Gremillion, Judge writing: Saunders and Ezell, Judges.)**

The independent administrator of a succession appealed the trial court's judgment sustaining an exception of prescription and dismissing its petition.

Affirmed. The deceased's third wife obtained power of attorney over his affairs. However, one day prior to her death, her son, the defendant and the deceased's step-son, obtained power of attorney over the deceased's affairs. Defendant had the deceased interdicted. The sons of the deceased file a petition to annul the deceased's testament arguing that he lacked testamentary capacity. The trial court agreed and declared the will and codicils null. The plaintiff was appointed independent administrator in April 2014. In April 2017, plaintiff file a petition against defendant for breach of fiduciary duty arguing that a prescriptive period of ten years applied and that contra non valentem applied to suspend prescription until April 2020. Defendant's exception of prescription was granted.

We affirmed the trial court's judgment. The ten-year prescriptive period applied as the claims asserted were not mere negligence but breach of the duty of loyalty and trust. Plaintiff's petition alleged breaches as early as 2002, but plaintiff argued that under contra non valentem he could not bring suit because he was not appointed administrator until April 2010.

We disagreed. The deceased died in 2005 and plaintiff was well aware of the claims existing at that time. He had recourse against defendant for breaches of fiduciary duty regardless of whether he was appointed succession administrator because he was a legal heir and a relative of the interdict with standing to petition the court for removal of a curator for breach of a fiduciary duty. *See* La.Civ.Code art. 1926; La.R.S. 9:1025.

***Nickel v. Ford Motor Co.*, 17-978 (La.App. 3 Cir. 5/23/18), __ So.3d __ (Panel: Gremillion, Judge writing: Keaty and Savoie, Judges.)**

Ford Motor Company and Bolton Ford appealed the trial court's judgment awarding the plaintiff, an attorney, over $140,000 for claims in redhibition relating to the purchase of a $37,000 Ford Flex.

Reversed. Plaintiff's claim was prescribed. Pursuant to La.Civ.Code art. 2534, plaintiff had one year to file a claim unless prescription was interrupted by the tender of the vehicle for repair. The trial court erred in finding that reasonable people could conclude that plaintiff tendered his vehicle for repair during a two-year period when no records were generated by any dealership and no other evidence proving that fact was admitted. Plaintiff, who was friends with the car dealership owner, claimed that he brought the car in several times but because he was friends with the owner, no records were generated. However, the dealership owner/friend sold the dealership a few months after the purchase and did not testify that plaintiff brought the vehicle to any other dealership he owned. Moreover, the times he did bring the vehicle in before the sale, records were generated regardless of the friendship.

Additionally, the trial court found a local dealership, Bolton Ford, negligently repaired the vehicle. This was manifest error as well considering that the dealership provided no repair because plaintiff refused to pay for it and plaintiff effectively abandoned his vehicle at the dealership.

On a side note, this Ford Flex was the debut model and it did experience problems syncing Apple devices and Microsoft software. Also, plaintiff incurred over $9,000 worth of damage to the car about a month after he purchased it which Ford's expert believed to be the cause of its ongoing problems because of a wiring harness problem. During the two-year period during which no records were generated plaintiff drove the vehicle nearly 70,000 miles.

PROCEDURE

***Palermo v. Century Indemnity Co., et al*, 17-825 (La.App. 3 Cir. 5/23/18), __ So.3d __ (Panel: Kyzar, Judge writing; Keaty and Conery, Judges).**

Certain Underwriters at Lloyd's, London (Certain Underwriters) appealed the granting of peremptory exceptions of res judicata dismissing its third-party demands seeking contribution against a number of entities, all collectively referred to as Appellees. The issue on appeal was whether the trial court erred in granting Appellees' exceptions of res judicata, based upon a finding that La.R.S. 13:4231, et seq., barred Certain Underwriters from filing a second third-party demand in the same proceeding where the court had previously entered a final judgment dismissing Certain Underwriters' third-party action without prejudice.

Reversed. After a de novo review of the res judicata effect of a prior judgment, we found the trial court erred in finding that a dismissal without prejudice barred Certain Underwriters from re-filing its third-party demands in the same proceeding when the underlying matter was still ongoing. After being sued, Certain Underwriters filed third-party demands, asserting incidental actions seeking contribution against Appellees. A number of Appellees filed exceptions of improper service of process, insufficiency of citation, and lack of jurisdiction to Certain Underwriters' original petition, which were sustained by the trial court. After Certain Underwriters failed to re-serve the parties within the time specified by the trial court, it ordered the dismissal of Certain Underwriters' third-party demands without prejudice, pursuant to La.Code Civ.P. art. 932(B). Five months later, Certain Underwriters filed a second third-party demand naming Appellees, among others, to which the trial court maintained the Appellees' exceptions of res judicata.

We found that Certain Underwriters substantive rights had not actually been previously addressed or resolved, and as such, the concept of res judicata should have been rejected. The trial court and Appellees relied on the holding in *Johnson v. University Medical Center in Lafayette*, 13-40 (La. 3/15/13), 109 So.3d 347, for the proposition that the dismissal of the third-party demands of Certain Underwriters, without prejudice and designated as a final judgment, has res judicata effect barring the refiling of the demands. We found the trial court misconstrued the holding in *Johnson*, which dealt with a claim that was dismissed without prejudice that was then re-filed in the same suit even though the main demand had already been dismissed, and found the facts of *Johnson* dramatically different than the facts at hand, where the plaintiff's main demand is still pending.

We found that the dismissal without prejudice of Certain Underwriters' third-party demands was based on procedural grounds rather than substantive ones. Therefore, we found no legal impediment to the re-filing of the third-party demands in the still pending main demand of the plaintiffs at hand. Where the main demand in the suit is still pending, a judgment of dismissal without prejudice does not preclude the re-filing of the dismissed claims in the original suit. Therefore, we found it would constitute an unnecessary and useless act to require Certain Underwriters to file a new, separate suit to assert its still viable third-party demands, and we, accordingly, reversed the rulings of the trial court.

***Jacueline Gaspard v. Horace Mann Insurance Company*, 17-1140 (La.App. 3 Cir. 5/9/18), __ So.3d ___. (Pickett, J.) Panel: Pickett, Saunders, Gremillion.**

In August 2012, the plaintiff was involved in a rear-end collision. She had been in a prior automobile accident in May 2008. After settling her claims with the tortfeasor and his insurer, the plaintiff filed a claim against her uninsured/underinsured insurer. The matter proceeded to trial, and the trial court determined that the 2012 accident aggravated injuries she suffered in the 2008 accident, that the aggravation resolved in February 2013, and that the damages she suffered from the aggravation were less than the limits of the tortfeasor's insurance policy. She appealed and assigned numerous errors with the trial court proceeding: the grant of a motion to strike her request

for a jury trial, the trial judge's failure to self-recuse; the denial of a motion for new trial without holding a hearing; the finding that most of the damages she proved were not caused by the accident; the awards for general damages and lost earning capacity were too low, and the denial of her claims for penalties and attorney fee.

Affirmed. The plaintiff waived her right to a jury trial when she failed to timely post a jury bond after her insurer failed to post a jury bond in accordance with the trial court's order on its motion for a jury trial, La.Code Civ.P. art. 1734.1(A), and proceeded to trial without seeking review of the trial court's recission of its order allowing her to post a bond. The plaintiff's complaint that the trial judge should have self-recused himself came too late because it was raised in her motion for new trial. Moreover, the record contains no objective evidence that the trial court was biased or impartial against her. After her 2008 accident, the plaintiff regularly sought treatment for complaints with pain in her neck left shoulder, and left arm. After the 2012 accident, she complained of increased pain in those same areas. Review of her treating chiropractor's records showed that as of February 2013, her complaints were essentially the same as they were in June 2012. The trial court did not err in finding that the plaintiff proved only a six-month aggravation of her pre-existing condition, in not awarding more general and special damages, in not awarding damages for lost earning capacity, and in dismissing the plaintiff's claim for penalties and attorney fees.

***Michael Neal Rollins v. State, Dep't of Public Safety and Corrections, et al.*, 17-901 (La.App. 3 Cir. 02/28/18), ___ So.3d ___ (Panel: Perret, Judge writing; Amy and Gremillion, Judges).**

The plaintiff filed this matter in September 2009, alleging that he sustained injury while in custody at the Iberia Parish Jail. The State filed an ex parte motion to dismiss on grounds of abandonment on January 25, 2017, alleging that the last step in the prosecution of the matter was a January 14, 2014 memo in opposition to the plaintiff's motion to compel. The trial court granted the motion, dismissing the matter and, subsequently, denied the plaintiff's motion to set aside the dismissal. By that latter ruling, the trial court observed that, although the plaintiff promulgated discovery requests within the subject time period, it did not serve those requests on one of the parties. Therefore, the trial court maintained the dismissal, citing La.Code Civ.P. art. 561(B). The plaintiff appealed.

Affirmed. We affirmed the trial court's ruling finding that La.Code Civ.P. art. 561(B), specifically provides formal discovery authorized by the Code of Civil Procedure, "and served on all parties whether or not filed of record," constitutes a step in the prosecution of an action citing jurisprudence explaining both the self-operative nature of Article 561 and the necessity of service of discovery on all parties, not only the party that is the subject of the discovery request.

The issue before this court in *Giglio* was whether plaintiffs' request for the issuance of a subpoena duces tecum on a third party constituted a step in the prosecution to interrupt the running of abandonment when it was filed in the record but not served on opposing counsel. This court ruled that the matter was abandoned based on the fact that the letter requesting the issuance of a

subpoena was properly classified as a discovery request and that "Article 561(B) requires that for a discovery request to interrupt prescription, it must be served on all parties." *Giglio,* 227 So.3d 856.

The Louisiana Supreme Court in Guillory v. Pelican Real Estate, Inc., 14-1539, 14-1593, 14-1624 (La. 3/17/15), 165 So.3d 875, also cited to La.Code Civ.P. art. 561(B) for its holding that discovery not served on all parties failed to constitute a step sufficient to interrupt the abandonment period. Specifically, the supreme court stated: "[t]he record . . . indicates that on December 17, 2012, plaintiffs sent discovery to Pelican only. It is undisputed this discovery was not served on all parties. Therefore, under the plain language of La.Code Civ. P. art. 561(B), this discovery does not constitute a step in the prosecution of the action." *Id*. at 877.

Although Plaintiff argues that the Motion to Set Aside the Dismissal should have been granted once the State of Louisiana withdrew the affidavit of Julius Grubbs, Jr., that supported its Motion to Dismiss on Grounds of Abandonment, we find no merit to this argument. The Louisiana Supreme Court in *Clark v. State Farm Mut. Auto. Ins. Co*., 00-3010, p. 6 (La. 5/15/01), 785 So.2d 779, 784 specifically held that "[a]rticle 561 provides that abandonment is self-executing; it occurs automatically upon the passing of three-years without a step being taken by either party, and it is effective without court order." Therefore, we find that abandonment occurred automatically in January 2017, when no steps had been taken in the prosecution of this matter in over three years.

***A.M.C., et al v. James D. Caldwell, et al,* 17-628 (La. App. 3 Cir. 02/15/18), __ So.3d __ (Panel: Ezell, Judge writing, Kyzar and Perret, Judges).**

The essential issue in this same-sex, intrafamily adoption case is whether attorney fees and costs were properly awarded following remand of the case to the district court from the supreme court. On appeal, Defendants ask for judgments rendered on July 10, 2015 and July 25, 2016 to be annulled and for a reversal of the award of attorney fees and costs, and also claim the district court erred in failing to grant the Attorney General's exception of no cause of action.

We vacated and set aside both the July 10, 2015 and the July 25, 2015 judgments and sustained exceptions of res judicata and no cause of action.

The same-sex couple in the case were validly married in California in 2008. In 2013, Plaintiffs filed a petition for intrafamily adoption in juvenile court, asking that the child's stepmother be allowed to adopt. The adoption was granted on January 27, 2014, though the case was remanded since the Attorney General was not notified of the hearing after appearing and requesting notice. Following remand, Plaintiffs added the Attorney General, the Governor, the Secretary of the Louisiana Department of Revenue, and the Louisiana State Registrar as defendants in supplemental and amending petitions, and added a claim pursuant to 42 U.S.C. § 1983. The Governor and Attorney General both filed exceptions of no cause of action, though only the Governor's was granted.

A judgment was signed on September 24, 2012, declaring Louisiana Constitution Article XII, § 15, the Defense of Marriage Act, and La.Civ.Code arts. 86, 89, and 3520(B) unconstitutional, finding these laws violated the Due Process and Equal Protection Clauses of U.S. Const. amend. XIV and the Full Faith and Credit provision found in U.S. Const. art. IV, § 1. The district court further ruled that Louisiana's Revenue Bulletin No. 13-024 (9/13/13) was unconstitutional and ordered the Secretary of the Department of Revenue to allow the Plaintiffs to file their state tax returns as a couple whose marriage is valid and recognized in Louisiana. The adoption was reaffirmed in a separate judgment. Defendants appealed to the Louisiana Supreme Court, which ruled that the Plaintiffs had received all the relief they requested based upon recent supreme court rulings, and dismissed the Defendants' appeal as moot, remanding the case for further proceedings.

