THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION PROGRAM

AUGUST 23, 2024

THIRD CIRCUIT JUDGES

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THE BASICS OF CRIMINAL APPEALS AND SUPERVISORY WRIT APPLICATIONS

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THE BASICS OF CRIMINAL APPEALS AND SUPERVISORY WRIT APPLICATIONS

I. APPEALS

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

1. Appealable?

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

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

i. Rulings that are appealable:

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

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

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

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

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

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

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

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

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

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

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

ll. La.Code Crim.P. art. 930.4(F) – eff. 8/1/24 – this article deals with repetitive post-conviction relief applications. The first sentence in paragraph F states that a supplemental pcr is subject to the limitations and restrictions in this article. The second sentence of the paragraph requires any pcr after the first one shall be served on the D.A. and the A.G. at least 60 days before the hearing. The final sentence of the paragraph states, "Both the district attorney and the attorney general shall have a right to suspensively appeal any order granting relief." Criminal staff suggests the legislature may have intended the sentence to be put in article 930.6.

ii. Rulings that are NOT appealable:

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

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

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

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

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

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

gg. Convicted but not yet sentenced

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

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

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

kk. Denial of a motion to correct illegal sentence such as those filed pursuant to *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012) and *Montgomery v. Louisiana,* 577 U.S. 190, 136 S.Ct. 718 (2016).

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 potential penalty, 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 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, to file a motion to reconsider sentence. If a motion to reconsider sentence is filed, the delay for appealing starts 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(s) to the time limitation.

4. Rule to Show Cause

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

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

5. Juvenile appeals

a. When a juvenile is adjudicated a delinquent under Title VIII of the Children's Code, review is by appeal, which is filed as criminal. Even if the adjudication as a delinquent is based on a misdemeanor offense, the courts of appeal have jurisdiction over the appeal. *See* La. Const. art. V, § 10(A)(2). An appeal may be taken only after a judgment of disposition. The State may not appeal from a judgment refusing to adjudicate a child

to be delinquent or from a judgment of acquittal. La.Ch.Code art. 331(B). If the ruling is that the family is in need of services (FINS), or that the child is in need of care, there is a right of appeal, but the appeal is civil. *See* La.Ch.Code art. 330(B).

b. Juvenile appeals shall be taken within 15 days from the mailing of the notice of judgment. If a timely application for new trial is made, the delay for appeal commences to run from the date of the mailing of notice of denial of the new trial motion (the delay for filing a motion for new trial is 3 days, exclusive of holidays, and shall commence to run from the mailing of the notice of judgment). A motion for new trial shall be decided expeditiously and within 7 days from the date of submission for decision. *See* La.Ch.Code art. 332(A) & (C).

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

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

C. Errors Patent – See separate Errors Patent outline.

D. Standards of Review

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

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

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

State v. Thacker, 14-418, p. 2 (La. 10/24/14), 150 So.3d 296, 297 – On appeal, sufficiency of the evidence was raised, but this court noted a particular problem with sufficiency of the evidence that was not raised; therefore, we did not address that particular issue 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, the harmless error analysis may apply in certain situations. The proper analysis for determining harmless error is not whether, in a trial that occurred without the error, a guilty verdict surely would have been rendered but whether the guilty verdict actually rendered in the trial was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081 (1993).

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

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

[Louisiana Constitution Article] I, § 20 guarantees that, "[n]o law shall subject any person to cruel or unusual punishment." To constitute an excessive sentence, the reviewing court must find the penalty so grossly disproportionate to the severity of the crime as to shock our sense of justice or that the sentence makes no measurable contribution to acceptable penal goals and is, therefore, nothing more than a needless imposition of pain and suffering. The trial court has wide discretion in the imposition of sentence within the statutory limits and such sentence shall not be set aside as excessive absent a manifest abuse of discretion. The relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. *State v.*

Barling, 00-1241, 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)

i. 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.

ii. 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.

c. 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.

d. La.Code Crim.P. art. 779 - Defendants are entitled to a jury trial in misdemeanor cases where the aggregate penalty exceeds six months. This also applies to cases wherein the defendant is charged via multiple bills of information and the charges have been either consolidated or treated as if consolidated. *State v. Hornung*, 620 So.2d 816 (La.1993); *State v. Crooks*, 16-472 (La.App. 3 Cir. 7/12/16) (unpublished opinion); *State v. Thomas*, 98-231 (La.App. 3 Cir. 1/6/99), 735 So.2d 669; *State v. Suggs*, 432 So.2d 1016 (La.App. 1 Cir. 1983). In addition to the advisement of jury trial rights at plea hearings, the mode of trial, and the jurisdictional ramifications in city courts, this affects whether the convictions and sentences should be appealed. Cases triable by jury are to be appealed. La.Code Crim.P. art. 912.1.

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

F. Finality of judgments– A decision/ruling by this court is final when the delay for applying for a rehearing, which is 14 days from rendition of judgment, 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 ("pcr")– 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. filed. 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)–(6).

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, other than ineffective assistance of counsel, 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, ***but see*** *State v. Francis*, 16-513 (La. 5/19/17), 220 So.3d 703 (per curiam); *State v. Harris*, 18-1012 (La. 7/9/20), 340 So.3d 845; *State v. Robinson*, 19-1330 (La. 11/24/20), 304 So.3d 846 (per curiam); *State v. Lee*, 18-1620 (La. 8/12/19), 279 So.3d 360.

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

e. Timeliness – Uniform Rules—Courts of Appeal, Rules 4–2 and 4–3 – 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. 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.

This court strictly applies Rule 4–3 to all pretrial writ applications (pro se and attorney-filed). *See State v. Goppelt*, 08-576 (La. 10/31/98), 993 So.2d 1188. Postmark date controls:

> [T]he timeliness of a mailing shall be shown only by an official United States Postal Service postmark or by official receipt or certificate from the United States Postal Service, or bonafide commercial mail services such as Federal Express or United Parcel Service, made at the time of mailing which indicates the date thereof. Any other date stamp, such as a private commercial mail meter stamp, or label from an Automated Postal Center, **shall not be used** to establish timeliness. [emphasis added.]

Uniform Rules—Courts of Appeal, Rule 2–13(emphasis added); *see also*, La.S.Ct.R. VII, § 9; La.S.Ct.R. IX, § 2; and La.S.Ct.R. X, § 5(d).

This court may choose whether to deny other types of writ applications based upon failure to comply with Rule 4–3, but the untimeliness of a writ is always brought to the attention of the panel. The La.S.Ct. has discouraged requiring strict compliance with Rule 4–3 post-trial. *State v. Broussard*, 21-1470 (La. 1/12/22), 330 So.3d 306 (probation revocations); *State v. Landry*, 14-513 (La. 10/3/14) 149 So.3d 276 (misdemeanor conviction), and *State v. Scott,* 12-2458 (La. 8/30/13), 123 So.3d 160 (pcr).

f. Incapacity - Once the issue of a defendant's incapacity to assist in his defense has been raised, most proceedings are stayed/continued/suspended until the trial court has ruled that the defendant has capacity. *See* La.Code Crim.P. art. 641 *et seq*. Except for appeals by the defense where the trial court has ruled the defendant insane based upon the State's motion (La.Code Crim.P. art. 912(C)(2)), this cessation of proceedings extends to applications for supervisory review. Usually, this court sees this in pro se pretrial writ applications seeking review of the denial of various pretrial pro se motions unrelated to sanity; however, this court has recently held that a pro se defendant has no standing to challenge that finding of incapacity when the ruling resulted from a motion

by his own attorney. *State v. De La Miya*, 24-254 (La.App. 3 Cir. 6/10/24) (unpublished opinion).

2. Contents – See Appendix 3 for complete listing, but the important things necessary for an adequate review of the merits are: pleading on which judgment is based; trial court's ruling, including reasons, if given; minutes of court; transcripts of any relevant hearings; and a copy of any exhibits introduced at those hearings. *See* Uniform Rules—Courts of Appeal, Rule 4-5; La.Code Crim.P. art. 912.1(C); *and City of Baton Rouge v. Plain*, 433 So.2d 710 (La.), *cert. denied*, 464 U.S. 896, 104 S.Ct. 246 (1983).

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 (initial setting and reduction – *See* La.Code Crim.P. art. 311 *et seq.*);
   ii. Habeas corpus (*See* La.Code Crim.P. art. 351 *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 (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 La.Code Crim.P. art. 701 as habeas.);
   iii. Speedy trial
      aa. Most often, defendants raise statutory speedy trial claims prior to trial, which are governed by La.Code Crim.P. art. 701, which establishes time limits for filing bill, arraignment, and for commencing trial after filing of motion for speedy trial. The remedy for a violation of this provision is release from bail.

However, if bill is filed prior to hearing on 701 motion, issue of pre-trial release is moot under *State v. Varmall*, 539 So.2d 45 (La.1989). On supervisory review, both pro se and attorney filers often challenge *Varmall*, but so far, it has withstood those challenges.

bb. Constitutional speedy trial violations are raised in the trial court via motion to quash - *See* La.Code Crim.P. art. 571 *et seq.* The remedy for this is dismissal of charges with prejudice.

iv. Double jeopardy – (*See* La.Code Crim.P. art. 591 *et seq.*; *State v. Green*, 16-32 (La.App. 3 Cir. 5/13/16) (unpublished opinion), *writ denied*, 16-1126 (La. 11/18/16), 210 So.3d 284 – 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 having 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);

vi. Motion In Limine-Scientific evidence, Expert testimony (*See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993)); Other Crimes (*See State v. Prieur*, 277 So.2d 126 (La.1973));

vii. Right To Counsel - *State v. Peart*, 621 So.2d 780 (La.1993);

viii. Right To Self-Representation *See State v. Queen*, 15-933 (La.App. 3 Cir. 10/20/15) (unpublished opinion) (holding the trial court could not deny a defendant's motion for self-representation on the grounds that the defendant was currently represented by counsel);

ix. Motion to Recuse – (*See* La.Code Crim.P. art. 671 *et seq*. regarding recusal of judges and prosecutors) – In *State v. Daigle*, 18-634 (La. 4/30/18), 241 So.3d 999 (citations omitted), the supreme court discussed the standard of review for recusing judges on grounds of bias set forth by *Rippo v. Baker*, 580 U.S. 285, 137 S.Ct. 905, 907 (2017) and examined by *State v. LaCaze*, 16-234 (La. 3/13/18), 239 So.3d 807:

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

x. Failure to Rule on Pretrial Pro Se Motions – A trial court cannot reject a pro se brief on the grounds that the defendant is represented by counsel; instead, it must consider thoe pleadings when doing so will not lead to confusion at trial. However, when a defendant is represented by counsel but the number of filings makes it appear the defendant is trying to represent himself, the trial court can conduct proceedings to determine if the defendant is capable of self-representation, whether he actually wants to represent himself, and if the defendant is aware of the dangers and disadvantages of such representation *See State v. Thibodeaux*, 17-705 (La. 12/6/17), 236 So.3d 1253.

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

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

i. Timeliness – Until recently Uniform Rules—Courts of Appeal, Rule 4–3 applied to actions seeking reversal of a probation revocation. The supreme court initially created one specific exception to this court's requirement that challenges to probation revocations be filed within the parameters of Uniform Rules—Courts of Appeal, Rule 4–3, and the supreme court limited the exception to the specific facts of that case. *State ex rel. Clavelle v. State*, 02-1244 (La. 12/12/03), 861 So.2d 186. However, in 2022, the Louisiana Supreme Court published a decision drastically altering the management of challenges to probation revocations by redefining "application for post conviction relief" as established by La.Code Crim.P. art. 924 to add challenges to probation revocations to the definition and by creating a jurisprudential exception to La.Code Crim.P. art. 930.8 by extending the time for seeking post-conviction relief for probation revocation challenges to two years from the date of the probation revocation. *State v. Broussard*, 21-1470 (La. 1/12/22), 330 So.3d 306.

ii. Revocation for violation of the terms of a sex offender contract (i.e,. the failure to stay away from minors) – Unless the terms of the sex offender contract are made conditions of probation by the sentencing court, violation of the contract is NOT grounds for revocation. *State v. Ducote*, 22-837 (La. 11/8/22), 349 So.3d 551; *State v. Thurman*, 17-881 (La.App. 3 Cir. 11/27/17) (unpublished opinion); *State v. Norwood,* 587 So.2d 75 (La.App. 5 Cir.1991).

d. Production of Documents – indigent defendants are entitled to copies of certain documents free of charge (transcript of guilty plea, bill of information or grand jury indictment, court minutes, document committing them into custody, and transcript of evidentiary hearings on pcr). *State v. ex rel. Simmons v. State*, 93-275 (La. 12/16/94), 647 So.2d 1094. 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 statute(s) 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 – will be addressed in pcr section of this session.

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

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

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

2. PERMISSION REQUIRED FOR FAX AND E-FILING - *See* Louisiana Court of Appeal Third Circuit Local Rule 10 - 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/a stay of the trial or hearing.

4. Form and Content

a. Status of the Case. (Dates of upcoming hearings & trial) Be sure to include the status of the case, the reasons for expedited consideration, and a specific time within which action is sought (as a separate page and properly noted in the index). **If the status of the case changes during the pendency of the writ, you must notify the court** of said change. *See* Uniform Rules—Courts of Appeal, Rule 4–5; Louisiana Court of Appeal Third Circuit Local Rule 12.

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

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

i. *See* La.Code Crim.P. art. 912.1(C); Uniform Rules—Courts of Appeal, Rules 4–2, 4–3, and 4–5; Louisiana Court of Appeal Third Circuit Local Rules 12, 14, and 28 for what a writ application must contain.

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

5. Service Upon All Interested Parties - A copy of the writ application must be sent to the trial court and all interested parties **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 4–5; Louisiana Court of Appeal Third Circuit Local Rule 14.

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 of the writ.

7. Request for a Stay of Proceedings – To be able to request a stay from this court, a stay must have first been requested from the trial court. *See* Uniform Rules—Courts of Appeal, Rule 4–4.

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 and when there is a majority, staff prepares the ruling, which is then processed and issued by the clerk's office. In emergency writs, the parties are notified via phone and the ruling is faxed.

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

a conference decision, when the writ was denied as untimely pursuant to Uniform Rules—Courts of Appeal, Rule 4–3.

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

III. MISCELLANEOUS

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

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

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

D. If a video or DVD admitted into evidence is submitted with a writ, Louisiana Court of Appeal Third Circuit Local Rule 27 requires that is be in Windows Media Audio (WMA) or Windows Media Video (WMV) format. The local rule further states that if the audio or video evidence cannot be converted to the required format(s), the software or codec required to view the evidence must be provided. See the local rule for further details.

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

F. Return Date Orders – Uniform Rules—Courts of Appeal, Rule 4–3, requires the trial court to set a specific return date. This court sometimes sees "as provided by law," which is contrary to the rule.

APPENDIX 1

CHECKLIST FOR JURISDICTIONAL REVIEW OF NEW CRIMINAL APPEALS

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

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

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

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

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

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

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

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

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

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

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

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

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

11. If a motion to reconsider sentence was filed, check for disposition of the motion. If no disposition is 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 for disposition of the motion.

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

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

WRIT 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* La.Code Crim.P. art. 912.1(C); Uniform Rules—Courts of Appeal, Rules 4–2, 4–3, and 4–5; Louisiana Court of Appeal Third Circuit Local Rules 12, 14, and 28; and *City of Baton Rouge v. Plain*, 433 So.2d 710 (La.), *cert. denied*, 464 U.S. 896, 104 S.Ct. 246 (1983))
1. Certificate of Service
    a. Ruling judge
    b. Opposing counsel
    c. Attorney of record if writ by a pro se defendant
    d. AGO when necessary
2. Affidavit of Correctness
3. Certificate of Attachments
4. Original Signature (no stamps allowed)
5. Status of the Case
6. Index/Table of Contents of All Items in the Writ Application
7. Statement of the Jurisdictional Grounds for the Writ Application

8. Statement of the Case
    a. Case History
    b. Writ History
9. 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
10. 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
        i. In writing
            aa. Order Format
            ab. Transcript or Oral Ruling
        ii. Reasons for Ruling
            aa. Order Format
            ab. Transcript or Oral Ruling
11. 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
12. A copy of charging instrument(s)
    a. The instant case
    b. Related cases
13. 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

14. Notices of Intent
    a. Date Stamped Copies of the Original Notice
    b. Date Stamped Copies of all motions to extend
15. Return Date Orders
    a. Signed Copy of Original Order
    b. Signed Copies of All Extensions Granted or Denied
16. 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)
17. 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 prior to joining the 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 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. Go in front of drawer
                bb. Priority order among other pretrial writs
                cc. Email staff alert if it has a short date
            iii. Misdemeanor writs
                aa. Determine priority before placing in cabinet
                -Usually, behind pretrials but before other writs
                -Sometimes before stayed pretrial writs
                bb. Priority order among other misdemeanors
                -Serving sentence or execution of sentence stayed?
                -Sentence length
            iv. Probation Revocation writs
                aa. Usually placed after pretrials & misdemeanors
                bb. Placed before PCR writs
            v. General Writs
                aa. Placed in cabinet by order of docket number
                bb. Behind Pretrials, Misdemeanors, & Probation

APPENDIX 3

DEFICIENCY REVIEW CHECKLIST

NAME:_____ KW/KH/JWK_____
PROCEDURAL BARS:
IA) 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)) **or** La.S.Ct. Rehearing Denied:___ or SCOTUS ruling:
Date PCR/Other Dist.Ct. pleading filed:
IF NO, IS AN EXCEPTION ALLEGED:
IB) Timely filed writ (Uniform Rule 4-3): Yes_____ No_____(NOT applicable on pro se PCR)
II) Repetitive:____ **III)** Sentencing Claims on PCR: ____ **IV)** Sought relief in tr.ct. first: ____
WRIT DEFICIENCIES: Items XED are NOT included. Items ✓ED ARE included. If items are present, #s indicate page #s, document names may be noted where p.#s are unavailable. +/- indicates an attempt was made.
Certificate of Service: 3Cir.Rule 14 (in same or quicker manner)

___	CoS on Judge	___	CoS on Opposing Counsel
___	Cos on Counsel of Record (pro se pretrial)	___	CoS on AGO (Const. Challenge)
___	Affidavit of Correctness	___	Certification of Attachments 3Cir.Rule 28
___	Original signature	___	Status of the case 3Cir.Rule 12
___	An index of all items contained therein;	___	A jurisdictional statement;

___ A procedural history of the case;
___ 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;
___ A copy of the ruling complained of (by mins., order, or transcript);
___ A copy of the judge's reasons for judgment, order or ruling (if written);
___ A copy of each pleading on which the ruling was founded;
___ A copy of the indictment or bill (assess necessity on a case-by-case basis);
___ A copy of pertinent court minutes;
___ The notice of intent and return date order required by Rules 4-2 and 4-3. (by mins., order, or transcript) (Not necessary for pro se PCR.)
___ When applicable, a separate page requesting expedited consideration **or** a stay order.
___ Transcripts & 912.1(C) documents:

___ Sufficient number of copies for attorney filed writ (2).
Reviewer: _____ Date:

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION PROGRAM

August 23, 2024

ERRORS PATENT

Presentation and Written Materials by:
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ERRORS PATENT

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

PRESENCE OF THE DEFENDANT

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

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

Louisiana Code of Criminal Procedure Article 835 requires a defendant to be present when sentence is pronounced in felony cases. *See State v. Debarge*, 14-798 (La.App. 3 Cir. 3/18/15), 159 So.3d 526. The Defendant's presence cannot be waived at sentencing. *See State v. Granger*, 08-1531 (La.App. 3 Cir. 6/3/09), 11 So.3d 695. Imposing restitution in the defendant's absence has been found to violate La.Code Crim.P. art. 835. *State v. Baronet*, 13-986 (La.App. 3 Cir. 2/12/14), 153 So.3d 1112. In 2020 La. Acts No. 160, § 1, the Louisiana legislature added

paragraph (B) to allow the trial court, by local rule, to provide for sentencing by simultaneous audio-visual transmission in accordance with La.Code Crim.P. art. 562.

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; *State v. Bruner*, 23-

35 (La.App. 3 Cir. 10/4/23) (unpublished opinion) (2023 WL 6461435); *State v. Barton*, 22-642 (La.App. 3 Cir. 2/15/23), 357 So.3d 907; *State v. Deville*, 22-350 (La.App. 3 Cir. 11/23/22), 354 So.3d 99; *State v. Watson*, 21-725 (La.App. 3 Cir. 4/27/22), 338 So.3d 95.

Louisiana Code of Criminal Procedure Article 470 provides that "[v]alue, price, or amount of damage need not be alleged in the indictment, unless such allegation is essential to charge or determine the grade of the offense." Value and/or grade of the offense is an essential element that must be charged for both simple arson and theft of a motor vehicle. *See State v. Toussaint*, 11-1404 (La.App. 3 Cir. 5/2/12), 94 So.3d 62, *writ denied*, 12-1211 (La. 11/16/12), 102 So.3d 30.

Louisiana Constitution Article 1 § 17(B) and La.Code Crim.P. art. 493.2 allow for offenses in which punishment may be at hard labor to be joined in the same charging instrument as offenses in which punishment is necessarily at hard labor provided that the joined offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Both articles require that cases so joined shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Although both provisions still allow for conviction by a non-unanimous jury, we note that the United States Supreme Court has required a unanimous jury verdict for a conviction of a serious offense. *Ramos v. Louisiana*, 590 U.S. 83, 140 S.Ct. 1390 (2020).

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

UNCONSTITUTIONALITY OF SUBSTANTIVE STATUTE

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

SANITY PROCEEDINGS

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

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, remand/reversal may be necessary. *See State v. Guillory*, 22-549 (La.App. 3 Cir. 1/25/23), 355 So.3d 1211.

WAIVER OF RIGHT TO COUNSEL

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

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

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

ATTORNEY CONFLICT OF INTEREST

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

DEFENDANT PLED GUILTY

Guilty plea colloquies are not reviewed for errors patent. *See State v. Scroggins*, 18-1943 (La. 6/26/19), 276 So.3d 131; *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 the defendant and his attorney (unless counsel has been waived) as required by La.Code Crim.P. art. 780.

When a written waiver is not executed, if the defendant and his attorney are in open court when the judge addresses the right to a jury trial and the waiver thereof, this court has held that the failure to obtain a written waiver is harmless error. *See State v. Loyd*, 18-968 (La.App. 3 Cir. 6/5/19), 274 So.3d 112; *State v. McElroy*, 17-826 (La.App. 3 Cir. 3/7/18), 241 So.3d 424; *State v. Charles*, 15-518 (La.App. 3 Cir. 11/25/15) 178 So.3d 1157, *writ denied*, 16-4 (La. 1/13/17), 215 So.3d 240.

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

PROPER SEQUESTRATION OF THE JURY

Louisiana Code of Criminal Procedure Article 791 requires a jury to be sequestered in capital cases after each juror is sworn (unless the state and the defense jointly move that the jury not be sequestered) and in noncapital cases, after the court's charge or at any time upon order of the court. The minutes are first examined to ascertain whether the jury was properly sequestered. If the minutes do not so reflect, the transcript of trial is examined. If the minutes or transcript simply states

that the jury was sequestered at the proper times or that the jury retired for deliberations, no error patent is recognized. Usually, no error patent is recognized unless something in the minutes or transcript indicates the jury was not properly sequestered, in which case remand for an evidentiary hearing or possible reversal is necessary.

PROPER JURY SIZE AND VOTING FOR VERDICT

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

Louisiana Constitution Article 1, § 17(A) and La.Code Crim.P. art. 782 now require that offenses committed prior to January 1, 2019, in which punishment is necessarily confinement at hard labor be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. However, for offenses committed on or after January 1, 2019, for which punishment is necessarily confinement at hard labor, the jury must be composed of twelve jurors, all of whom must concur to render a verdict. Louisiana Constitution Article 1 § 17(B) and La.Code Crim.P. art. 493.2 allow for offenses in which punishment may be at hard labor to be joined in the same charging instrument as offenses in which punishment is necessarily at hard labor provided that the joined offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Both articles require that cases so joined shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.

Although these provisions are still in effect, in *Ramos v. Louisiana*, 590 U.S. 83, 140 S.Ct. 1390 (2020), the Supreme Court held that non-unanimous jury verdicts are not permissible for serious offenses under the Sixth Amendment to the United States Constitution which applies to the states through the Fourteenth Amendment. For cases on direct review, *Ramos* requires non-unanimous verdicts for serious offenses to be vacated. *See State v. Watson*, 21-206 (La.App. 3 Cir. 12/8/21) (unpublished opinion) (2021 WL 5819884); *State v. Thornton*, 20-425 (La.App. 3

Cir. 5/5/21), 318 So.3d 1019; *State v. Davis*, 20-155 (La.App. 3 Cir. 5/5/21), 319 So.3d 889.

In *Edwards v. Vannoy*, 593 U.S. 255, 141 S.Ct. 1547 (2021), the Supreme Court held that *Ramos* does not apply retroactively to cases on federal collateral review. In 2022, the Louisiana Supreme Court held that *Ramos* does not apply retroactively to state collateral review. *See State v. Reddick*, 21-1893 (La.App. 3 Cir. 10/21/22), 351 So.3d 273.

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

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

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

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

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. If offenses listed in the charging instrument have not been disposed of, remand for a proper disposition is required. *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.

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, or 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*, 583 U.S. 1160, 138 S.Ct. 1175 (2018); *State v. Guillory*, 10-1175 (La.App. 3 Cir. 4/6/11), 61 So.3d 801. Statements by defense counsel that he has "no objection to sentencing" or "I believe that brings us to sentencing" have been found to constitute express waivers. *See State v. Boyd*, 17-1749 (La. 8/31/18), 251 So.3d 407; *State v. James*, 23-518 (La.App. 3 Cir. 3/6/24), 381 So.3d 958. Likewise, defense counsel's response affirming that the defendant was ready for sentencing has been found to be an express waiver. *State v. Samuel*, 19-408 (La.App. 3 Cir. 2/5/20), 291 So.3d 256, *writ denied*, 20-398 (La. 7/24/20), 299 So.3d 77.

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. *See State v. Holden*, 19-867 (La.App. 3 Cir. 7/15/20), 304 So.3d 520, *writ denied*, 20-1016 (La. 2/9/21), 310 So.3d 174; *State v. Charles*, 18-222 (La.App. 3 Cir. 5/1/19), 270 So.3d 859. If, however, the defendant does not challenge his sentence on appeal and does not claim prejudice due to the lack of the delay, the error is considered harmless. *See State v. Smith*, 23-334 (La.App. 3 Cir. 12/6/23), 375 So.3d 654; *State v. Toby*, 22-386 (La.App. 3 Cir. 3/8/23), 358 So.3d 289, *writ denied*, 23-491 (La. 12/5/23), 373 So.3d 714; *State v. Worley*, 21-688 (La.App. 3 Cir. 8/3/22), 344 So.3d 757, *writ denied*, 22-1381 (La. 12/20/22), 352 So.3d 86. This error is also considered harmless if the defendant received a mandatory life sentence. *See State v. Hills*, 23-629 (La.App. 3 Cir. 4/3/24), 387 So.3d 702; *State v. Craft*, 22-553 (La.App. 3 Cir. 2/1/23), 355 So.3d 1237, *writ denied*, 23-287 (La. 10/10/23), 371 So.3d 456; *State v. Griffin*, 21-452 (La.App. 3 Cir. 3/2/22), 351 So.3d 385, *writ denied*, 22-600 (La. 6/1/22), 338 So.3d 496; *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.

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. Flemones*, 23-742 (La.App. 3 Cir. 4/17/24), 387 So.3d 751; *State v. Swafford*, 23-687 (La.App. 3 Cir. 4/3/24), 387 So.3d 684; *State v. James*, 23-518 (La.App. 3 Cir. 3/6/24), 381 So.3d 958. This court has also ordered correction of the Uniform Commitment Order in cases where it conflicts with the sentencing transcript. *See State v. Brown*, 23-64 (La.App. 3 Cir. 9/13/23) (unpublished opinion) (2023 WL 6133536), *writ denied*, 23-1424 (La. 4/3/24), 382 So.3d 107; *State v. Walker*, 22-695 (La.App. 3 Cir. 4/19/23), 363 So.3d 1265, *writ denied*, 23-705 (La. 3/12/24), 381 So.3d 52; *State v. Bartie*, 22-251 (La.App. 3 Cir. 11/16/22) (unpublished opinion) (2022 WL 16955110).

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. Louisiana Code of Criminal Procedure Article 882 authorizes courts 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. However, in *State v. Brown*, 19-771 (La. 10/14/20), 302 So.3d 1109 (per curiam), the supreme court found that the appellate court erred in vacating an illegally lenient sentence absent a complaint by the State. 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. Broussard*, 22-507 (La.App. 3 Cir. 11/30/22), 354 So.3d 167; *State v. McKinney*, 21-721 (La.App. 3 Cir. 4/6/22), 337 So.3d 931; *State v. Gresham*, 21-680 (La.App. 3 Cir. 3/30/22), 350 So.3d 571, *writ denied*, 22-717 (La. 9/7/22), 345 So.3d 428.

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 mandatory 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. Johnson*, 23-510 (La.App. 3 Cir. 3/27/24), __ So.3d __ (2024 WL 1292826); *State v. Swafford*, 23-687 (La.App. 3 Cir. 4/3/24), 387 So.3d 684; *State v. Ford*, 16-869 (La.App. 3 Cir. 4/19/17), 217 So.3d 634, *writ denied*, 17-936 (La. 4/6/18), 239 So.3d 829; *State v. Dossman*, 06-449, 06-450 (La.App. 3 Cir. 9/27/06), 940 So.2d 876, *writ denied*, 06-2683 (La. 6/1/07), 957 So.2d 174.

When a trial court improperly limits or denies parole eligibility, the sentence must be corrected. An appellate court should not rely on the self-activating provisions of La.R.S. 15:301.1 when the trial court imposes "limits beyond what the legislature has authorized in the sentencing statute(s). . . ." *State v. Sanders*, 04-17 (La. 5/14/04), 876 So.2d 42. The sentence is amended to delete the improper denial of parole and the district court is ordered to make an entry in the minutes reflecting the change. *See State v. Hawkes*, 23-234 (La.App. 3 Cir. 12/6/23), 375 So.3d 1063, *writ denied*, 23-1655 (La. 5/21/24), __ So.3d

__ (2024 WL 2284705), *and writ denied*, 24-69 (La. 5/21/24), __ So.3d __ (2024 WL 2284926); *State v. Brown*, 22-483 (La.App. 3 Cir. 11/16/22), 353 So.3d 919, *writ denied*, 22-1791 (La. 5/2/23), 359 So.3d 1279; *State v. Durham*, 19-673 (La.App. 3 Cir. 3/18/20) (unpublished opinion) (2020 WL 1428897); *State v. Piper*, 18-732 (La.App. Cir. 3/7/19), 269 So.3d 952.

Mandatory life imprisonment without parole for offenders under the age of eighteen at the time of the commission of the offense was found unconstitutional in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012). The procedure for determining parole eligibility for such offenders is set forth in La.R.S. 15:574.4.

C. The trial court denied diminution of sentence. The trial court lacks authority to deny diminution of sentence (good time). If diminution is denied by the trial court, the sentence is amended to delete the restriction, and the trial court is instructed to make an entry in the court minutes reflecting the amendment. *See State v. Snider*, 22-786 (La.App. 3 Cir. 4/12/23), 363 So.3d 1247; *State v. Matthews*, 22-422 (La.App. 3 Cir. 11/16/22), 353 So.3d 301; *State v. Washington*, 19-39 (La.App. 3 Cir. 6/5/19), 274 So.3d 98.

D. The trial court imposes an indeterminate sentence. Louisiana Code of Criminal Procedure Article 879 requires the court to impose a determinate sentence. In *State v. Brown*, 19-771, p. 2 (La. 10/14/20), 302 So.3d 1109, 1110, the supreme court clarified that a sentence is not indeterminate "if it is possible to calculate a parole eligibility or full-term release date."

If the defendant is convicted of more than one count, this court has held that a separate sentence must be imposed on each count. *See State v. Charles*, 19-745 (La.App. 3 Cir. 6/24/20), 299 So.3d 688; *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. Johnson*, 23-510 (La.App. 3 Cir. 3/27/24), __ So.3d __ (2024 WL 1292826); *State v. Demouchet*, 22-326 (La.App. 3 Cir. 11/16/22) (unpublished opinion) (2022 WL 16954875); *State v. Pierre*, 14-1333 (La.App. 3 Cir. 5/6/15), 165 So.3d 365, *writ denied*, 15-1149 (La. 5/13/16), 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. *See State v. Garriet*, 21-779 (La.App. 3 Cir. 3/30/22) (unpublished opinion) (2022 WL 953973). The trial court must also specify on which count or counts the conditions of probation are being imposed. *See State v. Portalis*, 23-395 (La.App. 3 Cir. 12/6/23), 375 So.3d 1113; *State v. Pope*, 19-670 (La.App. 3 Cir. 6/10/20), 299 So.3d 161, *writ denied*, 20-852 (La. 10/6/20), 302 So.3d 532; *State v. Duhon*, 19-639 (La.App. 3 Cir. 4/1/20), 297 So.3d 892, *writ denied*, 20-479 (La. 11/10/20), 303 So.3d 1036, *and writ denied*, 20-672 (La. 11/10/20), 303 So.3d 1040; *State v. Ervin*, 17-18 (La.App. 3 Cir. 12/13/17), 258 So.3d 677. Additionally, the conditions imposed must be determinate. *State v. Deleon*, 23-779 (La.App. 3 Cir. 4/11/24), 387 So.3d 723. This includes the establishment of payment plans for fees ordered as conditions of probation. *See State v. James*, 23-518 (La.App. 3 Cir. 3/6/24), 381 So.3d 958.