A judgment was prepared by Plaintiffs reiterating the provisions from the previous two judgments, but also awarding costs, expenses, and reasonable attorney fees, which was signed on July 10, 2015 following a hearing on the amount of attorney fees. Defendants filed a motion to annul and another hearing was held on May 9, 2016 before a pro tem judge, who denied Plaintiffs' request for attorney fees and costs and affirmed the remainder of the July 10, 2015 judgment. The same month, the district judge originally assigned the case signed a judgment dismissing Plaintiffs' claims as moot, reinstating the previous order of September 24, 2012, and ordered the parties to file motions regarding attorney fees.

Plaintiffs filed a motion to amend this judgment on July 7, 2016. The district court then entered judgment on July 25, 2016, denying Plaintiffs' request for attorney fees and costs pursuant to the minute entry of the pro tem judge and vacated the judgment rendered on May 25, 2016. On July 26, 2016, Plaintiffs filed a motion for new trial. Defendants filed a petition to annul and vacate the July 25, 2016 judgment or in the alternative for a new trial. On March 20, 2017, the district court held a hearing on both of Defendants' motions to annul and vacate or for a new trial of the July 10, 2015 and July 25, 2016 judgments. The court also considered Plaintiffs' motion for attorney fees and costs. The district court denied both of Defendants' motions and granted Plaintiffs' motion, leading to this appeal.

Defendants argued that as the case was instituted as an adoption proceeding, the district court was acting as a juvenile court and lacked jurisdiction to rule on Plaintiffs claims for declaratory and injunctive relief and for a violation of 42 U.S.C. § 1983. We found that the district court's jurisdiction was not limited even though the court was acting as a juvenile court. We found that in the absence of a specialized juvenile or family court or a statute which limits jurisdiction of district courts acting as juvenile courts, the district court had jurisdiction to decide both the adoption matter and constitutionality claims.

Defendants argued that it was procedurally improper for the district court to enter the July 25, 2016 judgment, which vacated the May 25, 2016 judgment, and therefore, it should be annulled or vacated. Defendants claimed that the Plaintiffs did not file a petition for nullity, a motion for new trial, or an appeal challenging the judgment, but simply filed a motion to amend the judgment.

However, we found that the characterization of a pleading is not controlling, and courts should look to the substance of the pleadings. We further concluded that Plaintiffs' motion was actually a motion for new trial, the proper procedural vehicle. A motion for new trial, however, requires a contradictory hearing to be held, which was not done in this case. Therefore, we vacated and set aside the July 25, 2016 judgment.

Defendants claim that the July 10, 2015 judgment should be annulled because it was unnecessary for Plaintiffs to submit another judgment on remand because they received the relief they requested when the supreme court dismissed Defendants' appeal as moot. Defendants further argued that any judgment rendered subsequent to the supreme court's ruling should not have included an award for attorney fees and costs because the September 24, 2014 judgment granting Plaintiffs' motion for summary judgment awarded no such relief. Plaintiffs' motion for summary judgment filed on August 4, 2015, requested summary judgment on all issues in addition to specifically requesting attorney fees and costs. A judgment was signed by the district court on September 24, 2014, granting Plaintiffs' motion for summary judgment and denying Defendants' motion for summary judgment. A number of other specific rulings were issued. No mention of attorney fees was made at the hearing, and the judgment made no mention of attorney fees. We applied the legal principle "that a demand not granted or reserved in the judgment must be considered as rejected." We found that the July 10, 2015 judgment was an attempt by the Plaintiffs to get attorney fees and costs and was unnecessary. Once the supreme court dismissed the appeal as moot, the September 24, 2014 judgment was effective and final. Therefore, we found the district court had no jurisdiction to render the July 10, 2015 judgment which awarded attorney fees and costs. We vacated and set aside the July 10, 2015 judgment.

The Defendants claimed that the trial court erred in awarding attorney fees and costs. We agreed and found that Plaintiffs' claims for attorney fees and costs are barred by res judicata under La.R.S. 13:4231. The Plaintiffs raised the issue of attorney fees and costs in their motion for summary judgment, though no mention of this issue was raised at the hearing on the matter. The judgment did not include a reservation of the right to address the issue later, and the Plaintiffs did not appeal the failure of the trial court to address the issue when the case was appealed to the supreme court. Therefore, we sustained the peremptory exception of res judicata on the court's own motion pursuant to La.Code Civ.P. art. 927(B), and reversing the trial court judgment awarding attorney fees to the Plaintiffs.

We also sustained the Attorney General's exception of no cause of action. He was involved in this case due to challenge regarding the constitutionality of several state laws. The Attorney General is specifically granted the discretion whether to appear in a suit questioning the constitutionality of a statute. Allowing the office to be named as a party divests the Attorney General of this discretion. We reversed the district court judgment denying the Attorney General's exception of no cause of action.

***Caleb Kent Aguillard v. John Christopher Chatman*, 17-408 (La.App. 3 Cir. 1/31/18), __ So.3d __. (Pickett, J., writing.) Panel: Judges, Pickett, Cooks, Keaty.**

The plaintiff, an attorney, confirmed a default judgment in the amount of $60,000, together with legal interest and costs, against the defendant on his claims defamation. The defendant sought to have the confirmed judgment annulled. The trial court denied the relief, and the defendant appealed. During a status conference, the trial court denied the plaintiff's motion for a preliminary default and warned the defendant in open court to hire an attorney and that his failure to do so would result in "consequences." The defendant's refusal to heed the trial court's warnings would not be imputed to the plaintiff as improper conduct. The trial court did not err in refusing to find that Governor Edwards Executive Orders 16–53 and 16-57, suspended all legal proceedings "retroactively from Friday, August 12, 2016" did not affect the judgment which was confirmed on September 12, 2016 because the defendant failed to show that he could not file an answer "due to the declared disaster." The defendant testified at that he could not attend a hearing scheduled September 16, 2016, because he had a family vacation planned. He did not present any evidence that flooding which occurred August 12, 2016, prevented him for doing so. ***Affirmed.***

***GBB Properties Two, LLC v. Stirling Properties, Inc. LLC*, 17-352 c/w 16-1063 (La.App. 3 Cir. 10/25/17), 230 So.3d 225, *writ denied*, 17-1831 (La. 1/29/18), 2018 WL 805900 (Gremillion, Judge, writing, with Cooks and Kyzar, Judges).**

The trial court found that the plaintiff landowners had no cause of action against the developer. This case involved the development of the large mixed-use retail center in Lafayette known as Ambassador Town Center. The landowners entered into a series of complex agreements with four different entities including a PILOT agreement in which the developer suggested that the parties enter into a PILOT program and it would apply a $1.4 million infrastructure credit against the purchase price. The suit involved the failure of the developer to actually make any of the improvements on the property still owned by the plaintiff landowners.

Reversed. Based on the landowners' petitions, we reversed the trial court and found that the landowners sufficiently pled facts which stated a cause of action under the single-business-entity theory because the pleadings did not indicate an "insurmountable bar to relief." The landowners alleged that the four different entities operate as a single-business entity and, therefore, the liabilities of one of the corporations is also the liability of its alter ego or agent.

The facts that were sufficient to state a cause of action included that all of the four properties operated out of the same corporate office, one of the entities had no assets or existence separate and apart from the other, the landowners dealt with the same employees regarding all of the matters related to this transaction, the registered business addresses with the secretary of state were the same and the same letterhead was used.

PUBLIC ENTITY LIABILITY

***Minix v. City of Rayne*, 17-93 (La.App. 3 Cir. 4/4/18), ___ So.3d ___. (Five-judge -- Pickett, J., writing; Amy, J. dissents with reasons.)**

In this sidewalk fall case, the trial court found the city was not liable because the defect in the sidewalk was open and obvious and the city did not have notice of the defect. On appeal, the court found that the sidewalk was on a list of sidewalks to be repaired, therefore the city had notice of the condition of the sidewalk. Further, the minor child testified that the broken concrete shifted when she stepped on it, and "a defect in the sidewalk that does not manifest itself until the pedestrian actually steps on the defective spot cannot be held to be open, obvious, or apparent."

REAL ESTATE PURCHASE & GOOD FAITH DEPOSIT

***Noles-Frye Realty (NAI Latter & Blum) v. Holly Dixon*, 17-965 (La.App. 3 Cir. 5/9/18), __ So.3d __ (Panel: Amy, Judge writing; Cooks and Conery, Judges).**

After the failure of a purchase agreement related to a residential property, a realty company commenced a concursus proceeding so that the Sellers and the Buyer could advance their respective claims of entitlement to the underlying deposit. Following a hearing, the trial court ruled in favor of the Sellers after observing that, although the Buyer was credible in explaining that she could not obtain financing, she failed to produce corroborating documentary or testimonial evidence in that regard. The Buyer appealed.

Reversed and Rendered. The panel first addressed the Buyer's contention that the trial court erred in requiring her to demonstrate her good faith in acquiring financing rather than requiring the Sellers to prove that she breached the purchase agreement in bad faith. The panel noted that claimants in a concursus proceeding appear as both plaintiffs and defendants and each must lodge his or her respective claim against all other parties. In this proceeding, each party claimed the deposit by adverse provisions of the purchase agreement, with the Buyer initiating her claim under the provision requiring the return of the deposit to her if she "made good faith efforts to obtain the loan." Thus, the trial court did not err in articulating that it was the Seller's burden of proving the condition upon which she sought relief. On the merits, the panel found that the record supported the trial court's credibility determination in favor of the Buyer given her testimony that she applied to various lending institutions and even performed repairs to the property to facilitate the financing application in one instance. However, the panel concluded that the trial court was manifestly erroneous in its following determination that she ultimately failed in her burden of proving her good faith effort regarding financing. Rather, the trial court's suggestion that the claimant was required to produce corroborating evidence from the lending institutions as to the reason her applications were rejected imposed a requirement outside of the confines of the purchase agreement. It instead required only that the Buyer make a timely application for a loan and that she make good faith efforts in obtaining the loan. It did not qualify the return of the

deposit to her based upon a "reason" the loan could not be obtained. Finding that the record did not otherwise question the trial court's credibility determination in favor of the claimant, the panel concluded that the record dictated a finding that the Buyer satisfied her burden of proof and was entitled to the return of the deposit pursuant to the purchase agreement. The panel entered judgment in that regard.

SUCCESSIONS

***Succession of William Dalton Pelt*, 17-860 (La.App. 3 Cir. 4/11/18) __ So.3d __ (Panel: Kyzar, Judge writing; Keaty and Conery, Judges).**

Kristina Wright (Kristina), the appellant, intervened in the Succession of William D. Pelt, claiming to be his illegitimate, biological child. The appellees were the brothers and sisters of the deceased. Kristina appealed the granting of an exception of prescription dismissing her petition to establish filiation with her deceased alleged father, William Pelt. The issues on appeal were whether the trial court committed legal error by: not applying La.Civ.Code art. 197 as the law in effect on the date of decedent's death; failing to acknowledge the supreme court's interpretation of language included in La.Civ.Code art. 197 regarding legislative intent and retroactivity; and granting the exception on the notion that retroactive application of La.Civ.Code art. 197 would revive a prescribed claim.

Reversed and Remanded. We found the trial court did not correctly apply the provisions of La.Civ.Code art. 197 and, further, that it failed to interpret La.Civ.Code art. 197 in conjunction with La.Civ.Code art. 870. Kristina was born in Lake Charles on September 28, 1973. At the time of her birth, La.Civ.Code art. 197 had not yet been enacted, but rather filiation was based upon former article 209. Former article 209 contained two prescriptive periods for the filing of filiation actions: one year from the date of the alleged father's death or when the child turns nineteen years of age, whichever came first. Louisiana Civil Code article 197 replaced former article 209 and only contains one prescriptive period: any action to establish filiation must be filed within one year of the alleged father's death. The trial court found that the appellees acquired a vested right, the right to claim peremption, when Kristina reached nineteen years of age, as that occurred while former article 209 was still in effect.

We disagreed and found that a succession cannot exist before the death of the deceased, and, therefore, a potential heir cannot have a right or vested claim before that time. After review, we noted the wording of La.Civ.Code art. 197, which provides that "[f]or purposes of succession only," a child's action to establish paternity "is subject to a peremptive period of one year" and that the "peremptive period commences to run from the day of the death of the alleged father." We next noted La.Civ.Code art. 870, which states that "succession rights . . . are governed by the law in effect on the date of the decedent's death." Based on this and the fact that Kristina filed her petition for filiation within one year of her alleged father's death, we reversed the ruling of the trial court and remanded for further proceedings consistent therewith.

We further found the language in La.Civ.Code 197, "For purposes of succession only", shows clear intent that a succession proceeding is governed by its own rules, even in filiation actions, and, as such, the statute cannot be read without La.Civ.Code art. 870. Therefore, all filiation actions raised pursuant to a succession proceeding brought after the legislature passed 2005 La. Acts. No. 192, § 1, must be governed by the provisions of La.Civ.Code art. 197. We also specifically found that the second clause of La.Civ.Code 197 allows a child not yet filiated, who was born and turned nineteen while the repealed former article 209 was still in effect, to bring an action to be recognized as an heir in a succession proceeding within one year of the death of the alleged father.

***Succession of Keffer Thomas Delino, II v. The Jake Delino Trust*, 17-1053 (La.App. 3 Cir. 4/4/18), __So.3d__ (Panel: Thibodeaux, Chief Judge writing; Saunders and Kyzar, Judges).**

Plaintiff, the succession representative of the Succession of Keffer Thomas Delino, II, filed suit against the defendants, The Jake Delino Trust (Trust), Carole Delino Niebler (Carole), and James D. Delino, Jr. (Jimmy), seeking to annul a transfer of trust interest. Created in the testament of James D. Delino, Sr. (James), the Trust named both Jimmy and his brother, Keffer Thomas Delino, II (Keffer), income beneficiaries for life and directed the trustee, upon their deaths, to distribute the corpus of the trust to their "legal heirs." After Keffer's passing, a one-half interest in the corpus was transferred to Jimmy subject to a lifetime usufruct in favor of their mother, Carole, as directed by our law on intestacy. The trial court, however, found that Keffer's universal legatee was his only legal heir and granted the motion to annul the transfer.

Reversed. Interpreting the Trust in accordance with the law in effect at the time of its creation, we found that the term "legal heir" was, in 1990, a codified, as well as jurisprudentially recognized, reference to heirs of the blood and of the nearest relation to the deceased that were called by our law to inherit. We further found that, through his use of this term, the settlor clearly intended for his property to be distributed to those persons called by law to inherit the property attributable to his sons' proportionate roots, *i.e.*, their heirs of the blood of nearest relation. Under the law in effect at the time of the Trust's creation, as well as to time of the transfer, Keffer's legal heirs were his mother and his brother. Because the transfer of trust interest at issue herein clearly comported with the intent of the settlor, as well as the law, we concluded that the trial court legally erred in nullifying the transfer and reversed the trial court's judgment in its entirety.

***Succession of Elmoses Ivey*, 17-653 (La.App. 3 Cir. 2/21/18), 238 So.3d 532. (Pickett, J., writing.) Panel: Judges, Pickett, Cooks, Keaty.**

Testator's widow appealed the trial court's grant of summary judgment in favor of the decedent's children that the decedent's will was null and void because it did not comply with the legal requirements for a notarial will. The decedent's children identified four elements of the

notarial attestation clause of the decedent's will that did not comply with the requirements of La.Civ. Code art. 1577, which they argued rendered the will null and void.

Affirmed. Although La.Civ.Code art. 1577 provides that a flawed attestation clause is acceptable if it is "substantially similar" to the sample clause contained therein, the attestation clause in the decedent's will did not contain three mandatory requirements regarding the decedent's declaration in their presence that the document was his will and declarations by the notary and witnesses to the will that they witnessed the decedent sign each page of the will in the presence of each other. Therefore, the will was null and void. *See Successions of Toney*, 16-534 (La. 5/31/1), 226 So.3d 397, and *Succession of Brown*, 458 So.2d 140 (La.App. 1 Cir. 1984).

SUMMARY JUDGMENT

***Dufour v. The Schumacher Group of Louisiana, Inc., et al*, 18-20 (La.App. 3 Cir. 8/1/18), ___ So.3d ___. (Panel: Kyzar, Judge writing; Cooks and Keaty, Judges)**

Plaintiffs, Beth and Drew Dufour, wife and husband, filed a petition for damages for alleged medical malpractice against defendants: Rapides Regional Medical Center (RMC); Dr. Ross Fremin, an emergency room physician working at RMC on the day of the alleged incident giving rise to the claim; and Schumacher Group of Louisiana, LLC, the alleged direct employer of Dr. Fremin. The Dufours appealed the trial court's granting of summary judgment in favor of defendant, RMC, dismissing plaintiffs' claims against the hospital with prejudice, as well as the trial court's denial of plaintiffs' motion for a new trial thereafter. The issues on appeal were whether the trial court erred in striking the Dufours' opposition and granting the hospital's motion for summary judgment; whether the trial court abused its discretion in granting the hospital's motion to quash discovery; and whether the trial court was manifestly erroneous or abused its discretion in denying the Dufours' motion for new trial.

Reversed and Vacated. We found the trial court abused its discretion in striking the Dufours' supplemental opposition to the hospital's motion for summary judgment. Louisiana Code of Civil Procedure Article 966(B)(2) clearly states that a non-moving party must file "[a]ny opposition . . . and all documents . . . not less than fifteen days prior to the hearing on the motion." We found that the rescheduling of the hearing reset the time for the filing of opposition documents. Therefore, we found when a motion for summary judgment is continued by a trial court, the time limitations found in La.Code Civ.P. art. 966 are in relation to the newly set hearing date, not the original one.

After concluding that the trial court abused its discretion in striking the Dufours' opposition, and considering the summary judgment evidence in light of that conclusion, we found that the trial court erred in granting the hospital's motion for summary judgment as there remained genuine issues of material fact. Finally, we noted that our finding that the trial court erred in granting summary judgment required us to vacate the trial court's decision to grant the hospital's

motion to quash as moot. Also rendered moot was the Dufours' allegation of error in the denial of their motion for new trial.

***Duhon v. Petro "E" LLC*, 18-57 (La.App. 3 Cir. 7/11/18), ___So.3d ___ (Saunders, J., writing; Ezell, B.; Gremillion, S.)**

This case involves a dispute between Plaintiff, who farmed out property to Cross-Plaintiff, for various oil and gas exploration and production operations. Subsequently, Cross-Plaintiff leased the property to Defendant, who hired an oilfield service company to perform plug and abandon work on Plaintiff's property. During the operations, a saltwater spill occurred that damaged Plaintiff's property. As a result, Plaintiff sued several companies, including Cross-Plaintiff, Defendant, and the oilfield service company hired by Defendant. Plaintiff maintained that Defendant was an "alter ego" of the oilfield service company or was engaged in a single business enterprise ("SBE"), such that the oilfield service company should be held liable for the obligations of Defendant.

The oilfield service company filed a motion for summary judgment on Plaintiff's SBE claim, which concerned Plaintiff's claim only. The motion was granted - finding that the oilfield service company and Defendant are separate corporations. Plaintiff did not appeal that judgment. Subsequently, Cross-Plaintiff filed a cross-claim against Defendant, which it later amended to assert the identical SBE claim against the oilfield service company that had been previously asserted by Plaintiff. Again, the oilfield service company moved for summary judgment, citing the same reasons which supported its motion for summary judgment granted by the trial court on the Plaintiff's SBE claims. The trial court granted summary judgment pursuant to La.Code Civ.P. art. 966.

Reversed and remanded. The court found that a group of affiliated corporations constitutes a single business enterprise, such that "[w]hen a group of corporations integrate their resources to achieve a common business purpose and do not operate as separate entities, each affiliated corporation may be held liable for debts incurred in pursuit of the general business purpose." The court ruled that Cross-Plaintiff presented sufficient evidence to establish the existence of an SBE for purposes of satisfying its summary judgment burden. Specifically, the evidence submitted by Cross-Plaintiff in support of its SBE claim includes, but is not limited to, the following: (1) Defendant and the oilfield service company had common ownership, which was relevant to the operations conducted by Defendant and the oilfield service company, as it permitted the transfer of funds between the companies without any documentation, interest charges or efforts made to collect unpaid loans; (2) the loans between Defendant and the oilfield service company clearly did not result from any arms-length transactions; (3) Defendant used the oilfield service company's office space to store its files, but did not pay rent for the use of this space; and (4) Defendant did not have a separate phone number and fax, but used the oilfield service company's phone number and fax.

***Barber v. Louisiana Municipal Risk Management Agency*, 17-800 (La.App. 3 Cir. 4/18/18), ___ So.3d ___, 2018 WL 1833382 (Gremillion, Judge, writing, with Keaty and Savoie, Judges):**

This case arises from the motor vehicle accident involving then-Pineville City Marshal, Larry Jeane, and a vehicle occupied by the plaintiffs. The plaintiffs filed a motion for summary judgment on the issue of liability, in which they argued that because the accident occurred in the lane opposing Marshal Jeane's, he was presumed at fault. Further, relying upon *Brannon v. Shelter Mutual Insurance Company*, 507 So.2d 194 (La.1987), the defendants, who claimed that Marshal Jeane was rendered unconscious before the accident, were required to prove that Marshal Jeane was free from all fault by clear and convincing evidence. In opposition, the defendants relied upon the affidavit of an eyewitness, who saw marshal Jeane slumped over in his truck before the collision. Further, they submitted the affidavit of Dr. Brabson Lutz, and internal medicine physician, who attested that his review of the medical records and other evidence convinced him that, more probably than not, Marshal Jeane had been rendered unconscious before the accident by a cardia arrhythmia. Plaintiffs filed a memorandum in which they objected to Dr. Lutz's affidavit. The trial court granted plaintiffs' motion for summary judgment, and defendants appealed.

On appeal, we noted that the burden of proof of an affirmative defense is irrelevant. The Code of Civil Procedure places the burden in summary judgment on the mover. Once the mover has carried its burden in a motion for summary judgment, the burden then shifts to the defendant to produce evidence sufficient to demonstrate a genuine issue of material fact. The affidavit of the eyewitness and that of Dr. Lutz raised an issue of material fact regarding sudden unconsciousness. Plaintiffs also urged that we disregard Dr. Lutz's affidavit because they had objected to his affidavit, and the trial court "implicitly' granted their motion under *Daubert* to exclude it. We rejected this argument, noting that a trial court's silence on a party's request for relief generally signals its denial of such relief. We then analyzed Dr. Lutz's affidavit and considered it in our de novo review. We also rejected the plaintiffs' contention that, given Marshal Jeane's medical history, it was negligent for him to operate a motor vehicle, even though he had no prior indications of impairment.

***Colson v. Colfax Treating Co., LLC*, 17-912, 17-913 (La.App. 3 Cir. 4/18/18), ___ So.3d ___, 2018 WL 1835405 (Gremillion, Judge, writing, with Amy and Perret, Judges):**

This matter involves the damage claims of Pineville residents whose properties were contaminated by effluent from the creosote plant during Hurricane Gustav. The city moved for summary judgment based on the Louisiana Homeland Security and Emergency and Disaster Assistance Act, La.R.S. 29:721-39, and that the Red River, Atchafalaya, and Bayou Boeuf Levee District was tasked with flood control in the area that included the city, pursuant to La.R.S. 38:291(M). The trial court granted the City's motion in part, holding that the City was not responsible for flooding under La.R.S. 38:291(M), but denied it relief regarding contamination from the City's sewer system. In opposition to the motion, plaintiffs had attached the deposition of a Ph.D. chemical engineer who reviewed a copious volume of documents and concluded that

the creosote plant had violated the terms of its agreement with the City under which it was allowed to dump into the City's sewer system. Further, there was testimony from one of the plaintiffs that the contaminants were being discharged from the City sewer line before the hurricane flooding began; thus, there was a genuine issue of material fact as to whether the emergency preparedness act applied. While we found no authority for the proposition that the City was absolved of responsibility by creation of the levee district for alleged problems with the city's own sewer system, we affirmed the trial court's grant of summary judgment on the issue of "damages related to flooding" on the basis that the allegations of their petition and the evidence submitted in opposition to the city's motion regarded damages from chemical contamination and not from flood waters.

***Guillory v. Broussard*, 17-931 (La.App. 3 Cir. 3/28/18), ___ So.3d ___. (Pickett, J., writing)**

When a stock recission agreement is rescinded as null for lack of consent, the appropriate remedy is to return the number of shares rescinded by the nullified agreement, not the percentage of stock owned by the parties at the time the nullified agreement was entered into.

***State of Louisiana v. Tanya Buteaux*, 17-877 (La.App. 3 Cir. 3/14/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Pickett, Judges).**

Defendant, Tanya Buteaux, appealed her jury conviction of three counts of theft of $1,500.00 or more, violations of La.R.S. 14:67. The trial court sentenced Ms. Buteaux to five years at hard labor on each count, to be served concurrently, with all but two years suspended, and five years supervised probation upon release from incarceration. The court also ordered Ms. Buteaux to pay restitution to the victims in the amount of $89,186.63.

Affirmed and Remanded with Instructions. The State presented evidence of theft perpetrated through a scheme whereby Ms. Buteaux manipulated daily store statements to short the cash deposits. Viewing the evidence in a light most favorable to the prosecution, we found that, though circumstantial, the evidence was sufficient for the jury to find the essential elements of the crime of theft perpetrated by Ms. Buteaux and that the State negated all reasonable hypothesis of innocence. Accordingly, we concluded that the evidence was sufficient to support an ultimate finding by the jury that the reasonable findings and inferences permitted by the evidence exclude every reasonable hypothesis of innocence, and, therefore, the evidence was sufficient to sustain the verdict of three counts of theft beyond a reasonable doubt.