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. Lambert*, 23-269 (La.App. 3 Cir. 3/27/24) (unpublished opinion) (2024 WL 1296110); *State v. Gee*, 20-217 (La.App. 3 Cir. 3/10/21) (unpublished opinion) (2021 WL 914242); *State v. Domingue*, 17-786 (La.App. 3 Cir. 4/18/18), 244 So.3d 489; *State v. Ervin*, 17-18 (La.App. 3 Cir. 12/13/17), 258 So.3d 677.

Whether restitution is imposed as a condition of probation or as part of the principal sentence under La.Code Crim.P. art. 883.2, the trial

court must specify the amount of the restitution ordered. *See State v. Crooks*, 23-218 (La.App. 3 Cir. 11/8/23), 374 So.3d 241. The court must also specify to whom restitution is to be paid. *See State v. Garriet*, 21-779 (La.App. 3 Cir. 3/30/22) (unpublished opinion) (2022 WL 953973); *State v. McKinney*, 21-721 (La.App. 3 Cir. 4/6/22), 337 So.3d 931; *State v. Pope*, 19-670 (La.App. 3 Cir. 6/10/20), 299 So.3d 161, *writ denied*, 20-852 (La. 10/6/20), 302 So.3d 532.

E. The trial court sets the term of probation beyond that allowed by statute. In 2024, La.Code Crim.P. art. 893 was amended to change the probationary period for most offenses back to a five-year maximum. If this term is exceeded, correction is required. *See State v. Garriet*, 21-779 (La.App. 3 Cir. 3/30/22) (unpublished opinion) (2022 WL 953973); *State v. McKinney*, 21-721 (La.App. 3 Cir. 4/6/22), 337 So.3d 931.

F. The trial court applies the firearm sentencing enhancement provision set forth in La.Code Crim.P. art. 893.3 without written notice to invoke such enhancement by the State. If the trial court applies the firearm sentencing enhancement provisions set forth in La.Code Crim. P. art. 893.3 without a motion/notice by the State in accordance with La.Code Crim.P. art. 893.1, this court has vacated the sentence imposed and remanded for resentencing. *See State v. Bourg*, 18-435 (La.App. 3 Cir. 12/6/18), 260 So.3d 679, *reversed on other grounds*, 19-38 (La. 12/11/19), 286 So.3d 1005. If the State files a motion to invoke the firearm sentencing enhancement provision in compliance with La.Code Crim.P. art. 893.1, the specific findings of fact that must be made shall be submitted to the jury and proven by the State beyond a reasonable doubt. La.Code Crim.P. art. 893.2.

G. The trial court improperly imposes default time. Prior to August 1, 2021, this court routinely struck default time imposed on indigent defendants. *State v. Sanders*, 20-359 (La.App. 3 Cir. 2/3/21) (unpublished opinion) (2021 WL 359690); *State v. Holloway*, 10-74 (La.App. 3 Cir. 10/6/10), 47 So.3d 56. Effective August 1, 2021, La.Code Crim.P. art. 884 requires the trial court, prior to imposing

default time, to make a "substantial financial hardship" determination pursuant to La.Code Crim.P. art. 875.1.

H. The trial court imposes an illegally excessive sentence. If the trial court imposes a sentence that exposes a defendant to a term of imprisonment exceeding the maximum allowed under the statute, this court has vacated the sentence and remanded for resentencing. *State v. Anderson*, 23-507 (La.App. 3 Cir. 2/7/24) (unpublished opinion) (2024 WL 467321).

I. The trial court applies the improper version of the habitual offender law, La.R.S. 15:529.1. In *State v. Lyles*, 19-203, p. 5 (La. 10/22/19), 286 So.3d 407, 410, the Louisiana Supreme Court set forth three categories of persons potentially affected by 2017 La. Acts No. 282 and 2018 La. Acts No. 542:

> 1. There are persons . . . whose convictions became final on or after November 1, 2017, and whose habitual offender bills were filed before that date. Those defendants would be eligible to receive the benefits of all ameliorative changes made by Act 282.
>
> 2. There are persons whose convictions became final on or after November 1, 2017, and whose habitual offender bills were filed between that date and August 1, 2018 (the effective date of Act 542). Those persons would be eligible to receive the benefit of the reduced cleansing period, and they may also have colorable claims to the other ameliorative changes provided in Act 282 . . . .
>
> 3. Finally, there are persons whose convictions became final on or after November 1, 2017, and whose habitual offender bills were filed on or after August 1, 2018. They would receive the reduced cleansing period by operation of Subsection K(2) added by Act 542 but their sentences would be calculated with references to the penalties in

effect of the date of commission in accordance with Subsection K(2) added by Act 542.

Improper application of the foregoing categories for sentencing purposes has resulted in the habitual offender sentence being vacated and the case remand for resentencing. *See State Hughes*, 19-547 (La.App. 3 Cir. 2/5/20) (unpublished opinion) (2020 WL 578867).

NOTE: Effective August 1, 2022, La.Code Crim.P. art. 875.1 requires the trial court, prior to imposing a financial obligation in a felony case (any fine, fee, cost, restitution, or other monetary obligation), to conduct a hearing to determine whether payment in full would cause substantial financial hardship to the defendant or his dependents. The judicial determination of financial hardship may be waived by the court or the defendant. However, if the court waives, it must provide reasons on the record for its determination that the defendant is able to pay. If the court determines that a substantial financial hardship would be created on either the defendant or his dependents, it can waive all or any portion of the obligation (for restitution, the victim must consent) or order a monthly payment plan, half of which must be distributed toward a restitution obligation, if such was imposed. *See State v. Johnson*, 23-510 (La.App. 3 Cir. 3/27/24), __ So.3d __ (2024 WL 1292826); *State v. Portalis*, 23-395 (La.App. 3 Cir. 12/6/23), 375 So.3d 1113.

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. McLendon*, 23-298 (La.App. 3 Cir. 11/22/23), 374 So.3d 435, *writ denied*, 23-1672 (La. 6/19/24), 386 So.3d 1080; *State v. Randle*, 23-350 (La.App. 3 Cir. 1/31/24), 379 So.3d 858; *State v. Toby*, 22-386 (La.App. 3 Cir. 3/8/23), 358 So.3d 289, *writ denied*, 23-491 (La. 12/5/23), 373 So.3d 714. 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. Portalis*, 23-395 (La.App. 3 Cir. 12/6/23), 375 So.3d 1113; *State v. Ervin*, 17-18 (La.App. 3 Cir. 12/13/17), 258 So.3d 677; *State v. Bentley*, 15-598 (La.App. 3 Cir. 2/3/16), 185 So.3d 254.

A common error occurs when the trial court erroneously advises the defendant that he has two years from the *date of sentencing* to file for post-conviction relief. Louisiana Code of Criminal Procedure Article 930.8 states that a defendant has two years from the *finality of his conviction and sentence* to apply for post-conviction relief. When this error occurs, the trial court is ordered to correctly notify the defendant of the provisions of Article 930.8 by written notification, or at resentencing if resentencing is required. *See State v. Humphrey*, 22-724 (La.App. 3 Cir. 3/29/23), 364 So.3d 437, *writ denied*, 23-597 (La. 3/5/24), 379 So.3d 1271; *State v. Williams*, 19-718 (La.App. 3 Cir. 5/6/20), 298 So.3d 326, *writ denied*, 20-644 (La. 11/4/20), 303 So.3d 649; *State v. Barconey*, 17-871 (La.App. 3 Cir. 3/7/18), 241 So.3d 1046. 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 or when it fails to advise the defendant that the two years begins to run from the finality of both the conviction and sentence. *See State v. Brown*, 23-64 (La.App. 3 Cir. 9/13/23) (unpublished opinion) (2023 WL 6133536), *writ denied*, 23-1424 (La. 4/3/24), 382 So.3d 107; *State v. Hudson*, 23-764 (La.App. 3 Cir. 5/8/24) (unpublished opinion) (2024 WL 2045426); *State v. Hill*, 19-211 (La.App. 3 Cir.

11/6/19), 283 So.3d 1058, *writ denied*, 19-1917 (La. 5/7/20), 296 So.3d 618; *State v. Latigue*, 18-622 (La.App. 3 Cir. 2/20/19), 265 So.3d 93, *writ denied*, 19-707 (La. 10/8/19), 280 So.3d 593.

HABITUAL OFFENDER CLEANSING PERIOD

Louisiana Revised Statutes 15:529.1(C)(1) and (2) requires the lapse of either a five or ten-year cleansing period with respect to habitual offender adjudications. As set forth above, *Lyles*, 286 So.3d 407, discussed the applicability of both 2017 La. Acts No. 282 and 2018 La. Acts No. 542 as they relate to the appropriate cleansing period to be applied. Application of the incorrect cleansing period has resulted in this court vacating a defendant's habitual offender adjudication and sentence. *See State v. Sylvester*, 19-527 (La.App. 3 Cir. 2/5/20), 291 So.3d 718.

ERROR PATENT CHECKLIST

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

1. Presence of defendant (La.Code Crim.P. art. 831.)
_____ arraignment
_____ pleading
_____ jury selection
_____ at trial or plea
_____ judgment rendered
_____ sentencing (La.Code Crim.P. art. 835.)

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

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

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

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

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

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

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

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

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

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

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

13. Proper jury size and voting for verdict (La.Code Crim.P. art. 782 A.)
_____ capital - 12 out of 12
_____ hard labor - 12 out of 12
_____ all others - 6 out of 6

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

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

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

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

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

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

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

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

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

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION PROGRAM

August 23, 2024

POST-CONVICTION RELIEF

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* **Denotes material added to the PCR outline in 2024**.

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.

a. Custody is determined as of the date the application for post-conviction relief is filed. A change in custody status has no effect on a pending application for post-conviction relief, provided it was timely filed while in custody. *State v. Hayes*, 20-73 (La.App. 3 Cir. 8/4/21), 326 So.3d 934.

b. Sex offender registration is not a significant restraint on a juvenile's liberty such that it amounts to detention or confinement. *State in Interest of A.N.*, 18-1571 (La. 10/22/19), 286 So.3d 969.

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). *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**.

1. *State v. Juniors*, 21-476 (La.App. 3 Cir. 9/8/21) (unpublished opinion) – Relator was charged in the 40th JDC, and venue was subsequently transferred to the 15th JDC. Relator sought review in this court of the 40th JDC's denial of his motion to view sealed records. This court found relator's motion was not filed in the proper venue inasmuch as nothing presented in the writ application or the trial court's ruling indicated venue was transferred from the 15th JDC back to the 40th JDC. *State v. Juniors*, 21-1467 (La. 1/19/22), 330 So.3d 1076 – The supreme court concluded this court correctly determined that venue was in the 15th JDC.

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–1 and A–2 of the Louisiana Supreme Court Rules.

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. *State v. Bailey*, 19-1337 (La. 7/24/20), 299 So.3d 49 – The district court erred in barring consideration of petitioner's application for post-conviction relief based on a hyper-technical application of the pleading requirements found in La.Code Crim.P. art. 926.

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**. *See also* 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)**.

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 the conviction and sentence, finding that "unsubstantiated allegations of ineffective assistance of counsel, in the face of plea negotiations which resulted in the reduction of the charge from second degree murder to manslaughter and a 20-year recommended sentence, do not carry his burden of showing that he pled guilty involuntarily."

4. *State v. Trahan*, 15-848 (La.App. 3 Cir. 11/2/16) (unpublished opinion) – Relator's claim of ineffective assistance of counsel was denied because she failed to call her trial attorney to testify at the hearing on her application for post-conviction relief. *State v. Trahan*, 16-2150 (La. 8/31/18), 251 So.3d 406 – Relator's claim that counsel provided ineffective assistance at trial in failing "to introduce any evidence in support of the hypothesis of innocence proposed by defense counsel [in opening remarks]" merited a full evidentiary hearing conducted in accordance with La.Code Crim.P. art. 930. No witnesses testified at the hearing held in the district court and no evidence was presented. Therefore, the supreme court was unable to adequately review relator's claim. Thus, the case was remanded to the district court to reconsider its ruling after conducting a full evidentiary hearing. On remand, the trial court denied relief. *State v. Trahan*, 19-685 (La.App. 3 Cir. 11/9/20) (unpublished opinion) – This court addressed the trial court's denial of Relator's claim, which involved the issue of whether trial counsel should have anticipated the supreme court's approach to the case, finding "Relator has failed to show that trial counsel's

trial strategy of relying on the State's burden of proof constituted deficient performance and therefore has failed to demonstrate that counsel was ineffective. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)."

5. *State v. Carvin*, 19-2044 (La. 1/26/21), 309 So.3d 338 – The defendant failed to carry his burden of showing that trial counsel told him "that he was legally forbidden to testify or in some similar way compelled him to remain silent." Furthermore, the district court's factual determination that defendant acquiesced stands as an obstacle to affording relief. Therefore, the district court erred in granting the application for post-conviction relief.

IV. GROUNDS

A. Grounds upon which Post-Conviction Relief may be Granted– La.Code Crim.P. art. 930.3:

(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.

(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.

(8) The petitioner is determined by clear and convincing evidence to be factually innocent under Article 926.2.

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, *called into question by State v. Harris*, 18-1012 (La. 7/9/20), 340 So.3d 845.

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. Factual Innocence La.Code Crim.P. art. 926.2.

A. A petitioner, who has been convicted of an offense, may seek post-conviction relief on the grounds that he is factually innocent of the offense for which he was convicted. A petitioner's first claim of factual innocence pursuant to this Article that would otherwise be barred from review on the merits by the time limitation provided in Article 930.8 or the procedural objections provided in Article 930.4 shall not be barred if the claim is contained in an application for post-conviction relief filed on or before December 31, 2022, and if the petitioner was convicted after a trial completed to verdict. This exception to Articles 930.4 and 930.8 shall apply only to the claim of factual innocence brought under this Article and shall not apply to any other claims raised by the petitioner. An application for post-conviction relief filed pursuant to this Article by a petitioner who pled guilty or nolo contendere to the offense of conviction or filed by any petitioner after December 31, 2022, shall be subject to Articles 930.4 and 930.8.

B.(1)(a) To assert a claim of factual innocence under this Article, a petitioner shall present new, reliable, and noncumulative evidence that would be legally admissible at trial and that was not known or discoverable at or prior to trial and that is either:

(i) Scientific, forensic, physical, or nontestimonial documentary evidence.

(ii) Testimonial evidence that is corroborated by evidence of the type described in Item (i) of this Subsubparagraph.

(b) To prove entitlement to relief under this Article, the petitioner shall present evidence that satisfies all of the criteria in Subsubparagraph (a) of this Subparagraph and that, when viewed in light of all of the relevant evidence, including the evidence that was admitted at trial and any evidence that may be introduced by the state in any response that it files or at any evidentiary hearing, proves by **clear and convincing evidence** that, had the new evidence been presented at trial, no rational juror would have found the petitioner guilty beyond a reasonable doubt of either the offense of conviction or of any felony offense that was a responsive verdict to the offense of conviction at the time of the conviction.

(2) A recantation of prior sworn testimony may be considered if **corroborated** by the evidence required by Subsubparagraph (1)(a) of this Paragraph. However, a

recantation of prior sworn testimony **cannot form the sole basis for relief** pursuant to this Article.

(3) If the petitioner **pled guilty or nolo contendere** to the offense of conviction, in addition to satisfying all of the criteria in this Paragraph and in any other applicable provision of law, the petitioner shall show both of the following to prove entitlement to relief:

(a) That, by reliable evidence, he consistently maintained his innocence until his plea of guilty or nolo contendere.

(b) That he could not have known of or discovered his evidence of factual innocence prior to pleading guilty or nolo contendere.

C.(1) **A grant of post-conviction relief pursuant to this Article shall not prevent the petitioner from being retried** for the offense of conviction, for a lesser offense based on the same facts, or for any other offense.

(2) If the petitioner waives his right to a jury trial and elects to be tried by a judge, the district judge who granted post-conviction relief pursuant to this Article shall be recused and the case shall be allotted to a different judge in accordance with applicable law and rules of court.

(3) If the district judge denied post-conviction relief pursuant to this Article and an appellate court later reversed the ruling of the district judge and granted post-conviction relief pursuant to this Article, and if the petitioner waives his right to a jury trial and elects to be tried by a judge, upon the petitioner's motion the district judge who denied post-conviction relief shall be recused and the case shall be allotted to a different judge in accordance with applicable law and rules of court.

a. *State v. Gough*, 22-295 (La.App. 3 Cir. 7/25/22) (unpublished opinion) – La.Code Crim.P. art. 926.2 does not alleviate relator of the custody requirement found in La.Code Crim.P. art. 924.

b. *State v. Dunbar*, 23-419 (La.App. 1 Cir. 6/20/23) (unpublished opinion) (2023 WL 4077876) – The exception to the procedural bar and time limitation set forth in La. Code Crim. P. arts. 930.4 and 930.8 shall apply only to a substantive claim of factual innocence and shall not apply to any other claims raised by the petitioner. Relator presents "nontestimonial evidence" regarding La. Const, art. I, § 17 and La.Code Crim.P. art. 782 as they existed prior to their amendment in 2018. These allegations and the nontestimonial evidence submitted by relator have no bearing on his factual innocence in this case. Accordingly, the district court did not abuse its discretion by denying the application for postconviction relief.

c. *State v. Tyson*, 21-1086 (La. 1/26/22), 331 So.3d 901 – The supreme court applied the standard set in *State v. Conway*, 01-2808 (La. 4/12/02), 816 So.2d 290, and *State v. Pierre*, 13-0873 (La. 10/15/13), 125 So.3d 403, to an actual innocence claim filed prior to August 1, 2021, the effective date of La.Code Crim.P. art. 926.2. *See also State v. Nash*, 22-624 (La.App. 3 Cir. 5/3/23), 365 So.3d 876.

3. 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. *But see State v. Harris*, 18-1012 (La. 7/9/20), 340 So.3d 845; *State v. Robinson*, 19-1330 (La. 11/24/20), 304 So.3d 846.

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*, 577 U.S. 1, 136 S.Ct. 2 (2016) – Defense counsel's failure at trial to seriously probe a method of forensic analysis that was widely accepted at the time, although later discredited, did not amount to ineffective assistance of counsel. The Court held that the reasonableness of counsel's challenged conduct is viewed as of the time of counsel's conduct.

i. *Weaver v. Massachusetts*, 582 U.S. 286, 137 S.Ct. 1899 (2017) – A violation of the right to a public trial is a structural error. In the context of an error during jury selection, where the error is neither preserved nor raised on direct review but is raised later via an ineffective assistance of counsel claim, the defendant must demonstrate prejudice to secure a new trial.

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

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

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

m. *State v. Dressner*, 18-828 (La. 10/29/18), 255 So.3d 537, *cert. denied*, ___ U.S. ___, 139 S.Ct. 2691 (2019) – When the substantive issue an attorney failed to raise has no merit, the claim that the attorney was ineffective for failing to raise that issue also has no merit.

n. *State v. Cuccia*, 18-1726 (La. 5/28/19), 273 So.3d 305 – Relator raised six claims of ineffective assistance of counsel. The district court denied one of the claims. The supreme court remanded the matter for a complete ruling on all claims, including **specific detailed factual findings** by the district court in support of its ultimate legal conclusions. The lack of factual findings rendered the one claim that was addressed unreviewable.

4. 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. Johnson*, 19-2004 (La. 12/1/20), 314 So.3d 806 – An unconditional guilty plea is a solemn admission of guilt that should not be entered lightly, and certainly never made as a delaying tactic in the belief that it can simply be withdrawn later.

2. *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.

7. The court fails to pronounce sentence when it says, "I sentence you in accordance with the plea agreement." *State v. Sampy*, 19-191(La. 5/29/20) (unpublished opinion); *State v. Bolgiano*, 20-316 (La.App. 3 Cir. 8/3/20) (unpublished opinion).

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 v. 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. *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.

3. *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.

4. *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."

5. *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.

6. *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.

7. *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.

8. *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.

9. *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.

10. *McCoy v. Louisiana*, 584 U.S. 414, 138 S.Ct. 1500 (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.

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

12. *State v. Rideau*, 19-2092 (La. 8/14/20), 300 So.3d 839 – The record supported defendant's claim, and the State conceded, that misinformation with regard to his eligibility for early release precluded him from making his decision to waive trial and enter his plea "with eyes open." The matter was remanded to the district court to hold a hearing at which it would allow defendant to withdraw his guilty plea if he persisted in that desire after consulting with counsel.

13. *State v. Sewell*, 20-300 (La. 12/11/20), 314 So.3d 811 – It is not clear that *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010), imposed a duty on defense counsel to determine whether his or her client is a noncitizen to begin with. Thus, failure to inform defendant, a Jamaican national, of the removal consequences of his guilty pleas was not ineffective assistance where counsel did not know, and did not have any reason to know, that her client was not a United States citizen.

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. Sentencing 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* (best interest) plea requirements – (Not to be used interchangeably.) For *Crosby*, ONLY errors specifically reserved may be appealed. For *Alford*, a DETAILED factual basis is mandatory.

5. 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*, 577 U.S. 385, 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.'"

6. 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. *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.

d. *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.

e. *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.

f. *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.

g. *Ohio v. Clark*, 576 U.S. 237, 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.

h. *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.

i. *Samia v. United States*, 599 U.S. 635, 143 S.Ct. 2004 (2023) – The admission of a non-testifying codefendant's confession did not violate the Sixth Amendment's Confrontation Clause where the confession as modified did not directly inculpate the defendant but used the descriptor "other person" and the jury was instructed to consider the confession only as to the codefendant.

*j. *Smith v. Arizona*, ___ U.S. ___, 144 S.Ct. 1785, 1802 (2024) – A state may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless he/she is unavailable and the defendant has had a prior chance to cross-examine him/her. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. Nothing changes if the surrogate presents the out-of-court statements as the basis for his expert opinion. Those statements come into evidence for their truth because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them.

7. Double Jeopardy

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

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

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

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

d. *Currier v. Virginia*, 585 U.S. 493, 138 S.Ct. 2144 (2018) – Defendant was charged with burglary, grand larceny, and possession of a firearm after having been convicted of a violent felony. Defendant and the State agreed to sever the possession charge from the burglary and grand larceny charges to avoid evidence of his prior convictions during the trial for burglary and grand larceny, of which he was acquitted. Some of the same evidence was presented at the possession trial, where defendant was convicted. Because defendant consented to the severance his second trial and resulting conviction did not violate the double jeopardy clause.

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

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

g. *State v. Lemoine*, 20-561 (La. 10/14/20), 302 So.3d 1103 – "'The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether *each provision requires proof of a fact which the other does not*.' *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182 (emphasis added). In finding one of the crimes requires proof of an element that the other does not, and then reaching its conclusion, the court of appeal erred by conducting only one-half of the analysis under *Blockburger*."

h. *Smith v. United States*, 599 U.S. 236, 143 S.Ct. 1594 (2023) – The Constitution permits the retrial of a defendant following a trial in an improper venue conducted before a jury drawn from the wrong district.

8. 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."

9. 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. *State v. Broussard*, 21-1470 (La. 1/12/22), 330 So.3d 306 – The supreme court construed relator's motion to correct illegal sentence in which he argued the state failed to prove a probation violation as an application for post-conviction relief and concluded an inmate may seek review of a probation revocation via an application for post-conviction relief filed within two years of the revocation.

*d. *State v. Anderson*, 23-438 (La.App. 3 Cir. 12/20/23) (unpublished opinion) (on reh'g) (2023 WL 8797487) – The supreme court judicially redefined application for post-conviction relief as established by the legislature in La.Code Crim.P. art. 924 and judicially altered the grounds for post-conviction relief set forth in La.Code Crim.P. art. 930.3 to include challenges to probation revocations. The court concluded Relator's second application for post-conviction relief, which challenged his probation revocation, was not repetitive or a successive application under La.Code Crim.P. art. 930.4. It was procedurally improper for the defense to argue probation revocation claims in the first petition for post-conviction relief as it was filed before the ruling in *Broussard*. Furthermore, the pleading was not untimely because the supreme court judicially altered the La.Code Crim.P. art. 930.8 time limitation insofar as to allow challenges to probation revocations up until two years from the date of revocation.

*e. *State v. Landry*, 24-241 (La.App. 3 Cir. 7/17/24) (unpublished opinion) (2024 WL 3434926) – A ruling revoking probation is not an appealable judgment.

f. *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.

g. *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.

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

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

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

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

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

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

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

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

c. *State v. Counterman*, 491 So.2d 86 (La.App. 1 Cir. 1986) – The first circuit certified to the supreme court the following question, "In the instant case, since the trial court failed to follow the Supreme Court's directive in *State v. Counterman*, 475 So.2d 336 (La.1985), to consider defendant's request for appeal as an application for post conviction relief and to employ the proper procedures therefor, is this appeal properly before this Court?"

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

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

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

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

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

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

j. *Garza v. Idaho*, 586 U.S. 232, 139 S.Ct. 738 (2019) – "[N]o appeal waiver serves as an absolute bar to all appellate claims." *Id.* at 744. "[A] waived appellate claim can still go forward if the prosecution forfeits or waives the waiver." *Id.* at 745. Filing a notice of appeal is a simple, nonsubstantive act that is within the defendant's prerogative. *Id.* at 746. Simply filing a notice of appeal does not necessarily breach a plea agreement. The decision whether to appeal is ultimately the defendant's to make. *Id.* at 746. Where a defendant expressly requests an appeal, counsel performs deficiently by disregarding the defendant's instructions. *Id.* The defendant did retain a right to his appeal. "[H]e simply had fewer possible claims than some other appellants. Especially because so much is unknown at the notice-of-appeal stage . . . ." *Id.* at 748. "When counsel's deficient performance forfeits an appeal that a defendant otherwise would have taken, the defendant gets a new opportunity to appeal." *Id.* at 749. The presumption of prejudice applies regardless

of whether a defendant has signed an appeal waiver. Where an attorney performed deficiently in failing to file a notice of appeal despite the defendant's express instructions, prejudice is presumed with no further showing from the defendant of the merits of his underlying claims. *Id.* at 750.

k. *Boyd v. State*, 20-503 (La. 9/23/20), 301 So.3d 1153 – A defendant is not required to seek reinstatement of his right to appeal before he can present a claim of ineffective assistance of counsel by a timely-filed application for post-conviction relief. La.Code Crim.P. art. 924.1 should not be construed as requiring that a defendant pursue an appeal he has waived, forfeited, or does not want before he applies for post-conviction relief. *Counterman* provides a mechanism by which a defendant may seek reinstatement of his right to appeal after he has lost it. It does not **require** that a defendant seek reinstatement of his right to appeal before he can present a claim of ineffective assistance of counsel by timely filed application for post-conviction relief.

l. *State v. Burnley*, 21-79 (La. 5/4/21), 315 So.3d 205 – Applicant is not entitled to an out-of-time appeal. By pleading guilty unconditionally, he waived all non-jurisdictional defects in the proceedings leading to his conviction, and he cannot appeal or seek review of a sentence imposed in conformity with a plea agreement.

2. *State v. Shupp*, 21-759 (La.App. 3 Cir. 4/26/22) (unpublished opinion) – The trial court erred in granting an out-of-time writ of certiorari to the supreme court.

11. 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*, 576 U.S. 305, 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*, 581 U.S. 1, 137 S.Ct. 1039 (2017) – The non-scientific factors applied by Texas were inappropriate for determination of intellectual disability.

12. Jury Conduct

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

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

c. *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 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 of sentence. *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172, *called into question by State v. Harris*, 18-1012 (La. 7/9/20), 340 So.3d 845. ***State v. James**, 21-01758 (La. 11/8/23), 372 So.3d 802 – "As to his excessive sentence claim, it is not cognizable on collateral review."

*a. *State v. Whitmore*, 24-53 (La. 5/7/24), 384 So.3d 344 – "[A]pplicant's claim that the sentencing judge was not aware of his sentencing discretion is a claim for postconviction relief, which is subject to the time limitations set forth at La.C.Cr.P. art. 930.8."

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. 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.

c. *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.

d. *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."

e. *State v. Harris*, 18-1012 (La. 7/9/20), 340 So.3d 845 – Harris was adjudicated a habitual offender and sentenced to life imprisonment, which was affirmed on appeal after a bare excessiveness review. *See State v. Harris*, 13-133 (La.App. 3 Cir. 12/11/13), 156 So.3d 694. Harris subsequently filed an application for post-conviction relief wherein he alleged trial counsel was ineffective for failing to file a motion to reconsider and the sentencing court was unaware it had the authority to deviate below the mandatory life sentence. The trial court denied Harris's claims. Harris filed a writ application, arguing counsel at the hearing on his application for post-conviction relief was ineffective. This court denied relief. *State v. Harris*, 17-545 (La.App. 3 Cir. 4/24/18) (unpublished opinion). The supreme court granted Harris's writ application to address whether his claim that trial counsel was ineffective at sentencing was cognizable on post-conviction review. The supreme court, in addressing *Melinie*, stated: "The principle that claims of ineffective assistance—whether at an original sentencing hearing or with regard to a habitual offender adjudication—are not cognizable on collateral review originated in brief writ dispositions only, and was never the subject of a reasoned opinion of the Court." *Id.* at 12-13. The court further stated "several leaps of logic are necessary" to get from what is written in the post-conviction articles to the notion that ineffective assistance of counsel at sentencing is not cognizable on collateral review. *Id.*at 14.

The supreme court went on to state that direct review was ill suited for such claims. It noted Harris's complaints that counsel's ineffectiveness at the habitual offender sentencing resulted in his constitutionally excessive life sentence and that counsel did not inform the trial court that it could deviate downward from a statutory minimum sentencing provision of La.R.S. 15:529.1. It then stated: "An objectively reasonable standard of performance requires that counsel be aware of the sentencing options in the case and ensure that all reasonably available mitigating information and legal arguments are presented to the court. Since Louisiana law prohibits excessive sentences, and requires that individual circumstances be considered, counsel acts unprofessionally when he fails to conduct a reasonable investigation into factors which may warrant a downward departure from the mandatory minimum." *Id.* at 19. "Counsel's failure to object to the sentence or file a motion to reconsider at the habitual offender proceedings deprived defendant of an important judicial determination by the trial court, and also failed to correct any inaccurate assumptions concerning the law and the court's capacity to deviate downward if warranted. This failure also deprived the appellate court of an opportunity to review the district court's decisions (or errors of law), as well as

deprived it of the opportunity to review any evidence in support of defendant's excessiveness claim that he could have put into the record before the trial court." *Id.* The court noted it made an exception to *Melinie* in *Francis*. Therefore, in the interest of justice, it would do the same for Harris. The supreme court remanded the matter to the trial court to conduct an evidentiary hearing on Harris's claim that trial counsel rendered ineffective assistance at sentencing.

In his concurrence, Justice Crichton stated that *Melinie* was wrongly decided and should be overruled. "The majority opinion, however, leaves it to the reader to surmise as to the impact of the majority's ruling and does not explicitly reveal that *Melinie* is overruled."

f. *State v. Robinson*, 19-1330 (La. 11/24/20), 304 So.3d 846 – Robinson was adjudicated a fourth offender and sentenced to life imprisonment. The supreme court noted that counsel for Robinson filed a motion to reconsider sentence but counsel was unaware of the holding in *State v. Dorthey*, 623 So.2d 1276 (La.1993), allowing for a downward departure from a mandatory penalty. Thus, counsel did not seek a downward departure on the basis that a life sentence was excessive. "Due to counsel's error, the trial court did not consider whether a downward departure was warranted, and the trial record was not fully developed with regard to this question." *Id.* at 847. On appeal, the first circuit performed a review much like a bare excessiveness review and upheld Robinson's sentence. *See State v. Robinson*, 12-1731 (La.App. 1 Cir. 4/26/13) (unpublished opinion) (2013 WL 1791051), *writ denied*, 13-1234 (La. 11/22/13), 126 So.3d 480. In 2018, Robinson filed a motion to correct illegal sentence challenging his life sentence. The trial court granted the motion, but the first circuit reversed the trial court's ruling. The supreme court addressed the issue: "These proceedings occurred before our recent decision in *State v. Harris*, where **we held that an "ineffective assistance of counsel at sentencing claim is cognizable on collateral review**." Because the case had never been evaluated by any court in light of the decision in *Harris*, and because Robinson presented a *prima facie* claim of ineffective assistance of counsel at sentencing meriting an evidentiary hearing, Robinson's writ application was granted. The ruling of the court of appeal was reversed, and the matter was remanded to the district court to reconsider its ruling in light of *Harris* and to conduct an evidentiary hearing on the claim of ineffective assistance of counsel at sentencing.