***Shannon James Suarez v. John DeRosier, Individ. et al.*, 17-770 (La.App. 3 Cir. 3/7/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Pickett, Judges.)**

Shannon James Suarez (Suarez) appealed a summary judgment granted on the grounds of absolute immunity in favor of Calcasieu Parish District Attorney John DeRosier (DeRosier) and Investigator Bill Pousson (Pousson) for malicious prosecution and investigative misconduct. Suarez alleged that the trial court erred in granting the motion when he was not allowed adequate

discovery, which would determine whether qualified or absolute immunity applied. Suarez also alleged that the trial court erred when it failed to deem his request for admission of fact as admitted because DeRosier failed to answer within the specified fifteen days under La.Code Civ.P. art. 1467(A).

The suit arose after Suarez was arrested, and the District Attorney filed formal charges of stalking, and later added simple battery to the Bill of Information. Suarez filed a motion to quash, asserting the battery charge prescribed. When Suarez went to appeal the adverse decision on his motion to quash, he discovered that a subsequent version of the Bill of Information was stamped "Sex Offender." Suarez then filed a malicious prosecution claim against DeRosier. Suarez added Pousson as a defendant for investigative misconduct. The Defendants responded with affidavits of employees of the District Attorney's Office, which shifted the burden to Suarez after he failed to object to the affidavits.

Reversed and remanded. We found that the trial court erred in granting summary judgment because Suarez was not allowed adequate discovery. Plaintiff's counsel repeatedly attempted to propound discovery for seven months and to schedule depositions, but defense counsel was not cooperative, requested several extensions, and ultimately filed a motion for summary judgment rather than answering discovery. Under La.Code Civ.P. art. 966(C)(1), a mover is entitled to judgment after adequate discovery when a genuine issue as to material fact remains. Until Suarez could propound discovery, a genuine issue as to material fact remained because Suarez could not establish the applicable immunity which is determinative of the case, nor could he meet his burden of proof to oppose the summary judgment. *See Broussard v. Winters*, 13-300 (La.App. 3 Cir. 10/9/13), 123 So.3d 902. Additionally, this court was unable to consider the request for admissions because the summary judgment does not encompass a ruling on the merits or an interlocutory ruling on the request for admissions. The trial court's judgment was reversed and remanded to allow for the opportunity to propound discovery.

TOXIC TORT

Robert J. Broussard, et al. v. Multi-Chem Group, LLC, **17-985 (La.App. 3 Cir. 7/11/18), __So.3d__ (Panel: Amy, Judge writing; Kyzar and Perret, Judges).**

The plaintiffs in the consolidated cases (represented on appeal by docket numbers 17-985 through 17-922) sought personal injury damages associated with alleged exposure to chemicals following an explosion at the defendant chemical facility. Liability was established in pre-trial proceedings with consideration of the claims of twelve bellwether plaintiffs proceeding to a bench trial. The trial court awarded each plaintiff general damages, including those for mental anguish due to fear of developing cancer. The trial court also awarded medical expenses for some of the plaintiffs. The defendants appealed.

Affirmed (17-985; 17-986; 17-987; 17-989; 17-990; 17-991; 17-992)**.** ***Reversed in Part; Affirmed as Amended and Rendered*** (17-988). The panel first rejected the assertion that the trial court erred in finding that materials from the explosion travelled in multiple directions, as testified to by the plaintiffs' meteorology expert, and in its corresponding rejection of the defendants' expert's opinion that the materials moved away from the plaintiffs' locations due to prevailing winds. The trial court assessed the experts' credentials in favor of the plaintiffs' expert, concluded that the defendants' expert's opinion was contrary to photographic evidence, and questioned the reliability of that opinion given the use of proprietary methods. The panel further found no error in the reliance on the plaintiffs' expert in pharmacology and toxicology who testified as to the site's chemicals and who further testified regarding consistency between the plaintiffs' complaints and exposure to such substances. The expert's academic and professional experience supported her qualification in the tendered fields. Neither did the trial court abuse its discretion in accepting the testimony of an otolaryngologist, who opined that the symptoms of those he examined were more likely than not caused by the explosion. The physician testified that the symptoms as reported by the plaintiffs did not require more extensive testing as suggested by the defendants.

The defendants further questioned the finding of both general and specific causation. Insofar as general causation requires proof that the complained of substance is capable of causing particular injury, the plaintiffs' toxicologist reviewed the site's chemicals, explaining that they could cause acute effects and that some had potential for future injury. To the extent that the testimony was not more detailed, the trial court remarked that the available data was generated under the defendants' direction. That limitation also related to the burden of proving specific causation, which the defendants contended required proof of the dose and duration of exposure. However, jurisprudence indicates that such proof is not required. Instead, surrounding evidence may support a finding that symptoms are consistent with chemical exposure. The trial court accepted testimony regarding the direction of the smoke plum, the possible effects of such exposure, and the plaintiffs' testimony regarding their experiences following the explosion. Such evidence supported the trial court's finding.

Finally, the panel reviewed the damages awarded, affirming the awards and the quantum thereof for seven of the plaintiffs. *See* 17-985; 17-986; 17-987; 17-989; 17-990; 17-991; and 17-992. However, the panel reversed the damages awarded to five plaintiffs for fear of developing cancer due to a lack of questioning and/or testimony regarding such fear. *See* 17-988.

Bradford v. CITGO Petroleum Corporation, et al.**, 17-296 c/w 17-297 through 17-321 (La.App. 3 Cir. 1/10/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Cooks and Gremillion, Judges).**

CITGO Petroleum Corporation (CITGO) appealed the trial court's judgment in favor of twenty plaintiffs on the issue of causation. It also appealed the trial court's judgment in favor of thirteen plaintiffs on the issue of symptom duration following exposure to CITGO's chemical spill and release.

Affirmed. Finding no error or manifest error in the trial court's judgment, we affirmed.

On June 6, 2006, following a flash flood, CITGO's wastewater treatment unit overflowed and spilled slop oil and wastewater into the Calcasieu River contaminating 100 miles of coastline and area waterways with benzene, H_2S, xylene, toluene, n-hexane, and ethylbenzene. CITGO's steam lines became submerged and the facility also released H_2S and sulfur dioxide (S02) into the air in illegal concentrations for a full day. The wind carried the toxic emissions and released them into the surrounding community.

All of the plaintiffs in these consolidated suits lived, worked, or socialized in the areas near to or affected by CITGO's slop oil spill and air release. Their individual locations were mapped, and the records of the individual plaintiffs revealed medical symptoms consistent with CITGO's material safety data sheets for exposure victims: eye irritation, respiratory tract irritation, headaches, dizziness, visual disorders, allergic reactions, and nausea. The plaintiffs provided expert testimony establishing general causation and provided medical testimony establishing specific causation. *See Arabie v. CITGO Petroleum Corp.*, 10-244 (La.App. 3 Cir. 10/27/10), 49 So.3d 529, *aff'd on liability and causation, rev'd on punitive damage issue*, 10-2605 (La. 3/13/12), 89 So.3d 307; *Arabie v. CITGO Petroleum Corp.*, 15-324 (La.App. 3 Cir. 10/7/15), 175 So.3d 1180, *writ denied*, 15-2040 (La. 1/8/16), 184 So.3d 694; *Cormier v. CITGO Petroleum Corp.*, 17-104 (La.App. 3 Cir. 10/4/17), __ So.3d __, 2017 WL 4401592; *and see Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194 (5 Cir.1996); *Pick v. American Medical Systems, Inc.*, 958 F.Supp. 1151 (E.D. La.1997); *Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347, 351 (5th Cir. 2007); *Seaman v. Seacor Marine L.L.C.*, 326 Fed.Appx. 721, 729 (5th Cir. 2009); *Bell v. Foster Wheeler Energy Corp.*, 15-6394 (E.D. La. 3/6/17), 2017 WL 889083.

We further found that the trial court's findings of fact on general damages regarding duration of exposure were not manifestly wrong and were consistent with *Jones v. Progressive Security Insurance Co.*, 16-463 (La.App. 3 Cir. 12/29/16), 209 So.3d 912.

WORKERS' COMPENSATION

Jeansonne v. La. Dep't. of Public Safety and Corrections Youth Services, Office of Juvenile Justice, **17-635 (La.App. 3 Cir. 6/6/18), ___ So.3d ___ 2018WL2715416 (Gremillion, Judge, writing, with Chief Judge Thibodeaux, and Judges Amy, Keaty, ad Conery. Amy and Conery, Judges, concurred in part and dissented in part):**

The claimant in this workers' compensation case worked as a maintenance man at the Cecil Picard Youth Center in Bunkie. He claimed to have been involved in two separate accidents in the course and scope of his employment in June 2015 and March 2016. Mr. Jeansonne did not tell anyone of his first accident until after his second. The Workers' Compensation Judge (WCJ) found that Mr. Jeansonne had been involved in the June 2015 accident but failed to prove an accident in March 2016. Mr. Jeansonne had been given a return-to-work clearance from his surgeon only nine

days before his second accident. Because of inconsistencies—some admittedly rather glaring—the WCJ found Mr. Jeansonne lacked credibility regarding the second accident and denied benefits.

On appeal, we examined the entirety of the record. Every witness testified that Mr. Jeansonne was a diligent, conscientious worker. When asked why Mr. Jeansonne failed to notify the employer of his first accident, his doctor replied that he probably wanted to proceed with a claim under his health insurance to avoid the hassle of a workers' compensation claim and because he wanted to return to work as soon as possible. This testified was echoed by Mr. Jeansonne and corroborated by the notes of the center's human resources director that were taken at the time Mr. Jeansonne reported the accidents. When asked whether there was a specific task that caused him to feel pain, Mr. Jeansonne said, that at midday on March 17, he had been changing out a faucet in one of the facility's cabins and, "I felt that something was broken again....That's the way it felt when I come out from under that lavatory. I said 'Well, something—something's not right.'" There was a definite change in the findings of MRI studies taken between the two accidents compared to those after the second accident. Based upon these factors, we reversed the WCJ on his finding regarding the March 2016 accident but affirmed the WCJ's finding that the State controverted Mr. Jeansonne's claim as to negate any penalties or attorney fees.

***Cumins v. R.A.H. Homes, LLC,* 17-905 (La.App. 3 Cir. 5/2/18) ___ So.3d ___ (Saunders, J., writing; Pickett, E.; Gremillion, S.)**

This is a Workers Compensation case in which we must decide whether the Defendant/Principal is entitled to summary judgment based on tort immunity under the two-contract theory as provided in La.R.S. 23:1061(A)(2). Defendant entered into a contract with homeowners to build a single-family residence, which contemplated or included the installation of an HVAC system in the attic of the residence. Defendant subcontracted the installation of the HVAC system. Subcontractor hired Plaintiff as a laborer to fulfill its contract with Defendant. Plaintiff was injured while performing the tasks required by Defendant's contract with the Homeowners. As a result, Plaintiff sued several defendants, including this Defendant in tort.

The Louisiana Workers' Compensation Act provides that, generally, workers' compensation is the exclusive remedy for work-related injuries. See La. R.S. 23:1032. The exclusive remedy provision of the workers' compensation statute precludes an employee from filing a lawsuit for damages against his employer or any principal. See La.R.S. 23:1032(A).

Defendant filed responsive pleadings generally denying the claims and allegations of Plaintiff and asserting various affirmative defenses, including the defense of statutory employer immunity pursuant to La.R.S. 23:1061(A)(2).

After written discovery was exchanged between the parties, Defendant filed a Motion for Summary Judgment pursuant to La.Code Civ.P. art. 966, requesting that Plaintiff's claims against it be dismissed. The trial court granted Defendant's motion and dismissed Plaintiff's claim with prejudice.

Affirmed. The court found no abuse of the discretion afforded the trial court in granting of Defendant's Motion for Summary Judgment as Defendant established that it is entitled to statutory immunity from a tort suit by virtue of the two-contract theory. The court ruled that Defendant's motion for summary judgment correctly set forth that there are two basis for finding statutory employment: (1) pursuant to Louisiana Revised Statutes 23:1061(A)(2), being a principal in the middle of two contracts referred to as the "two-contract theory," or (2) pursuant to Louisiana Revised Statutes 23:1061(A)(3), the existence of a written contract recognizing the principal as the statutory employer. Defendant's evidence is sufficient to prove that a statutory relationship was conferred upon Defendant, as Principal, when it entered into two separate two contracts, one with the Homeowners, and one with the subcontractor, in which the work or services provided by the immediate employer, i.e., the subcontractor, was contemplated by or included in the contract between Defendant and the Homeowner. Moreover, contrary to Plaintiff's argument, Section 23:1061(A)(3) does not apply to Section 23:1061(A)(2), therefore, a written contract is neither necessary nor required for a statutory employee relationship to exist under the two-contract theory.

***Verret v. Tyson Foods, Inc.*, 17-1068 (La.App. 3 Cir. 4/18/18), __ So.3d ___. (Pickett, J., writing)**

The claimant, a Louisiana resident, was injured while driving a truck in Oklahoma for a company headquartered in Arkansas. He filed a workers' compensation claim in Louisiana, alleging the contract for hire was made in Louisiana. The employer filed an exception of lack of subject matter jurisdiction, which was overruled by the WCJ. The WCJ awarded benefits. The employer appealed.

Reversed. The OWC did not have subject matter jurisdiction to hear a claim made by a long-haul driver from Louisiana against his employer, who did not operate principally in Louisiana, when the contract of hire was not made in Louisiana. A contract of hire was not formed during single phone call made by the claimant from Louisiana to the employer's facility in Texas when the evidence shows the employer did not actually hire the claimant until he returned to Texas to complete certain requirements for employment.

***Guillory v. R&R Construction, Inc.* 17-935 (La.App. 3 Cir. 3/14/18) __ So.3d __ (Saunders, J., writing; Thibodeaux, U.; Pickett, E.)**

This case involves a compromise entered into between Employer and Employee after Employee was injured during the course and scope of his employment. Subsequently, the parties entered into a settlement agreement wherein Employer stipulated to the unconditional tender of a lump sum settlement to Employee on or before a specified date. Thereafter, Employer failed to properly tender settlement funds to Employee pursuant to the terms of their settlement agreement.

Employee filed for a new trial seeking penalties and attorney fees for Employer's failure to tender settlement funds pursuant to the terms of their settlement agreement, and for including certain statutory language on the settlement checks that imposed impermissible conditions on

Employee's receipt of the settlement funds, contrary to the settlement agreement between the parties pursuant to La.R.S. 23:1201(G). Following a hearing, the workers' compensation judge found in Employee's favor.

Affirmed. The court found no abuse of the discretion afforded the workers' compensation judge in finding that the imposition of penalties and attorney fees was warranted for Employer's failure to properly tender settlement funds to Employee pursuant to the terms of their settlement agreement. The court ruled that pursuant to Louisiana Civil Code Article 3071 "[a] compromise is a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship", and Louisiana Revised Statutes 23:1201(G) is penal in nature, and concerns an obligation that arises because of Employer's conduct after a final judgment. Here, the parties agreed to a deadline upon which settlement funds were payable, effectively amending the provisions of Louisiana Revised Statutes 23:1201(G). If there was no penalty or ramification for not complying with the agreement, that portion of the settlement agreement would be meaningless and unenforceable. The court ruled that the workers' compensation judge did not err in imposing penalties and attorney fees for Employer's untimely tender of settlement funds, as the parties contractually agreed to shorten the time in which settlement funds were due, the agreement was not against public policy, the agreement was approved by the workers' compensation judge, was placed on the record, and became final. Further, Employer was aware of the ramifications for failure to timely tender settlement funds prior to agreeing on a specified date to do so, and the failure to do so was not the result of a condition Employer had no control over. Additionally, the settlement checks imposed an impermissible condition on Employee's receipt of the settlement funds, contrary to the settlement agreement between Employer and Employee.

***Katina Hodges v. Golden Nugget Lake Charles, LLC*., 17-936 (La.App. 3 Cir. 3/7/18), 242 So.3d 654 (Pickett, J., writing.) Panel: Judges, Pickett, Thibodeaux, Saunders.**

The workers' compensation claimant sought workers' compensation benefits after she suffered a subarachnoid hemorrhage in her brain while in the course and scope of her employment as a security guard for her employer. The employer denied her claim for benefits on the basis that her alleged injury was not a compensable workers' compensation claim and that she had forfeited benefits because she misrepresented working for pay while receiving compensation benefits. The workers' compensation judge held that the fall cause by the hemorrhage was a compensable accident and awarded the claimant total temporary disability benefits, supplemental earnings benefits, medical benefits, penalties and attorney fees.

***Amended and Affirmed as Amend*ed.** Resolution of the compensable claim issue centered on the divergent opinions of the claimant's treating physicians and the defendant's expert. The WCJ did not err in accepting the treating physician's testimony, which was corroborated by two other physicians, over that of the consulting expert. The WCJ's determination that the accident caused an exacerbation of the claimant's pre-existing shoulder injury and pre-existing depression which was based in large part on his assessment of the claimant's credibility and substantiated by

her treating physicians. The employer's failure to pay the claimant workers' compensation benefits when supported by her treating physicians warranted penalties and attorney fees because the employer did not reconsider its initial denial although the claimant continued to seek treatment and it did not consult an expert to substantiate its position for almost a year after the accident. Contrary to her arguments, the evidence established that as of August 15, 2016, the claimant was no longer entitled to SEBs because she regularly worked part-time from October 2015 until June 2016 when she began receiving Social Security disability benefits. Additionally, the employer established that jobs satisfying her physicians' restrictions to accommodate her physical limitations were available to her.

***James Crawford Bailey v. Veolia Environmental Services,* 17-655 (La.App. 3 Cir. 1/31/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Gremillion and Conery, Judges).**

James Crawford Bailey (Bailey) appealed a judgment in favor of Veolia Environmental Services (Veolia), finding that Bailey failed to prove untimely payment of pharmacy bills and prescription medications for his workers' compensation claim. Bailey also appeals the Workers' Compensation Judge's (WCJ) denial of penalties and attorney fees. Veolia alleges the WCJ erred in denying Veolia's objections to documents as hearsay, and requests frivolous appeal damages.

Bailey filed a disputed claim for compensation, alleging untimely payment of medical expenses, and penalties and attorney fees. Veolia denied the allegations in their answer and no facts were stipulated in their pre-trial statement or at trial. However, Veolia agreed to the characterization of untimeliness in their pre-trial statement. At trial, Bailey's counsel submitted receipts from the pharmacy with handwritten notations documenting whether payment was made timely or untimely. No secondary documentation or witness testimony was presented to verify these receipts. Veolia objected to the exhibits as hearsay and the objection was overruled. The WCJ found that Bailey did not establish with the receipts alone that Veolia made untimely payments. As an aside, the WCJ mentioned that Bailey offered little evidence of medical necessity—Bailey, on appeal, alleges the WCJ improperly injected medical necessity post-trial.

Affirmed. On appeal, we found that the WCJ was not clearly wrong that Bailey failed to prove by a preponderance of evidence that the prescription payments were untimely. *See Cobb v. Lafayette Parish School Bd.*, 16-990 (La.App. 3 Cir. 5/17/17), 220 So.2d 825, 828, *writ denied*, 17-1481 (La. 11/13/17), 230 So.3d 209. We have found that pharmacy receipts alone were not sufficient to meet the plaintiff's burden of proof. *Id.* Additionally, we rejected Bailey's argument that the WCJ injected medical necessity post-trial because the WCJ mentioned medical necessity as a mere aside. However, it is well-established that in order to be entitled to medical benefits, it is presupposed that the claimant would need to show medical necessity and some connexity between the injury and the need for medical benefit. *See Fritz v. Home Furniture-Lafayette*, 95-1705 (La.App. 3 Cir. 7/24/96), 677 So.2d 1132. Because we found that the WCJ was not clearly wrong, the issue of penalties and attorney fees is moot. Veolia's contention that the WCJ erred in its denial of their hearsay objections was not addressed because their answer only focused on frivolous appeal damages. We denied Veolia's request for frivolous appeal damages, finding that

both parties agreed that the only issue at trial was untimely payments, not entitlement, and Bailey limited his evidence to his own prejudice—not because he did not seriously believe in his position. *See Guidry v. Carmouche*, 320 So.2d 267, 271 (La.App. 3 Cir. 1975) (citations omitted); *see also Seale v. Evangeline Parish Police Jury*, 330 So.2d 378, 380 (La.App. 3 Cir. 1976).

***White v. WIS International*, 17-132 (La.App. 3 Cir. 10/25/17), 230 So.3d 246 (Panel: Keaty, Judge writing; Thibodeaux and Perret, Judges)**

It is undisputed that the Workers' Compensation Claimant suffered an on-the-job injury on May 28, 2016. By check dated August 8, 2016, Claimant began receiving Temporary Total Disability Benefits (TTDs) retroactive to July 27, 2016, when Employer received a work restriction slip from Claimant's physical medicine and rehabilitation physician. (Employer continues to pay Claimant those benefits.) Claimant filed a Form 1008 Disputed Claim for Compensation (1008) against Employer seeking an award of indemnity benefits from the date of the accident until it began paying her benefits, plus penalties and attorney fees. Employer failed to answer the complaint, and the workers' compensation judge (WCJ) entered a preliminary default against it. After an October 24, 2016 evidentiary hearing, the WCJ rendered judgment awarding Claimant TTDs from the date of the accident plus penalty and attorney fees. Employer appealed.

Reversed and remanded: There is no entitlement to a default judgment in a workers' compensation case absent strict compliance with the procedural requirements for such judgments set forth in La.R.S. 23:1316.1(B)(4). To satisfy the burden of proving, by clear and convincing evidence, her physical inability to engage in any employment, Claimant was required to introduce objective medical evidence of her disabling condition. *See* La.R.S. 23:1221(1)(c). Claimant's testimony alone was not sufficient proof that she was disabled before July 27, 2016, such that she was entitled to receive indemnity benefits from Employer before that time. Although Claimant testified that she was given an "excuse for work" by the doctor who treated her in the emergency room and by her primary care doctor, she failed to present any work excuses for the disputed period or medical records, notes, findings, or diagnoses to support her testimony regarding her claimed disability.

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION
PROGRAM - 2018

CRIMINAL CASE LAW UPDATE

Presentation and Written Materials by:
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2018 CRIMINAL CASE LAW UPDATE

State v. Aguillard, 17-798 (La.App. 3 Cir. 4/11/18), 242 So.3d 765. Driver's ed teacher was convicted of two counts of indecent behavior with a juvenile although there was no physical contact. The driver's ed teacher made inappropriate comments to the two victims while they were driving. There was also evidence that the defendant was looking at pornography and the victims saw it. This court upheld the convictions and upheld the five-year concurrent sentences imposed on each count.

State v. Bartie, 18-131 (La. App. 3 Cir. 3/22/18), (unpublished opinion), *writ denied*, 18-640 (La. 7/9/18), __ So.3d __. "Defendant's confession, obtained after he first invoked his right to remain silent, is not admissible at trial, as police failed to 'scrupulously honor' the Defendant's right to remain silent." [This was a pre-trial writ.]

State v. Batiste, 17-1099 (La.App. 3 Cir. 5/9/18), 246 So.3d 52. This court reversed defendant's conviction because a witness refused to testify, and the trial court allowed the witness's prior statement to come in through the testimony of a police officer as well as the introduction of the statement itself. The defendant objected based on lack of confrontation, but the trial court overruled. This court found error was not harmless since the unavailable witness's prior statement was crucial to proving use of a weapon and specific intent.

State v. Domingue 17-786 (La.App. 3 Cir. 4/18/2018), 244 So.3d 489. The defendant shot an unarmed guy who was advancing toward him in his trailer. Level of force was not reasonable, so the self-defense claim failed. *See State v. Mincey*, 08-1315, (La.App. 3 Cir. 6/3/09), 14 So.3d 613.

State v. Eckert 17-848 (La.App. 3 Cir. 5/2/18), 244 So.3d 551. Military expert was presented to testify regarding the mechanics of chokeholds in a strangulation case. Majority ruled that that district court did not err by excluding the testimony, as it did not address the central issue of the case (the length of time the defendant held the choke). Further, even if error were to be found, it would have been harmless. Dissent: Expert's testimony would have shown that chokeholds

can be non-lethal, and this is a matter outside the experience of the average lay juror. (Note: *See State v. Curley*, 16-1708 (La. 6/27/18), __ So.3d __ re: prior domestic abuse by victim, self-defense, and potential use of experts in such cases.)

State v. Guillory 17-403 (La.App. 3 Cir. 10/11/2017), 229 So.3d 949, *writ denied*, 17-1964 (La. 6/1/18), 244 So.3d 437. The defendant stabbed a guy who punched him. Level of force was not reasonable, so self-defense claim failed. *See State v. Mincey*, 08-1315, (La.App. 3 Cir. 6/3/09), 14 So.3d 613.

State v. Hernandez 17-803 (La.App. 3 Cir. 3/7/18), 241 So.3d 1053. This court upheld the defendant's conviction even though the jury was allowed to go home during the middle of deliberations.

Langley v. Prince, 890 F.3d 504 (5th Cir. 2018). Collateral estoppel case; issue of specific intent had been previously litigated and was improperly relitigated in the most recent state-level proceeding. Therefore, the federal Fifth Circuit reversed Langley 's conviction.

State v. Malveaux 17-1082 (La.App. 3 Cir. 5/30/18), 245 So.3d 81. OK to obtain GPS/phone location information without warrant due to exigent circumstances. Police had reasonable belief that a third party was in danger.

State v. Price, 17-520 (La. 6/27/18), __ So.3d __. Simple kidnapping is NOT a valid responsive verdict to a second-degree kidnapping charge.

State v. Queen, 17-599 (La.App. 3 Cir. 1/4/18), 237 So.3d 547. This court remanded for a *Peart* hearing since the trial court failed to hold an adequate hearing.