Justice Crain dissented. He noted Robinson had already asserted his mandatory life sentence was excessive, warranting a downward departure. The issue was analyzed by the first circuit, and the claim was denied. Moreover, Robinson's writ application to the supreme court, based solely on his excessive sentence

argument, was unanimously denied. Robinson's sentence was not illegal, and the first circuit's ruling on the motion to correct illegal sentence was correct. Justice Crain continued: "There is no explanation why this repetitive claim, fully litigated on direct appeal, is not precluded by Louisiana Code of Criminal Procedure article 930.3. . . . Although the *Harris* majority characterized its holding as an 'exception to *Melinie*,' that opinion is now being used as authority in this case to vacate a sentence on collateral review where (1) the sentence was legally imposed, (2) the constitutionality of the sentence was judicially reviewed and upheld on direct appeal, (3) **defendant makes no express claim of ineffective assistance of counsel at sentencing**, (4) the relief granted defendant was based on statutory amendments not applicable to the sentence, and (5) the mandatory sentence is declared unconstitutional without any determination that defendant is 'exceptional' under *Dorthey*. If any remnant of *Melinie* survived *Harris*, today it is buried. Collateral review of sentences is no longer the exception; it is the rule. In fact, by ignoring the repetitive nature of this claim, one can reasonably question whether there are any procedural bars to reviewing any sentence at any time."

g. *State v. Robinson*, 20-427 (La.App. 5 Cir. 3/8/21) (unpublished opinion) (2021 WL 863395) – Robinson filed a "Motion to Correct Illegal Sentence and Hold a *Dorthey* Hearing." The trial court denied the motion, finding Robinson did not point to an illegal term in his sentence. In his writ application to the fifth circuit, Robinson argued the trial court erred in refusing to recognize its authority to use discretion to reduce his sentence pursuant to *Dorthey* and failing to articulate a basis under La.Code Crim.P. art. 894.1(C) for not deviating from the maximum sentence. The fifth circuit acknowledged that Robinson had been sentenced to life as a habitual offender. The fifth circuit noted trial counsel argued that the district court should consider a downward departure and objected to the sentence but did not file a motion to reconsider sentence after the trial court incorrectly determined it did not have discretion to consider whether the minimum sentence mandated by La. R.S. 15:529.1 was constitutionally excessive. Relator eventually raised the constitutional excessiveness issue in his third appeal but, since he had not raised the issue in his prior consolidated appeal, the fifth circuit declined to consider the issue and affirmed Relator's conviction and sentence. *State v. Robinson*, 12-22 (La. App. 5 Cir. 10/16/12), 102 So.3d 922, 926, *writ denied*, 12-2434 (La. 4/12/13), 111 So.3d 1017. The court stated: "Although Relator's trial counsel argued that the trial court could perform a *Dorthey* analysis and consider reducing Relator's habitual offender sentence, trial counsel did not formally file a motion to reconsider sentence. Also, Relator's appellate counsel for his first two appeals did not assign the alleged

excessive sentence as error in its brief. **Thus, we find that Relator has presented a *prima facie* claim of ineffective assistance of (trial and appellate) counsel**, similar to the defendants in *Cardell Robinson*, *Harris*, and *Francis*, but, **in this case, the issue is not properly before us**." Counsel submitted an alternative request for relief and asked the supreme court to remand the matter for an evidentiary hearing to determine whether Robinson received ineffective assistance of counsel during sentencing by way of a letter to the Court's Clerk of Court pursuant to Uniform Rules — Rule 2–12.6.1. The court granted the writ for the limited purpose of remanding the matter to the trial court, and ordered the district court to grant Robinson leave of court to either amend his motion to correct illegal sentence, or file a PCR, and hold an evidentiary hearing on the claims of ineffective assistance of counsel within forty-five days of its receipt of the pleading.

The supreme court denied writs. However, Justice Crain would have granted the writ to revisit *Robinson*, 304 So.3d 846, and *Harris*, which he said were wrongly decided. *State v. Robinson*, 21-485 (La. 5/25/21), 316 So.3d 443.

h. *State v. Dugas*, 22-453 (La.App. 3 Cir. 6/21/23), 368 So.3d 259, *writ denied*, 23-1008 (La. 12/19/23), 375 So.3d 407 – Relator's sentence became final in 1997. She filed an application for post-conviction relief in 2019 and added a claim regarding *Harris* in April 2021. This court concluded that *Harris* provided a new interpretation of constitutional law as to the right to make a claim for ineffective assistance of counsel at sentencing on post-conviction review but does not apply retroactively. *The supreme court has not addressed the issue. *See State v. Whitmore*, 23-945 (La. 5/7/24), 384 So.3d 343 (Crichton, J., concurring).

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.' The two-part test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), applies to challenges of guilty pleas based on claims of ineffective assistance of counsel."

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.

*****4. **Errors Patent**

1. *State v. Link*, 24-595 (La. 5/30/24), 386 So.3d 277 – La.Code Crim.P. art. 920 pertains to the scope of appellate review and does not establish any ground for post-conviction relief or apply in the district court on collateral review.

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. *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 curiams order the district court to record a minute entry consistent with the per curiam. *See State v. Singleton*, 15-765 (La. 10/30/15), 178 So.3d 556.

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

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

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

***Any attempt or request by a petitioner to supplement or amend the application shall be subject to all of the limitations and restrictions set forth in this Article. In addition to serving the district attorney for the jurisdiction where the underlying conviction was obtained, any application filed after the first application for post-conviction relief shall be served on the district attorney and the attorney general at least 60 days in advance of the hearing on the application. **Both the district attorney and the attorney general shall have a right to suspensively appeal any order granting relief.**

a. Should this have been included in **La.Code Crim.P. art. 930.6**, which states:

A. The petitioner may invoke the supervisory jurisdiction of the court of appeal if the trial court dismisses the application or otherwise denies relief on an application for post conviction relief. No appeal lies from a judgment dismissing an application or otherwise denying relief.

B. If a statute or ordinance is declared unconstitutional, the state may appeal to the supreme court. If relief is granted on any other ground, the state may invoke the supervisory jurisdiction of the court of appeal.

C. Pending the state's application for writs, or pending the state's appeal, the district court or the court of appeal may stay the judgment granting relief.

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

***All of the limitations set forth in this Article shall be jurisdictional and shall not be waived or excused by the court or the district attorney.

VI. TIME LIMITATION.

A. La.Code Crim.P art. 930.8 – An application for post-conviction relief, including one seeking 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 (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), 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. *Ohlsson v. State*, 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 article 930.8 is jurisdictional; therefore, a trial court has no authority to extend the time limit provided therein.

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

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

10. *Benoit v. Guerin*, 23-250 (La. 6/7/23), 361 So.3d 966 – Relator's conviction and sentence for sexual battery became final in January 2018. Resentencing on a separate count did not restart the time limitations of La.Code Crim.P. art. 930.8 with respect to the sexual battery conviction. The district court

had no authority to allow a supplemental or amended PCR with respect to the sexual battery conviction because the PCR was untimely filed.

C. Date of Filing

1. *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.

***State v. Johnson*, 23-501 (La.App. 3 Cir. 5/17/24) (unpublished opinion) – Relator's pleading, which had a filing deadline of December 31, 2022, was timely filed on January 3, 2023, under the mailbox rule. Moreover, December 30, 2022, through January 2, 2023, were legal holidays. *See also State v. Robinson*, 23-274 (La.App. 3 Cir. 5/16/24) (unpublished opinion); *State v. Bertrand*, 23-708 (La.App. 3 Cir. 7/11/24) (unpublished opinion).

D. Informing Defendant of Prescriptive Period – La.Code Crim.P. art. 930.8(C)

1. At the time of sentencing, the trial court shall inform the defendant of the prescriptive period for seeking post-conviction relief.

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 (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).

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 **shall** 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. If the petitioner pled guilty or nolo contendere to the offense of conviction and is seeking relief pursuant to Code of Criminal Procedure Article 926.2 and five years or more have elapsed since the petitioner pled guilty or nolo contendere to the offense of conviction, he shall not be eligible for the exception provided for by this Subparagraph.

(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.

(5) The petitioner qualifies for the exception to timeliness in Article 926.1.

(6) The petitioner qualifies for the exception to timeliness in Article 926.2.

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. *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(A)(1).

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

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

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

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

C. New Ruling/Interpretation of Constitutional Law

1. Relators who were under the age of 18 when they committed a homicide have 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*, 577 U.S. 190, 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.

Jones v. Mississippi, 593 U.S. 98, 141 S.Ct. 1307 (2021) – States are not required to make a separate finding on incorrigibility before imposing a life sentence without parole for a juvenile offender. A discretionary system that takes into account factors like age and other attendant characteristics is sufficient.

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*, 583 U.S. 978, 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.

7. *State v. James*, 20-68 (La. 4/27/20), 295 So.3d 388 – The application for post-conviction relief was untimely inasmuch as the decision in *Seals v. McBee*, 898 F.3d 587 (5th Cir. 2018), which found La.R.S. 14:122 (public intimidation) unconstitutionally broad, is persuasive authority but is not binding on state courts.

8. *State v. Pierre*, 19-739 (La. App. 3 Cir. 5/24/21) (unpublished opinion) – *State v. Curley*, 16-1708 (La. 6/27/18), 250 So.3d 236, addressing the admissibility of evidence of Battered Woman's Syndrome, did not establish a new interpretation of constitutional law. *See also State v. Clark*, 19-727 (La.App. 3 Cir. 5/25/21) (unpublished opinion).

9. *Ramos v. Louisiana*, 590 U.S. 83, 140 S.Ct. 1390 (2020) – Non-unanimous verdicts are not permissible under the Sixth Amendment to the Constitution, and the prohibition applies to the states through the Fourteenth Amendment.

a. *State v. Moore*, 21-579 (La.App. 1 Cir. 7/19/21) (unpublished opinion) 2021 WL 3033573 – *Ramos* is inapplicable to defendants convicted of a serious offense by a unanimous jury verdict. Moreover, the jury instructions regarding the numbers of jurors required to convict were not erroneous, as they were based upon the law in effect at the time of defendant's jury trial.

b. *State v. Rodgers*, 21-190 (La.App. 3 Cir. 4/14/21), 318 So.3d 315, *writ denied*, 21-675 (La. 9/27/21), 324 So.3d 87 – The Constitution requires unanimity in all verdicts, not just guilty verdicts.

c. *Edwards v. Vannoy*, 593 U.S. 255, 141 S.Ct. 1547 (2021) – *Ramos* does not apply retroactively on federal collateral review.

d. *State v. Reddick*, 21-1893 (La. 10/21/22), 351 So.3d 273 – *Ramos* does not apply retroactively on state collateral review. However, Oregon found *Ramos* retroactively applicable. *Watkins v. Ackley*, 370 Or. 604, 523 P.3d 86 (2022).

e. *State v. Vaughn*, 22-214 (La. 5/5/23), 362 So.3d 363 – Once a conviction is final, a case is no longer on "direct review" for purposes of *Ramos v. Louisiana*, 590 U.S. 83, 140 S.Ct. 1390 (2020), and *State v. Reddick*, 21-1893 (La. 10/21/22), 351 So.3d 273. A case is not considered to be on direct review when the only matter remaining is an appeal of a resentence.

f. *State v. Clues-Alexander*, 21-831 (La. 5/13/22), 345 So.3d 983 – The jurisprudential development of *Ramos* subsequent to defendant's knowing and voluntary plea did not render the plea involuntary or unknowing.

D. Prejudice to the State – La.Code Crim.P. art. 930.8(B).

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."

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

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

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

***E. Supplementation/Amendment – La.Code Crim.P. art. 930.8(D)**

Any attempt or request by a petitioner to supplement or amend the application shall be subject to all of the limitations and restrictions as set forth in this Article.

***F. Waiver – La.Code Crim.P. art. 930.8(E)**

All of the limitations set forth in this Article shall be jurisdictional and shall not be waived or excused by the court or the district attorney.

VIII. MISCELLANEOUS

A. Judgment on PCR

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

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

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

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

4. *State v. Ball*, 19-1674 (La. 11/24/20), 305 So.3d 90 – Although the district court did not specifically rule on counsel's ineffectiveness in relation to *Batson* challenges, the court's "global denial" sufficed as a denial of the claim.

5. *State v. Strickland*, 20-521 (La.App. 3 Cir. 11/16/21) (unpublished opinion), *writ denied*, 21-1886 (La. 2/8/22), 332 So.3d 669 – Relator abandoned his application for post-conviction relief when he failed to act on it for nineteen years.

B. A pleading's nature is determined by its substance and not its caption.

State ex rel. Lay v. Cain, 96-1247 (La.App. 1 Cir. 2/14/97), 691 So.2d 135. *See also State v. Curry*, 17-737 (La. 8/3/18), 250 So.3d 261.

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

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

application for post-conviction relief. *State v. Parker*, 98-256 (La. 5/8/98), 711 So.2d 694.

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

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

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

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

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

g. State v. Richcreek, 19-735 (La.App. 3 Cir. 1/17/20) (unpublished opinion), *writ denied*, 20-282 (La. 5/1/20), 295 So.3d 945 – Sex offender registration and supervision are not part of the sentence imposed. *See State v. Trosclair*, 11-2302 (La. 5/8/12), 89 So.3d 340; *State v. Cole*, 19-115 (La.App. 3 Cir. 11/20/19), 317 So.3d 574.

h. *State v. Lyles*, 19-203 (La. 10/22/19), 286 So.3d 407 – Defendants whose convictions became final on or after November 1, 2017, and whose habitual offender bills were filed before that date are eligible to receive the benefit of all ameliorative changes made by 2017 La. Acts No. 282.

i. *State v. Kennon*, 19-998 (La. 9/1/20), 340 So.3d 881 – Defendant's conviction on drug charges became final, for purposes of determining whether Habitual Offender Law amendments applied, at the time appellate review of defendant's conviction was completed, rather than at the time that adjudication of a later-filed habitual offender bill became final.

j. *State v. Quinn*, 19-647 (La. 9/9/20), 340 So.3d 829, *cert. denied*, ___ U.S. ___, 141 S.Ct. 1406 (2021) – Defendant was sentenced under the habitual offender statute in effect at the time of the crime, which provided a sentencing range of 20 to 80 years. If sentenced under the habitual offender statute as amended by 2017 La. Acts No. 282, the sentencing range would be 13 1/3 to 80 years. The district court sentenced defendant to consecutive terms of life and 50 years. Considering the sentences imposed, the supreme court found there was no reason to believe the district court would impose a lesser sentence if defendant were resentenced under a provision in which the minimum sentence had been reduced from one-half the maximum unenhanced sentence to one-third the maximum unenhanced sentence. Defendant cited *State v. Williams*, 17-1753 (La. 6/15/18) (per curiam), 245 So.3d 1042, for the proposition a defendant is entitled to be resentenced under Act 282 even when the defendant's sentence is well within the ranges provided under either version of the habitual offender statute. In *Williams*, the State conceded the defendant should be resentenced. "Under the circumstances here, and where there is no reason to believe a different outcome will result, we decline to remand for resentencing." *But see State v. Bias*, 20-74 (La.App. 3 Cir. 6/29/21) (unpublished opinion), *writ denied*, 21-1214 (La. 1/19/22), 331 So.3d 328 – Remanded for resentencing when the sentencing range was reduced from 25 to 100 years to 16 and 2/3 to 100 years, and relator was sentenced to 70 years.

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 – La.Code Crim.P. art. 926.1

1. Time Limitations

*"(1) Prior to **August 31, 2030**, 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, 2030**, 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)** mandates an application requesting DNA testing allege all of the following:

(1) A factual explanation of why there is an articulable doubt, based on competent evidence whether or not introduced at trial, as to the guilt of the petitioner in that DNA testing will resolve the doubt and establish the innocence of the petitioner.
(2) The factual circumstances establishing the timeliness of the application.
(3) The identification of the particular evidence for which DNA testing is sought.
(4) That the applicant is factually innocent of the crime for which he was convicted, in the form of an affidavit signed by the petitioner under penalty of perjury.

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

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

5. *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.

6. *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.

7. *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.

8. *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. Motion for Testing of Evidence – La.Code Crim.P. art. 926.3

A. Upon motion of the state or the petitioner, the district court may order the testing or examination of **any evidence** relevant to the offense of conviction in the custody and control of the clerk of court, the state, or the investigating law enforcement agency.

B. If the motion is made by the petitioner and the state does not expressly consent to the testing or examination, a motion made under this Article shall be granted only following a contradictory hearing at which the petitioner shall establish that good cause exists for the testing or examination. If the state does not expressly consent to the testing or examination and the motion made under this Article is granted following the contradictory hearing, the district attorney and investigating law enforcement agency shall not be ordered to bear any of the costs associated with the testing or examination.

1. *State v. Brown*, 22-539 (La.App. 3 Cir. 4/28/23) (unpublished opinion), *writ denied*, 23-740 (La. 11/21/23), 373 So.3d 446 – The trial court did not err in summarily denying relator's motion for testing of evidence. Relator's only allegation of good cause for examining the alleged plea agreement was to establish his factual innocence under La.Code Crim.P. art. 926.2. Relator did not make sufficient allegations of good cause inasmuch as Relator had already filed at least two claims of factual innocence under La.Code Crim.P. art. 926.2. The court did not consider whether the plea was the type of evidence addressed by La.Code Crim.P. art. 926.3.

*2. Items requested – Panasonic microcassette tape analyzed for voice matching; rape kit that may or may not have been done from an offence charged in 1984; news footage; a confession for evidence that it was involuntary; examination/questioning of jurors for an indication that the prosecutor threatened them during deliberations.

E. 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 es rel. Wyatt v. State*, 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."

F. Post-Conviction Plea Agreements – La.Code Crim.P. art. 930.10

"A. Upon joint motion of the petitioner and the district attorney, the district court may deviate from any of the provisions of this Title.

B. Notwithstanding the provisions of Code of Criminal Procedure Article 930.3 or any provision of law to the contrary, the district attorney and the petitioner may, **with the approval of the district court**, jointly enter into any post conviction plea agreement for the purpose of **amend**ing the petitioner's **conviction, sentence, or habitual offender status**. The terms of any post conviction plea agreement pursuant to this Paragraph shall be in writing, shall be filed into the district court record, and shall be agreed to by the district attorney and the petitioner in open court. The court shall, prior to accepting the post conviction plea agreement, address the petitioner personally in open court, inform him of and determine that he understands the rights that he is waiving by entering into the post conviction plea agreement, and determine that the plea is voluntary and is not the result of force or threats, or of promises apart from the post conviction plea agreement."

1. Often raised in a Motion to Correct Illegal Sentence or Motion to Amend Sentence.

*2. *State v. Lee*, 22-1827 (La. 9/1/23), 370 So.3d 408 – La.Code Crim.P. art. 930.10 is unconstitutional as it allows a court to overturn a final conviction without a finding of legal defect under La.Code Crim.P. art. 930.3, allowing the judicial branch to exercise the governor's exclusive pardon power and violating the doctrine of separation of powers.

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

SECOND EXTRAORDINARY & REGULAR SESSIONS

Effective dates vary for 2024 legislation. Unless otherwise indicated, the effective date is August 1, 2024.

La.R.S. 14:2 Definitions – (B) Crimes of Violence (61) Illegal use of weapons or dangerous instrumentalities. Effective April 29, 2024. (62) First degree vehicle negligent injuring when the blood alcohol concentration exceeds 0.20.

La.R.S. 14:32 Negligent Homicide – The maximum sentence was changed from 5 to 10 years.

La.R.S. 14:34.9 Battery of a Dating Partner – If the strangulation results in serious bodily injury, the offender, *in addition to any other penalties imposed* for the offense, shall be imprisoned at hard labor for not less than 5 nor more than 50 years without benefit of probation, parole, or suspension of sentence.

La.R.S. 14:35.3 Domestic Abuse Battery – If the strangulation results in serious bodily injury, the offender, *in addition to any other penalties imposed* for the offense, shall be imprisoned at hard labor for not less than 5 nor more than 50 years without benefit of probation, parole, or suspension of sentence.

La.R.S. 14:39.1 Vehicular Negligent Injuring – (C)(1) shall be fined not more than $1000 or imprisoned for not more than 6 months, or both. (2) BAC 0.15 percent but less than 0.20 percent shall be fined not more than $1000 and imprisoned for not less than 7 days nor more than 6 months. At least 7 days of the sentence shall be served without the benefit of probation or suspension of sentence. (3) BAC of at least 0.20 shall be fined not more than $1000 and imprisoned for not less than 30 days nor more than 6 months. At least 30 days of the sentence shall be served without the benefit of probation or suspension of sentence.

La.R.S. 14:39.2 First Degree Vehicular Negligent injuring – (D)(1) shall be fined not more than $5000 or imprisoned with or without hard labor for not more than 10 years or both. (2) BAC 0.15 percent or a prior OWI conviction shall be fined not more than $5000 and imprisoned without or without hard labor for not less than 2 nor more than 10 years. At least 2 years of the sentence shall be served without the benefit of probation, parole, or suspension of sentence. During any period of probation, the offender shall participate in a court-approved substance abuse

treatment program and may require successful completion of a court-approved driver improvement program.

La.R.S. 14:43.7 Administration of Surgical Castration for Certain Sex Offenders; Failure to Comply with Court Order – Surgical castration as part of a sentence with a penalty for failure to comply.

La.R.S. 14:57.1 Vandalizing, Tampering with or Destroying a Crime Camera System – (B) Crime camera system means any camera or license plate reader erected or installed for the purpose of observing or deterring illegal activity as well as other listed component parts necessary for proper functionality and operation. (C) Punishable with or without hard labor, for not more than 2 years, or may be fined not more than $2000, or both.

La.R.S. 14:62 Simple Burglary – Now covers squatting and the penalty includes liability for damages.

La.R.S. 14:64.2 Carjacking – (B) Increased penalties. Effective April 29, 2024.

La.R.S. 14:64.4 Second Degree Robbery –(A)(2) The taking of anything of value from a retail establishment under certain circumstances has been moved from the definition of simple robbery and added to the definition of second degree robbery. (B)(2) penalty of 5 to forty years upon a second or subsequent conviction within the previous 10 years. (B)(3) Any person who commits second degree robbery with a firearm shall be imprisoned at hard labor for an additional period of 5 years without benefit of parole, probation, or suspension of sentence, to be served consecutively to the sentence imposed.

La.R.S. 14:67 Theft – (B)(4)(b) Theft of a package that has been delivered to an inhabited dwelling owned by another shall be imprisoned with or without hard labor, for not more than 2 years, or may be fined not more than $2,000, or both. (C) If the offender commits an assault upon a store or merchant's employee who is acting in the course and scope of his employment duties during the commission or attempted commission of theft, at least 15 days of the sentence shall be served without benefit of probation or suspension of sentence.

La.R.S. 14:67.6 Mail Theft

La.R.S. 14:67.7 Theft or Unauthorized Reproduction of a Mail Receptacle Key or Lock

La.R.S. 14:73.14 Unlawful Dissemination or Sale of Images of Another Created by Artificial Intelligence

La.R.S. 14:95 Illegal Carrying of Weapons **–** Allows any person 18 years of age or older who is not prohibited from possessing a firearm under state or federal law to carry a concealed weapon without a permit. Effective July 4, 2024.

La.R.S. 14:98 Operating a Vehicle While "Impaired" – Changed the term under the influence to impaired; addresses impairment by alcohol, any other drug, combination of drugs, or combination of alcohol and drugs; and defines "drug" as any substance or combination of substances that, when taken into the human body, can impair the ability of the person to operate a vehicle safely. Removed the affirmative defenses that the label on the container of the prescription drug or the manufacturer's package of the drug does not contain a warning against combining the medication with alcohol and the operator did not knowingly consume quantities of the drug or drugs that substantially exceed the dosage prescribed by the physician or the dosage recommended by the manufacturer of the drug. *See also* La.R.S. 14:32.1, 14:32.8, 14:39.2, 14:39.2.

La.R.S. 14:98.1, **La.R.S. 14:98.2**, **La.R.S. 32:378.2**, **La.R.S. 32:414**, **La.R.S. 32:667**, **La.R.S. 32:668** – Changes to the time period for use of an ignition interlock device. Effective July 1, 2024.

La.R.S. 14:103.3 Disturbing the Peace; Residences – No person shall petition, picket, demonstrate, or assemble with other persons within 50 feet of an individual's residence in a manner which interferes, disrupts, threatens to disrupt, or harasses the individual's right to control or use his residence.

La.R.S. 14:108 Resisting an Officer – (B) Obstruction of an individual now includes the failure to provide or display the person's state issued driver's license or identification upon the officer's request when the person is an operator of a motor vehicle, the person has been lawfully detained for an alleged violation of a law, and the officer has exhausted all resources at his disposal to verify the identity of the person.

La.R.S. 14:108.1 Aggravated Flight from an Officer – (E) Increased the penalty from 5 to 10 years and from 10 to 15 for offenses resulting in serious bodily injury.

La.R.S. 14:109 Approaching a peace officer lawfully engaged in law enforcement duties – (A) No person shall knowingly or intentionally approach within 25 feet of a peace officer who is lawfully engaged in the execution of his official duties after the peace officer has ordered the person to stop approaching or to retreat. (C) provides the affirmative defense of not receiving or understanding the command.

La.R.S. 14:202.1 Residential Contractor Fraud – (D)(2) when the misappropriation or intentional taking amounts to a value of $1000 or more and the victim is 65 or older, the defendant shall be imprisoned, with or without hard labor, for not more than 5 years to be served concurrently with the sentence imposed.

La.R.S. 14:133.1.1 Election Fraud or Forgery

La.R.S. 15:574.22 Parole Ineligibility – No person committed to the Department of Public Safety and Corrections for an offense committed on or after August 1, 2024, shall be eligible for parole except a person who satisfies the provisions of R.S. 15:574.4(D), (E), (F), (G), (H), (J), or (K). Effective April 29, 2024. *See also* La.R.S. 14:574.4

La.R.S. 15:1352 Definitions – Added 17 offenses to the definition of racketeering activity. Effective June 10, 2024.

La.R.S. 46:1844 Rights of the Victim – (K**)** The court must allow a person presenting a victim impact statement to direct the statement toward the defendant, unless doing so disturbs the order and decorum of the courtroom.

La.Code Crim.P. art. 62 Authority of Attorney General **–** (D) Any pleading containing an allegation of unconstitutionality of a criminal law shall be in writing and served upon the attorney general of the state. Upon proper service, the attorney general shall have 30 days to respond to the allegations or represent or supervise the interests of the state. The attorney general shall have a right to *directly appeal* adverse rulings to the supreme court of Louisiana for supervisory review whether or not the attorney general participated in the underlying proceeding. Effective April 29, 2024.

La.R.S. 49:257 Legal Representation of Certain State Agencies – (C) Notwithstanding any other law to the contrary, the attorney general, at his discretion, shall represent or supervise the representation of the interests of the state in any action or proceeding in which the constitutionality of a state statute or of a resolution of the legislature is challenged. In all other proceedings in which the constitutionality of a law is challenged, the attorney general shall be served notice or a copy of the pleading. The attorney general, at his discretion, shall be permitted to present, represent, or supervise the representation of the state's interest in the proceeding if the proceeding is in accordance with La.Code Crim.P. art. 62(D). Effective April 29, 2024.

La.Code Crim.P. art. 389 Burden of proof; justification of self-defense raised; probable cause – (A) In any criminal proceeding in which the justification of self-defense is raised pursuant to R.S. 14:19 or 20, the state shall have the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense. (B) Any defendant intending to assert the justification of self-defense pursuant to R.S. 14:19 or 20 shall provide written notice to the district attorney within 10 days after the state has moved for discovery under Article 724. Thereafter, the court may, for good cause shown, allow a defendant to provide such notice at any time before the commencement of the trial. (C) A peace officer shall consider evidence of self-defense in accordance with R.S. 14:19 or 20 when determining if probable cause exists to conduct an arrest.

La.Code Crim.P. art. 571 Crimes for which there is No Time Limitation – Added molestation of a juvenile or person with physical or mental disabilities.

La.Code Crim.P. art. 572 Limitation of Prosecution of Noncapital Offenses – Allows the prosecution of any sex crime to be initiated outside of the current time limitations when the identity of a suspect is established using newly discovered photographic or video evidence. Prosecution must commence within 3 years of the date the defendant's identity is established. Effective March 5, 2024.

La.Code Crim.P. art. 573.4 Running of the Time Limitation; Exception; Third Degree Rape – The limitation established by article 572 does not commence until the crime of third degree rape is discovered by the victim.

La.Code Crim.P. art. 582 Time Limitation; Effect of New Trial – (A) When a defendant obtains a new trial through a motion for new trial, appeal, post-conviction relief, or any other mechanism provided in state or federal law, or when there is a mistrial, the state shall commence the second trial within one year from the date the new trial is granted, or the mistrial is ordered, or within the period established by Article 578, whichever is longer. (B) If the state seeks review of the granting of the new trial, the period of limitations in this Article shall not commence to run until the judgment granting the new trial has become final by the state exhausting all avenues of review in the appropriate appellate courts, including the Louisiana Supreme Court. Effective May 23, 2024.

La.Code Crim.P. art. 893 Suspension and Deferral of Sentence and Probation in Felony Cases – (A)(B) Increases the maximum length of probation from 3 to 5 years. (G) Specialty courts. (H)(2) Compliance credits. Effective date listed as April 29, 2024. *But see* 2024 La. 2nd Ext. Sess. Acts No. 8, § 4 stating it is applicable to offenses committed on or after August 1, 2024.

La.Code Crim.P. art. 897 Termination of Probation or Suspended Sentence; Discharge of Defendant – Exclusions added.

La.Code Crim.P. art. 899.1 Administrative Sanctions for Technical Violations – (A) Administrative sanctions for technical violations of probation are available for all offenses. Effective date listed as April 29, 2024. *But see* 2024 La. 2nd Ext. Sess. Acts No. 8, § 4 stating it is applicable to offenses committed on or after August 1, 2024.

La.Code Crim.P. art. 900 Violation Hearing; Sanctions – (A)(6)(b) Removed tiered sentencing. Provides a sentence of not more than 90 days without diminution of sentence for all technical violations. (A)(6)(c) Credit for time served prior to a revocation hearing for time in actual custody while being held for a technical violation applies only to a defendant's first revocation for a technical violation. (A)(6)(d) What is considered a technical violation has changed. Effective date listed as April 29, 2024. *But see* 2024 La. 2nd Ext. Sess. Acts No. 8, § 4 stating it is applicable to offenses committed on or after August 1, 2024.

La.Ch.Code art. 804 Definitions – (1)(a) ***Before March 1, 2019, and on or after April 19, 2024***, "child" means any person under the age of twenty-one, including an emancipated minor, who commits a delinquent act ***before attaining 17*** years of age. (1)(b) ***From March 1, 2019, and until June 30, 2020***, "child" means any person under the age of twenty-one, including an emancipated minor, who commits a delinquent act on or after March 1, 2019, until June 30, 2020, when the act is not a crime of violence as defined in R.S. 14:2 and ***occurs before the person attains 18*** years of age. (1)(c) From ***July 1, 2020, until April 19, 2024***, "child" means any person under the age of twenty-one, including an emancipated minor, who commits a delinquent act ***on or after July 1, 2020, until April 19, 2024***, and ***before the person attains 18*** years of age. Effective April 19, 2024.

La.Ch.Code art. 897.1 Disposition After Adjudication of Certain Felony Grade Delinquent Acts – (B) Prohibits modification of sentence for a child 14 years or older when he/she committed first degree rape or aggravated kidnapping. (C) Calls for secure confinement for a second or subsequent offense that is a crime of violence and allows for placement in a secure public or private institution. (D) Juveniles in secure confinement for armed robbery, carjacking, or a second or subsequent crime of violence are eligible for modification after serving 24 months or if the disposition is less than 36 months after serving 1/2 of the disposition. (E) Sets froth the considerations for modification of disposition. Effective July 1, 2024.

JURISPRUDENCE

Motion to Quash

State v. Shirley, 24-260 (La. 6/5/24), 386 So.3d 279 – The State alleged Marshall Rayburn, while wearing a court-ordered electronic ankle monitor, repeatedly breached the perimeter of the residence of Peggy Rayburn, from whom he had been ordered to stay away. Ultimately, Marshall Rayburn shot and killed Peggy Rayburn and attempted to kill her neighbor. The State further alleged that defendant, as an employee of the electronic monitoring company, was aware of the perimeter breaches but never attempted to inform law enforcement of them. The defendant was indicted for negligent homicide and subsequently filed a motion to quash. The defendant's arguments pertained to her acts or omissions, the existence of a duty and its scope, and the degree of negligence. The first circuit granted the motion, finding the conduct alleged did not provide a legal basis for the crime charged. The supreme court found the arguments raised by the defendant in motion to quash amounted to a defense on merits of the charge. Thus, the first circuit's ruling was vacated. The dissent said the defendant fell asleep on the job and did not alert police. *See also State v. Hopkins*, 24-399 (La. 6/5/24), 385 So.3d 1145, which charged the owner of the electronic monitoring company.

State v. Chapman, 24-17 (La. 4/3/24), 382 So.3d 81 – The State asserted defendant, a sheriff's deputy, committed the offense of malfeasance in office by intentionally performing his duties in an unlawful manner when he re-entered a home after consent was withdrawn. The supreme court found the motion to quash was properly denied.