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION
PROGRAM - 2018

WILL YOU BE MY FRIEND?
AND OTHER ETHICAL ISSUES FOR TODAY

Presentation and Written Materials by:
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WILL YOU BE MY FRIEND?
AND OTHER ETHICAL ISSUES FOR TODAY

I. The Rules of Professional Conduct have the force and effect of substantive law. *Jones v. ABC Ins. Co.*, 13-167 (La.App. 5 Cir. 9/24/13), 122 So.3d 608.

A. Most rules are focused toward private practice attorneys, but they still all apply to court-employed attorneys.

B. Court-employed attorneys have additional ethical rules to follow.

1. Louisiana Supreme Court Rule XV technically applies to the clerk of the Louisiana Supreme Court "and the other personnel employed or appointed by the court," but logically the provisions of Rule XV apply to us too.

2. Louisiana Supreme Court Rule XIX outlines the disciplinary process.

3. Our human resources manual applies to all employees of the Louisiana Supreme Court and Louisiana Courts of Appeal.

4. Criminal Staff also has "Comments for Staff Attorneys" that include ethical obligations.

II. Rule XV prohibits us from the practice of law except for a few narrow exceptions and from engaging "in any business, calling, or employment which interferes with the proper discharge of [our] duties."

A. Obviously, we can't have clients and a side practice like some other public employees are allowed to do.

B. We also have to avoid impropriety and the appearance of impropriety. Human Resource Management Manual Part One, Chapter 7, Article I, Section 2(e).

1. Our HR Manual uses the example of hiring an immediate family member in a supervisor/subordinate relationship. What about more distant relationships? What about close friendships? Can we follow

the rules to the letter and still violate the ethical duty to avoid the appearance of impropriety?

2. What about other business interests we may have? Can we hire other court personnel to work in an unrelated business in which we are involved?

C. The Manual also prohibits us from soliciting membership in or contributions to an organization unrelated to court business. What about selling tickets for our favorite organization's fundraiser or raffle? What about inviting other court personnel to join professional organizations that are unrelated to the business of the court?

III. The duty of confidentiality is an important area of the Rules of Professional Conduct and of our HR Manual.

A. Rules of Professional Conduct 1.7, 1.9, and 1.11 address what is expected of attorneys moving from one employment to another, including court-employed attorneys, regarding confidentiality of clients and files.

B. Our HR Manual requires us "to respect the confidential nature of judicial activities" and "the privacy of [our] co-workers and the general public." Social media can have a big impact on this requirement!

1. What are the dangers of being social media "friends" with our co-workers?

2. What about being "friends" with judges?

3. What about being "friends" with political candidates?

4. What about being "friends" with other attorneys who are in private practice?

C. The Manual defines breach of confidentiality of information as "prohibited conduct" and provides, "[a]n employee who violates the confidentiality of matters pertaining to cases, investigations or other such Court business shall be subject to dismissal."

1. Can we identify the files on which we work to people outside the court?

2. Anything not available to or known by the public regarding our cases, our files, our judges, or our co-employees is confidential.

3. According to the Rules of Professional Conduct, this obligation of confidentiality continues after our court employment ceases.

IV. How much political activity is too much?

A. We cannot hold or run for political office as long as we are court employees.

B. We also cannot, according to the Manual, "engage publicly in political activities . . . ."

1. Social media have opened a whole new world for saying what we think about things.

2, Should we post political comments on Facebook, Instagram, Twitter, etc.? Is that engaging in political activity?

3. Should we "retweet," "like," "love," or insert emojis?

V. Lagniappe -- Persistence pays off! *In Re Riley*, 18-237 (La. 5/25/18).

THE EFFECTS OF BAD LEGAL WRITING ON PROFESSIONALISM IN THE PRACTICE OF LAW

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Third Circuit Judges' Association CLE

August 17, 2018

"The power of a clear statement is the great power at the bar." Daniel Webster

THE IMPORTANCE OF PROFESSIONALISM

In 1996, the Conference of Chief Justices (CCJ) adopted a resolution "calling for a study of lawyer professionalism and the development of a National Action Plan to assist the state appellate courts of highest jurisdiction to reverse" a perceived trend of "decreased public confidence in legal and judicial institutions."[1] That report recognized that professionalism was a much broader concept than ethics and included "not only civility among members of the bench and bar, but also competence, integrity, respect for the rule of law, participation in pro bono and community service, and conduct by members of the legal profession that exceeds the minimum ethical requirements."[2]

From the Lawyer's Oath of Admission in Louisiana: To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.

From the Code of Professionalism[3]

- I will conduct myself with honesty, dignity, civility, courtesy and fairness and will not engage in any demeaning or derogatory actions or commentary toward others.
- I will not knowingly make statements of fact or law that are untrue or misleading[,] and I will clearly identify for other counsel changes I have made in documents submitted to me.
- I will work to protect and improve the image of the legal profession in the eyes of the public.

Louisiana Rules of Professional Conduct, Rule 1.1(a): A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Louisiana Rules of Professional Conduct, Rule 1.4(b): The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

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[1] A National Action Plan on Lawyer Conduct and Professionalism (adopted January 21, 1999, by the Conference Justices), p. 1.

[2] *Id*. at p. 2.

[3] Louisiana State Bar Association, www.lsba.org.

The Supreme Court of Ohio, publishes "Professionalism Dos & Don'ts: Legal Writing. The Commission on Professionalism drafts the list to guide lawyers in their professional writings. They include suggestions on style, substance, and grammar.

CONSEQUENCES OF POOR LEGAL WRITING AND THE IMPORTANCE OF CORRECT GRAMMAR AND GOOD WRITING

"Words are the principal tool of lawyers and judges, whether we like it or not."[4]

"On the whole, we think of our consumers – other judges, lawyers, the public. The law that the Supreme Court establishes is the law that they must live by, so all things considered, it's better to have it clearer than confusing." United States Supreme Court Justice Ruth Bader Ginsburg

- Bad impression on clients and the general public

A survey of state and federal judges revealed that ninety-four percent (94%) opined that there were basic writing problems in the briefs they read.[5]

"Errors in grammar, punctuation, and spelling suggest that the writer is sloppy and careless—qualities that people do not want in a lawyer. Minor errors distract the reader from the message to be conveyed. Major errors may distort the message or make it unintelligible."[6]

In re Disciplinary Action Against Hawkins, 502 N.W.2d 770, 771 (Minn. 1993): "Public confidence in the legal system is shaken when lawyers disregard the rules of court and when a lawyer's correspondence and legal documents are so filled with spelling, grammatical, and typographical errors that they are virtually incomprehensible." The court did not suspend Hawkins but did publicly reprimand him for unprofessional conduct.

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[4] Chalfee, Jr., Zechariah. "The Disorderly Conduct of Words." 41 Colum.L.Rev. 381, 382 (1941).

[5] Kosse, Susan Hanley & David T. ButleRitchie. "How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study." 53 J. LEGAL EDUC. 80 (2003).

[6] Dernbach, John C., et al. A Practical Guide to Legal Writing & Legal Method. 3rd ed. New York: Aspen Publishers, 2007, p. 200.

- Communication Errors

Communication errors include failure to follow the client's instructions, failure to obtain the client's consent or to advise the client (regarding possible outcomes resulting from a recommended course of action), and failure to explain administrative matters to the client.[7] From 1997-2007, communication errors accounted for one-third of malpractice claims and cost firms nearly $22 million (for approximately 7,200 claims).[8]

One must recognize the difference between an effectively written document and a well-written document.[9] A document is effective if it accomplishes its purpose, i.e., to persuade the court or to inform the client.[10] "Good legal writing, therefore, is best understood as writing that helps legal actors make decisions in the course of their professional duties."[11]

"A lawyer should keep in mind that the purpose of communication is to communicate, and this can't be done if the reader or listener doesn't understand the words used."[12]

- Annoying the Judge or Getting Benchslapped[13]

Kennedy v. Schneider Elec., ___ F.Supp.3d ___, ___ (N.D. Ind. 2014): "Before proceeding to the merits of these motions, the Court pauses to note the poor advocacy by Plaintiff's attorney. Plaintiff's brief, a mere eight pages long, does not cite a single case. The writing is ungrammatical, and the brief does not follow the formatting requirements listed in Northern District of Indiana Local Rule 5–4. . . . This isn't the first time, either."

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[7] Pinnington, Dan. "The Biggest Malpractice Claim Risks." LawPRO Magazine. Volume 7, No 2 Summer 2008: 17-20.

[8] *Id.*

[9] Osbeck, Mark. "What is 'Good Legal Writing' and Why Does it Matter?" Drexel L. Rev. 4, no. 2 (2012): 417-466.

[10] *Id.*

[11] *Id.* at 426.

[12] Garner, Bryan A. The Redbook: A Manual on Legal Style. 2nd ed. Minnesota: Thompson/West, 2006, p. 183.

[13] According to urbandictionary.com, David Lat popularized this term when he was blogging for UnderneathTheirRobes.com.

Alers v. City of Philadelphia, ___ F.Supp.2d ___, ___ (E.D. Pa. 2009): "In sum, the totality of legal arguments presented to the court have been convoluted, have at times been incomprehensible, have often contained citations that are dubiously relevant (if at all) to stated propositions, and have frequently been of little assistance to the Court. The parties are strongly cautioned that the Court expects a marked improvement in all future written submissions."

Colyer v. Speedway, LLC, 981 F.Supp.2d 634, 644 (E.D. Ky. 2013): "Colyer's counsel is reminded that he should at least make a pretense of having proofread his documents before filing them in federal court." The court stated that Colyer's argument could not be understood due to numerous grammatical, punctuation, spelling, and citation errors.

In re Jacoby Airplane Crash, ___ F.Supp.2d ___ (D.N.J. 2007) (footnote 28): While the court commended the work of most of the attorneys involved in this litigation, "[u]nfortunately, the Court expresses opposite sentiments with respect to the work product provided by counsel for Plaintiffs Nimer El Samna and Big Lion, namely Hamdi M. Rifai, Esq. of Clifton, New Jersey. Mr. Rifai's briefing has not lived up to the expectations of a lawyer practicing before this Court insofar as his submissions are consistently replete with grammatical and typographical errors." The court listed numerous examples of spelling errors and other grammatical mistakes and concluded that, "the sheer volume of mistakes in Mr. Rifai's submissions, in relation to the overall number of words contained therein, suggests that such mistakes are a byproduct of carelessness rather than understandable oversight. . . . [M]ost of Mr. Rifai's mistakes could have been easily caught and corrected." *Id*.

Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 172 (5th Cir. 2011): "Usually we do not comment on technical and grammatical errors, because anyone can make such an occasional mistake, but here the miscues are so egregious and obvious that an average fourth grader would have avoided most of them." The court affirmed the dismissal of plaintiff's claims on summary judgment.

Noel v. SDH Services West, LLC, 17-cv-23078, United States District Court, Southern District of Florida (2017): The trial court granted an order to allow plaintiff's counsel to file a second amended complaint but not until he certified that the pleading had been reviewed and approved by a teacher of the English language. The trial court stated that the complaint was "replete with grammatical errors, including improper punctuation, misspelling of words, incorrect conjugation of verbs, and lack of apostrophes when required for possessive adjectives; sentence fragments; and nonsensical sentences." *Id*. at ___.

- Censure Before the Bar

In re Sobolevsky, 430 F. Appx. 9 (2 Cir. 2011) and *In re Sobolevsky*, 96 A.D.3d 60, 944 N.Y.S.2d 20 (2012): Sobolevsky was an immigration attorney. The United States Court of Appeals, Second Circuit, referred Sobolevsky to the Court's Grievance Panel in seven different instances after noting in several of the court's written opinions that his appellate briefs were "of extremely poor quality." Some of his errors included referring to his client by the wrong name, referring to evidence that was not submitted, using boilerplate language that was irrelevant, using the wrong font, and failing to comply with scheduling orders. Sobolevsky was suspended from the practice of law for two years. The New York Supreme Court made the suspension reciprocal.

Kentucky Bar Association v. Brown, 14 S.W.3d 916, 918-919 (Ky. 2000): Brown was suspended for sixty days for failing to provide competent representation to his client when he filed a brief that was "a little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message."

- Loss of Legal Fees

Devore v. City of Philadelphia, ___ F.Supp.2d ___ (E.D.Pa. 2004): The court reduced the hourly rate request by Plaintiff's counsel from $300.00 per hour to $150.00, which it noted was generous. The court noted that Mr. Puricelli's carelessness was disrespectful to the court. His writing was described as vague, ambiguous, unintelligible, verbose and repetitive.

Aaron P. v. Hawaii, Dep't of Educ., ___ F.Supp.2d ___, ___ (D. Haw. 2013): Attorneys' fees requested by the plaintiffs' attorneys were reduced based on the quality of representation received being "significantly lower than is usual in the local market." It was noted that the briefs were ungrammatical, poorly structured, and littered with unexplained acronyms and unformatted citations, and are therefore very difficult and time-consuming to read." *Id*. (Footnotes omitted.)

- Harm to Your Client's Case

Thornell v. Performance Imports, ___ F.Supp.3d ___ (N.D. Ala. 2016): The parties disagreed over the meaning of a clause in an arbitration agreement included in the purchase agreement for a 2003 Ford Mustang. The sentence read: "Arbitration will be conducted by and under the rules of the American Arbitration Association . . ., or any other arbitration organization [the buyer] select[s], subject to [the seller's] approval." *Id*.

at 1. The defendant argued that "subject to the seller's approval" applied to the entire sentence rather than just to "select" and that the plaintiff was refusing to comply with the agreement because he insisted on using the American Arbitration Association. The court noted that "[o]n a purely grammatical level, the disputed sentence could withstand the torture necessary to make it ambiguous[,]" but the court favored the "generally accepted referent" of "select." *Id*. at 2. "Not only is this the most natural reading that jumps to mind first upon reading the sentence, it also leads to the most reasonable result." *Id*. at 3.

Gandy v. Lynx Credit, ___ F.Supp.3d ___ (N.D. Tex. 2014): The court declined to enter a default judgment, even though it would have been procedurally proper, because of the poorly drafted complaint. "As an initial matter, the Court notes the quality of writing, or rather lack thereof, in counsel's brief. Counsel's slipshod effort is devoid of clarity and rife with spelling errors, grammatical miscues, poor formatting, and questionable quotations. Filings of this type do a disservice to both the Court and the client." *Id*. at note 2.

Duncan v. AT&T Communications, Inc., 668 F. Supp. 232, 234 (S.D.N.Y. 1987): "A complaint may be so poorly composed as to be functionally illegible. This is not to say that a complaint needs to resemble a winning entry in a writing contest. . . . However, the court's responsibilities do not include cryptography, especially when the plaintiff is represented by counsel." The complaint was dismissed.

Smith v. Town of Eaton, Ind., 910 F.2d 1469 (7th Cir. 1990), *cert. denied*, 499 U.S. 962, 111 S.Ct. 1587, (1991): A police officer's claim for wrongful termination was dismissed on summary judgment. The brief submitted on behalf of the police officer was described as "rambling, almost totally incomprehensible in its treatment of the issues and legal principles." *Id*. at 1470. The court stated: "[u]nprofessional presentation of arguments not only is a disservice to this court, but also 'is a disservice to other litigants,' who must wait while this court is forced to undertake the extra duty of formulating counsel's arguments. *Bonds v. Coca–Cola Co*., 806 F.2d 1324, 1328 (7th Cir.1986)." *Id*. The court noted that it must "be vigilant in enforcing the bar's responsibility to present issues clearly and comprehensively. Counsel for the police officer was admonished that "such performance is not to be repeated" and was fined $500.00. *Id*. at 1473.

- Statutory Construction (For further discussion of the Oxford Comma, see the section on Mechanics.)

"[S]tatutes . . . from their verbosity, their endless tautologies, their involutions of case within case and parenthesis within parenthesis are rendered more perplexed and incomprehensible not only to common readers, but to the lawyers themselves." Thomas Jefferson

La.Civ.Code art. 14 (1987): "The words of the law are generally to be understood in their most usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words." This article was deleted in 1987 and replaced with La.Civ. Code art. 11. The comment to La.Civ.Code art. 11, states that "This provision reproduces the substance of Articles 14 and 15 of the Louisiana Code of 1870. Changes in phraseology and terminology, made in the light of Article 2047 of the Civil Code as revised in 1984, do not change the law."

La.Civ.Code art. 10: "When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law."

La.Civ.Code art. 11: "The words of a law must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the law involves a technical matter."

La.Civ.Code art. 2047: "The words of a contract must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the contract involves a technical matter."

La.Code Civ.P. art. 5053 reads, in part: "Words and phrases are to be read in their context, and are to be construed according to the common and approved usage of the language employed."

La.Code Civ.P. art. 5054: "Clerical and typographical errors in this Code shall be disregarded when the legislative intent is clear."

Bellino v. JPMorgan Chase Bank, N.A., ___ F.Supp.3d ___, ___ (S.D.N.Y. 2015): "[A]n 'awkward, and even ungrammatical,' statute is not necessarily ambiguous."

Reg'l Urology, L.L.C. v. Price, 42,789 (La. App. 2 Cir. 9/26/07), 966 So. 2d 1087, 1094-95, *writ denied*, 07-2251 (La. 2/15/08), 976 So. 2d 176:

> The last antecedent is a rule of statutory construction. *Fosscett v. Lake Charles Municipal Fire and Police Civil Service*

> *Board*, 125 So.2d 44 (La.App. 3 Cir.1960). However, the rule should apply only where there are uncertainties or ambiguities, when other rules of construction fail, and when the intent of the legislature (or contracting parties, as in this case) is unclear. *Id. See also* 82 C.J.S. Statutes, § 334, at 670. In construing statutes, the Louisiana Supreme Court has explained that punctuation cannot control construction if it goes against the real intent of the legislature and that the rule of the last antecedent "will not be adhered to where extension to a more remote antecedent is clearly required by consideration of the entire act." *Buras v. Fidelity & Deposit Co. of Maryland*, 197 La. 378, 385, 1 So.2d 552, 554 (La.1941); *State v. Anderson*, 540 So.2d 974 (La.App. 2[] Cir.[]), *writ denied*, 544 So.2d 398 (La.1989), *cert. denied*, 493 U.S. 865, 110 S.Ct. 185, (1989).

The doctrine of the last antecedent is defined in 82 C.J.S. Statutes §334, p. 760 as: "relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote, nor are they ordinarily to be construed as extending to following words." It is to be applied only when the statute is ambiguous, and the clear intent of the legislature is paramount.

O'Conner v. Oakhurst Dairy, 851 F.3d 69, 70 (1 Cir. 2017): "For want of a comma, we have this case." Employees of Oakhurst Dairy sought overtime pay for certain activities. Exemption F to 26 M.R.S.A. §664(3) states that the protection of the overtime law does not apply to: [t]he canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of: (1) Agricultural produce; (2) Meat and fish products; and (3) Perishable foods. The disagreement concerned the meaning of the words "packing for shipment or distribution." The employees asserted that, "in combination, these words refer to the single activity of 'packing,' whether the 'packing' is for 'shipment' or for 'distribution.'" *Id*. at 71. The dairy asserted "that that the disputed words actually refer to two distinct exempt activities, with the first being 'packing for shipment' and the second being 'distribution.'" *Id*. The court discussed a 2009 Maine Legislative Drafting Manual that instructed: " don't use a comma between the penultimate and the last item of a series. *Id*. at 73. The court noted that most states and the federal government had a differing opinion. The court noted that the:

> drafting conventions of both chambers of the federal Congress warn against omitting the serial comma for the same reason. See U.S. House of Representatives Office of the Legislative Counsel, House Legislative Counsel's Manual on

> Drafting Style, No. HLC 104-1, § 351 at 58 (1995) (requiring a serial comma to "prevent[] any misreading that the last item is part of the preceding one"); U.S. Senate Office of the Legislative Counsel, Legislative Drafting Manual § 321(c) at 79 (1997) (same language as House Manual).

Id. at (note 5).

The trial court agreed with the dairy, but the appellate court reversed the trial court's grant of a partial summary judgment in favor of the dairy. The decision was rumored to carry a price tag of $10 million.[14] In February of 2018, the dairy settled the case for $5 million,[15] and the statute has been amended to replace the commas with semicolons (including one after "shipment").[16] (Footnote added.)

- Criminal Cases

Heyliger v. People, 66 V.I. 340 (2017), *cert. denied*, ___ U.S. ___, 138 S.Ct. 138, (2017): Heyliger was found guilty of murder during an attempt to perpetrate a third-degree assault against a person other than the decedent. On appeal, he argued "that the grammatical arrangement and syntax of 14 V.I.C. § 922(a)(2), absent the serial comma between 'assault in the third degree' and 'and larceny,' require[d] a finding of assault in the third degree and larceny as one unified charged offense." *Id*. at 351. According to Heyliger, "the lack of a serial comma controls the interpretation of the statute; therefore, his conviction under 14 V.I.C. § 922(a)(2), which was predicated solely on 'third degree assault,' is insufficient standing alone to support his conviction of first-degree felony murder." *Id*. The court found this argument to be "specious" but did give a detailed analysis of the use of the serial comma. *Id*.

Henderson v. State, 445 So.2d 1364, 1365 (Miss.1984): "This case presents the question whether the rules of English grammar are a part of the positive law of this state." The defendant challenged the adequacy of his indictment on the charge of breaking and entering based on a poorly worded document, which according to the defendant left doubt as to who did the breaking and entering. The indictment used words such as "burglariously." *Id*. at 1366. The court recognized that the indictment would get an "'F' from every English teacher in the land." *Id*. at 1365.

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[14] Victor, Daniel. "Lack of Oxford Comma Could Cost Maine Company Millions in Overtime Dispute." N.Y.Times 16 March 2017, sec. A:21.

[15] In *O'Conner v. Oakhurst Dairy*, ___ F.Supp.3d ___(D. Me. 2018), the district court approved the settlement and dismissed the case.

[16] Victor, Daniel. "Suit Over Oxford Comma is Settled as Maine Drivers Get $5 Million." N.Y.Times 9 Feb. 2018, sec. A:11.

But, the court found the defendant's argument to be meritless and found the indictment to be legally adequate. "Establishment of a literate bar is a worthy aspiration. 'Tis without doubt a consummation devoutly to be wished. Its achievement, however, must be relegated to means other than reversal of criminal convictions justly and lawfully secured." *Id*. at 368.

BASIC RULES

A. If you are having trouble punctuating a sentence, re-write it.

B. Be consistent.

C. The rules of grammar do not change based upon how often a particular mistake is made.

D. Proofread, edit, and proofread again.

MECHANICS

"One of the great paradoxes about the legal profession is that lawyers are, on the one hand, among the most eloquent users of the English language while, on the other, they are perhaps its most notorious abusers."[17]

Punctuation Rules to Note:

- The Oxford Comma is the final comma in a list of things.

  Example: I bought a dress, a pair of shoes, and a jacket.

  - ✓ Its use is stylistic. Newspapers use AP style which does not require its use.
  - ✓ Its omission can cause ambiguity in certain sentences.

    Example: I love my parents, the President and Madonna.

    Are your parents the President and Madonna? Without the use of the Oxford Comma, one cannot be certain.

  - ✓ There are no reported cases in Louisiana with the term "oxford comma" or "serial comma."

[17] Tiersma, Peter. "The Nature of Legal Language." *LANGUAGEand LAW*, www.languageandlaw.org/NATURE.HTM.

- Pay attention to the use of punctuation marks within quotation marks.

    - ✓ Commas are placed within quotation marks.

    - ✓ According to the Harbrace College Handbook, periods are placed within the quotation marks when the quotation ends the sentence. Other sources note that periods are always placed inside of quotation marks.

    - ✓ Unless they are part of the quoted material, semicolons and colons are generally placed outside the quotation marks.

    - ✓ If the question mark, exclamation point, or a dash applies only to the quoted material, place them inside of the quotation marks. If they do not, then the marks should be placed outside of the quotation marks.

- Contractions

    - ✓ "Using the full version of a word is always grammatically correct."[18]
        - ✓ Use for stylistic purposes.

        - ✓ In formal writing, the use of contractions should be avoided. "Asking whether you should use contractions in formal academic writing is sort of like asking whether you should wear a bathing suit to a party."[19]

- Possessive Nouns

    - ✓ If the noun is plural, add the apostrophe after "s."

    - ✓ If the noun is singular and ends in "s," put the apostrophe after the "s."

    - ✓ Pay attention to the difference between the possessive and the plural.

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[18] "Using Contractions Correctly." Your Dictionary. grammar.yourdictionary.com/style-and usage/using-contractions.html.

[19] Lee, Chelsea. "Contractions in Formal Writing: What's Allowed, What's Not." APA Style. 10 December 2015. American Psychological Association.blog.apastyle.org/apastyle/ 2015/12/contractions-in-formal-writing-whats-allowed-whats-not.html.

- ✓ Hot Topic: Attorneys Fees or Attorney's Fees or Attorneys' Fees

  Bradshaw v. Boynton-JCP Associates, Ltd., 125 So.3d 289 (Fla. 4 DCA 2013): An award of attorney's fees was reversed. "The offer was apostrophe-challenged, creating ambiguities as to whether the drafter intended references to singular or plural defendants or plaintiffs." *Id*. at 289. The court noted that "the offer, entitled 'Defendant's Joint Proposal for Settlement,' also appears to have been adopted from a form without sufficient editing; it requires 'Plaintiff'(s)' to 'execute a stipulation,' and 'Plaintiff(s)' to 'execute' a general release of 'Defendant(s).'" *Id*.

  Haymond v. Lundy, 205 F.Supp.2d 403, 406 n. 2 (E.D.Pa. 2002): "The court must first decide a threshold issue of style. Is Lundy's petition best read as a request for: (1) an 'attorney fee;' or his (2) 'attorney fees;' (3) 'attorney's fee;' (4) 'attorney's fees;' (5) 'attorneys fee;' (6) 'attorneys fees;' (7) 'attorneys' fee;' (8) 'attorneys' fees;'?"