Time Limitation

State v. Mouton, 23-723 (La. 5/10/24), 384 So.3d 845 – Only when a premature motion asserting a preliminary plea is timely re-urged after the initiation of prosecution does it suspend the limitation period to commence trial. Additionally, the third circuit erred in *State v. Simmons*, 22-208 (La. App. 3 Cir. 10/19/22), 350 So.3d 599, *writ denied*, 22-1622 (La. 2/7/23), 354 So.3d 675, in finding that the court closure related to Hurricane Laura interrupted the time limitation under La.C.Cr.P. art. 579 when orders authorized by La.Code Crim.P. art. 958 and issued by the supreme court suspended the time limitations. Article 958 was enacted in 2020 and allows the supreme court to issue 30-day orders of suspension of "all time periods, limitations, and delays pertaining to the initiation, continuation, prosecution . . . of

any prosecution of any state . . . criminal . . . matter . . .” in the event “the governor has declared a disaster or emergency pursuant to the provisions of R.S. 29:721 et seq.”

Objections

State v. Santiago, 23-501 (La. 5/10/24), 384 So.3d 879 – The fourth circuit found the defendant tacitly objected to the trial court’s erroneous ruling regarding the number of peremptory challenges by attempting to exercise a seventh challenge. The supreme court held the contemporaneous objection rule does not allow a tacit or implicit objection.

State v. Sagastume, 22-1824 (La. 12/8/23), 379 So.3d 1243 – Per La.Code Crim.P. art. 800, a defendant must object after a court ruling refusing to sustain his challenge for cause even when his challenge was accompanied by clearly stated reasons.

Verdicts

State v. Digerolamo, 24-287 (La. 4/30/24), 383 So.3d 911 – The jury’s verdict finding defendant was read in open court by the minute clerk. After neither party requested polling, the trial court thanked the jurors for their service and dismissed them to the jury room. The trial court then declared the case concluded, adjourned court, and met privately with the jury. The jury continued to deliberate and changed its verdict. The supreme court found the judge erred in allowing continued deliberations, a change of verdict, and granting a mistrial months later.

State v. McDowell, 23-508 (La. 3/5/24), 379 So.3d 1256 – Attempted domestic abuse battery with child endangerment is a cognizable offense and a responsive verdict to the charge of domestic abuse battery with child endangerment.

Recusal

State v. Mire, 23-1010 (La. 12/5/23), 373 So.3d 709 – Under the “unique circumstances presented” in the first degree murder prosecution, which sought the death penalty, the supreme court reversed the trial court’s denial of the defendant’s motion to recuse inasmuch as the judge’s brother was a detective with the Ascension Parish Sheriff's Office and was a link in the chain of custody for evidence that the state intended to present at trial, noting there was a substantial and objective basis for recusal which on its face may cause doubt as to neutrality.

Notice of Intent/Return Date

State v. Barton, 23-331 (La.App. 3 Cir. 5/4/24) (unpublished opinion) – Uniform Rules—Courts of Appeal, Rule 4–3 contains mandatory language directing the district court to set a reasonable return date in response to a timely filed notice of intent. Thus, the trial court erred when it denied relator's request to set a return date.

State v. Tolliver, 24-323 (La.App. 3 Cir. 7/16/24) (unpublished opinion) – The trial court properly denied relator's motion for extension to file supervisory writs filed more than 30 days after the trial court's ruling inasmuch as the trial court may not extend the time for filing after the delay in Uniform Rules—Courts of Appeal, Rules 4–2 and 4–3 has expired.

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

Prepared for
Third Circuit Judges' Association CLE
Lake Charles, LA
August 23, 2024

JUDGES OF THE THIRD CIRCUIT

Chief Judge Elizabeth A. Pickett
Judge Shannon J. Gremillion
Judge D. Kent Savoie
Judge Van H. Kyzar
Judge Candyce G. Perret
Judge Jonathan W. Perry
Judge Sharon Darville Wilson
Judge Charles G. Fitzgerald
Judge Gary J. Ortego
Judge Ledricka J. Thierry
Judge Guy E. Bradberry
Judge Wilbur L. Stiles

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PRESCRIPTION

***Green v. Dauphinet*, 23-521 (La.App. 3 Cir. 2/7/24), 380 So.3d 169. (Stiles, J., writing, Pickett and Fitzgerald, JJ.), *writs denied*, 24-299 (La. 4/30/24), 383 So.3d 931, 24-319 (La. 4/30/24), 383 So.3d 932.**

Plaintiff Green alleged that he was leaving a bar when a city police officer unlawfully pushed him to the ground and violently beat him before arresting him. The charge of resisting arrest was later dismissed. Plaintiff filed suit against the officer and City officials, advancing causes of action for second degree battery, false imprisonment while armed with a dangerous weapon, and intentional infliction of emotional distress. Plaintiff asserted that his claims arose from "crimes of violence" and that the two-year prescriptive period of La.Civ.Code art. 3493.10 was therefore applicable to his suit. Defendants filed exceptions of prescription, arguing that Plaintiff merely speculated that the officer's actions constituted crimes of violence and, therefore, the one-year period of La.Civ.Code art. 3493 was controlling.

The trial court sustained the exception and dismissed Plaintiff's claims.

HELD: *Reversed and Remanded.*

The panel observed that the legislature designated enumerated offenses in La.R.S. 14:2(B)'s definition of "crimes of violence," including second degree battery and false imprisonment; offender armed with a dangerous weapon. The Plaintiff alleged each element of those offenses in his petition. The further claim of intentional infliction of emotional distress was derivative of those listed offenses. The trial court therefore erred in finding the matter prescribed.

The panel found no merit in Defendants' claim that Plaintiff was required to allege that the officer used his weapon in the altercation in order to advance his claim for false imprisonment while armed with a dangerous weapon. That argument was based on the definition of "dangerous weapon." However, the correct analysis begins with the definition of "crime of violence," wherein the legislature designated the crimes included within that definition by their nature. The statute does not limit the offense to use, but provides that it "involves the possession or use of a dangerous weapon." Legislative intent also undermined Defendants' claim that La.Civ.Code art. 3493.10 requires a defendant to have been charged with a qualifying crime of violence. Article 3493.10 does not include such a requirement. Defendants' suggestion would read a substantive element into the legislation that is not reflected in the unambiguous wording of the Article.

Finally, the panel rejected Defendants' contention that Plaintiff's claims must be viewed as ones for "excessive force" and thus subject to the one-year period of La.Civ.Code art. 3492. Although a person making "a lawful arrest" may use "reasonable force," Plaintiff alleged that he was subject to unlawful arrest and that the officer acted violently and brutally.

***Ardoin v. Certain Underwriters at Lloyd's of London*, 23-719 (La.App. 3 Cir. 4/3/24), 387 So.3d 676. (Ortego, J., writing, Perret & Bradberry, JJ.)**

Property owner, Tommy M. Ardoin, Jr. in his capacity as Executor of Succession of Tommy M. Ardoin, Sr., appealed the judgment of the trial court sustaining the exceptions of prescription and no cause of action filed by Defendants, dismissing plaintiff's claims.

Property owner filed original Complaint in the Western District of Louisiana ("WDLA") on August 25, 2022[1] against subscribers to insurance market for failure to pay amounts owed under policy arising from damages incurred during hurricane, and alleging subscribers denied his claim in bad faith. Defendants were served with process through the Louisiana Secretary of State on December 15, 2022. Noting that in Plaintiff's claims the amount in controversy did not meet the $75,000 jurisdictional minimum, Defendants filed a Motion to Dismiss for lack of subject matter jurisdiction, which Judge Cain of the WDLA granted on March 6, 2023. The U. S. Fifth Circuit Court of Appeals dismissed Plaintiff's appeal on July 18, 2023, for want of prosecution.

After Judge Cain dismissed his federal complaint, Plaintiff filed his second petition for damage in the Thirty-First Judicial District Court on April 5, 2023, more than two years after Hurricane Delta. Defendants then filed the Exceptions of Prescription and No Cause of Action. After hearing, the state court granted the exceptions and dismissed Plaintiff's claims, with prejudice, by Judgment signed and noticed on September 20, 2023. ***HELD:*** *AFFIRMED.*

Prescription:

Pertinent to this argument, La.Civ.Code article 3462 (emphasis added) provides as follows:

> Prescription is interrupted when the owner commences action against the possessor, or when the obligee commences action against the obligor, in a court of competent jurisdiction and venue. **If action is commenced in an incompetent court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period**.

Plaintiff argues that the district court erred in finding that his filing of suit in the WDLA did not interrupt prescription. Plaintiff contends his Complaint alleged an amount in controversy that was more than the $75,000 jurisdictional minimum. Plaintiff notes that Louisiana does not allow plaintiffs to allege specific monetary amounts in their petitions. Furthermore, as Plaintiff alleged claims of bad faith resulting in penalties and attorney fees against Defendants, Plaintiff argues he successfully met the jurisdictional minimum for diversity jurisdiction. Therefore, the first suit filed in federal court served to interrupt prescription as to the second suit filed in state court.

Defendants argue that Plaintiff's primary argument rests on the flawed assertion that the WDLA federal complaint interrupted prescription such that the state petition was timely. Defendants contend the federal court ruling is final and not reviewable by this state court. Defendants argue that Plaintiff's attempt to re-argue federal court subject matter jurisdiction on appeal must be rejected because a state court has no power to re-consider a federal court's final judgment. Moreover, Defendants contend that as a final, non-appealable judgment, the federal court's dismissal of the Complaint for lack of subject matter jurisdiction is res judicata and cannot be re-litigated or collaterally attacked in this state court proceeding. La.R.S. 13:4231. Thus, Defendants conclude that the complaint did not interrupt prescription, and Plaintiff's claims have prescribed and have no cause of action.

After a review of the record, we find Plaintiff's arguments fails because (1) the WDLA was not a competent court of jurisdiction, and (2) Defendants were not served by process within

[1] *Ardoin v. Certain Underwriters at Lloyds London*, No. 2:22-CV-04142, (W.D. La. Mar. 6, 2023) (unpublished opinion) (2023 WL 2386887), *appeal dismissed*, No. 23-30189 (5th Cir. July 18, 2023) (unpublished opinion) (2023 WL 6458645).

the Hurricane Delta prescriptive period. Specifically, Defendants were not served with the state petition until December 15, 2022, two months after October 9, 2022, the end of the prescriptive period for Hurricane Delta claims. Thus, we find the court correctly sustained Defendants' Exception of Prescription.

No Cause of Action:

Plaintiff argues that not only have his claims not prescribed for the reasons described in previous portions of this opinion, but he states a cause of action in his petition when he alleged claims of breach of contract and bad faith under La.R.S. 22:1973 and La.R.S. 22:1892.

Defendants argue that Plaintiff's bad faith prescription argument is moot because Plaintiff's hurricane claims have prescribed. Thus, Plaintiff has no cause of action for any of the damages alleged in the petition, including bad faith, attorneys' fees or consequential damages pursuant to La.R.S. 22:1892 or La.R.S. 22:1973.

The Louisiana Supreme Court recently held that an insurance policy's two years contractual limitation on institution of suits applies to all claims arising out of hurricane damage, including claims for breach of good faith duties under La.R.S. 22:1892 and La.R.S. 22:1973. *Phyllis Wilson v. Louisiana Citizens Prop.,* 23-1320, (La. 1/10/2024), 375 So.3d 961. Because Plaintiff's hurricane claims prescribed, and there is no "amount due," Plaintiff has no cause of action for bad faith penalties, attorneys' fees, costs, or other damages pursuant to La.R.S. 22:1892 or La.R.S. 22:1973.

Accordingly, we find the court correctly sustained Defendants' Exception of No Cause of Action.

***Mosing v. Doug Ashy Building Materials, Inc.,* 23–3 (La.App. 3 Cir. 11/22/23), 375 So.3d 613 (Savoie, J. writing; Perry & Ortego, JJ.).**

Plaintiffs Gregory and Donna Mosing appealed the judgment of the trial court, sustaining the exceptions of prescription filed by Defendants, Doug Ashy Building Materials, Inc. and Master Wall, Inc. and dismissing the Mosings' claims.

The Mosings entered into a contract with a contractor to re-stucco approximately ninety percent (90%) of the exterior of their home. The contractor suggested the Mosings use stucco manufactured by Master Wall mixed with paint manufactured by Doug Ashy. The project was completed in December 2018. In the middle of 2019, the Mosings noticed yellowing in the finish of the stucco. The Mosings filed suit against Doug Ashy and Master Wall on June 2, 2021, alleging claims for negligence, products liability, and redhibitory defects in the stucco and/or paint. In response, Doug Ashy and Master Wall filed exceptions of prescription.

Held: Affirmed. Regarding the Mosings claim based on redhibition, the petition states that the re-stuccoing of the Mosings' residence was completed in December 2018. Using this completion date as the date of delivery of the defective product, the Mosings' redhibition claim against Defendants would have prescribed in December 2020, pursuant to La.Civ.Code art. 2534. The Mosings further allege in their petition that they noticed the yellowing of the stucco in the middle of 2019. Therefore, one year from "the day the defect or unfitness was discovered by the buyer" would be the middle of 2020. La.Civ.Code art. 2534. In accordance with La.Civ.Code art. 2534, the Mosings' redhibition claim prescribed in December 2020 because that is the date that occurred first. The Mosings filed this lawsuit on June 2, 2021; therefore, this matter is prescribed on its face as to the redhibition claim.

The Mosings' negligence and products liability claims run from the day the damage is sustained. The petition alleges that the yellowing occurred to the stucco in the middle of 2019. No specific date was given. However, these claims would prescribe in the middle of 2020. Suit was not filed until June 2, 2021. As a result, these claims are prescribed on the face of the petition as well.

The Mosings argue *contra non valentem* applies to this case. We found the Mosings had constructive knowledge of the defect in the summer of 2019, when they first noticed the yellowing of the stucco. This excited their attention, put them on guard and had them call for an inquiry, specifically calling their contractor out to their home to examine the stucco. This led to further inquiries and inspections. Although they did not have the actual knowledge of the facts that would entitle them to bring a suit, they had constructive knowledge of the defect. Neither the third or fourth category of *contra non valentem* apply to this case.

CIVIL PROCEDURE

***Arnaud v. George, In His Capacity as State Registrar and Bureau Director, Office of Vital Statistics*, 23-744 (La.App. 3 Cir. 4/24/24), 387 So.3d 818. (Wilson, J., writing, Perret & Thierry, JJ.)**

Baylie Fatih Arnaud (Arnaud) filed a petition in proper person to have the State Registrar issue a new birth certificate to change the gender marker from female to male. The trial court granted the petition, but the State appealed, alleging that the requirements of La.Code Civ.P. art. 1704 were not followed. We found that the trial court's judgment was an absolute nullity because the State Registrar was not served with the petition was required by Article 1704. The record was devoid of any proof that citation and service were made on the State Registrar, and no hearing was held before the district court signed the judgment ordering the State Registrar to change the gender marker and issue a new certificate of live birth. Arnaud did not file a brief with this court.

This court noted that "[e]ven assuming that there was valid citation and service of the petition for gender marker change on the State Registrar, the signing of the judgment in this case as tantamount to the signing of a default judgment since no answer was filed by the State Registrar and since no hearing was held." Because we found that the judgment was an absolute nullity, this court did not address the State Registrar's argument that La.R.S. 40:62(C) (Issuance of new birth certificate after anatomical change of sex by surgery) requires the district court to conduct an evidentiary hearing "where the proof/evidence could be offered and introduced into the record" for consideration before ordering the issuance of a new birth certificate.

HELD: ***Vacated and Remanded*.**

***Pinnacle Constr. Group, L.L.C. v. Devere Swepco JV, LLC*, 23-551 (La.App. 3 Cir. 2/28/24), 380 So.3d 879. (Gremillion, Judge, writing, Perry & Thierry, JJ.)**

This litigation dated to the filing of plaintiff's petition in 2013, in which it sought payment for construction work undertaken in a residential development in Eunice. The owner and general contractor were sued. When the owner failed to answer the suit, the court entered a default judgment against it. The owner later filed a petition in the lawsuit to annul the judgment because it had posted a bond securing payment in accordance with La.R.S. 9:4835; thus, pursuant to the

Private Works Act, its obligation was extinguished. The owner later filed its annulment action in a separate suit that was consolidated with the one at bar.

In December 2022, Liberty Mutual, the surety on the bond, filed an ex parte motion to dismiss on the ground of abandonment. The pertinent period during which Liberty Mutual claimed the matter was abandoned stretched from May 16, 2016, when Pinnacle filed an opposition to the owner's motion to amend its petition, and September 25, 2020, when Pinnacle filed a motion to have hearings on various exceptions and the petition for annulment refixed for hearing. During the intervening period, those exceptions and the annulment action had been set for hearing for September 25, 2017, but the parties appeared on the record to continue the hearings because they were negotiating settlement.

The trial court signed the ex parte order, and Pinnacle filed a motion to set it aside, which was denied. On appeal, Pinnacle asserted that the ex parte motion should not have been signed and that the defendants had waived abandonment. Abandonment is governed by La.Code Civ.P. art 561. The article *requires* the trial court to sign a properly supported ex parte motion. Thus, the trial court did not err in signing the motion. Pinnacle asserted that the contractor and Liberty Mutual waived abandonment because they moved for a continuance of a hearing scheduled for March 7, 2022. A step sufficient to evidence abandonment is the same as a step in the prosecution of the case. Louisiana courts have uniformly held that moving for a continuance is not a step in the prosecution of the claim; therefore, moving for a continuance does not suffice to waive abandonment, either.

***Flowers v. Jena Band of Choctaw Indians*, 23-728 (La. App. 3 Cir. 6/12/24), ___ So.3d ___ (2024 WL 2947807). (Pickett, C.J., writing, Ortego & Thierry, JJ.)**

The patron of a casino owned and operated by the Jena Band of Choctaw Indians sued to recover damages for injuries she sustained on the casino premises. She appealed two judgments. The first judgment granted the casino insurer's exception of no right of action and dismissed the patron's claims against it with prejudice. The second judgment denied the plaintiff's motion to file a second supplemental and amending petition to add another defendant.

HELD: AFFIRMED. The trial court properly granted the insurer's exception of no right of action. The Indian tribe had sovereign immunity; therefore, the patron could not obtain a judgment against the tribe. Pursuant to its insurance policy, the insurer is only obligated to pay what the tribe is obligated to pay, so the patron had no right of action against the tribe. Additionally, the trial court did not err in denying the patron's motion to amend her petition. The patron sought to add a new defendant, a tribe employee, almost four years after her March 2020 injury in an attempt to avoid having her claims dismissed. The employee, however, also had sovereign immunity in his capacity as tribe employee and would not be covered by the tribe's insurance policy. Therefore, adding the employee in his personal capacity would likely restart this litigation again from square one with the new defendant seeking to add additional parties. Early in the litigation, the trial court warned counsel that it did not believe subject matter jurisdiction existed, but counsel waited over two years to add another defendant. The trial court did not err in refusing to allow the amendment.

***Levine v. Nationwide Agribusiness Insurance Company, et al.,* 23-488 (La.App. 3 Cir. 3/6/24), 381 So.3d 908, *writ denied*, 24-426 (La. 6/19/24), 386 So.3d 310. (Panel: Fitzgerald, J., writing, Pickett & Stiles, JJ.)**

Deputy Charles Levine suffered serious injuries when he was hit from behind by a box truck driven by Renauldo Hawkins, an employee of Universal Environmental Services. In addition negligence claims against Hawkins, Levine asserted direct negligence claims against UES for negligent hiring, training, and supervision. Prior to trial, defendants filed "Defendants' Binding and Irrevocable Judicial Admissions and Judicial Confessions Regarding Liability" in which they confessed that Hawkins was 100% at fault and that UES was vicariously liable. They reserved only their right to contest medical causation and damages only and advised the jury of the limited scope of the trial.

At trial, plaintiffs pursued their claims against both Hawkins and UES directly. After testimony regarding the fault of First Advantage, a known but unnamed third party, the trial court allowed defendants to add First Advantage to the jury verdict form. The court did so despite the judicial confession and evidence that UES was the ultimate responsible party. The request and objections to this addition were made off the record. Confusingly, the jury found 200% liability, assigning Hawkins 100%, UES 70%, and First Advantage 30%. Then the trial court reduced the $5,000,000 award to plaintiff by 30% based on that allocation. The trial court denied motions for a JNOV and new trial.

HELD: The trial court erred in adding a third party to the jury verdict form after defendants filed a valid judicial confession and in light of the evidence. The appellate court vacated the judgment, reallocated fault, and reinstated the full award after a de novo review of the record and after determining the issue had been preserved for appeal despite the scant record evidence. Further, the general damage award was found to be reasonable and the collateral source rule was applicable. The court of appeals applied the Louisiana Supreme Court's recent decision in *Pete v. Boland Marine and Manufacturing Company, LLC,* 23-170 (La. 10/20/23), __So.3d__ (2023 WL 6937381) which revised the analysis of general damage awards.

***City of Alexandria v. Villard*, 23-632 (La.App. 3 Cir. 3/20/24), 382 So.3d 492 (Bradberry, J. writing; Savoie and Stiles, JJ.)**

The City of Alexandria and the mayor, Jeff Hall, filed suit for declaratory and injunctive relief against the members of City Council who voted to amend the Mayor's budget claiming that two amendments violated the City's Home Rule Charter. The trial court denied a motion for summary judgment filed by the City and one of the council members who voted against the amended budget.

HELD: *Judgment Vacated and Remanded.* Following the filing of the action, the trial court asked the parties to try and work things out, and a valid budget was passed in June 2021. With the passing of the budget, this court was deprived of subject matter jurisdiction because courts will not decide abstract, hypothetical, or moot controversies, or render advisory opinions with respect to such controversies. Also, there was no further relief the court could give to the City since it had not requested penalties as allowed by La.R.S. 39:1315, should judgment be rendered in its favor.

The case was remanded to the trial court to decide the remaining issue of the City Council Members' reconventional demand for attorney fees and costs.

***Hebert v. Elegant Reflections, LLC d/b/a Elegant Reflections LLC of Texas*, 23-278 (La.App. 3 Cir. 12/20/23), 377 So.3d 453. (Wilson, J., writing; Ortego & Stiles, JJ.) (Ortego concurs without reasons.)**

Defendant, Elegant Reflections, appeals the default judgment of the trial court in favor of plaintiffs, Matthew and Michelle Hebert, finding Elegant liable for defective construction and breach of contract and awarding the Heberts damages for emotional distress, repair costs, attorney's fees, and a refund of all money paid to Elegant.

HELD: ***Vacated and Remanded***. On appeal, Elegant argued that the trial court erred by rendering judgment against Elegant because it was not properly served with the citation and petition. We first note that insufficiency of service is to be raised by a declinatory exception and shall be raised prior to the signing of a default judgment. La.Code Civ.P. art 928(A). However, under La.Code Civ.P. art. 2002, a final judgment shall be annulled if rendered against a defendant who has not been served as required by law. When effecting service under the long arm statute, La.R.S. 13:3205 requires that an affidavit be filed showing that process was mailed to defendant "to which shall be attached the return receipt of the defendant." The affidavit in the present case only included a tracking printout showing that the documents were delivered "to an individual at the address[.]" Because there was not strict compliance with La.R.S. 13:3205, the default judgment is an absolute nullity. As the nullity is patent of the face of the proceedings, the issue is properly before this court on appeal. We vacate the default judgment, and the matter is remanded to the trial court for further proceedings. All other assignments of error are rendered moot.

***Pinnacle Constr. Group, L.L.C. v. Devere Swepco JV, LLC*, 23-551 (La.App. 3 Cir. 2/28/24), 380 So.3d 878. (Gremillion, J., writing, Perry & Thierry, JJ.)**

This litigation dated to the filing of plaintiff's petition in 2013, in which it sought payment for construction work undertaken in a residential development in Eunice. The owner and general contractor were sued. When the owner failed to answer the suit, the court entered a default judgment against it. The owner later filed a petition in the lawsuit to annul the judgment because it had posted a bond securing payment in accordance with La.R.S. 9:4835; thus, pursuant to the Private Works Act, its obligation was extinguished. The owner later filed its annulment action in a separate suit that was consolidated with the one at bar.

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The trial court signed the ex parte order, and Pinnacle filed a motion to set it aside, which was denied. On appeal, Pinnacle asserted that the ex parte motion should not have been signed and that the defendants had waived abandonment. Abandonment is governed by La.Code Civ.P. art 561. The article *requires* the trial court to sign a properly supported ex parte motion. Thus, the trial court did not err in signing the motion. Pinnacle asserted that the contractor and Liberty Mutual waived abandonment because they moved for a continuance of a hearing scheduled for March 7, 2022. A step sufficient to evidence abandonment is the same as a step in the prosecution of the case. Louisiana courts have uniformly held that moving for a continuance is not a step in the prosecution of the claim; therefore, moving for a continuance does not suffice to waive abandonment, either.

***Boatwright, et al. v. Farm Bureau Ins. Co., et al.*, 23-17 (La.App. 3 Cir. 10/18/23), ___ So.3d ___ (2023 WL 6856728), *writ denied*, 24-203 (La. 4/9/24), 382 So.3d 842. (Perry, J., writing; Savoie & Ortego, JJ).**

In December 2018, Nicholas Boatwright, in proper person, filed a petition for damages on behalf of himself and his minor daughter, against several defendants, including Robert Bernard ("Defendant Bernard"). Service of the petition, however, was withheld on all defendants. A supplemental petition was filed, again in proper person, adding several defendants. Though service was requested on the new defendants, service was not requested on Defendant Bernard. A third-filed petition, the first to be filed through counsel, made no request for service on any of the defendants.

In March 2022, Defendant Bernard filed a declinatory exception of insufficiency of service of process and a motion for involuntary dismissal, seeking dismissal of plaintiffs' claims under La.Code Civ.P. art. 1672(C) because service was not requested upon Defendant Bernard within ninety days as required by La.Code Civ.P. art. 1201(C). After initially overruling Defendant Bernard's exception, the trial court subsequently rendered judgment sustaining the exception of insufficiency of service of process and granting the motion for involuntary dismissal. The plaintiffs appealed.

HELD: ***Affirmed.*** This court held that the motion for involuntary dismissal was the appropriate procedural vehicle for plaintiffs' failure to serve citation on Defendant Bernard within ninety days of the commencement of the action. Defendant Bernard's motions for extensions of time to file an answer to plaintiffs' initial and amended petitions did not constitute a waiver of requirement of service of citation within ninety days of filing of petition, and dismissal of plaintiffs' petition for damages against Defendant Bernard, without giving plaintiffs the opportunity to cure the violation, was not manifest error.

DISCOVERY

***Fontenot v. Fontenot*, 23-110 (La.App. 3 Cir. 12/13/23), 378 So.3d 189, *writ denied*, 24-84 (3/19/24), 381 So.3d 711. (Savoie, J. writing; Kyzar & Wilson, JJ.).**

The parties are extended family members related to Percy and Elsie Fontenot. Prior to their deaths, Percy and Elsie established two trusts. Plaintiffs are beneficiaries of both trusts, and Defendants are co-trustees of one or both trusts. The trusts own shares of stock in PJF, Inc., which

is a closely held family corporation that was also established by Percy and Elsie. The trusts together own one hundred percent of the voting stock in PJF, Inc., and approximately eighty percent of the non-voting stock.

The Plaintiffs filed suit against Defendants in their capacities as trustees, based on alleged breaches of fiduciary duties. Plaintiffs allege, *inter alia*, that Defendants, as co-trustees, elected themselves to PJF, Inc.'s board of directors, appointed themselves as officers, paid themselves excessive salaries through PJF, Inc., used PJF Inc. to pay for personal expenses, and are mismanaging the trusts by engaging in self-dealing and enriching themselves at the expense of the trust beneficiaries.

Plaintiffs issued a subpoena duces tecum to PFJ, Inc., who is not a party to the litigation, seeking the production of various financial and other business documents. PJF, Inc. filed a motion to quash, arguing that the action was filed by Plaintiffs in their limited capacities as trustees and that the Trust Code did not confer upon them any rights to demand records of an entity who is not a trustee or party to the litigation. PJF, Inc. also argued that La.R.S. 12:1-1602, which governs the examination of corporate records, does not confer a right of inspection upon beneficiaries of a trust that owns stock in the corporation. The trial court granted the motion, finding that the Plaintiffs did not have inspection rights under La.R.S. 12:1-1602, and Plaintiffs appealed.

***Held*: *Reversed*.** The trial court erred in concluding that La.R.S. 12:1-1602 operates to the exclusion of discovery statutes and that records of a corporation in which a trust owns stock are never discoverable in litigation brought by beneficiaries of that trust. Rather, the corporate records sought are relevant to Plaintiffs' claims arising out of Defendants' alleged breaches of their fiduciary duties, and they are discoverable under La.Code Civ.P. art. 1422. The fact that PJF, Inc.'s records reflect actions taken by Defendants in their capacities as directors and officers, rather than co-trustees, does not shield PJF, Inc. from having to produce its records under the circumstances. By taking on multiple roles with fiduciary duties owed to different persons, Defendants created potential conflict of interest concerns. Even when acting as corporate officers and directors, they remain trustees with a duty of loyalty to the trust beneficiaries.

SUMMARY JUDGMENT

***Hood v. Sasol Chemicals (USA), LLC*, 23-379 c/w 23-579 (La.App. 3 Cir. 5/1/24), ___ So.3d ___ (2024 WL 1896887). (Gremillion, J., writing, Fitzgerald & Ortego, JJ.)**

Plaintiffs sued several defendants and the Calcasieu Parish Police Jury for wrongful death and survival when a tree fell onto the cab of their decedent's truck. The tree was missing a substantial portion of its top and leaned heavily over the roadway. However, it was in leaf and had no visible indications of rot on the road side other than the missing top. The police jury and the landowner each filed motions for summary judgment. Among the evidence introduced were Google Maps photos that showed that the tree had been damaged at least eleven years before the accident. The trial court denied the landowner's motion for summary judgment. On application for supervisory writs, we found that a genuine issue of material fact existed. Experts opined that the condition of the tree should have excited further inquiry by the landowner, who had a contractor whose task it was to inspect its properties and report on such conditions.

Similarly, in the consolidated case, 2024 WL 1898621, the landowner appealed the grant of summary judgment in favor of the police jury. The police jury referred the court to what it maintains is the "dead tree rule," i.e., it is only responsible for the removal of dead trees that pose a hazard to the motoring public. We found that the police jury's duty extends to more than dead trees but also those that otherwise appear defective to the point of posing an unreasonable risk of harm through general observation. The same evidence that prevented the landowner's summary judgment prevented summary judgment in favor of the police jury.

The case also contains a portion regarding which parties are allowed to brief a case on appeal.

***Hebert v. Pro. Outsource Serv.*, 23-347 (La.App. 3 Cir. 2/14/24), 380 So.3d 755. (Wilson, J., writing; Perry & Bradberry, JJ.)**

Mrs. Hebert is employed as a bailiff at the Fifteenth Judicial District Court in Lafayette, Louisiana. In October of 2020, she slipped and fell allegedly as a result of hand sanitizer that had spilled on the terrazzo floor. Mrs. Hebert and her husband filed suit against the company that sold the sanitizer dispenser and its insurer and Lafayette City- Parish Consolidated Government (LCG). LCG filed a motion for summary judgment, claiming that it is entitled to immunity pursuant to La.R.S. 29:735 because its installation of the hand sanitizer dispenser was in direct response to the declared state of emergency caused by the COVID-19 crisis. Once LCG showed that immunity applied, the burden shifted to the Heberts to show that genuine issues of material fact existed regarding any exception to immunity. La.Code Civ.P. art. 966. The Heberts concede that there was no willful misconduct by LCG and argue instead that LCG is not entitled to immunity because it acted so slowly in installing the dispensers that its actions cannot be said to be an emergency response. The Heberts acknowledged that a statewide public health emergency was declared through Proclamation No. 25 JBE 2020 on March 11, 2020. But they contend that the hand sanitizer dispensers were not ordered until April 28, 2020, and not installed until June 30, 2020, even though they had been delivered on May 26, 2020.

We found that none of the arguments advanced by the Heberts present a genuine issue of material fact regarding LCG's entitlement to immunity pursuant to La.R.S. 29:735. The Heberts presented no evidence to show that the actions of LCG were not "emergency preparedness activities" taken in response to a public health emergency. It was undisputed that at the time of Mrs. Hebert's accident, the State was still under an emergency declaration. We affirm the trial court's grant of summary judgment in favor of LCG and the dismissal of all claims against LCG with prejudice.

HELD: ***Affirmed.***

***Hillebrandt on Behalf of Colbert v. State Farm Mut. Auto. Ins. Co.*, 22-286 (La.App. 3 Cir. 11/29/23), 375 So.3d 639. (Wilson, J., writing; Ortego & Stiles, JJ.)**

We reversed a grant of summary judgment in favor of the defendants in a case where Jordyn Colbert, a nine-year-old girl, was hit by a car driven by Kirsten Riggs, a new driver, who was on her way to a Mardi Gras parade with four passengers in the vehicle. The issue was whether the affidavit of Colbert's older brother, Jarayle Thomas, who was a witness to the accident, created a genuine issue of material fact regarding the comparative fault between Riggs and Colbert of

whether Riggs' affidavit absolved herself of any liability. Colbert testified in deposition that she ran into the street without stopping and without looking to get a ball. Riggs testified in her affidavit that she was traveling less than the posted speed when she saw Colbert running across the center line of the street and that Colbert jumped into the air, landed on the hood of the car, roll off the hood and back on the ground before continuing to jog into an adjacent house. Thomas testified in his affidavit that Riggs' vehicle appeared to be speeding, did not try to avoid hitting Colbert, and did not honk its horn before hitting Colbert. Riggs and her insurer filed a motion for summary judgment alleging that there was no evidence that Riggs was negligent in any way because Colbert was left to play outside unsupervised and admitted that she ran into the street without looking to see if a car was coming.

In granting summary judgment, the trial court stated that "the only thing in [Thomas'] affidavit that could possibly create a material issue of fact is the statement from the witness that the defendant, quote, appeared to be speeding." The trial court then stated: "That, in itself, is insufficient to create a material issue of fact. Because, as we know in this case, the speed limit was 45 miles an hour." The trial court then pointed out that "[t]he defendant's affidavit says she was traveling less than the posted speed limit. The defendant's affidavit established that she immediately applied her brakes upon seeing the child." This court found that the trial court's conclusion that Riggs and her insurer met their burden of proof on the motion for summary judgment required the weighing of evidence and the making of credibility determinations.

HELD: ***Reversed and remanded for further proceedings.***

CRIMINAL LAW AND PROCEDURE

State v. Richard, **23-523 (La.App. 3 Cir. 3/20/24), 381 So.3d 1087. (Ortego, J., writing. Kyzar & Fitzgerld, JJ.) (Kyzar concurs with reasons).**

Defendant, Richard, was convicted in the 12th Judicial District Court, Avoyelles Parish, of failure to seek assistance, with death, in violation of La.R.S. 14:502, and sentences to four years imprisonment at hard labor. Defendant appeals her conviction, claiming the evidence was insufficient to establish that defendant possessed knowledge of victim suffering from great bodily injury from drug overdose after defendant and witness finding victim in her car to support conviction. **HELD:** *CONVICTION REVERSED; JUDGMENT OF ACQUITTAL ENTERED; SENTENCE VACATED.*

Defendant was convicted of failure to seek assistance, death related, in violation of Louisiana Revised Statutes 14:502 (A)(1), which in pertinent part, states (emphasis added):

> Any person at the scene of an emergency who ***knows*** that another person has suffered serious bodily injury shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the injured person.

Louisiana Revised Statutes 14:2(C) defines serious bodily injury as injury that "involves unconsciousness; extreme physical pain; protracted and obvious disfigurement; protracted loss or

impairment of the function of a bodily member, organ, or mental faculty; or a substantial risk of death."

After noting that there is no jurisprudence as to the sufficiency of the evidence for failure to seek assistance, as La.R.S. Article 14:502 is a relatively new statute that was enacted on August 1, 2018, the court reviewed the evidence adduced at trial and arguments of the parties.

To support a conviction for failure to seek assistance, death related, under La.R.S. 14:502, the State bears the burden of proving that Defendant: (1) was at the scene of emergency, (2) knew that Ms. Bernard suffered serious bodily injury, (3) failed to give Ms. Bernard reasonable assistance, and (4) the serious bodily injury resulted in Ms. Bernard's death, and thus show that Defendant possessed sufficient knowledge that Ms. Bernard was suffering "great bodily injury" ***and*** that Defendant had intentionally failed to seek medical treatment for Ms. Bernard.

The court found the evidence was clear that as to this tragic incident Defendant, who was Ms. Bertrand's longtime partner, neither participated in Ms. Bertrand's drug use/binge, nor did she provide Ms. Bertrand with any of the "cocktail" of assorted drugs Ms. Bertrand ingested. Additionally, both Defendant and Ms. Adams, the only two witnesses as to Ms. Bertrand's condition, testified and confirmed that when they arrived Ms. Bertrand was in her car and she was conscious, breathing and even snoring, and most importantly, ***without*** any obvious signs of serious physical injury. Specifically, Ms. Bertrand was not experiencing convulsions, foaming at the mouth, bleeding, blue lips, or displaying any other physical signs or symptoms that would cause a rational person to suspect a serious medical emergency was occurring and that in the past it was both their experiences that when Ms. Bertrand used drugs that she would simply "sleep it off" and fully recover. In addition, Dr. Tape testified that it was not unusual for a heroin user to "sleep off" the drugs, as in the case of Ms. Bernard. Further, the investigation of the tribal police department, as the death occurred on a reservation, revealed nothing contradicting Defendant and Ms. Adams's testimony. Thus, finding the evidence adduced at trial was insufficient to support Defendant's conviction.

The court further noted that a conviction on these facts, and as a result of the State's interpretation, would completely undermine the purpose of the statute, which is encouraging persons to provide assistance in the service of saving more lives. Instead, it disincentivizes people from offering help and assistance, even when a person has suffered great bodily injury or is in obvious stress and ignores the realities of substance abuse in every-day life, i.e., the problems and burdens that are placed upon families, friends, spouses, law enforcement, innocent bystanders, and the public in general.

***State v. Hawkes*, 23-234 (La.App. 3 Cir. 12/6/23), 375 So.3d 1063, *writs denied*, 23-1655, 24-69 (La. 5/21/24), 385 So.3d 243, 244. (Wilson, J., writing; Savoie & Kyzar, JJ.)**

A unanimous jury found Defendant, David K. Hawkes, guilty of the responsive verdicts of manslaughter and aggravated assault with a firearm. The trial court sentenced Mr. Hawkes to the maximum forty years without the benefit of probation, parole, or suspension of sentence for manslaughter and seven years for aggravated assault with a firearm. The sentences are to run consecutively.

HELD: ***Affirmed***. The trial court erred in ordering Mr. Hawkes to serve his sentence without benefit of parole and his sentence is amended to delete the denial of parole eligibility. Mr. Hawkes argues on appeal that the composition of the petit jury violated the constitution because the trial court improperly excluded a juror who had a felony conviction that was more than five

years old. As the group allegedly discriminated against was not a protected class, the exclusion was subject to harmless error review. As the excluded juror was never actually called as a juror, the error was harmless. Mr. Hawkes also asserted that his sentence was excessive as a first felony offender. Given that Mr. Hawkes actions were sufficient to support a murder conviction, Mr. Hawkes received the benefit of being convicted of manslaughter. Compared to similar cases, the trial court did not abuse its discretion. Lastly, Mr. Hawkes argues the trial court erred in running his sentences concurrently. Since Mr. Hawkes failed to raise the issue in a motion to reconsider sentence, the issue is precluded from review.

***State v. Watson*, 23-18, 23-19 (La.App. 3 Cir. 10/18/23), ___So.3d___ (2023 WL 6856630), *writ denied*, 382 So.3d 111. (Wilson, J., writing; Gremillion & Kyzar, JJ.)**

In these consolidated cases, a jury found Defendant, Marvin Watson, guilty of two counts of first-degree murder, a violation of La.R.S. 14:30, for the murder of his wife and stepson. Mr. Watson was sentenced to two consecutive terms of life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.

HELD: ***Affirmed***. Mr. Watson claims the evidence was insufficient to support his first-degree murder convictions. The record overwhelmingly shows that Mr. Watson did not kill the victims in self-defense. The physical evidence proved neither victim was armed at the time of shooting, the victims had no non-gunshot wounds, and Mr. Watson had no visible signs of injury suggesting a fight. The only evidence of self-defense was Mr. Watson's own self-serving and conflicting testimony. The evidence viewed in the light most favorable to the prosecution, proved beyond a reasonable doubt all of the elements of first-degree murder.

Additionally, Mr. Watson alleges the trial court erred in denying his motion for change of venue. Mr. Watson presented newspaper articles and social media posts discussing the murders. The trial court denied Mr. Watson's motion for a change of venue and reasoned that the voir dire process would clear up any issues. Considering the factors listed in *State v. Bell*, 315 So.2d 307 (La.1975), Mr. Watson failed to prove the existence of an overriding prejudice in the community that affected his right to an impartial jury. Thus, the trial court did not abuse its discretion in denying the motion to change venue.

***State v. Cooper*, 23-456 (La.App. 3 Cir. 12/20/23), 377 So.3d 923. (Thierry, J., writing; Savoie & Perret, JJ.)**

This appeal involved the trial court's grant of Defendant's Motion for a Change of Venue. Defendant argued motion alleged that due to the "villainization" of Defendant publicly and in social media, the public perception of Defendant was tainted such that h could not receive a fair trial in Acadia Parish. Defendant requested venue be moved to the larger, neighboring parish of Lafayette. No mock or actual coir dire was conducted and no expert testimony or polling data was presented by Defendant. The trial court noted specifically its concern for Defendant's ability to receive a fair trial due to the nature of the pre-trial publicity as it relates to articles claiming he "got off on a technicality" for an earlier crime where he was eventually convicted as a principal to obstruction of justice in a murder case. The trial court concluded that the community from which Defendant's jury would be pulled from had a prejudice towards him. Therefore, it granted the

change of venue from Acadia Parish to Lafayette Parish. The State appealed, contending Defendant failed to meet his burden of proving actual prejudice and the trial court abused its discretion in granting the change of venue.

HELD: ***Reversed and Remanded***. This court found the trial court abused its discretion in granting the change of venue to Lafayette Parish. The articles and news coverage presented at the hearing were from within the first several months of the crime in 2021, and were mostly factual, not inflammatory. Moreover, no polling evidence was offered, and there was no testimony from any witness to substantiate the trial court's conclusion that "the community of person's where [Defendant's] jury will be pulled from has a prejudice towards him." This court noted the law is clear that the burden is on the Defendant seeking a change of venue to demonstrate the extent of prejudice in the minds of the community as a result of such knowledge or exposure to the case. Accordingly, considering the evidence submitted by defendant, viewed in light of the factors set forth in *State v. Bell*, it was concluded Defendant did not meet his burden of demonstrating prejudice in the public mind such that a fair trial in Acadia Parish would be impossible.

State v. Ford, **23-718 (La.App. 3 Cir. 12/13/23), 377 So.3d 900,** ***writ denied,*** **380 So.3d 573. (Kyzar, J. writing; Savoie & Bradberry, JJ.):**

Defendant, in addition to other felony charges, was charged with possession of a firearm by a convicted felon. Defendant sought to quash the charge of possession of a firearm by a convicted felon, arguing that pursuant to the United States Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111 (2022), La.R.S. 14:95.1 was unconstitutional as it applied his circumstances, as the underlying felony forming the predicate for the gun charge was a non-violent, drug-related offense. The trial court denied the motion to quash, finding the statute constitutional. Defendant applied for a supervisory writ.

HELD: ***Writ Granted. Relief Denied.*** At the outset, the court noted that defendant failed to notify the AG that he was contesting the constitutionality of La.R.S. 14:95.1, thus it notified that AG. It further decided to consider defendant's writ since the State's interests were not harmed by the trial court's finding that the statute was constitutional and because it had been notified by the appeal court but had chosen not to respond.

In *Bruen*, the Supreme Court held that the Second and Fourteenth Amendments to the U.S. Constitution protects an individual's right to carry a handgun. It further held that in order for the state to restrict an individual from carrying a handgun, it had to justify its regulation by establishing that the regulation was consistent with the United State's historical tradition of firearm regulation. It further set forth the type of evidence that could be used to show that the regulation was consistent with the historical tradition of firearm regulation. On appeal, the court held that the Supreme Court's holding in *Bruen* did not declare unconstitutional laws making it unlawful for convicted felons to own or possess firearms, such as La.R.S. 14:95.1. The court affirmed the trial court's judgment denying defendant's motion to quash.

State v. Randle, **23-350 (La.App. 3 Cir. 1/31/24), 379 So.3d 858. (Kyzar, J. writing; Savoie & Thierry, JJ.)**

Defendant, along with two co-participants, one being her husband, kidnapped and murdered the victim and then withdrew money from his accounts. She was indicted by a grand

jury for second degree and, following a jury trial, was convicted. She was sentenced to mandatory life in prison without probation, parole, or suspension of sentence. Defendant appeals.

HELD: ***Affirmed; Remanded with Instructions.*** On appeal, the court held that the evidence was sufficient to find that she was guilty of second degree murder. Although defendant argued that the jury should not have believed her husband's testimony due to inconsistencies in his testimony and because he agreed to testify in exchange for possible leniency, the court found that there was abundant other evidence, including her own statements, by which the jury could find her guilty. Defendant testified at trial and admitted to her active participation in the robbery, kidnapping, and murder of the victim. She further admitted that she shoplifted the zip ties, tape, and steel cable used to bind the victim prior to his murder. Although she claimed that she was coerced by her husband into participating in the crime, she admitted that she had never reported him to the police for physical violence. The court held that the jury was aware of the details surrounding the husband's decision to testify and was free to accept or reject his testimony. It further found no internal inconsistency or irreconcilable conflict between his testimony and all of the other evidence. The court also held that defendant's own statements were sufficient to satisfy the elements of armed robbery and aggravated kidnapping.

The court further held that the defense of coercion was unavailable to defendant pursuant to La.R.S. 14:18(6), as it does not distinguish between specific intent murder or felony murder, as argued by defendant. The evidence established that she was not coerced as she had multiple opportunities to disengage from any influence exerted over her by her husband. The court further disagreed with defendant's argument that the trial court erred when it allowed her husband to testify about confidential spousal communications, despite her objection and assertion of the privilege. It held that defendant was not entitled to the privilege since the communications between her and her husband regarding the crime were shared with the third co-participant, her cousin. As defendant failed to rebut the prima facie showing by the state that the communications were not privileged, the trial court did not err in allowing the testimony. The court further rejected defendant's claim that she received ineffective assistance of counsel because her counsel failed to consult an expert on coercive control/intimate partner violence or call any witness regarding her husband's general reputation for truthfulness or their marriage. Since the defense of coercion is not available to a defendant charged with murder, defendant's counsel could not be found to be ineffective for failing to pursue evidence/testimony that would not be admissible. The issue of the husband's reputation and background, as well as his decision to testify at trial, was full explored before the jury, and the jury chose to accept some of his testimony. However, even without his testimony, the jury was presented with overwhelming evidence establishing that defendant was guilty of second degree murder.

***State v. Denton*, 23-313 (La.App. 3 Cir. 11/29/23), 374 So.3d 1157, *writ denied*, 386 So.3d 316. (Kyzar, J. writing; Perry & Fitzgerald, JJ.)**

Defendant was charged with second degree murder and with possession of a firearm by a convicted felon. Following a jury trial, defendant was convicted by a unanimous jury. He was sentenced to mandatory life imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence on the second degree murder conviction, and twenty years at hard labor, without the benefit of probation, parole, or suspension of sentence on the possession of a firearm by a convicted felon, with both sentences ordered to run concurrently. Defendant appeals, arguing

that the evidence was insufficient to prove beyond a reasonable doubt that he was guilty of second degree murder.

HELD: ***Affirmed.*** On appeal, the court held that after considering all of the evidence presented at trial, the evidence was sufficient to prove the elements of second degree murder. The evidence established that defendant fired his gun multiple times through the door as the victim was on the other side, knocking on the door. This evidence was sufficient to prove that defendant had the specific intent to either kill or cause great bodily harm to the victim. The court further held that defendant failed to prove that he was acting in self-defense at the time of the incident. The victim was not attempting to force his way into defendant's motel room, and there was no evidence that the victim was armed with a dangerous weapon. After the shooting, defendant calmly walked out of his motel room, saw the victim lying on the ground, and then walked back into his room. Moreover, defendant never indicated to the investigating officers that he felt threatened by the victim prior to the shooting. The court also rejected defendant's claim that the evidence presented at trial supported a conviction of manslaughter or negligent homicide.

EVIDENCE

***Day v. Thompson.*, 23-301 (La.App. 3 Cir. 5/22/24), ___ So.3d ___ (2024 WL 2339772). (Pickett, C.J., writing, Kyzar & Perry, JJ.)**

In this personal injury action, the driver of an 18-wheeler rear-ended a car driven by Tracey Day on March 17, 2017. Day and her husband filed suit against the operator of the vehicle, the truck owner, the operator's employer, and the vehicle insurer for damages sustained as a result of the collision. Trial was set for September 2021, but the insurer's lawyer requested a continuance because of damage he sustained as a result of Hurricane Ida. The court allowed the continuance, but the court did not allow any further discovery before trial in January 2022.

On the day the trial began, the plaintiff's counsel asked if Mrs. Day could be excused from the trial because she could not sit for longer than 30 minutes. The trial court court allowed her to be absent over the objection of the defendants. Counsel for the insurer then hired a private investigator to follow Mrs. Day during the trial. The investigator recorded Mrs. Day's movements. On the fourth day of trial, the defense attempted to introduce the video and the testimony of he investigator as impeachment evidence. The plaintiffs objected, and the trial court sustained the objection. The defense proffered the videos and the testimony of the investigator.

After the jury awarded over $3.9 million in damages. The defendants appealed, arguing only that the trial court erred in refusing to allow the introduction of the surveillance videos and the testimony of the private investigator.

Held: Affirmed. The trial court has vast discretion concerning the admission of evidence. Given the late date at which the surveillance video was recorded, the previous agreement of the parties to allow no further discovery, and the delay that would be caused in allowing the plaintiffs an opportunity to authenticate the video footage, the trial court did not abuse its discretion by excluding the evidence.

***Thibodeaux v. Shoppers Value Food,* 22–745 (La.App. 3 Cir. 8/16/23), 370 So.3d 177, *writ denied*, 23-1271 (La. 11/21/23), 373 So.3d 458 (Savoie, J. writing; Kyzar & Thierry, JJ.).**

Plaintiff Tenrines Thibodeaux appealed the judgment of the trial court, striking certain exhibits from the record, granting the Motions for Summary Judgment filed by Defendants Argonaut Great Central Insurance Company, Lafayette Piggly Wiggly, LLC, and Chip Jones, and dismissing Plaintiff's claims with prejudice.

Plaintiff slipped and fell on water leaking from a cooler in a Shoppers Value Food Store in Lafayette, Louisiana. Defendants filed Motions for Summary Judgment. At the hearing on the motions, Defendants objected to the filing of Mr. Thibodeaux's Affidavit and Mr. Beard's Affidavit. Mr. Beard was Plaintiff's expert engineer. Defendants objected to Mr. Beard's Affidavit, arguing that Mr. Beard's affidavit was based purely on conjecture. Specifically, Defendants complained that Mr. Beard did not conduct a site inspection or perform any slip resistant testing. Regarding Plaintiff's Affidavit, Defendants argued that it was self-serving. After sustaining the objections, the trial court found that Plaintiff did not carry his burden of proof.

Held: Reversed and Remanded. As to Mr. Beard's Affidavit, Mr. Beard was unable to conduct a site inspection because Shoppers Value had filed for bankruptcy and abandoned the site of the accident. Plaintiff should not be deprived of an expert based on the actions of Defendant. As to Plaintiff's Affidavit, it is not self-serving. A self-serving affidavit is: "1) it is inconsistent with previous sworn depositions—with no explanation for the inconsistencies; 2) is offered after the motion for summary judgment was filed; and 3) claims to create an issue of material fact." *Dean v. De La Salle of New Orleans, Inc., 21-388, p. 10 (La.App. 4 Cir. 12/21/21), 334 So.3d 425, 431*. There was no claim or evidence that Plaintiff's Affidavit was inconsistent with previous sworn depositions. Plaintiff's Affidavit is also not uncorroborated. *See Davis v. Consol. Rd. Dist. A for Par. Of Jefferson*, 22-240 (La.App. 5 Cir. 10/5/22), 355 So.3d 1. The affidavits offered by Plaintiff should have been admitted, and they create genuine issues of material fact.

***Oris Latour et al v. Steamboat Bill's*, 22-162, 22-163 (La.App. 3 Cir. 12/7/22), 354 So.3d 181, *writ granted*, 23-27 (La. 4/4/23), 358 So.3d 855, *reversed in part*, 23-27 (La. 10/20/23), 371 So.3d 1026. (Pickett, J., writing, Ezell & Savoie, JJ.)**

Oris Latour and his wife filed suit to recover damages and loss of consortium damages they allegedly sustained as a result of Mr. Latour's trip and fall at Steamboat Bill's restaurant. They asserted Mr. Latour tripped and fell on a ledge that was twenty-eight feet long by two feet wide by three and one-half inches high and was poured on top of the concrete floor. The ledge was blocked on three sides by a fence and on the fourth side by tables and chairs. The Latours asserted the ledge presented an unreasonable risk of harm under La.R.S. 9:2800.6. A jury awarded the Latours damages totaling over $750,000. Steamboat Bill's appealed, assigning seven errors. The defendants did not assign error with the jury's award of damages to Mr. Latour.

HELD: REVERSED IN PART; AFFIRMED IN PART; AND RENDERED. The trial court committed reversible error in refusing to allow Steamboat Bill's to present evidence that its owner had no knowledge of prior accidents being caused by the ledge and in refusing to instruct the jury that it could determine Steamboat Bill's did not intentionally spoliate evidence if it had no knowledge of Mr. Latour's trip and fall when it allowed a surveillance recording of that event to be overwritten. These errors interdicted the trial proceeding requiring this court to conduct a de novo review of liability. On de novo review, the court determined competent expert evidence

established the ledge constituted an unreasonable risk of harm and assessed Steamboat Bill's with 85% fault and Mr. Latour with 15% fault. It affirmed the jury's award for loss of consortium and assessment of all costs to Steamboat Bill's.

The supreme court reversed this court's increase of the fault attributed to Steamboat Bill's, finding that this court legally erred in decreasing the fault of Mr. Latour, who failed to appeal or answer the appeal.

CONTRACTS

***George v. Christus Health Southwestern Louisiana d/b/a Christus St. Patrick Hospital*, 24-5 c/w 24-6 (La.App. 3 Cir. 8/21/24), __ So.3d __. (Kyzar, J., writing, Perret & Stiles, JJ.)**

Plaintiff, a neurosurgeon, filed suit against defendant after his request for reinstatement of his privileges at defendant's hospital was denied. Plaintiff's privileges were summarily suspended after allegations were made that he appeared to be impaired during surgery and then could not be located for a later procedure. Defendant appointed a committee to investigate the allegations. Although plaintiff denied that he was drug impaired, he admitted that he was impaired due to fatigue and agreed to obtain a leave of absence and to be evaluated through the PHFL. At the same time, the PRC was reviewing a wrong-level ACDF performed by plaintiff. The PRC noted documentation issues with plaintiff's practice, that he performed surgery on the wrong level, and that he ignored warnings by the OR staff. As a result, it ordered a 100% retrospective review of plaintiff's surgeries performed during the eight months he was at the hospital. After review, the PRC noted a pattern of poor pre- and post-op documentation and recommended that plaintiff's request for reinstatement, when made, be denied. Plaintiff requested reinstatement after testing positive for cocaine, undergoing treatment, and being cleared by the PHFL. The hospital's CC voted to deny his request. Plaintiff's request for reinstatement was denied by the MEC after he failed to present any evidence addressing the concerns raised by his retrospective review at a hearing before the MEC. Plaintiff waived his right to review this finding after negotiating with defendant regarding the information it would report to the NPDB. He filed suit for breach of contract and detrimental reliance after defendant reported that his privileges were revoked due to unsafe practice and substandard care. Plaintiff's medical license was later put on three-years' probation by the LSBME, and he was restricted from performing neurosurgery for two years after he failed to accurately complete the application to renew his medical license.

Following a jury trial, the jury found that defendant breached its contract with plaintiff, but that its breach was not a proximate cause of plaintiff's damages. It further allocated 92% fault to plaintiff and 8% fault to defendant. It also held that plaintiff proved that he suffered $1,000,000.00 in damages for loss of past income. However, upon plaintiff's motion for JNOV, the trial court amended the jury verdict to find that plaintiff proved by a preponderance of the evidence that defendant's breach of contract was a proximate cause of his damages. It further amended the jury verdict to raise the percentage of fault allocated to defendant from 8% to 35% and to lower plaintiff's fault from 92% to 65%. The trial court denied defendant's motion for JNOV. Both parties appealed from this judgment.

HELD: ***Reversed and Rendered.*** On appeal, the court held that the evidence in favor of plaintiff was not so overwhelming that reasonable minds could have reached a different conclusion as to the element of causation. Considering the many instances of plaintiff's fault, any jury could

have reasonably concluded that he caused the suspension and ultimate denial of his privileges. It also found that it was reasonable for the jury to find that defendant made no representations as to what it would report to the NPDB. Defendant was legally required to accurately report plaintiff's conduct to the NPDB, and it had an overriding moral and legal duty to protect the safety of its patients. The court found that defendant was not at fault for the probation and restrictions placed on plaintiff by the LSBME. It further found that although defendant technically breached some contract provisions, those breaches were not the cause of plaintiff's failure to regain his privileges. In addressing defendant's motion for JNOV, the court held that the jury legally erred in allocating fault and assessing damages against defendant after finding that its actions were not a proximate cause of plaintiff's damages. Accordingly, the court reversed the judgment granting plaintiff's motion for JNOV on the issue of causation and fault, reversed the judgment denying defendant's motion for JNOV, and rendered judgment granting a JNOV in favor of defendant, dismissing plaintiff's claims against it.

***Dealer Services South, Inc. v. Martin Automotive Group, Inc.*, 23-195 (La.App. 3 Cir. 11/29/23), 375 So.3d 628, (Panel: Gremillion, J., writing, Pickett & Fitzgerald, JJ.)**

Broker of automobile contracts (such as extended warranties) appealed the trial court's judgment finding the signature of the former CEO employee was forged and the contract was unenforceable.

AFFIRMED. The contract required payment if certain quotas weren't met. Evidence at trial suggested that this contract in no way benefited the dealership and was essentially only advantageous to the broker, and perhaps, the employee. Although the trial court discussed whether the employee breached a fiduciary duty, the issue on appeal is whether the employee's signature was forged. Even though the employee and the broker testified that he signed the contract, the dealership successfully proved that the signature was forged through expert and lay testimony. While these facts were unusual because a party to the contract was not disavowing his own signature, the trial court did not err in finding that the dealership proved the contract was forged as it bore no resemblance to employee's signature. Also, the employee steadfastly claimed that he signed the document, thus his argument on appeal that he authorized someone else to sign it for him (his wife) failed.

***Unicorp, LLC v. BRaDD, LLC*, 03-229 (La.App. 3 Cir. 10/25/23), __ So.3d __ (2023 WL 7008039). (Pickett, C.J., writing, Gremillion & Fitzgerald, JJ.)**

The owner of an apartment complex appealed the trial court's judgment granting summary judgment in favor of the contractor that constructed the complex and ordering the owner to pay the contractor funds retained by the owner's lender in accordance with the parties' contracts. The project was insured by the Federal Housing Administration (FHA), which is overseen by the U.S. Department of Housing and Urban Development (HUD). Unicorp alleged that pursuant to the two contracts the parties signed, BRaDD owed it funds that had not been approved for release by HUD. In doing so, it equated the terms "final payment" and "balance due" used in the contracts as having the same meaning. BRaDD disagreed and argued if it released funds to Unicorp without the approval of HUD, it would lose its funding.

HELD: REVERSED. BRaDD's interpretation of the contract provisions at issue was supported by federal jurisprudence on the meaning of the two terms. *See Trans-Bay Engineers &*

Builders, Inc. v. Hills, 551 F.2d 370, 374 (D.C. Cir.1976); *Van-Tex, Inc. v. Pierce*, 703 F.2d 891 (5th Cir. 1983).

TORTS

***Boyance v. United Fire & Cas. Co.*, 23-442 (La.App. 3 Cir. 4/3/24), 387 So.3d 586. (Pickett, C.J., writing, Perret & Wilson, JJ.)**

The plaintiff filed suit to recover damages she and her four-year-old son sustained in an accident on I-10 west of Breaux Bridge. After being hit from behind by a box truck, the plaintiff's truck was pushed into the rear of an eighteen wheeler that had entered the highway from a weigh station. Her truck then spun around and after coming to rest in another lane of the highway, caught fire. The plaintiff managed to climb out of the window of her door and ran to get her son from his car seat. She could not get his seat belt to release, and her son was cried out for her to save him. Just as her son was freed from the truck, the truck exploded. She sued the driver of the truck that hit her, his employer, and their insurer, as well as the driver of the eighteen wheeler, his employer, and their insurer. After a jury trial, judgment was awarded in favor of the driver and her son in the amounts of $1,520,000.00 and $125,000.00, respectively, as well as special damages, against the truck driver and insurer that hit plaintiff's truck from the rear. The box-truck defendants appealed. **HELD: AFFIRMED.** The defendants failed to preserve the two objections raised regarding evidentiary rulings made by the trial court during trial pertaining to expert testimony by not objecting on the record when the rulings were made. The trial court's jury instruction on a vehicle entering a roadway as provided in La.R.S. 32:124 was not erroneous under the facts of this case: specifically, an eighteen wheeler traveling behind the box truck that hit the plaintiff from behind, saw the plaintiff's truck and the preceding eighteen wheeler and changed lanes, avoiding an accident, the trial court's jury instruction was not erroneous or misleading. The box-truck defendants argued the jury erred in not assessing the driver of the eighteen wheeler with fault. Testimony and other evidence at trial presented the jury with conflicting details as to who was at fault, and the box-truck defendants did not address why their driver should not be presumed to be at fault for hitting the vehicle in front of him as provided by La.R.S. 32:81. Lastly, the jury's damage awards were not excessive under the unique facts of this case in which a mother and her son both feared for their own lives and the lives of each other and endured physical and mental injuries that will forever remind them of the trauma of the accident.

***Williams v. Travelers Indemnity Company of CT, et al.*, 23-601 (La.App. 3 Cir. 03/20/24), ___ So.3d ___ (2024 WL 1184560). (Ortego, J., writing, Kyzar & Fitzgerald, JJ).**

Motorist and her spouse brought action against ambulance driver, his employer and employer's insurer seeking damages and loss of consortium caused as a result of a motor vehicle accident. Judgment of jury verdict allocated ambulance driver 40% and employer 60% at fault for the accident, awarded motorist $350,00.00 damages and spouse $60,000.00 for loss of consortium. Insurer, employer, motorist and spouse appealed.

HELD: *AFFIRMED.*

On appeal, the court found no abuse of discretion by the jury as they heard conflicting evidence and expert opinions and then assessed fault to ambulance driver and Acadian Ambulance only. Specifically, as to the employer, finding that a reasonable jury could find that the testimony of the driver/employee that he was unsure of the last time he read the Acadian Ambulance motor vehicle safety policy, along with Acadian Ambulance's required use of laptops by individuals driving their ambulances, provided a reasonable basis for the jury to find a failure of Acadian Ambulance to train and supervise its employees. As to defendant's claim of allocation of fault to an unnamed third party, DOTD, as to signage and highway marking, the court found the record supports the jury's finding of no fault by DOTD. Finally, on the issue of damages, the court found that a reasonable basis exists in the record for the jury award of damages to motorist of $350,000.00, and jury's award of $60,000.00 for loss of consortium to motorist's spouse was not excessive.

***Tuminello v. ABC Insurance Co.*, 23-446 (La.App. 3 Cir. 2/28/24), 381 So.3d 320, *writ denied*, 24-401 (La. 5/29/24), 385 So.3d 702. (Panel: Gremillion, J., writing, Perret & Ortego, JJ.)**

Plaintiff was injured as he exited the "Thunder Roll" slide at an amusement park and landed on his head on an airbag. This case involves extensive litigation against the amusement park owner, the Italian slide part manufacturer, the USA distributor of the slide parts, the air bag manufacturer, and the manufacturer of the scaffolding upon which the slide is built. The plaintiff asserted varying and alternative claims under the LPLA and in general negligence. The trial court granted summary judgment in favor of all of the defendants.

AFFIRMED IN PART; REVERSED IN PART. The USA distributor, as the final product manufacturer, would not be dismissed as genuine issues remained as to its liability under the LPLA. All of plaintiff's claims lie under the LPLA; plaintiff has no claims in negligence. Summary judgment against the scaffolding manufacturer was proper as there was no evidence whatsoever that its product was defective. Plaintiff's express warranty claim against the distributor failed but there were genuine issues remaining as to his claims design defects, composition or construction defects, and inadequate warnings.

***Arnold Lyle Lewis, Ind. Admin. of Succession of Rosalie Hardy Lewis and John Charles Lewis v. Harbor Freight Corp., et al.*, 23-455 (La.App. 3 Cir. 2/7/24), 380 So.3d 186. (Pickett, C.J., writing, Fitzgerald & Stiles, JJ.)**

Husband, wife, and daughter died from carbon monoxide poisoning while using a generator after Hurricane Laura. The decedents' son and brother filed suit in his capacity as the independent administrator of the decedents' successions to recover survival damages and wrongful death damages for the death of the decedents, as provided by La.Civ.Code art. 2315.1 and La.Civ.Code art. 2315.2. The named defendants filed exceptions of no right of action, asserting the plaintiff did not have a right of action to recover either survival or wrongful death damages under either La.Civ.Code art. 2315.1 or La.Civ.Code art. 2315.2, which the trial court granted.

HELD: AFFIRMED. Pursuant to La.Civ.Code art. 2315.1(B), succession representatives have a right of action for survival damages only "in the absence of any class of beneficiary set out in Paragraph A." As the child of and sibling of the decedents, the plaintiff is a beneficiary for

purposes of La.Civ.Code art. 2315.1(B); therefore, he has no right of action for survival damages. The plaintiff also does not have a right of action to recover wrongful death damages under La.Civ.Code art.2315.2 because it does not provide a right of action for succession representatives.

***Certain Underwriters at Lloyd's, London v. Alliance Drilling Consultants, L.L.C.*, et al., 23-265 c/w 23-270 (La.App. 3 Cir. 12/20/23), 377 So.3d 459, *writ denied*, 24-117 (La. 3/12/24), 381 So.3d 48. (Fitzgerald, J., writing; Kyzar & Perry, JJ.)**

The non-operator of an oil and gas well and its insurer brought an action against the operator and its agent, asserting claims for negligence, gross negligence, and breach of contract stemming from a blowout of the well. The trial court entered a jury verdict in favor of the operator and agent, granted their motion for costs, and entered judgment that taxed all costs to the non-operator and insurer, including expert fees. The non-operator and insurer appealed.