  Days Inns Worldwide, Inc. v. Investment Properties of Brooklyn Center, LLC, F.Supp.2d (D.Minn 2011): The court extensively discussed the issue and likened it to "the egg-cracking dispute between Lilliput and Blefuscu" in Gulliver's Travels by Jonathan Swift. *Id*. at note 1. Plaintiffs requested "attorneys' fees." *Id*. The court noted the different usages by other courts and style manuals. It found "attorney fees" to be acceptable but "inelegant." *Id.* The Minnesota court settled on "attorney's fees" as suggested by the Supreme Court's Manual of Style.

  The most prevalent form is "attorney's fees," whether there is one attorney or more than one attorney. "Attorney fees" is becoming more popular. Avoid "attorneys fees" at all costs because it is ungrammatical in its exclusion of the apostrophe to signal the possessive form. [20]

[20] Garner, Bryan A. A Dictionary of Modern Legal Usage. 2nd ed. Oxford University Press, 1995.

- Hot Topic: Placement of Legal Citations

  ✓ Bryan A. Garner advocates the placement of legal citations in footnotes rather than in the text of the document.[21]

  ✓ Judge Richard A. Posner disagrees.[22]

  ✓ *Ledet v. Seasafe, Inc.*, 00-1205 (La.App. 3 Cir. 4/4/01), 783 So.2d 611: Plaintiff's statutory employer sought to dismiss the claims for reimbursement by the insurer for Plaintiff's direct employer. The court of appeal upheld the trial court's denial of the relief sought by the statutory employer. Judge Woodard, who was the writing judge for the majority opinion, also wrote a separate concurring opinion to address concerns raised by then Chief Judge Doucet in his concurring opinion. Judge Docuet's concurrence reportedly objected to the use of case citations in footnotes rather than the text of the body of the opinion. Judge Doucet withdrew his concurrence before publication. Judge Woodard did not withdraw her concurrence. She noted that a proper reading of the BlueBook reveals that it does not dictate the location of citations but notes that citations generally appear within the text of the document. Bryan A. Garner noted that four out of five justices on the Delaware Supreme Court, two justices on the Texas Supreme Court, all judges in Alaska, and all appellate judges in California use citational footnotes.[23]

GRAMMAR

- Passive Voice

  ✓ Avoid when you want to be clear and forceful.

  I mailed the letter. Not: The letter was mailed by me.

- Dangling Modifiers: descriptive phrases that do not apply to the nouns that immediately follow it.

  Correct: John tried a new study method after his grades had been declining for months.

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[21] Garner, Bryan A. "The Citational Footnote." The Scribes Journal of Legal Writing. 97 (2007).

[22] Posner, Richard A. "Against Footnotes." 38 CT. REV. 24, 24 (2001).

[23] Garner, *supra* at note 21.

Incorrect: After declining for months, John tried a new study method to improve his grades.

- Subject-Verb Agreement

boys like either the boy or the girl runs

boy likes neither the boy nor the girl runs

neither the basket nor the **apples were** **Neither of them likes**

neither the apples nor the **basket was**

Each cat and each dog has

Either John or you were going

Either you or I was going

The commander in chief and president is

- ✓ A relative pronoun has the same number as its antecedent: It is the doctor who often suggests a diet.

- ✓ Collective nouns denoting a fixed quantity take a singular verb when they refer to the group as a unit and take a plural verb when they refer to individuals or parts of the group.

  The number is small. **BUT** A number was absent.

  His complaint is allergies.

  Allergies are his complaint.

  Statistics is an interesting subject, but statistics are often misleading.

- ✓ Hot Topic: Consider the Effects of Attempting to Use More Politically Correct Terms Than the Masculine Pronouns.

- Necessity of Using "That"

Example: She testified that she was at the store when the robbery happened, and she went home afterwards.

Did she go home after the robbery or after she testified.

Better: She testified that she was at the store when the robbery happened and that she went home afterwards.

USAGE

- Use simple, straightforward style. Avoid overwriting.

  Harbrace's example, p. 204
  Ornate: The majority believes that the approbation of society derives primarily from diligent pursuit of allocated tasks.
  Simple: Most people believe that success results from hard work.

- Keep your audience in mind.
  Avoid inaccurate, inexact, or ambiguous usage.

- Be concise.

  ✓ Repeat words or phrases only when necessary for emphasis, clarity, or coherence.

  Repetitious: This interesting instructor makes an uninteresting subject interesting.
  Concise: This instructor makes a dull subject interesting.
  Repetitious: Purple in color; because of the fact that; by virtue of; really unique

  ✓ Note, however, that consistency in using certain terms avoids confusion by the reader, who might assume that the usage of a different term conveys a difference in meaning.[24]

  ✓ There was a 286-word sentence in *The Red and the Black* by Stendhal. In an article "Sentences that Do Too Much" by Howard Darmstadter in 10 Scribes Journal of Legal Writing, 129 (2005-2006), the sentence is dissected and discussed. "Lawyers often say that each sentence should be susceptible of only one interpretation." *Id*. at 132. "If we make the structure of sentences, paragraphs, and documents readily apparent, our readers will have a framework on which all those words can hang." *Id.* at 135. We should strive for that. It will take work.

  ✓ Do Not Make Your Reader's Job More Difficult.[25]

  Do not use boilerplate language.

[24] Osbeck, *supra* note 9.

[25] The Supreme Court of Ohio Commission of Professionalism. *Dos & Don'ts: Legal Writing*.

Avoid lengthy citations.

✓ Do Not Make Inappropriate Comments.[26]

✓ Avoid hyperbole and sarcasm.

Nissim Corp. v. Clearplay, Inc., 499 Fed.Appx. 23, note 4 (Fed. Cir. 2012): "The excessive hyperbole in the briefs makes them difficult to take seriously and unpleasant to read, and strips both parties of their credibility."

✓ Do not make overly emotional arguments.

- Clarity

"[C]larity is almost universally regarded as the hallmark of good legal writing."[27]

"[C]larity requires proper (i.e., conventional) grammar and punctuation."[28]

✓ The use of articles is sometimes necessary.

Ambiguous: My wife and friend stood by my side.

Better: My wife and a friend stood by my side.

✓ Complete comparisons.

She is taller.
She is taller than Sally.

- Stuffy Words and Legalese

✓ "Legal jargon is a double-edged sword. In one sense, reading a brief makes me want to scream. The language is archaic and murky, and its only purpose seems to be to create confusion. Conversing with an attorney, one sometimes gets the feeling that one is speaking with a

[26] *Id.*

[27] Osbeck, *supra* note 9, at 424.

[28] *Id.* at 428.

creature from another universe. The truth of the matter is, however, that legal jargon serves a purpose."[29]

- ✓ Precision sometimes requires the use of technical language rather than "plain language."[30] It has been reported that technical terms and terms of art make up only three percent (3%) of any legal document.[31]

- Parallelism: the use of components in a sentence that are grammatically the same or similar in their construction, sound, meaning, or meter. Allows consistency and balance.

  Like father, like son.

  I want to have both a new house and a new car.

  You may respond by calling, visiting, or emailing.

  Giving and receiving NOT giving and to receive

- Strunk & White's Approach to Style[32]

  - ✓ Place yourself in the background.
  - ✓ Write in a way that comes naturally.
  - ✓ Work from a suitable design.
  - ✓ Write with nouns and verbs, not adjectives and adverbs.
  - ✓ Revise and rewrite.
  - ✓ Do not overwrite. "Rich, ornate prose is hard to digest, generally unwholesome, and sometimes nauseating. If the sticky-sweet word, the overblown phrase are your natural form of expression, as is sometimes the case, you will have to compensate for it by a show of vigor, and by writing something as meritorious as the Song of Songs, which is Solomon's."[33]

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[29] Strumpf, Michael, and Douglas, Auriel. The Grammar Bible. New York: Henry Holt and Company, 2004, p. 398.

[30] Osbeck, *supra* note 9.

[31] Garner, "The Myth of Precision." *Supra* at note 20, p. 663.

[32] Strunk, William, Jr., and White, E.B. The Elements of Style. 4th ed. Massachusetts: Allyn & Bacon, 2000.

[33] *Id*. at 72.

- ✓ Do not overstate. "A single overstatement, wherever or however it occurs, diminishes the whole."[34]
- ✓ Avoid the use of qualifiers. "Rather, very, little, pretty – these are the leeches that infest the pond of prose, sucking the blood of words."[35]
- ✓ Do not affect a breezy manner.
- ✓ Use orthodox spelling.
- ✓ Do not explain too much.
- ✓ Do not construct awkward adverbs.
- ✓ Make sure the reader knows who is speaking.
- ✓ Avoid fancy words. "Avoid the elaborate, the pretentious, the coy, and the cute. Do not be tempted by a twenty-dollar word when there is a ten-center handy, ready and able."[36]
- ✓ Do not use dialect unless your ear is good.
- ✓ Be clear.
- ✓ Do not inject opinion.
- ✓ Use figures of speech sparingly.
- ✓ Do not take shortcuts at the cost of clarity.
- ✓ Avoid foreign languages.
- ✓ Prefer the standard to the offbeat.

PROOFREADING AND EDITING

"Clutter is the disease of American writing. We are a society strangling in unnecessary words, circular constructions, pompous frills and meaningless jargon."[37]

- "**Editing** is the first task that should be undertaken after finishing the first draft of a piece of text. It involves checking the content of the text to ensure that the ideas are expressed clearly and logically, and for a coherent and meaningful whole."[38]

- "**Proofreading** involves checking over the text in finer detail after the editing stage, to detect errors in spelling, production, grammar and format."[39]

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[34] *Id*. at 73.

[35] *Id*.

[36] *Id*. at 76-77.

[37] Zinsser, William. On Writing Well. 7th ed. New York: Harper Perennial, 2006, note 35.

[38] Guide to Editing and Proofreading. Oxford Learning Institute. www.learning.ox.ad.uk.

[39] *Id*.

- "Good organization is crucial in legal writing."[40]

- Focus on the text to determine that it flows logically, is coherent, and forms a meaningful whole.[41]

- Read it out loud.[42]

- Print it out.[43]

- Take a break and come back to it.[44]

- Use fresh eyes – ask a colleague to proofread it.

- Make a list of mistakes that you often make and use it as a checklist when you proofread your documents.[45]

- Beware the pitfalls of computer editing and spell checking. They are not replacements for your own proofreading and editing.

    - ✓ Consider the case where the spell check changed "sua sponte" to "sea sponge," and the lawyer did not notice this before the brief was submitted to the court. *People v. Danser*, an unpublished opinion (Cal.App. 1 2006). His client happened to be a former judge who was convicted for fixing traffic tickets. The client notice the error first.

- Consider how your document looks on the page.

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[40] Neumann, Richard. Legal Reasoning and Legal Writing. 6th ed. Wolters Kluwer, 2009, pp. 51, 55.

[41] Guide to Editing and Proofreading, *supra* at note 38.

[42] Ross, Brittney. "9 Perfect Ways to Improve Your Proofreading Skills." Grammarly blog. November 1, 2017. www.grammarly.com/blog/proofreading-tips.

[43] *Id.*

[44] *Id.*

[45] *Id.*

EXERCISES TO IMPROVE OUR WRITING

"Words are not pebbles in alien juxtaposition." Judge Learned Hand

Develop your own voice because "the legal writer who can effectively convey factual information through narrative is much more likely to engage the reader's attention than one who merely enumerates the facts in cut-and-dried fashion."[46]

How's Your Command of Grammar?[47]

Editing for Wordiness.[48]

[46] Osbeck, *supra* at note 9.

[47] Garner, Bryan A. "How's Your Command of Grammar?" Before The Bar Blog. www.abaforlawstudents.com. November 1, 2013.

[48] Fruchwald, Scott. "Exercises for Legal Writers II: Editing for Wordiness." https://community.pepperdine.edu.

SOME USEFUL RESOURCES (in MLA citation form)

A. www.grammarly.com

1. This site also includes a free grammar checker.

B. citationmachine.net

1. This site will automatically generate citations in several different styles.

C. Quickanddirtytips.com/grammar-girl

D. Glenn, Cheryl, and Gray, Loretta. Harbrace College Handbook. 19th ed. Massachusetts: Lyn Uhl, 2017.

E. Garner, Bryan A. The Redbook: A Manual on Legal Style. 2nd ed. Minnesota: Thompson/West, 2006.

F. Strunk, William, Jr., and White, E.B. The Elements of Style. 4th ed. Massachusetts: Allyn & Bacon, 2000.

G. Shertzer, Margaret. The Elements of Grammar. New York: Macmillan Publishing Company, 1986.

1. This is a companion book to The Elements of Style.

H. Strumpf, Michael, and Douglas, Auriel. The Grammar Bible. New York: Henry Holt and Company, 2004.

I. Columbia Law Review Editors, Harvard Law Review Editors, University of Pennsylvania Law Review Editors, and The Yale Law Journal Editors. *The Bluebook: Uniform System of Citation*. 18th ed. Massachusetts: Garnet House, 2006.

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