HELD: Affirmed. The third circuit held that: (1) The jury instruction that each party's fault had to be judged solely upon each party's own acts or omissions and no party was legally responsible for the acts or omissions of any other party was permissible; (2) The agent was the operator's "legal representative," and thus the exculpatory clause in the joint operating agreement applied to the agent; (3) Portions of the agent's investigative report were inadmissible; (4) The trial court acted within its discretion in awarding costs for non-testifying experts; and (5) The trial court acted within its discretion in declining to reduce expert fees awarded to the operator and agent.

***Jones v. Rogers, et al.*, 23-125 (La.App. 3 Cir. 11/15/23), 374 So.3d 399. (Perry, J., writing; Perret & Stiles, JJ).**

Lucille Jones ("Jones"), a teacher's aide, allegedly suffered injuries when her car was struck by a school bus being driven by Jimmy Rogers ("Rogers") as Jones was leaving work but still in the school parking lot. Jones filed a tort suit asserting Rogers was the sole cause of the accident and her resulting injuries. In an amended petition, Jones named Iberia Parish School Board ("IPSP") as a defendant who provided insurance for damages caused by its employee, Rogers.

IPSB and Rogers ("Defendants") filed a motion for summary judgment and an exception of no cause of action, requesting dismissal of Jones's tort claims. Defendants argued there were no genuine issues of material fact that Jones and Rogers were co-employees and the collision occurred on the premises of their employer, IPSB. Defendants further argued that if summary judgment was granted, Defendants were also entitled to dismissal of Jones's lawsuit on the basis that Jones's petition failed to state a cause of action in tort against all Defendants. The trial court agreed, granting Defendant's motion for summary judgment, sustaining the exception of no cause of action, and dismissing Jones's lawsuit with prejudice. Jones appealed.

HELD: ***Affirmed.*** This court held that Jones is limited to the remedies provided by the Louisiana Workers' Compensation Act. Jones's alleged injuries occurred on her employer's premises and Jones alleges her injuries were caused by her co-employee, Rogers, who was, at all times material hereto, within the course and scope of his employment.

***Gabriel v. Louisiana Organ Procurement Agency*, 22-775 (La.App. 3 Cir. 9/20/23), 371 So.3d 1121. (Gremillion, J., writing, Kyzar & Wilson, JJ.)**

Plaintiffs' mother was admitted to the hospital with a massive cerebral hemorrhage. She was declared brain dead. The mother was an organ donor, and the Louisiana Organ Procurement Agency dispatched Dr. Ramcharan to harvest her organs. In the course of the procedure, the mother's face was disfigured. Plaintiffs sued pursuant to La.Civ.Code art. 2315.6. The Agency was released on summary judgment. Dr. Ramcharan filed a motion for summary judgment pursuant to an immunity statute and exceptions of prescription and no cause of action. The trial court maintained the exception of no cause of action based upon the Agency's consent form, which advises that corpse disfigurement may occur.

HELD: The exception was not properly maintained. Louisiana has long held that family members have causes of action for the mishandling of their loved one's corpse. Reliance upon La.Civ.Code art. 2315.6 is not required. The trial court erred in relying upon the consent form because it is axiomatic under Louisiana law that the court may not entertain evidence in determining an exception of no cause of action. La.Code Civ.P. art. 931. The immunity statute, La.R.S. 17:2954.6, was enacted after the occurrence and could not be applied retroactively. Reversed.

***Rougeau v. Hospital Service District No. 2 of Beauregard Parish*, 22-749 (La.App. 3 Cir. 7/26/23), 368 So.3d 1196, *writ denied*, 23-1157 (La. 11/15/23), 373 So.3d 76. (Kyzar, J., writing; Savoie & Thierry, JJ.)**

Plaintiff, an EMT, suffered a shoulder injury when a nurse unexpectedly stopped the stretcher she was pulling with her right arm. Prior to the jury trial, the trial court excluded the testimony of defendants' expert witness, after he left his deposition and refused further cooperation. Following a jury trial, the jury found the nurse negligent, but held that his actions did not cause plaintiff's shoulder injury. On motion of plaintiff, the trial court granted a JNOV in her favor and awarded her damages. Defendants appealed.

HELD: ***Affirmed.*** On appeal, the court affirmed the trial court's ruling excluding defendants' expert witness's testimony at trial. It further affirmed the jury's finding of negligence on the part of the nurse based on the testimony of plaintiff's expert witness, the surveillance video of the incident, and the fact that the incident occurred before the EMTs had transferred the care of the patient they were transporting to the emergency room personnel. The court further affirmed the trial court's grant of JNOV, finding that the incident was the cause of plaintiff's injury, and the damage award.

INSURANCE

***Guillory v. La. Farm Bureau Cas. Ins. Co.*, 22-634 (La.App. 3 Cir. 10/4/23), 371 So.3d 1202, *writ denied*, 23-1453 (La. 01/10/24), 376 So.3d 848. (Wilson, J., writing; Gremillion & Kyzar, JJ.)**

This case involves the homeowners' claims against their insurer for breach of contract, penalties, and attorney's fees regarding the handling of the claim for damages sustained in

Hurricanes Laura and Delta. Several issues were presented in the appeal, including the timeliness of a recusal motion, failure to preserve an objection to jury instructions, the determination of satisfactory proof of loss, entitlement to damages for mental anguish due to bad faith handling on the claim, and the taxing of costs.

On May 19, 2022, sixteen days before trial was to begin, the defense filed a motion to recuse Judge Clayton Davis based on certain adverse rulings and based on the assertion that Plaintiffs' attorneys (Cox, Cox, Filo, Camel & Wilson) had contributed 72.73% of the total contributions to Judge Davis' campaign for the open seat on the Third Circuit Court of Appeal. Judge Davis denied the motion to recuse as untimely. Louisiana Code of Civil Procedure Article 154(A) provides that a motion to recuse must be filed "no later than thirty days after the discovery of the facts constituting the ground upon which the motion is based, but in all cases prior to the scheduling of the matter for trial. In the event that the facts constituting the ground upon which the motion to recuse is based occur after the matter is scheduled for trial or the party moving for recusal could not, in the exercise of due diligence, have discovered such facts, the motion to recuse shall be filed immediately after such facts occur or are discovered." If the motion is untimely, the trial court can deny it without the appointment of an ad hoc judge or a hearing, but in that case, the trial court "shall provide written reasons for the denial." La.Code Civ.P. art. 154(C). That requirement was met in this case.

Plaintiffs and the trial court characterized the motion to recuse as an attempt to get a continuance after the defense's motion for continuance was denied on March 31, 2022. The motion to recuse included a Candidate's Report filed by Judge Davis on January 13, 2022, and the report indicated that the contributions were made on November 9, 2021. This court found that the facts that formed the basis of the motion to recuse were discoverable, with the exercise of due diligence, on January 13, 2022, and the exception provided in Article 154 is not applicable to extend the thirty-day time period for that reason. We found no abuse of discretion in the trial court's denial of the motion to recuse as untimely and did not consider the merits of the motion.

The defense asserted that the trial court failed to properly instruct the jury as to the definition of "arbitrary and capricious." Louisiana Code of Civil Procedure Article 1793(C) provides that prior to the jury retiring or immediately after the jury retires, a party must object to the giving or failing to give a jury instruction and specifically state that matter to which the party objects and the ground of the objection. The record in this matter reflected that the defense was given the opportunity to make objections on the record and did so with respect to two other charges. The defense did not make a blanket objection to the charges and made no objection to the trial court's failure to include the defense's proposed jury instructions concerning "arbitrary and capricious." Since the defense failed to properly preserve this assignment of error for review, it was not considered by this court.

The next issue concerned satisfactory proof of loss and the timeliness of payments by the insurer. The defense contended that the jury's conclusion that its payments to Plaintiffs were untimely is unsupported by the evidence in this case because the "overwhelming evidence" shows that it promptly inspected the property and issued payment upon receipt of satisfactory proof of loss well within the time limits imposed by La.R.S. 22:1973 and 22:1892. According to the insurer, the only significant delays in processing this claim resulted from the failure of the public adjuster hired by Plaintiffs to submit his estimates. Plaintiffs argued that this argument improperly shifted the burden to them. The jury concluded that the defense had satisfactory proof of loss at the time of its original inspection. Although the defense assigned as error that the jury abused its discretion

by awarding excessive damages and statutory penalties, it did not argue that point in its brief, and this court considered it abandoned.

Plaintiffs made a claim for damages resulting from mental anguish due to the insurer's bad faith in handling their claim. In an attempt to prove their claim, Plaintiffs presented evidence and testimony that they lived in a camper in their driveway for nearly two years. The defense argued that evidence of Plaintiffs' voluntary decision to do so was irrelevant because they withdrew their claim for recovery of additional living expenses. We found the testimony to be relevant.

Finally, the defense argued that several of the items taxed a costs by the trial court were improper under La.Code Civ.P. art. 1920. Specifically, the defense argued that the costs of exhibits and depositions that were not used at trial and the costs associated with the mock jury and the jury consultant were unnecessary. Louisiana Revised Statutes 13:4533 provides that "The costs of the clerk, sheriff, witness' fees, costs of taking depositions and copies of acts used on the trial, and all other costs allowed by the court, shall be taxed as costs." Also, "the positive law in this instance allows for discretion on the part of the trial court to set costs other than those specifically enumerated, as equitable." *Barre-Williams v. Ware*, 20-665, p. 6 (La.App. 4 Cir. 4/28/21), 365 So.3d 760, 769. Furthermore, La.R.S. 22:1892(B)(1)(a) provides for a penalty, attorney fees, and costs. Plaintiffs argued that to interpret the use of the term "costs" in this statute as limited to those allowable in any other suit would render its use meaningless and superfluous. For these reasons, this court affirmed the entirety of the trial court's award of costs in this matter.

HELD: ***Affirmed.***

***Bobb v. Sylvester*, 23-109 (La.App. 3 Cir. 11/15/23), 374 So.3d 1117. (Gremillion, J., writing; Pickett & Bradberry, JJ.).**

Plaintiffs were the driver and passenger in a car that was struck by a truck owned by Mr. Sylvester. The accident happened late at night. The driver fled the scene on foot, and plaintiffs could not offer a description of him other than his clothing. The driver's identity remains unknown to this day. However, Mr. Sylvester and his son both testified that an employee, Abraham Chambers, was the last person to have driven the truck with their knowledge and consent. No employee, though, had permission to drive the truck for any purpose other than business.

Sylvester and his insurer, State Farm, moved for summary judgment. They argued that because plaintiffs would bear the burden of proving that the driver had permission to drive the truck, and they could not prove that Chambers was the driver, summary judgment should be rendered dismissing the suit.

The Initial Permission Rule provides that once permission to drive a motor vehicle is given, it remains valid until withdrawn. Chambers had permission to drive the truck on the day of the accident. Both Sylvesters testified that they thought Chambers was the driver at the time of the accident. This was sufficient evidence to create a genuine issue of material fact that precluded summary judgment.

SUCCESSIONS

***In re Succession of Reggie*, 23-61 (La.App. 3 Cir. 12/20/23), ___ So.3d ___ (2023 WL 8791836), *writ denied*, 24-328 (La. 4/30/24), 383 So.3d 926. (Thierry, J., writing; Ortego & Bradberry, JJ.)**

This appeal involved the trial court's grant of a judgment of possession. The appellant, who was one of eight children, alleged that the extrajudicial partition of her mother's estate was invalid. The executor—decedent's nephew—and the heirs agreed to a partition process that involved bidding and placing stickers on the movable property items they wanted. Alternatively, they could opt for a cash distribution instead of receiving movable property. After the appellant was notified that she needed to prioritize her movable property selections, as she selected far more items than the other heirs, she told the executor, "I am pulling my bid on all items." The appellant argued that she did not consent to the process, and that the process constituted a credit sale rather than an in-kind partition. A credit sale requires a prior court order, while court approval is not required for an agreed-upon nonjudicial partition.

HELD: ***Affirmed***. The appellant consented to the partition process, as evidenced by emails in the record. Her statement, "I am pulling my bid on all items," could be interpreted to mean that the appellant wished to pull her bids and receive the cash distribution instead, and therefore the trial court was not manifestly erroneous. Furthermore, this court found the method of distribution to be a partition rather than a sale, as a partition is defined as "a sort of exchange" in La.Civ.Code art. 1382. The bidding process in this case was precisely "a sort of exchange."

***Succession of Middlebrooks*, 23-236 (La.App. 3 Cir. 02/28/24), 381 So.3d 298, *writ denied*, 24-398 (La. 6/5/24), 385 So.3d 1159. (Panel: Gremillion, J., writing, Pickett & Bradberry, JJ.)**

Son filed a petition to annul probated testament based on the presumption of revocation when a will "in the possession of or accessible to the deceased" cannot be found. The trial court found that the presumption was successfully rebutted and son appealed.

AFFIRMED. Although it was debatable whether the presumption even applied because the will was not in the decedent's possession as it had gone missing from under the mattress where he normally kept it and the testimony was that he was aware of that fact, that issue was not determinative because the executrix successfully rebutted the presumption.

Although the executrix bore the burden of proving revocation, a lack of evidence in the record that he intended to revoke it IS evidence of a lack of intent to revoke. The trial court was within its discretion to credit the testimonial evidence of several witnesses that the decedent wanted his daughter to have it all to the exclusion of her siblings.

***Succession of Thomas* 23-43 (La.App. 3 Cir. 10/4/23), 371 So.3d 1195. (Ortego, J., writing; Pickett & Stiles, JJ).**

Testator's daughter filed petition to open intestate succession and request for appointment of notary to search for testator's will, alleging that she believed that a document purported to be testator's last will and testament existed but was invalid. The District Court, 27th Judicial District,

St. Landry Parish, issued judgment declaring will valid as to form and declaring that it be probated. Daughter, as sole heir, appealed.

This case arises out of the death of Eldrick Ray Thomas (the decedent). After the trial court appointed a notary to search for any purported testament of the decedent, two separate reports were filed showing a total of four (4) documents purporting to be the testament of the decedent. The four documents were:

1. A purported original testament, bearing a raised notary seal, dated June 7, 2021, retrieved from Juan Joseph of Williams Funeral Home. (Exhibit A).
2. A purported original testament, bearing a raised notary seal, dated June 7, 2021, was retrieved from the decedent's niece, Cynthia Thomas Benjamin. (Exhibit B).
3. A "true copy" of a purported notarial testament dated June 20, 2018, retrieved from the law office of Frank Olivier. (Exhibit C).
4. A copy of a purported notarial testament dated October 12, 2021, retrieved from attorney Vanessa Harris, who had, in turn, retrieved the document from her client, Cynthia Thomas Benjamin. (Exhibit D).

On May 18, 2022, Cynthia Thomas Benjamin (Cynthia) filed a petition for recordation and execution of notarial testament. Courtney had filed an April 29, 2022 opposition to probate of testament. The trial court, in essence, consolidated the matters and set a hearing for May 27, 2022.

After a two-day hearing on May 27 and June 1, 2022, the trial court issued a judgment in favor of Cynthia declaring the June 7, 2021 notarial testament (Exhibit B) valid as to form, and declared that it be probated. The trial court also assessed Courtney with costs. The present appeal followed with Courtney alleging two assignments of error.

HELD: *REVERSED AND REMANDED*

In accordance with legislative intent, courts liberally construe and apply statutes in favor of maintaining the validity of the will if that will substantially complies with the statute. *Liner*, 320 So.3d 1133; *Succession of Guezuraga*, 512 So.2d 366 (La.1987).

A trial court's determination that witnesses were present when the testator signed a will is subject to a manifest error review. *Succession of Pedescleaux*, 21-611 (La.App. 5 Cir. 5/11/22), 341 So.3d 1224.

In will contest cases, factual findings of the trial court are accorded great weight and will not be disturbed on appeal absent a finding of manifest error. *Succession of Daigle*, La.App. 3 Cir.1992, 601 So.2d 10.

II. Fraud and the June 7, 2021 Will's Attestation Clause

Appellant contends that the trial court erred in finding the testament valid without analysis of the deviations in form in an attestation clause and by excluding the issue of fraud attributable to the witnesses to the testament. We find merit to appellant's contentions.

A. Attestation Clause:

The attestation clause of the June 7, 2021 will is as follows:

> Signed and declared by ELDRICK RAY THOMAS, testator above name in our presence to be his last will and testament, and in his presence of each other, we have unto subscribed our name as witnesses, this 7th day of June, 2021, at Opelousas, St. Landry Parish, Louisiana within and for which the undersigned Notary Public is duly commissioned, qualified and sworn.

Under the attestation clause, the decedent's signature is above his printed name, as well as the signatures and printed names of witnesses Angela T. Lemon and Latasha S. Manuel. There is then a blank with "NOTARY PUBLIC" whereon Virginia M. Jones signed her name and notary number with her handwritten, printed name and a date, "6-7-2021", beneath the blank.

This court finds merit to Courtney's argument. We are mindful of legislative intent and jurisprudence instructing us to apply statutes in favor of validating wills that substantially comply with La.Civ.Code 1577, in the absence of fraud. However, here, including "as witnesses" rather than either adding "and the undersigned notary public" after "as witnesses" or simply omitting "as witnesses" changes the meaning of the clause. Accordingly, we find that the attestation clause of the June 7, 2021 will cannot reasonably be interpreted to substantially comply with La.Civ.Code art. 1577(2).

B. Alleged Fraud & Undue Influence

Additionally, in *Guezuraga*, 512 So.2d at 368 (citations omitted), our supreme court pointed out that consideration of form deviations are done while mindful of fraud risk, stating:

> Where the departure from form has nothing whatsoever to do with fraud, ordinary common sense dictates that such departure should not produce nullity. It was the intent of the legislature to reduce form to the minimum necessary to prevent fraud. It is submitted that in keeping with this intent, slight departures from form should be viewed in the light of their probable cause. If they indicate an increased likelihood that fraud may have been perpetrated they would be considered substantial and thus a cause to nullify the will. If not, they should be disregarded.

Here, the attestation clause does not include language asserting that the notary personally observed the decedent declare and sign the document as his last will and testament. This failure aligns with evidence in the record and Courtney's allegation that a pattern of fraud exists when a document grants Cynthia Benjamin rights in relation to the decedent's property or affairs and is witnessed by Angela T. Lemon and Latasha S. Manuel. Given Courtney's allegation, we will review each document contained in the record as to that alleged pattern of fraud and the validity of the June 7, 2021 will.

Exhibit E is a sale dated October 14, 2021, allegedly signed by decedent, notarized by Martina D. Chaisson, and witnessed by Angela Lemon and Latasha Manuel in New Iberia, Louisiana. Cynthia admitted in her testimony that she received the proceeds from that sale. It is clear from the record that this sale was invalid and involved fraud. The record established that the notary, Martina Chaisson, could not do business in Iberia Parish. Chaisson testified that she notarized the documents Cynthia brought to her that decedent allegedly signed, including Exhibit E, but the decedent and witnesses were not present. Additionally, witness Angela Lemon admitted that Chaisson was not present when she signed "some documents." Finally, witness Latasha Manuel testified that decedent only asked her to witness one document, but she appears as a witness on several that he signed, including Exhibit E and Exhibit B, the June 7, 2021 notarial will that the trial court found valid.

Exhibit F is a document granting power of attorney to Cynthia Benjamin over the decedent's medical and financial affairs. The document is dated October 7, 2021, allegedly signed by decedent, notarized by Martina D. Chaisson, witnessed by Angela Lemon and Latasha Manuel in New Iberia, Louisiana. As was the case with Exhibit E, it is clear from the record that Chaisson

cannot do business in Iberia Parish. Further, Chaisson testified that she notarized the power of attorney, but no one was there when she signed it, Lemon admitted that Chaisson was not present when she signed "some documents," and Latasha Manuel testified that decedent only asked her to witness one document. Thus, the document was rightfully rejected by Belle Teche Nursing Home business office manager, Cheryl Bonin.

Exhibit G is comprised of two policy owner change requests signed by decedent and Cynthia Benjamin and notarized by Martina Chaisson. These requests attempted to change the policy owner from decedent to Cynthia Benjamin. One was dated September 24, 2021, while the other was undated. The insurance company that issued the policies rejected these documents because the decedent's signatures did not match those it had on file. Further, Chaisson admitted that she did not see decedent sign the documents. Finally, Jerome Fontenot, the decedent's insurance agent and friend of "many years," visited the decedent at the nursing home and testified that the decedent never gave permission for Cynthia to be made owner of those policies.

Exhibit D is a purported notarial will dated October 12, 2021, at the top but October 11, 2021, at the bottom. The document specifically revokes decedent's will "dated August 30, 2021." It goes on to grant Cynthia Benjamin power of attorney over decedent's medical and financial assets and to bequeath Cynthia Benjamin ownership of all decedent's property. The one-page document is signed by decedent twice, notarized by Martina D. Chaisson, and witnessed by Angela Lemon and Latasha Manuel. Keeping with the pattern established in Exhibits E, F, and G, Chaisson testified that she notarized Exhibit D, but she wasn't present when the decedent or witnesses signed it, Lemon admitted that Chaisson was not present when she signed "some documents," and Latasha Manuel testified that decedent only asked her to witness one document. Thus, a review of the entire record before us shows Courtney provided sufficient evidence to prove a pattern of fraud in this case.

Given the above, we find the trial court erred in validating the June 7, 2021 notarial will. The attestation clause of that purported notarial will substantially deviated from the form set out in La.Civ.Code art. 1577(2) in light of the inclusion of the language "as witnesses." The record further evidences a pattern of fraud in this case. Thus, we nullify the June 7, 2021 will, and reverse the trial court's previous order to probate same.

III. Validity of the June 20, 2018 Will

The record before us contains Exhibit C, a notarial will dated June 20, 2018. The will is signed by the decedent, notarized by Charles J. Fontenot, and witnessed by Patricia D. Nicko and Barbara L. Faul. Appellant asks that this court either find that the decedent died intestate, or that Exhibit C is valid.

"The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal." La.Code Civ.P. art. 2164.

> While the trial court remains the original forum for resolving factual and legal issues, the Louisiana Constitution expressly extends the jurisdiction of appellate courts in civil cases to the review of facts as well as law. . . . *Gonzales v. Xerox Corp.*, 254 La. 182, 320 So.2d 163, 165-66 (1975) (citations omitted).

Here, neither Courtney nor Cynthia assert that there is evidence outstanding regarding the decedent's disposition of his assets. Further, neither asserts that the record before us is not complete. Thus, we will conduct a de novo review of whether the June 20, 2018 will is valid.

The June 20, 2018 will (Exhibit C) bequeaths all of the decedent's property to Courtney and LaShonda Davis to "share and share alike." There is no evidence in the record that this will is invalid. There is nothing in the language of the will that renders it invalid on its face. There was no argument made that this will is invalid due to fraud or any undue influences. Accordingly, we find and render that the June 20, 2018 notarial will is valid and order it probated.

TRUSTS

***In Re: Marshall Legacy Foundation*, 23-522 (La.App. 3 Cir. 6/12/24), ___ So.3d ___ (2024 WL 22947780). (Wilson, J., writing, Pickett & Perret, JJ.)**

As everyone knows, this is just one piece of the massive puzzle that is the litigation concerning the Marshall family fortune. The fight for control over the Marshall Legacy Foundation (MLF) has been ongoing since 2013, when the Fourteenth Judicial District Court granted Elaine Marshall's request to divide the Marshall Heritage Foundation (MHF), which was previously named the Marshall Museum of Racing (MMR), into two new foundations: MHF-New and MLF. The purpose of the division was to give control over MHF-New to E. Pierce Marshall, Jr. (Pierce) and control of MLF to Preston Marshall (Preston) since the brothers had "differing passions, charitable aspirations, and views of the most prudent management of the funds in the . . . [MHF]."

The sole purpose of MLF is to give money to charities and tax-exempt organizations. Preston refused to sign certain checks sent to him by his mother, Elaine, and caused a debit hold to be placed on MLF's accounts. Elaine and a co-trustee, Dr. Stephen Cook, then had Preston removed as trustee, and this litigation began with the ex parte filing of a petition for instructions and injunctive relief. It should be noted that the checks that Preston refused to sign where the same checks that he asked the court for permission to pay in is his ex parte petition.

Preston sought to have Dr. Cook removed as trustee and have Preston's removal as trustee declared invalid. This matter was before this court on numerous occasions before finally proceeding to trial on the merits in March of 2023. The trial court ruled in favor of Elaine and Dr. Cook as follows: (1) Dr. Cook is a valid trustee of MLF and has not breached any fiduciary duty and has not been involved in any self-dealing; (2) Mrs. Marshall and Dr. Cook, as the legal co-trustees of MLF, were justified and acted within their authority when they removed Preston from his position as co-trustee of MLF because of Preston's misconduct and breaches of fiduciary duties; (3) any and all other claims set forth by Preston were denied; and (4) any relief not expressly granted as denied.

On appeal, Preston sought the reversal of the trial court's ruling and a declaration that any retrial be through a trial by jury. Preston asserted that the trial court erred in upholding significant amendments to the MMR trust provisions that were non-amendable. This court, finding that the MLF, not MMR, was the trust at issue, affirmed the trial court's ruling in its entirety. Preston relied on *Albritton v. Albritton*, 600 So.2d 1328 (La.1992) and its holding that the strong public policy in favor of trust indestructibility forbids attempts to amend a trust. As did the trial court, we found *Albritton* to be distinguishable because that trust was an irrevocable testamentary spendthrift trust that was set to terminate in two stages. This is quite different from MLF, whose sole purpose is to donate funds to charity. In sum, this court upheld the trial court's finding that Elaine and Dr. Cook properly removed Preston as a co-trustee and that Preston was judicially and equitably estopped from challenging the allegedly prohibited amendments and from removing Dr.

Cook as a valid trustee. Preston was not allowed to have his cake and eat it too by benefiting from his own appointment as co-trustee by Dr. Cook over a time span of nearly eighteen years and never objecting to Dr. Cook's serving as trustee.
HELD: ***Affirmed*****. Preston's writ is presently pending before the Louisiana Supreme Court.**

MEDICAL MALPRACTICE

Lachney v. Gates**, 23-682 (La.App. 3 Cir. 4/3/24), 386 So.3d 1123. (Kyzar, J., writing; Pickett & Perry, JJ.)**

Plaintiff initially filed a medical malpractice action against doctor after she had undergone several surgeries. She later amended her petition to allege negligence on the part of the doctor based on his failure to inform her that he was under extreme stress relative to spousal abuse at the time of her surgery. Plaintiff amended her petition more than six years later, alleging administrative negligence claims against defendant hospital for failing to implement policies for monitoring physician fitness, for failing to properly credential its physicians, for failing to recognize the doctor's significant psychiatric/psychological condition, and for failing to recognize the impairing effects of the medicine he was taking. The defendant filed an exception of prescription, which was granted. Plaintiff appealed.

HELD: ***Affirmed.*** On appeal, the court dismissed plaintiff's argument that the general code articles on interruption of prescription should apply as her claim against defendant involved "administrative negligence," which falls outside the scope of the LMMA. In finding plaintiff's claim subject to the prescriptive period found in La.R.S. 9:5628, the court held that plaintiff's claims against defendant were based on its failure to supervise and train a healthcare provider practicing at its facility, which act is specifically defined as malpractice under La.R.S. 40:1231.1(A)(13). The court further held that although plaintiff titled her claims as "administrative negligence," the claims did not concern the actions taken by the hospital in managing its facility, but rather focused on the actions it took or failed to take in supervising the doctor, who practiced at its facility. The court further held that an application of the *Coleman* factors weighed in favor of plaintiff's claims falling under the LMMA. As plaintiff's claims had been filed more than three years after the alleged malpractice, the court affirmed the judgment of trial court granting defendant's exception of prescription.

ARBITRATION

Emerge Const. Grp. v. Bushnell**, 23-63 (La.App. 3 Cir. 10/18/23), 372 So.3d 452*****, writ denied*****, 23-1695 (La. 2/27/24), 379 So.3d 663. (Bradberry, J. writing; Ortego and Thierry, JJ.)**

Emerge Construction Group appealed a trial court judgment granting a motion to vacate or modify an arbitration award filed by Rayburn Bushnell.

HELD: ***Reversed; April 19, 2022 Arbitration Award Confirmed.*** Following Hurricane Laura in 2020, Bushnell entered into three contracts with Emerge: (1) a Mitigation Contract; (2) a Repair Contract; and (3) R/V Contract (a temporary housing rental agreement). Under the provisions of the contracts, Emerge sought arbitration to settle all disputes between the parties for

nonpayment of work performed and services provided. After arbitration, Emerge was awarded sums of monies on the contracts in addition to attorney fees. Emerge sought confirmation of the award in district court. Mr. Bushnell filed a motion to modify or vacate the arbitration award. The trial court granted the motion to vacate the award.

Pursuant to La.R.S. 9:4213, a motion to vacate must be served upon the adverse party within three months after the award is filed or delivered. There was no evidence that the motion was ever served, and even if properly served, it was untimely since over 3 months after delivery of the arbitration award.

***Van Way v. Walker*, 23-235 (La.App. 3 Cir. 10/18/23), 372 So.3d 439, *writ denied*, 23-1516 (La. 1/17/24), 377 So.3d 249. (Gremillion, J., writing; Pickett, C.J. & Fitzgerald, J.)**

Plaintiffs were income and principal beneficiaries to a trust that owned 98.9% of a holding company. The remaining 1.1% was owned by their brother, but this interest was the only voting interest in the company. Over the many years of the trust's existence, plaintiffs claim that they received no disbursements, despite the corporation having recorded massive profits. They sued the trustee, who was also the Chief Financial Officer of the holding company. As the suit wore on, the parties agreed to submit it to arbitration. The arbitration hearing occurred over the course of four days. Afterward, the arbitrator found in favor of the trustee. When the trustee filed a motion to confirm the award, plaintiffs appealed, arguing that the award blatantly ignored provisions of the Trust Code and should be vacated. The trial court confirmed the award, and plaintiffs appealed, urging the same grounds for reversing.

HELD: Louisiana Revised Statutes 9:4210 lists the exclusive grounds for vacating an award by an arbitrator. The presumption that an arbitration award is valid precludes review of the arbitrator's findings of law or fact. "Manifest disregard of the law" does not constitute a ground for vacating an arbitration award. Couching findings of the arbitrator in the terms employed by La.R.S. 9:4210 does not allow a party to seek vacation of the award when what that party actually seeks is a review of the factual findings or conclusions of law. Affirmed.

TERMINATION OF PARENTAL RIGHTS

***In Re: L.W.B. and S.S.B. in the Interest of K.S.B. and E.R.G.*, 23-248 (La.App. 3 Cir. 10/4/23), 371 So.3d 1213, *writ denied*, 23-1454 (La. 1/10/24), 376 So.3d 849. (Thierry, J., writing; Pickett & Stiles, JJ.)**

The biological father, A.G., appeals the judgment of the trial court terminating his parental rights and granting the intrafamily adoption of his biological daughter, E.R.G., to appellees, S.S.B. and L.W.B. (the maternal grandmother and step grandfather of E.R.G.). The trial court specifically found A.G. did not have just cause for his failure to communicate with E.R.G. for a period in excess of six months. Accordingly, the trial court held his consent to the adoption was not necessary. The trial court then found the adoption was in the best interest of E.R.G., terminated A.G.'s parental rights and granted the adoption to S.S.B. and L.W.B. A.G. appealed, contending

the trial court erred finding the statutory grounds for stripping A.G. of his parental rights based on his lack of contact with E.R.G. without just cause were satisfied where that lack of contact was in compliance with a permanent protective order.

HELD: ***Reversed***. The protective order issued against A.G. specifically prohibited him from contacting E.R.G. "personally, through a third party, or via public posting, by any means, including written, telephone, or electronic (text, email, messaging, or social media) communication." To violate that order would have subjected A.G. to arrest under La.R.S. 14:79. Therefore, he had just cause in not communicating with E.R.G. during the period in question. The trial court erred in taking the drastic action of terminating A.G.'s parental rights because he legally complied with the protective order issued by the court. Further, even if no protective order had been granted, A.G. was likewise prohibited under La.R.S. 46:1846 from communicating with the alleged victim of his criminal conduct. Violation of that statute is a criminal offense. We further find that abstaining from criminal conduct, as it relates to the victim of his alleged crime, is just cause for the failure to communicate. Having found that A.G. had just cause for his failure to communicate with E.R.G., his consent to the adoption was required by law. Accordingly, the granting of the adoption without that consent was not legally permissible and this court was bound to reverse that judgment.

***State in the Interest of C.W. & T.W.*, 23-634 (La.App. 3 Cir. 2/7/24), 380 So.3d 179. (Pickett, C.J., writing, Fitzgerald & Stiles, JJ.)**

The trial court terminated the father's parental rights to his two children. The father was incarcerated from the date the instanter order was issued removing the children to the custody of the state until the trial. In its petition, DCFS alleged termination was proper because the father abandoned his children by failing to provide contributions for support and failure to communicate with the children, and failure to substantially comply with the case plan. At trial, DCFS claimed it sought termination of the father's parental rights because he failed to provide contributions and lack of sufficient contact. Importantly, DCFS did not allege that the father's incarceration as the reason it sought termination. DCFS acknowledged at the hearing below that it did not comply with the provisions of La.Ch.Code art. 1036.2, so it was not alleging incarceration as a grounds for termination. Also, DCFS abandoned failure to comply with the case plan a reason for termination.

The trial court found the father's extended incarceration was a factor in its determination that termination of parental rights was appropriate.

HELD: AFFIRMED. "This case presented an impossibility for W.W. Because of his incarceration, he could not work his case plan, visit his child, or provide parental contributions to the support of his children, and DCFS failed to comply with the provisions of La.Ch.Code art. 1036.2 to allow W.W. an alternate means of preventing the department from seeking termination of his parental rights. We find the trial court committed manifest error in finding the state proved sufficient grounds for termination in this case."

DOMESTIC RELATIONS & CHILD CUSTODY

***Bridges v. Bridges*, 23-763 (La.App. 3 Cir. 7/3/24), ___ So.3d ___ (2024 WL 3281667). (Bradberry, J. writing, en banc.)(Stiles, J., concurs in part, dissents in part, and assigns reasons, joined by Pickett, Savoie, Kyzar, & Perry, JJ.)**

Jeff Bridges filed a motion to modify custody on June 20, 2023, against his former wife, Leanne Bridges, seeking an additional three days per month of time with his two daughters.
HELD: ***Judgment affirmed in part, rendered in part, and remanded.*** A considered custody decree was rendered on December 16, 2021 awarding the parties joint custody and designating Leanne the domiciliary parent. James was granted visitation every other weekend. It was noted at the hearing before judgment was rendered that James was recovering from the use of methamphetamine and marijuana. At the hearing on the motion to modify custody, James provided evidence that he had three years of negative follicle tests. Leanne filed an exception of no cause of action alleging that James's allegations were insufficient to support a modification of custody under the *Bergeron* standard. James argued that the courts are allowed to tweak a physical custody schedule even when the evidence will not support a change of custody under the *Bergeron* standard.

This court analyzed cases on the subject matter of what burden applied when a party seeks to modify the nature of the joint or sol physical custody arrangement under a considered joint custody decree. The issue was whether a party seeking to increase physical custody must establish the *Bergeron* standard of proving that the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, or the lesser burden that the increase in physical custody is in the best interests of the children.

After reviewing the conflicting jurisprudence from this court, in a majority vote of 7 to 5, this court ruled that visitation standards apply when a parent does not have custody citing La.Civ. Code art. 136(A). This court held that the time a parent spends with their child in a custody or joint custody arrangement is physical custody and not visitation and that the law regarding visitation is not applicable to a parent awarded custody. The time a parent with joint custody is exercising with the child as part of a joint custody plan is physical custody rather than visitation.

We then determined that James's allegations in his petition did not meet the heavy *Bergeron* standard but reversed the judgment as far as it dismissed James's action and remanded to allow him the opportunity to amend his petition to state a cause of action under La.Code Civ.P. art. 934.

Dissent: The dissent agreed that custody and visitation are two distinct legal terms. However, the majority found that the heavy *Bergeron* standard did not apply noting that it is difficult to rationalize the fact that a parent who has been deemed less fit and without legal custody may alter his/her visitation according to the best interest standard and without having to establish the heavy *Bergeron* standard.

***D.A.B. v. C.G.W.*, 23-548 (La.App. 3 Cir. 3/27/24), 387 So.3d 23. (Pickett, C.J., writing, Perret & Wilson, JJ.)**

In April 2014, the biological mother gave birth to a son while in a same-sex relationship with another woman. After the women ended their romantic relationship, the biological mother sought child support pursuant to a co-parenting agreement the two had signed after the birth of the

child. The former partner sought custody. The parties entered into a consent judgment which granted joint custody with the biological mother designated as the domiciliary parent. The former partner was afforded visitation but could not exercise that visitation in the presence of her then-partner/wife. The parties later entered into another consent judgment which altered the visitation schedule.

Relevant to the appeal, the former partner filed a motion for contempt and modification of custody in March 2022. The mother reconvened and sought sole custody. The trial court, applying *Cook v. Sullivan*, 20-1471 (La. 9/30/21), 330 So.3d 152, found that the appropriate statute to determine custody was La.Civ.Code art. 133, which provides that a non-parent seeking custody must show that sole custody to the parent would result in substantial harm to the child. The trial court awarded the mother sole custody and terminated the child support obligation of the mother's former partner.

Held: Affirmed. The trial court applied the wrong law. Because there was a previous consent judgment, the appropriate analysis is set forth in *Tracie F. v. Francisco D.*, 15-1812 (La. 3/15/16), 188 So.3d 231, which held that, in an action to modify a consent custody judgment between a parent and a non-parent, the parent must show that "(1) there has been a material change in circumstances after the original custody award; and (2) the proposed modification is in the best interest of the child." *Tracie F.*, 188 So.3d at 235, citing *Evans v. Lungrin*, 97-541, 97-577 (La. 2/6/98), 708 So.2d 731. Reviewing the record de novo, this court found that the mother showed a material change in circumstances. Further, reviewing the best interest factors listed in La.Civ.Code art. 134, the court found that sole custody with the biological mother was in the best interest of the child. The court specifically found that the inability of the parties to co-parent was a factor in its determination.

***Boudreaux v. Boudreaux*, 22-804 (La.App. 3 Cir. 7/5/23), 368 So.3d 754 (Savoie, J. writing, Kyzar & Thierry, JJ.).**

In 2018, Ms. Carpenter (formerly, Boudreaux) and her ex-husband, Mr. Boudreaux, stipulated to a custody judgment that, *inter alia*, stated their child was to attend Life Christian Academy for kindergarten in the fall of 2018 and that Ms. Carpenter was responsible for "100% of the tuition and fees due Life Christian Academy[.]" Ultimately, the child was never enrolled in Life Christian Academy.

Ms. Carpenter was later found in contempt of court for violating an April 2019 order regarding school enrollment. She was also found in contempt of the 2018 custody judgment following a March 2021 trial, where Ms. Carpenter appeared pro se. Following that trial, Mr. Boudreaux was granted interim domiciliary custody and ordered to "immediately enroll the child in Hamilton Christian Academy."

In August 2022, the trial court rendered a third judgment finding Ms. Carpenter in contempt. This judgment was based on Ms. Carpenter's failure to reimburse Mr. Boudreaux for school tuition at Hamilton Christian Academy. Ms. Carpenter was also sanctioned for a frivolous motion for new trial and frivolous "discussions, extensions, and refixings." The trial court further denied Ms. Carpenter's motion for contempt. Ms. Carpenter appealed.

Held: Reversed in Part. Because there was no judgment requiring Ms. Carpenter to pay tuition for Hamilton Christian Academy, the trial court was manifestly erroneous in finding Ms. Carpenter in contempt for failing to reimburse Mr. Boudreaux.

The trial court was also manifestly erroneous in finding that Ms. Carpenter's motion for new trial and any requested re-fixings were sanctionable under La.Code Civ.P. art. 863 as the record does not contain sufficient evidence to support the ruling. While Mr. Boudreaux argued that sanctions were appropriate based upon Ms. Carpenter's statements allegedly made during the March 2021 trial and/or in discussions held in chambers, appellate review is limited to the record before the appellate court, and the appeal record did not contain the relevant transcripts. Further, sanctions under La.Code Civ.P. art. 863 are limited to assertions made in signed pleadings.

***McNeil v. Stern*, 23-314, 23-315 (La.App. 3 Cir. 9/27/23), 371 So.3d 1187, *writ denied*, 23-1431 (La. 1/10/24), 376 So.3d 847. (Pickett, C.J., writing, Thierry & Stiles, JJ.)**

Ms. Stern and Mr. McNeil had a child together, born December 1, 2020. Mr. McNeil acknowledged paternity soon after the child's birth. The child was born in Texas, but Ms. Stern soon returned to Louisiana with her newborn son, where she exercised visitation with her older child. On March 4, 2021, Mr. McNeil filed a rule to establish paternity and custody in Vermilion Parish. After a hearing, the Louisiana court determined Louisiana was the home state of the child. The Louisiana court awarded custody to Mr. McNeil. On March 5, 2021, Ms. Stern filed a suit in Texas seeking to establish Mr. McNeil's paternity and seeking custody. Ms. Stern acknowledged the Louisiana suit but argued that Texas was the home state of the child. The trial judge in Texas was unable to arrange a conference with the trial judge in Louisiana, and it eventually determined that jurisdiction was proper in Texas. The Texas court awarded custody to Ms. Stern. Eventually, Mr. McNeil ended up with custody of the child.

In August 2022, Ms. Stern petitioned the Louisiana court to annul the judgment awarding Mr. McNeil custody and to recognize the Texas judgment under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which awarded her custody of her son. Following a trial, the district court determined that Louisiana is the home state of the child, and thus had subject matter jurisdiction. The court declined to register the Texas judgment. Ms. McNeil appealed.

HELD: AFFIRMED. Ms. Stern argued that the key issue in the appeal was whether Louisiana or Texas was the home state of the child. As the issue presented was a determination of subject matter jurisdiction, the court reviewed the evidence presented at the trial de novo, and determined that Louisiana, not Texas, is the home state. While the child was born in Texas, Ms. Stern returned to Louisiana with the child on January 2, 2021, and the child spent at least fifty-one of the next sixty-one days in Louisiana before Mr. McNeil filed his petition in Vermilion Parish. Thus, the trial court did not err in refusing to register the Texas judgment awarding Ms. Stern custody.

***Rabalais v. Rabalais*, 23-164 (La.App. 3 Cir. 10/18/23), 372 So.3d 970, *writ denied*, 23-1519 (La. 1/24/24), 378 So.3d 67. (Kyzar, J. writing, Gremillion & Wilson, JJ.)**

The mother, the domiciliary parent of the three children of the marriage, decided to remove the two minor daughters from public school and enroll them in private school due to issues they were having in public school. The father challenged the move based on the grounds that the children had historically attended public school and because the children's older brother was also attending public school. The father claimed that it was not in the minor daughters' best interest to

attend the private school and because there had been no showing that the public school met a particular educational need, which was not being met by the public school. Accordingly, he argued that he was not responsible for paying a pro-rata share of the private school tuition. Following a hearing, the trial court, finding that it was in the best interests of the daughters to attend the private school, ordered that the costs of the private school be included in the father's child support. The father appealed.

HELD: ***Affirmed.*** On appeal, the court found no legal error in the trial court's finding that it was in the best interests of the two daughters that they be enrolled in private school. It further found no abuse of discretion in the trial court's finding that the expenses of the private school should be included in the father's child support obligation. The court held that pursuant to La.R.S. 9:315.6(1), as amended in 2001, the expenses of private school tuition may be included in the basic child support obligation if the attendance at such school meets the needs of the child, which needs include stability and continuity. Based on the testimony of the children's clinical psychologist, the court found no abuse of discretion in the trial court finding that the private school was meeting the needs of the children for stability, considering the bullying and cyber issues experienced by the elder daughter and the sadness and depression experienced by the younger daughter, both were attending public school.

***Malone v. Roberts*, 23-226 (La.App. 3 Cir. 9/20/23), __ So.3d __ (2023 WL 6135663), *writ denied*, 23-1692 (La.1/24/24), 378 So.3d 69. (Bradberry, J. writing; Perret and Fitzgerald, JJ.)**

Brianne Roberts appealed a trial court judgment granting domiciliary custody to Levi Malone of their minor daughter, Aurora Malone. A previous consent judgment named Brianne as the domiciliary parent. The mother was living in California and the father lived in Louisiana at the time of the judgment.

HELD: ***Reversed in Part; Affirmed in Part; Remanded with Instructions.*** In addition to the designation of Levi as the domiciliary parent, other issues on appeal concerned evidentiary matters and the failure to hold the Levi in contempt of court for failing to pay child support, which he agreed he did not pay. On the contempt issue, the trial court did not make a ruling, so we considered silence as to this issue a rejection of that issue. The record was clear that Levi failed to pay $150 a month in court-ordered child support, so we remanded the case to the trial court to determine the appropriate punishment under La.R.S. 13:4611(d)(i) for violation of the judgment.

Brianne objected to evidence of Facebook posts and Snapchat locations. However, Brianne testified that the posts were hers and testified about the content of the posts. She also explained her locations as identified by the Snapchat locations. We found no abuse of discretion in admittance of this evidence since Brianne testified and authenticated the evidence. We also found harmless error in the admission of arrest records taken from the internet since Brianne admitted she had been arrested for DUI.

The relocation statute was not admissible because Brianne lived in California when the original consent judgment was rendered, which had not designated a principal residence of the child. The child lived a majority of the time in Louisiana during the prior six months at the time of the present proceeding so Louisiana was considered the principal residence.

There was no abuse of discretion in determining that that there was a material change of circumstances and it was in the best interest of the child that her father be designated the primary custodial parent.

COMMUNITY PROPERTY

***Pratt-Cook v. Cook*, 24-57 (La.App. 3 Cir. 6/5/24), ___ So.3d ___ (2024 WL 2836845). (Ortego, J., writing, Gremillion, Perry, JJ).**

Wife seeks supervisory writs from judgment granting husband's request for immediate payment of his proportionate share of wife's retirement benefits, retroactive to date she originally began receiving her retirement benefits, although wife had returned to work with same employer prior to entry of judgment of divorce.

Wife filed petition for divorce. On February 10, 2023, husband filed petition for division of parties' community property, including wife's LASERS retirement benefits, although previously retiring and wife had returned to work with same employer, prior to the entry of judgment of divorce. Because Edwards' retirements benefits had been suspended due to her reemployment with NSU, Cook asked the trial court for an immediate payment in the amount that he would have received had Edwards not reentered the work force. Following a hearing, the trial court granted Cook's request and ordered that his ownership interest in Edwards' LASERS retirement account be calculated and paid to him retroactive to the date that Edwards began receiving her fully vested and matured LASERS benefits, holding wife is indebted to husband for his share of Edwards' DROP benefits, along with her monthly LASERS retirement benefits. Additionally, the court ordered wife' counsel to prepare an order calculating husbands's ownership interest in Edwards' LASERS retirement funds and ordering that either: (1) husband be allowed to immediately begin drawing his share of wife's retirement benefits or (2) wife directly pay husband an amount equal to his ownership interest in the LASERS retirement benefits that wife would have received had she not returned to work. The trial court's proceedings have been stayed pending this court's ruling on the instant writ application.

I. Application of Sims v. Sims and La.R.S. 11:291(G)

In the instant writ application, wife argues that the trial court erred in finding that either she or LASERS is currently indebted to Cook for benefits despite those benefits not being payable prior to wife's retirement, and thus deviates from a long line of Louisiana cases, starting with *Sims v. Sims*, 358 So.2d 919 (La.1978). Further, wife maintains that the trial court's finding also violates La.R.S. 11:291(G).

In *Sims*, 358 So.2d at 922, the Louisiana Supreme Court held that the non-employee spouse is entitled to a judgment recognizing his or her interest in the other spouse's pension benefits only (emphasis added), "*if and when they become payable*, with the spouse's interest to be recognized as one-half of any payments to be made, insofar as they are attributable to the other spouse's contributions or employment during the existence of the community." This recognition of payments to the non-employee ex-spouse and those payments not being due until becoming payable is echoed and codified in La.R.S. 11:291(G) (emphasis added), which states, "[A] state or statewide retirement system ***shall not*** pay any funds to any persons until such funds normally become payable as provided by the laws governing the retirement system[.]"

Husband argues that the *Sims* line of cases should not apply because the facts in the present matter are distinguishable, as being a "re-retirement." Husband notes that the community interest in the retirement benefits in the instant case matured once wife originally left her employment in July 2020. Thus, Husband contends that he acquired a vested property interest in the retirement

benefits once the community of acquets and gains was terminated retroactive to July 5, 2022. Further, husband contends that the amount of his interest in the retirement benefits was quantifiable because the amount of the retirement benefits was set at $3,000.00 per month.

We find husband's arguments misplaced. We agree that Cook acquired a vested percentage interest in wife's retirement once the community was terminated. However, we find the *payment* to husband, by either wife or LASERS, of his portion of those benefits ***shall*** not be payable prior to Edward's retirement or in this case her re-retirement. La.R.S. 11:291(G); *Sims*, 358 So.2d 919.

II. Retirement vs. Re-retirement:

Cook argues that there is a distinction between Edwards' retirement, receiving her retirement benefits (along with Cook receiving his proportionate share) and then her return to work and suspension of her retirement benefits until her later retirement/re-retirement. In other words, husband argues that once wife retired in 2022, specifically because of his alleged "need" to continue receiving his proportionate share, it is of no moment that she returned to work and is no longer eligible for payment/receipt of retirement benefits. As discussed above, we find the legal reasoning is the same, whether it is wife's initial retirement or her return to work—simply the law and jurisprudence states that if a state employee returns to work, then any retirement benefits ***shall*** be suspended. Thus, we find no practical, factual or legal difference or distinction in law or jurisprudence as to a state employee's retirement or re-retirement pursuant to La.R.S. 11:291(G), and *Sims*, 358 So.2d at 919. Therefore, we find these arguments by husband to be without merit.

III. Bad Faith

Next, Cook maintains that while *Sims* and its progeny recognized that the choice of voluntary reemployment belongs to the employee-spouse, the employee-spouse must act in good faith when making that choice. Cook asserts that Edwards acted in bad faith by preventing him from receiving his share of her retirement benefits indefinitely by returning to work and her retirement payments suspended.

Finding it is unclear from the record what facts and evidence, if any, the trial court considered as to Edwards allegedly being in bad faith, we find the trial court erred in choosing to deviate from the plain language of *Sims* and La.R.S. 11:291(G), which require that the benefits to be awarded to the non-employee spouse shall be suspended until Edward's retirement. In finding such, the trial court erroneously and improperly based its ruling on equity rather than requiring Cook to carry his burden by providing sufficient evidence to show bad faith by Edwards, with the trial court only noting that Cook is a 66-year-old man in necessitous circumstances because he has Social Security as his sole source of income. In summary, we find that Edwards' benefits are suspended until her retirement/re-retirement, and no payment is due Cook until that time, as contemplated by *Sims* and La.R.S. 11:291(G). We further find that Cook failed to present any evidence that Edwards acted in bad faith by returning to work. Accordingly, we reverse the judgment of the trial court finding either LASERS or Edwards is indebted to Cook for continuous benefits for his share that Edwards would have received had she not voluntarily returned to work.

IV. DROP Payments

Additionally, Edwards contends that the trial court erred to the extent that it also awarded Cook a portion of her lump-sum DROP benefits, which she contends was received and spent by the parties during their marriage and prior to the termination of the community of acquets and gains. We find merit to this contention.

Here, in 2019, while Cook and Edwards were *still married*, Edwards entered the State's Deferred Retirement Option Plan (DROP), and she withdrew a lump sum of money from her DROP fund before retiring. The judgment of divorce was entered and the former community was

terminated retroactive to July 5, 2022. Thus, both Cook and Edwards received and enjoyed the benefits of the lump sum from Edwards' DROP funds, along with her monthly retirement checks, for two to three years prior to the termination of the community of acquets and gains.

WRIT GRANTED, RENDERED AND MADE PEREMPEMPTORY: The writ is granted, rendered, and made peremptory, reversing the trial court's judgment granting husband's request for immediate payment of his proportionate share of wife's retirement benefits, retroactive to date originally began receiving her retirement benefits.

***Foley v. Foley.*, 23-565 (La.App. 3 Cir. 2/28/24), 380 So.3d 873. (Panel: Gremillion, J., writing, Perry & Thierry, JJ.)**

In this community property partition, the husband sought clarification of whether a realtor fee was owed in his attempts to buy out his wife's interest in the property. The husband, who the realtor stated had been difficult to work with over a period of several years, in a lengthy letter to the trial court sought reimbursement for her services.

REMANDED. The trial court has vast discretion in handling partitions of community property pursuant to La.R.S. 9:2801(A). The trial court's order only indicated a full realtor fee if the property was listed. Two options were possible on remand: If the husband exercised his option to buy, the trial court is to hold a full hearing to determine what fee, if any, is owed the realtor for the years of work already completed. If the husband was unable or unwilling to exercise his option, the property shall be listed for sale at the realtor's ordinary commission rate in the listing contract.

***Elliott v. Elliott*, 22-789 (La.App. 3 Cir. 10/18/23), 372 So.3d 447. (Wilson, J., writing; Gremillion & Kyzar, JJ.)**

When the Elliotts divorced, they entered into a consent judgment, dated July 11, 2000, for the partition of their community property. The judgment stated: "ordered, adjudged and decreed that no further actions will be taken by either party to collect separate maintenance, retirement, or other benefits due either party and no further actions will be taken to obtain possession of any material good not currently held by the party."

Nearly twenty-two years after the consent judgment was signed, Mrs. Elliott filed a motion to reopen the community property partition and alleged that she recently learned that Mr. Elliott had purposely failed to disclose the existence of a pension plan from Shell in the original community property partition. Mr. Elliott filed an exception of res judicata, which was granted by the trial court.

On appeal, Mrs. Elliott argued that res judicata is inapplicable because the consent judgment did not include the Shell pension plan and cited several cases for the proposition that a plaintiff is not precluded from seeking a supplemental partition of an omitted asset which was never considered by the parties at the time of the original agreement." *Succession of Tucker*, 445 So.2d 510, 513 (La.App. 3 Cir.), *writ denied*, 447 So.2d 1077 (La. 1984). This court distinguished the cases cited by Mrs. Elliott on the grounds that the language used in those consent judgments, unlike the language used in the Elliotts' consent judgment, did not specifically include retirement benefits.

Mrs. Elliott then argued that the consent judgment should be annulled due to fraud. This court rejected this argument because the motion to reopen the community property partition did

not seek annulment of the consent judgment. Further, Mrs. Elliott did not introduce any evidence to support her claims that her consent was vitiated because Mr. Elliott either intentionally or inadvertently withheld the existence of the Shell pension plan. "[A] relative nullity involves a factual issue which must be proven by evidence placed in the record." *Smith v. LeBlanc*, 06-41, p. 7 (La.App. 1 Cir. 8/15/07), 966 So.2d 66, 72.

HELD: ***Affirmed.***

***Yates v. Yates*, 22-741 (La.App. 3 Cir. 11/2/23), 375 So.3d 548. (Panel: Gremillion, J., writing, Kyzar & Wilson, JJ.)**

Wife appealed the trial court's partition of community property and award of $158,298.82 in reimbursements to the husband. The wife's twelve assignments of error, with multiple sub-assignments, even included claims that the trial court erred in awarding her excessive reimbursements.

AFFIRMED AS AMENDED; REVERSED IN PART; REMANDED. The trial court erred in declaring checking and savings account separate property without accounting for the undisputed community funds existing in the account; trial court's determination relating to retirement accounts was not erroneous, trial court's valuation of the home at $590,000 rather than $606,000 was not erroneous where wife admitted to same; mathematical errors relating to credit card accounts, mortgage payments, insurance premiums, property taxes, rental reimbursements, and others were corrected on appeal. For the majority of the husband's claims, he provided no evidence of the claims However, if uncontested, the amount listed in his detailed descriptive list would stand. The most significant errors were reimbursements to the husband for "the Yates Estate" for $39,262.38 when the only proof of inheritance was in the amount of $15,969.79 and the evidence was clear that this money wasn't used to benefit the community. Moreover, the husband spent the father's money while the father was still alive, which funds would be presumed to be community since the father's donative intent could not be established. A spouse is entitled to reimbursement for separate funds expended since the date of termination of the community, *not* the date of separation. Because we were unable to reconcile the trial court's math, which did not appear to properly halve reimbursement claims, the case was remanded for further proceedings to recalculate assets, liabilities, and reimbursements taking into consideration our findings.

PROPERTY

***Ebert v. Howell*, 23-588 c/w 23-589 (La.App. 3 Cir. 3/6/24), 381 So.3d 990. (Panel: Fitzgerald, J., writing; Kyzar & Ortego, JJ.) (Kyzar concurs with reasons.**

The Eberts (tenants/lessees) and Howell (owner/lessor) executed in authentic form a lease agreement with an option to purchase immovable property. The lease provided a two-year initial term—from April 15, 2019, through March 14, 2021—with monthly rental payments of $2,726.85. It contained an option for the Eberts to purchase the property "at any time throughout the initial term of the foregoing lease". During the lease's initial term, the parties orally modified the agreement on two occasions: first, for the payment of property taxes; and second, for the payment of flood insurance premiums. The Eberts continued to reside in the house for twenty-four months after the March 14, 2021 termination date, and they continued paying

monthly rent until December 2022 when Howell refused to deposit those funds. The relationship between the parties soured. The Eberts filed a Petition for Declaratory Judgment and to Enforce Option to Purchase. Howell filed a motion to evict the Eberts from the leased premises. The trial court denied the Eberts' actions but granted Howell's motion for eviction. The Eberts appealed.

HELD: Affirmed. The third circuit held that the trial court's finding of fact, that the parties extended the lease by oral agreement in July 2021—which was after the initial term of the lease had expired—is not manifestly erroneous. That finding has no bearing on the enforceability of the option to purchase according to the third circuit. The third circuit explained that the Eberts failed to secure an extension of the option in writing and that this failure is fatal to their appeal. Whether there was an oral agreement to extend the lease is immaterial according to the third circuit.

***CV Land, LLC v. Millers Lake, LLC*, 23-69 (La.App. 3 Cir. 11/2/23), 373 So.3d 529. (Panel: Stiles, J., writing; Perret and Perry, JJ.).**

CV Land purchased a 1,014-acre tract in Evangeline Parish and thereafter sought to access water from a 3,000 acre reservoir maintained by the adjacent landowner, Miller's Lake. After Miller's Lake demanded payment for the release of water, CV Land filed suit alleging that the lake's levee system restricted the naturally running waters of Bayou Nezpique, which had historically flowed across the CV Land tract. CV Land pointed out that, although La.Civ.Code art. 658 permits the use of naturally running water as it runs over one's own land, the property owner may not capture that water and sell it to downstream riparian landowners. La.R.S. 38:218 instead requires that the water be returned to its natural course before it leaves the estate "without any undue retardation of the flow of water outside of [its] enclosure[.]" CV Land sought damages, an injunction preventing Miller's Lake from impeding the natural flow of the water, and an order for the restoration of the natural flow of water without charge or cost to CV Land.

Miller's Lake filed an exception of no right of action, asserting that the predecessor in title to both tracts, J.B. Miller, created the lake and levee system when the larger property was under his common ownership. It thus argued that CV Land's downstream riparian rights were voluntarily alienated and/or renounced. Noting that the levee had been in place for decades, Miller's Lake also claimed that CV Land's riparian rights were lost by acquisitive prescription. The trial court sustained the exception.

HELD: *Reversed and Remanded.* Miller's Lake focused on CV Land's advancement of its riparian rights and argued that, as a natural servitude, those rights could be altered by agreement, destination of the owner, or prescription. The panel noted, however, that "[l]egal and natural servitudes may be altered by agreement of the parties *if the public interest is not affected adversely*." La.Civ.Code art. 729. CV Land's petition plainly identified the running waters of Bayou Nezpique as public things and, thus, property of the State. *See* La.Civ.Code art. 450 ("Public things that belong to the state are such as *running waters* ….); *See also* La.R.S. 9:1101 ("The waters of and in all bayous … and the beds thereof … are declared to be the property of the state."). While public things are susceptible of ownership, they are not susceptible of private ownership. They are instead owned by the state for the benefit of all. *See, e.g.*, La.Civ.Code art. 458 (providing "any person residing in the state" with a right of action to seek removal of works built without a lawful permit on public things.). That public character, the panel determined, undermined Miller's Lake position that CV Land's rights to the public water were altered by agreement or destination of the owner as neither Mr. Miller nor his heirs or assigns could have acquired the ownership of

the Bayou. Miller's Lake argument regarding acquisitive prescription similarly lacked merit as it is well settled that prescription does not run against the state. *See* La.Const. art. 9, § 4; La.Const. art. 12, § 13.

EMPLOYMENT LAW

***In re Richard*, 23-476 (La.App. 3 Cir. 1/24/24), 379 So.3d 849. (Gremillion, J., writing, Perret & Ortego, JJ.)**

Plaintiff was a non-tenured teacher employed by the Natchitoches Parish School Board (NPSB) who was fired by the Superintendent. Plaintiff was sent an August 3, 2022 letter from the Superintendent outlining seven reasons he was considering terminating her employment and inviting a response within seven days. In response, the teacher emailed the Superintendent and stated, "All of the allegations are Unsubstantiated. Thank you." Three days after receiving the response, the Superintendent penned a second letter in which he stated:

> On August 5th, 2022, 1 provided you with a letter detailing eight (8) concerns relative to your performance. Such letter also informed you that, based upon those reasons, I was contemplating disciplinary action against you, including your possible termination. You were afforded seven (7) days to respond to the allegations.
>
> On August 12th you responded via an email in which you simply stated that all the allegations concerning your employment were "unsubstantiated." You did not go into any further detail, nor did you dispute the claims in any specific manner.
>
> Based on the reasons outlined in my initial letter and the available information, coupled with your failure to dispute them in any specific manner and your failure to provide any additional information, it is my determination that the concerns/reasons are substantiated. Accordingly, I am terminating your employment with Natchitoches Parish School Board effective Tuesday, August 16th, 2022.

On judicial review of the matter, plaintiff seized upon the language indicating that her employment was being terminated based upon an "eighth concern" not addressed in the Superintendent's initial letter. After reviewing the timeline of events of the previous school year, during which the plaintiff was ill and receiving treatment, we concluded that the Superintendent was neither arbitrary nor capricious in terminating the plaintiff. See La.R.S. 17:443(A). As to the "eighth concern, we also pointed out that the same letter mentioned the Superintendent's "August 5" letter, which was actually dated August 3. "[R]egardless of where there were seven or eight—or just one—stated grounds for termination, proof of any one suffices."

***Master Flow Technologies, LLC v. Chris Lee*, 23-615 (La.App. 3 Cir. 4/3/24), 386 So.3d 1153. (Fitzgerald, J., writing, Kyzar & Ortego, JJ.)**

Chris Lee left his position as sales representative at MFT to work for Mulholland Energy Services. Shortly thereafter, MFT filed claims against Lee under the Louisiana Uniform Trade Secrets Act and for a temporary restraining order, preliminary injunction, and ultimately, a permanent injunction prohibiting Chris from competing against MFT and/or disclosing confidential information. MFT based its lawsuit on noncompetition and confidentiality provisions included in Chris's original employment agreement. The trial court entered a preliminary injunction prohibiting Lee from competing with MFT in various parishes in Louisiana and counties in Texas and from disclosing or using MFT's proprietary or confidential information, and Lee appealed.

HELD: The trial court erred in issuing the injunction because the noncompetition agreement failed to strictly comply with the provisions of La.R.S. 23:921. The noncompetition was overly broad and ambiguous in that it failed to sufficiently describe MFT's business or the activities from which Lee was prohibited. The agreement as written would have prevented Lee from working in essentially any capacity in the oil and gas industry, as well as many related businesses. Further, the injunction was improper in that it prohibited Lee from disclosing confidential information without specifying the information at issue and without sufficient evidence proving the existence of a trade secret or proprietary information. The injunction was vacated and the case remanded.

***In re Richard*, 23-476 (La.App. 3 Cir. 1/24/24), 379 So.3d 849. (Gremillion, J., writing, Perret & Ortego, JJ.)**

Plaintiff was a non-tenured teacher employed by the Natchitoches Parish School Board (NPSB) who was fired by the Superintendent. Plaintiff was sent an August 3, 2022 letter from the Superintendent outlining seven reasons he was considering terminating her employment and inviting a response within seven days. In response, the teacher emailed the Superintendent and stated, "All of the allegations are Unsubstantiated. Thank you." Three days after receiving the response, the Superintendent penned a second letter in which he stated:

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On judicial review of the matter, plaintiff seized upon the language indicating that her employment was being terminated based upon an "eighth concern" not addressed in the Superintendent's initial letter. After reviewing the timeline of events of the previous school year, during which the plaintiff was ill and receiving treatment, we concluded that the Superintendent was neither arbitrary nor capricious in terminating the plaintiff. See La.R.S. 17:443(A). As to the "eighth concern, we also pointed out that the same letter mentioned the Superintendent's "August 5" letter, which was actually dated August 3. "[R]egardless of where there were seven or eight—or just one—stated grounds for termination, proof of any one suffices."

***Verrett v. Lake Wellness Ctr.*, 23-168 (La.App. 3 Cir. 11/22/23), __ So.3d __ (2023 WL 8101988). (Panel: Gremillion, J., writing, Pickett & Fitzgerald, JJ.)**

Plaintiff filed suit against employees under the Whistleblower Act. The trial court granted a peremptory exception of no cause of action in favor of the defendants.

AFFIRMED. Employee managers and supervisors are not an "Employer" under the Whistleblower Act. Plaintiff's claims of crimes and wrongdoings against the employees have no relevance to the Whistleblower claim; additionally, a piercing the corporate veil argument would not work. Finally, Plaintiff raised extremely inflammatory information for the first time on appeal relating to kickbacks and corruption which would be stricken from the record.

WORKERS' COMPENSATION

***Kibodeaux v. Jan's Construction Co., Inc.* 23-454 (La.App. 3 Cir. 4/3/24), 386 So.3d 1148, 2024 WL 1424965 (Ortego, J., writing, Gremillion, Savoie, Perret & Stiles, JJ.; Savoie concurs with reasons; Perret dissents and would affirm.)**

Employer seeks supervisor writs from the workers' compensation judge (WCJ), denial of employer's motion for summary judgment seeking to dismiss employee's claim against employer, alleging that he contracted COVID-19 on the job was a compensable "occupational disease" pursuant to La.R.S. 23:1031.1(B). Defendant arguing that the WCJ manifestly erred in that Kibodeaux cannot satisfy the requirement and prove that COVID-19 is a compensable occupational disease that is "characteristic of or peculiar to" the claimant's employment.

Kibodeaux, an oilfield surveyor, filed a workers' compensation claim against employer, alleging that he contracted COVID-19 on the job and that COVID-19 is a compensable occupational disease. Kibodeaux asserts that he contracted COVID-19 because of being required to travel out of state for work, be on call 24 hours a day, and stay in hotels near jobsites. Kibodeaux contends that these factors caused him to have a greater risk of exposure to COVID-19. Kibodeaux argues that although COVID-19 is not listed as a compensable occupational disease pursuant to the statute, certain jurisprudence supports his assertion that he contracted COVID-19 on the job and that COVID-19 claims fall under the general occupational disease statute, La.R.S. 23:1031.1. Kibodeaux contends that he is entitled to the presumption of causation because: 1) he was well before he started working for Jan's on September 2, 2021; 2) the symptoms of his disabling disease

appeared and continuously got worse during his employment in September [2021]; and 3) medical records and testimony will show that there is a reasonable possibility that his disability was caused by his employment.

Seeking dismissal of Kibodeaux's claim, employer filed a motion for summary judgment asserting that COVI-19 does not constitute a compensable occupational disease under the Louisiana Workers' Compensation Act (LWCA), La.R.S. 23:1021. As such, the burden shifts from Jan's, as the movant, to Kibodeaux, as claimant, to show he can carry his burden of proof at trial that his COVID-19 illness meets the definition of an occupational disease under La.R.S. 23:1031.1(B). Thus, for this summary judgment, pursuant to La.Code Civ.P. art. 966(C)(2), the burden is on Kibodeaux to show he can carry the evidentiary burden of proof at trial that COVID-19 is an occupational disease particular to his employment with employer, and claimant cannot sustain said burden.

Acknowledging that there are no Louisiana appellate cases which directly address whether COVID-19 constitutes an occupational disease, the five-judge panel notes that the jurisprudence clearly states that in determining whether the disease at issue is an occupational disease requires that the claimant prove it was contracted during the course of claimant's employment, ***and*** that the disease was the result of the particular nature of the work performed.

After reviewing the record, we find that Kibodeaux has failed to provide any evidence of any specific occurrence that caused him to contract COVID-19. Specifically, Kibodeaux testified that he had no idea of any incident where he was exposed to COVID-19 or from what person, if any, he may have contracted the virus. He further testified that no person on his crew or anyone he came in contact with at work had COVID-19 before or after he contracted COVID-19 that could have exposed him to the virus, ***and*** he failed to present any evidence that the disease was the result of the particular nature of the work performed as an oilfield surveyor.

Accordingly, we find that pursuant to La.Code Civ.P. art. 966(C)(2), Kibodeaux cannot carry his evidentiary burden of proof at trial that the COVID-19 virus he contracted as an oilfield surveyor meets the definition of an occupational disease pursuant to La.R.S. 23:1031.1(B).

WRIT GRANTED, RENDERED AND MADE PEREMPEMPTORY: The writ is granted, rendered, and made peremptory, reversing the WCJ's judgment denying Realtor, Jan's Construction Company's motion for summary judgment, and the Realtor's motion for summary judgment is granted dismissing the claimant, Jacob Kibodeaux's case against his employer, with prejudice.

ATTORNEY FEES

Braxton v. La. State Troopers Association, **23-253 (La.App. 3 Cir. 1/31/24), 381 So.3d 186. (Kyzar, J. writing; Perry & Fitzgerald, JJ.)**

Plaintiff's daughter was stopped and arrested for driving under the influence. At the time of this incident, Plaintiff was a member of the Louisiana State Troopers Association; however, he was asked to resign his position due to his actions following his daughters arrest. Plaintiff filed a defamation action against various defendants, including the supervisor of the arresting officer, as a result of an incident report written by the supervisor. Following plaintiff's amendment of his petition adding the state police as a defendant and raising additional allegations relating to a second incident report and a Facebook posting by the supervisor. The state police filed a special motion

to strike the plaintiff's defamation claims against it, which the trial court granted. On appeal, this judgment was affirmed, with writs denied by the supreme court. Thereafter, the state police sought attorney fees and costs pursuant to La.Code Civ.P. art. 971(B), and the supervisor moved for summary judgment, on the issue of the second incident report and the Facebook posting. Following hearings, the trial court awarded the state police $50,376.25 in attorney fees, plus court costs. It further granted judgment in favor of the supervisor on the issue of the second incident report, but denied judgment on the issue of the Facebook posting. Plaintiff appealed both judgments.

HELD: ***Affirmed.*** Based on the complexity of the litigation, the state police's late entry into the suit, and the fact that the special motion strike was the only defense raised by the state police in response to plaintiff's defamation claim, the court held that the trial court's award of $50,375.25 in attorney fees was reasonable. The court further found no manifest error in the trial court's determination that the hourly rate of $175.00 was reasonable. Plaintiff benefited from this hourly rate as it was the maximum amount that could be charged the state and because the normal hourly rate charged by the state's counsel was $275.00 to $300.00. The court further affirmed the award of court costs to the state despite the fact that it was exempt from paying upfront costs. Although these costs were deferred, by statute they must be paid within thirty days of a final judgment, either by the state or by the party cast with costs. La.R.S. 4521(B).

The court further affirmed the trial court's grant of partial summary judgment in favor of the supervisor on the issue of the incident report. The court held that the statements made by the supervisor in the incident report enjoyed a qualified privilege as they were made in good faith on a subject that the supervisor had an interest or duty to communicate on and that they were made to a person having a corresponding interest or duty. After reviewing plaintiff's evidence, the court held that he failed to establish that the supervisor's statements were false or that he entertained serious doubt as to the truthfulness of his statements. Thus, the judgment of the trial court was affirmed.

RES JUDICATA

***Cordova v. Lafayette Gen. Health, Inc.*, 23-353, 23-354 (La.App. 3 Cir. 1/31/24), 379 So.3d 870. (Bradberry, J. writing; Perry and Wilson, JJ.)**

Dr. J. Cory Cordova appealed a trial court judgment granting an exception of res judicata filed by Lafayette General Health System, Inc., University Hospital and Clinics, Inc. and Lafayette General Medical Center, Inc. The issue in these consolidated cases centers around the release of information regarding substandard evaluations to third parties contained in Dr. Cordova's LSU Medical School residency file.

HELD: ***Affirmed As Amended.*** In 2017, Dr. Cordova began an internal medicine residency with LSU's residency training program at University Hospital & Clinics, Inc. Dr. Cordova claims that he was placed on unwarranted probation and subject to a request for adverse action, in addition to information being placed in his file which was misleading, false, and inappropriate. He was non-renewed for the residency program. Dr. Cordova filed suit against the Defendants in addition to LSU and other parties arguing that they sabotaged his efforts to apply to other residency programs by sending inappropriate and incomplete documentation regarding his disciplinary status and evaluations to two other programs. Since he alleged due process violations

under the federal and state constitutions, his case was removed to federal court. After the action was appealed all the way to the United States Supreme Court, the federal court dismissed with prejudice all claims against all Defendants.

Dr. Cordova then filed a new suit in district court alleging that information had been released after this ruling to programs where he sought a medical license to practice. The Defendants filed an exception of res judicata arguing that this is exactly the same issue that was before the federal court which was already decided. This court found that what was at issue was the release of information as in the federal case, and he could have sought declaratory relief to prevent the release of future information. We also awarded $7,500 in attorney fees for defending a frivolous appeal as requested by the Defendants in their answer to the appeal.

CONSTITUTIONAL LAW

***Doe v. Diocese of Lafayette*, 22-120 (La.App. 3 Cir. 8/17/24), ___ So.3d ___ (2023 WL 10510178), *writ denied*, 23-1189 (La. 6/28/24), ___ So.3d ___ (2024 WL 3248861). (Pickett, C.J., writing, Perret, J., joining the opinion, Fitzgerald, J., concurring with reasons, Bradberry, J., dissenting with reasons, and Gremillion dissenting for the reasons assigned by Judge Bradberry.)**

The plaintiff sued the Diocese of Lafayette alleging that he had been sexually abused by a priest over fifty years ago when he was 16 years old. The diocese filed an exception of prescription. The trial court denied the exception, finding that Act 322 of the 2021 Legislature, which created a three-year look back window for claims of sexual abuse for minors, was applicable. The diocese applied for supervisory writs. The third circuit denied the writ. The supreme court granted the diocese's writ of certiorari and remanded the case to the court of appeal for briefing, argument, and a full opinion.

In the intervening period, the legislature passes Act 386 of the 2022 Legislature, which clarified its intent in Act 322 to revive all claims of sexual abuse of a minor prescribed under the prior law. Also, the supreme court issued an opinion finding that in Act 322, the legislature did not expressly manifest an intent to revive all claims prescribed under the prior law. *T.S. v. Congregation of Holy Cross Southern Province, Inc. & Holy Cross College, Inc.*, 22-1826 (La. 6/27/23), 366 So.3d 64. The supreme court acknowledged Act 386 in its opinion but did not address the effect of Act 386 on the claims in *T.S.* because the suit was filed before the passage of the 2022 act.

On remand from the supreme court, this court found that Act 386 clearly manifested an intent to revive all claims of sexual abuse of minors during the look-back period. The court further found that the revival period did not deprive the diocese of a vested right. The court also found no violation of any federal or state due-process guarantees. The court determined that the retroactive application of an act of the legislature is a permissible exercise of the police power that is not constitutionally prohibited.

Subsequently, the supreme court reached the same conclusion in *Bienvenu v. Defendant 1*, 23-1194 (La.6/12/24), 386 So.3d 280 (opinion on rehearing).

MPRE®

Matthew's Professional Responsibility Examination

Choose the best answer.

Ethics CLE

Matthew Couvillion

Administrative General Counsel, Third Circuit

August 23, 2024

Hearken back, if you will, to law school. When I talk with people about law school, I think I sound like our grandparents who traveled uphill both ways in the snow to get the chance to go to school. I did not enjoy the experience. There were many reasons, one of which was certainly a particular standardized test, the Multistate Professional Responsibility Exam. The " 'best answer' among several correct answers" nonsense infuriated me.

When I talk to more recent law school graduates, they apparently think law school was enjoyable and fun and exciting. I do not recognize their description of the experience. But at least they still have to take the MPRE.

I've designed this hour of ethics CLE as a mini-MPRE. I have changed the rules slightly – there may be multiple correct answers. And the correct answer(s) should be glaringly obvious. I've provided a copy of the Rules of Professional Conduct relevant to the questions. I have also included some additional reference material related to our specific roles in the legal system, as judges and lawyers employed by the courts.

My goal is to facilitate some discussion about the issues raised in the questions, so please interrupt me to ask questions, make brilliant insights, or tell me that my understanding is wrong.

Code of Judicial Conduct

Canon 3

(A) Adjudicative Responsibilities

(3) A judge shall be dignified, patient, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals with in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(4) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, and shall not permit staff, court officials or others subject to the judge's direction and control to do so.

(6) . . . . Judges of appellate courts shall also avoid all actions or language which might indicate to counsel, litigants or any member of the public, the particular member of the court to whom a case is allotted or assigned for any purpose. Similar circumspection should be exacted on the part of court officers, clerks and secretaries.

(B) Administrative Responsibilities

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

Canon 5

(C) Financial Activities.

(4) Information acquired by a judge in his or her judicial capacity shall not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.

Canon 7

(A) A Judge or Judicial Candidate Shall Not, Except to the Extent Permitted By These Canons:

(8) use court staff, facilities, or other court resources in a campaign for judicial office, except to the extent that such use is de minimis in nature[.]

Rules of Professional Conduct

Rule 1.1 Competence

(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.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions of Rule 1.16 and to paragraphs (c) and (d) of this Rule, a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 Communication

(A) A lawyer shall:

. . . .

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished[.]

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

Rule 1.16 Declining or Terminating Representation

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
> . . . .
> (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement[.]

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]

3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

> (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists[.]

3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such person during the proceeding unless authorized to do so by law or court order;
>
> . . . .
>
> (d) engage in conduct intended to disrupt a tribunal.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or

Article III. PROHIBITION OF PRIVATE LAW PRACTICE

Section 1. **Statement of Policy.** Attorneys employed at the Supreme Court, the Courts of Appeal, or by the justices or judges thereof, shall not practice law, mediate or arbitrate, except as counsel, mediator or arbitrator for the court in which that attorney is employed or for the Judiciary Commission of Louisiana; nor shall they engage in any business, calling or employment which interferes with the proper discharge of their duties. Attorneys may act pro se and may perform routine legal work incident to the management of their personal affairs or the personal affairs of their immediate family (as defined in the Louisiana Code of Judicial Conduct), so long as the pro se or immediate family legal work does not present an appearance of impropriety, does not take place while on duty or in their workplace, and does not interfere with their primary responsibility to the office in which they serve, and further provided that:

(1) In the case of pro se legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule); and

(2) In the case of immediate family legal work, such work is done without compensation (other than such compensation that may be allowed by statute or court rule) and does not involve the entry of an appearance in any state court in a contested matter.

(3) Notary work may be performed provided it is without remuneration of any kind.

Question 1

A new attorney took a job with a firm performing residential real estate closings. In cases where a second witness was not available at the closing, he would sign the documents as a witness and return the closing packet to the firm's office, where another member of the firm's staff who was not present at the closing would notarize the documents.

The attorney then took a position as a law clerk with the state court of appeals. While working at the court of appeals, he continued to perform two or three closings per month for his previous firm.

Why is the attorney subject to discipline under the Rules of Professional Conduct?

(A) He has engaged in the unauthorized practice of law.
(B) He has engaged in conduct involving dishonesty or misrepresentation by knowingly allowing a person not present at the closing to notarize documents.
(C) He has engaged in conduct prejudicial to the administration of justice.
(D) Yes, yes, and yes.

Question 2

An attorney received an adverse ruling from a federal magistrate judge, who also set a rule to show cause hearing for the attorney to show why he and his client should not be sanctioned for filing a deficient pleading. The magistrate judge ordered the attorney to produce certain emails between him and counsel for another party regarding the pleading for in camera inspection. The attorney objected to the setting of the rule to show cause hearing before the magistrate judge reviewed the emails.

On the same day that the magistrate judge ordered the rule to show cause hearing, but before the clerk's office had an opportunity to enter the order into the record, the attorney telephoned the chambers of the District Judge and spoke with the judge's law clerk regarding the impending rule to show cause. The law clerk responded with an email to the attorney, all counsel of record in the case, and the magistrate judge, which stated:

> In response to your phone call today, I am informing you that the proper procedure of this court is for the magistrate judge to first issue a ruling on the Rule to Show Cause on the Rule 11 motion. Then, should you disagree with the magistrate judge's ruling, you may appeal to District Judge. At this point in the process, however, it would be premature for District Judge to intervene.

The attorney replied to all, and requested a status conference before District Judge before the rule to show cause issued because it would be unfair to issue the rule to show cause before reviewing the emails requested by the magistrate judge.

In his brief ahead of the show cause hearing, the attorney argued that he did not contact District Judge's chambers until after the magistrate judge had issued the rule to show cause. At the hearing, the attorney conceded that his brief was incorrect about the timing of his contact with the law clerk. His brief also asserted that he did not discuss the issuance of the rule to show cause with the law clerk. When asked at the hearing if he discussed the issuance of the rule to show cause with the law clerk, the attorney claimed he could not remember. Later, he conceded that he did discuss the rule to show cause but could not remember if he talked to the law clerk about District Judge intervening to stop the issuance of the rule.

Is the attorney subject to discipline for his conduct?

(A) No, because he was zealously representing his client's interests.

(B) No, because any factual errors in his brief were cleared up in his testimony at the hearing.

(C) Yes, because the attorney knowingly disobeyed an obligation under the rules of a tribunal by contacting the law clerk to discuss the issuance of the rule to show cause.

(D) Yes, because the attorney made false statements to the magistrate judge when asked direct questions.

Question 3

An attorney represented the defendant in a suit to enforce a promissory note. The attorney sought to have the suit removed to federal court on the basis of diversity jurisdiction. The federal court swiftly remanded the matter back to state court, finding both the plaintiff and the defendant are citizens of Louisiana.

On remand, the state court issued an order for a writ of seizure and sale of certain property. The attorney filed multiple pleadings attempting to block the sheriff's sale, which the court denied. The attorney then sent a threatening and disrespectful fax to the trial court's fax number and emailed a similar message to the trial court's law clerk. These messages clearly sought to relitigate the underlying issues. In response to this correspondence, the court issued a Rule to Show Cause why the attorney should not be held in contempt for improper *ex parte* communications.

Before the contempt hearing, the attorney filed two writ applications directly with the supreme court seeking "protection" from the show cause order. When the supreme court denied both writs, the attorney filed a second Notice of Removal to federal court. The federal court found the attorney lacked a reasonable basis for invoking the jurisdiction of the federal court and remanded back to state court. It imposed costs and attorney's fees for improper removal.

The trial court never held the contempt hearing.

Did the attorney do anything wrong in sending the messages to the law clerk?

(A) No, he was being a zealous advocate for his client and trying to right a manifest injustice.
(B) No, he was frustrated, so he gets to throw a tantrum like a two-year-old child.
(C) No, because he was never held in contempt by the judge. No harm, no foul.
(D) Yes, he tried to influence an official by means prohibited by law, the messages were prohibited ex parte communications, and the attorney attempted to disrupt the tribunal.

Question 4

Martin molested his daughter. When his wife Sandra finds out, Martin turns himself in to the police, confesses to the crime, and is arrested. Sandra calls her neighbor, an attorney, upset that the police interviewed the child outside of Sandra's presence. The attorney visited Martin in jail, and Martin admitted to the criminal behavior. Martin explains to the attorney that his chief concern is to shield his daughter from testifying about the abuse.

Meanwhile, there is a concurrent investigation by DCFS. The attorney intervened in the investigation and refused to allow the DCFS worker to ask the child about the molestation. The child is removed from the home and DCFS files a child in need of care petition. The attorney appears at the CINC hearing, seeking to enroll as counsel for Martin, Sandra, and Martin's daughter. He explains that he represents the father in the criminal proceedings.

The judge refuses to allow the attorney to enroll as counsel in the CINC proceeding. The attorney explains that his intention, on the wishes of Martin, was to have Martin plead guilty and go to jail to avoid the need for his daughter to testify about the abuse.

Can the attorney continue to represent Martin in the criminal proceedings?

(A) Yes, because Martin is willing to plead guilty as long as his daughter does not have to testify.
(B) Yes, because the trial judge in the CINC proceeding did not prohibit him from representing Martin in the criminal case.
(C) Yes, because the victim did not want to testify against her father.
(D) No, because, the representation of one client is adverse to another client.

Question 5

An attorney is hired to represent a criminal defendant who is charged with attempted first degree murder of a police officer. On the first morning of trial, the attorney and the defendant are both present in the courtroom during the initial questioning of prospective jurors. During a mid-morning break, the defendant goes to the bathroom, never to return. When the break is over, the attorney notes the absence of his client, explains that he did not know that his client intended to absent himself, and moves for a continuance or a mistrial. The trial judge denied both motions.

The attorney then announces that he will no longer participate in the trial, but he will remain at the counsel table. He explains to the trial court that without his client, he will be unable to provide an adequate defense. True to his word, the attorney did not object when the trial court gave an improper jury charge or the prosecutor implied the defendant's flight might show a guilty conscience. The jury found the defendant guilty as charged. On appeal, the conviction was reversed.

Is the attorney subject to discipline for violation of the rules of professional responsibility?

(A) No, because he made a strategic decision in good faith to represent his client's best interests.
(B) No, because he was prepared for trial and he was not complicit in his client's decision to absent himself from the trial.
(C) Yes, because he was just a potted plant.
(D) Yes, because the failures to make obvious timely objections caused the court of appeal to reverse the defendant's conviction.

Question 6

The defendant is found guilty of first degree murder. Before the penalty phase of the trial begins, the capital-certified defense attorney informs the court that it can no longer represent the defendant. The defense attorney wants to call the defendant's mother to testify, but the defendant insists that he does not want her to testify. Unable to present the strongest defense he has, the defense attorney indicates he is unwilling to represent the defendant.

The defendant explains that he would rather represent himself and present no defense than allow the defense attorney to call his mother as a witness. The trial court holds a hearing the next day to determine if the defendant is knowingly waiving counsel and is capable of representing himself. During the hearing, the trial court tells the prosecuting attorney that he can be present and observe but would not have any input in the hearing. The trial court finds the defendant knowingly waived counsel and allows him to represent himself in the penalty phase. He presents no defense, and the jury recommends a death sentence. On appeal, the supreme court reverses the sentence.

According to Justice Crichton, who failed to fully consider applicable rules of professional conduct?

(A) The defense attorney for failing to abide by the client's decision about the scope and objectives of the representation.
(B) The defense attorney for failing to bring this issue to the attention of the court in pre-trial proceedings.
(C) The judge for ordering the prosecuting attorney to remain an observer during the hearing.
(D) The prosecutor for remaining silent as a "minister of justice" with a duty to safeguard the rights of the victim's family and the defendant.

Question 7

An attorney qualifies as a candidate for district judge in Attakapas Parish. As part of the documentation, the attorney certifies that she has filed state and federal taxes for the last five years. Following the close of the qualifying period, a citizen files a public records request with the Department of Revenue requesting information on the status of tax returns for the attorney for the last five years. The Department of Revenue has no record of a tax return filed by the attorney for 2021.

A citizen files an objection to the candidacy. At the hearing, the attorney testifies that she is sure she filed her state taxes in 2021, but cannot offer any proof. A witness from the Department of Revenue testifies that there is no record of a 2021 tax return filed in the attorney's name or using her social security number. The attorney is disqualified from the race.

Is the attorney subject to discipline under the rules of professional conduct?

(A) No, she just forgot.
(B) Yes, she failed violated the rule requiring candor to a tribunal.
(C) Yes, filing incorrect qualifying forms is conduct involving dishonesty, fraud, deceit, or misrepresentation.
(D) No, because it's bad enough she can't be a judge.

Question 8

An attorney is hired as a law clerk for Appellate Judge. Appellate Judge has recused himself from Writ 18-12 and Appeal 18-14 because Sam, a personal friend of Appellate Judge and a former client of Appellate Judge's son, is a litigant. On her first day of work, another law clerk in Appellate Judge's chambers, explains to the new attorney that all the judge's staff is recused from cases in which he recuses himself. Sam is also a former client of the attorney and helped the attorney get the clerkship with Appellate Judge.

While employed at the court of appeal, the attorney reviewed the briefs filed in Writ 18-12 and emailed Sam to critique the brief filed by her appellate counsel. The attorney also prepared a memo with list of supplemental authorities and sent it to Sam for her counsel to sign and file with the court of appeal. The attorney explains to Sam that the contents of this memo should be cut and pasted into a new Word document before emailing to her counsel. The writ application is denied.

After the appeal panel heard oral arguments in Appeal 18-14, the attorney forwarded a digital recording of the arguments to Sam via email. The attorney also found a pre-argument memorandum from one of the judges on the panel in the court's shared drive that she then shared with Sam. After the opinion was circulated by the writing judge, the attorney sent documents which disclosed the identity of the writing judge from her court email to her personal email, and then to Sam via her personal email.

When a massive print job was discovered on a printer by Appellate Judge's secretary, the attorney's actions – accessing records from the shared drive, transmitting those documents to Sam, and preparing briefs for Sam's counsel to sign and file in the appellate court on behalf of Sam – were discovered. After a police investigation, the attorney was charged with an offense against intellectual property. She eventually pled no contest to that charge.

In how many ways has the attorney violated the rules of professional conduct? (Choose all that apply.)

(A) A violation of Rule 3.5(a) by seeking to influence a judge or other official by means prohibited by law.
(B) A violation of Rule 3.5(b) by communicating ex parte with a judge, juror, prospective juror, or other official by means prohibited by law.
(C) A violation of Rule 3.5(d) by engaging in conduct intended to disrupt a tribunal.

(D) A violation of Rule 8.4(a) by violating or attempting to violate the Rules of Professional Conduct.
(E) A violation of Rule 8.4(b) by committing a criminal act, especially one that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.
(F) A violation of Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.
(G) A violation of Rule 8.4(d) by engaging in conduct that is prejudicial to the administration of justice.
(F) A violation of Rule 8.4(e) by stating or implying an ability to influence improperly a judge, judicial officer, governmental agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Notes on Question 1

In the Matter of C.H. Barbier, 654 S.E.2d 85 (S.C. 2007).

Louisiana Rule of Professional Conduct 5.5(a): A lawyer shall not practice law **in violation of the regulation of the legal profession** in that jurisdiction, or assist another in doing so.

The Supreme Court of South Carolina has promulgated a separate Code of Conduct for Staff Attorneys and Law Clerks which prohibits a law clerk from "undertak[ing] to perform legal services for any private client in return for remuneration." Louisiana does not have a separate code, but I would suggest that the Supreme Court HR Manual is a regulation of the practice of law.

Notes on Question 2

In re Ungarino, 21-1455 (La. 1/19/22), 330 So.3d 1077.

The law clerk's contemporaneous email to all parties and the magistrate judge was key to the magistrate judge finding that the attorney engaged in improper ex parte communications and that his lack of candor to the court. ["To describe respondent's responses to this court as 'evasive' would be far too generous."]

The supreme court imposed a one year and one day suspension with all but forty-five days deferred. The disciplinary board had recommended a fully deferred suspension, and the supreme court, sua sponte, ordered briefing to address the appropriate sanction.

The magistrate judge referred the attorney to the Eastern District of Louisiana Lawyers' Disciplinary Enforcement Committee for investigation and discipline. The Chief Judge of the federal court issued a suspension of the attorney without setting forth any factual findings or determinations of rule violations. (Presumably she relied on the transcript of the rule to show cause hearing and the order and reasons issued by the magistrate judge.)

ODC filed charges stemming against the attorney a year and a half after the federal court issued its suspension. (Reciprocal discipline). The hearing committee made no factual findings or determinations of rule violations, reasoning that the federal court had already issued findings. [But it hadn't, really.]

The disciplinary board adopted the findings of fact detailed by the magistrate judge's order and reasons. They determined that he violated Rules 3.3 Candor Toward the Tribunal [self-evident], 3.4 Fairness to Opposing Party and Counsel [knowingly disobeying an obligation under the rules of a tribunal], and 3.5 Impartiality and Decorum of the Tribunal [communicate ex parte with a judge or other official during the proceeding].

Notes on Question 3

In re Klein, 23-66 (La. 5/18/23), 362 So.3d 392.

The attorney also filed pleadings impugning the integrity of the judge and the opposing lawyer and his counsel, for which he was disciplined. The attorney introduced no evidence at the formal hearing to refute any of the facts as presented by the ODC.

Suspended for a year and a day.

Conduct with law clerk violated Rule of Professional Conduct 3.5(a), (b), and (d):

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
. . . .
(d) engage in conduct intended to disrupt a tribunal.

Notes on Question 4

In re Sharp, 24-329 (La. 6/5/24), ___ So.3d ___.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

The trial judge in the CINC proceeding prohibited the attorney from representing any member of the family in any proceeding.

The DA filed the complaint. The ADA testified at the hearing committee that the child was adamant that she wanted to testify against her father, and that her testimony at trial helped convict Martin.

Respondent's intervention in the DCFS investigation was found to have violated Rule 8.4(d) (conduct prejudicial to the administration of justice).

In re Hjortsberg, 24-149 (La. 6/28/24), ___ So.3d ___.

Iran-Contra Hearing clip (potted plant)

The trial court never held the attorney in contempt, and testified at the hearing that the attorney was courteous and prepared, and never disrespectful.

The court of appeal reversed the defendant's conviction on direct appeal. One judge found that the attorney's failure to object to two clear errors constituted ineffective assistance of counsel. A second judge found that it wasn't just ineffective assistance of counsel, it was a denial of the defendant's right to counsel. This concurring opinion concluded:

> Further, if defense counsel's failure to participate was a deliberate ploy attempting to obtain a continuance or a new trial, defense counsel could possibly be subject to sanctions or disciplinary action.

The third judge on the panel would have relegated the claim of ineffective assistance to post conviction relief, where evidence could be taken on the voluntariness of the defendant's conduct and the reasons for the attorney's nonparticipation at trial.

It was the comment in the concurring opinion that persuaded an appellate lawyer in the DA's office to file a complaint with the ODC.

The hearing committee found that ODC did not prove violation of any rules of professional conduct. The supreme court found Hjortsberg violated rules 1.3, 8.4(a), and 8.4(d):

> Rule 1.3 Diligence
>
> A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> Rule 8.4 Misconduct

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(d) Engage in conduct that is prejudicial to the administration of justice[.]

One issue to note in the opinion on appeal (*State v. Brown*, 21-625 (La.App. 1 Cir. 2/16/22).) The court found no merit to an assignment of error that there was insufficient evidence to support the jury's conviction on the basis that the state failed to prove a specific intent to kill, citing the improper jury charge. (Viewing the evidence in a light most favorable to the prosecution.) But in the discussion of the assignment of error on ineffective assistance of counsel, the court reasoned that the jury could have found the defendant guilty because of the improper jury charge. Points to the way the standard of review applied by appellate courts can be determinative of outcome.

Notes on Question 6

Crichton concurrence:

> Specifically, if hypothetical counsel makes a strategic decision to wait several years until a sequestered jury trial is well underway to bring to a trial court's attention a fundamental rift with the client, might Rule 1.3 Diligence ("A lawyer shall act with reasonable diligence and promptness in representing a client"), Rule 1.4(a)(2) Communication ("A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished"), Rule 3.5(d) Impartiality and Decorum of the Tribunal ("A lawyer shall not engage in conduct intended to disrupt a tribunal"), and Rule 8.4(d) Misconduct ("It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice") be implicated?
>
> Assuming future capital counsel claims to not know of the holding in this case, other Louisiana jurisprudence, or persuasive and applicable jurisprudence on the issue from other States, might Rule 1.1(a) ("Competence [involves], the legal knowledge, skill, thoroughness and preparation") be implicated? Of particular concern, would Rule 3.3(a)(2) ("A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse...") be implicated? That duty would surely include knowledge of the holding of this case, the holdings of *State v. Felde*, 422 So.2d 370 (La. 1982), and *State v. Bordelon*, 07-0525 (La. 10/16/09), 33 So.3d 842, as well as the persuasive cases from other states cited in the majority opinion.
>
> If counsel finds himself deadlocked with a client over scope of representation issues concerning the penalty phase, should counsel consider Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued") or Rule 1.16(b)(1),(4); (c) and (d) (Declining or Terminating Representation)?

McCallum concurrence:

> Certain comments of the defendant's appellate counsel, during oral argument, have attracted my attention. First, Ms. Kappel stated that

defendant's death penalty certified trial counsel provided incorrect legal advice to him when advising him concerning his options as to his right to an attorney at the penalty phase of the proceedings. Ms. Kappel further hinted that she thought there had been a violation of the Rules of Professional Conduct in that regard. The inferences that might logically be drawn from these comments, considering the advanced and specialized training required of attorneys who are certified to handle capital cases, are troubling. An examination of various recent capital murder cases reveals a potential, disturbing pattern. It may very well be that some in our profession, who oppose the imposition of the death penalty in any circumstance, are resorting to any means to derail capital prosecutions. This "the ends justifies the means" approach is not ethically permissible. Deliberate procedural sabotage is not a legitimate trial strategy.

I need not impute any ill motives to trial counsel in this case to make the point that if such conduct were to occur, it would be subject to disciplinary sanctions. Those who oppose capital punishment have many legitimate methods at their disposal to wage their fight in the political arena. However, it must be made clear that unprofessional conduct in the trial of a case, especially a capital offense, is neither appropriate nor acceptable. This issue deserves this Court's closest scrutiny in the future.

Notes on Question 7

The supreme court found violations of Rules 3.3(a)(1) (candor toward the tribunal), 8.4(a) (violation of the rules of professional conduct), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Suspended for nine months, with six months deferred. (There was other misconduct).

The Department of Revenue is prepared to answer public records requests immediately after qualifying, and most of the contests to candidates last year were for failure to file income tax returns.

Bonus election law information!
La.R.S. 18:463:
(iv) Except for a candidate for United States senator or representative in congress, that for each of the previous five tax years, he has filed his federal and state income tax returns, has filed for an extension of time for filing either his federal or state income tax return or both, or was not required to file either a federal or state income tax return or both.

"Tax returns that have not been delivered to the Louisiana Department of Revenue have not been filed. *Russo v. Burns*, 2014-1963 (La. 9/24/14), 147 So.3d 1111, 1114." *Braggs v. Dickerson*, 2022-01227 (La. 8/13/22), 344 So.3d 63. (*But see Clark v. Bridges*, 23-237 (La. 2/22/23), 356 So.3d 990, which discusses the determination of when a tax return that is transmitted electronically is considered filed.) The fourth circuit recently discussed this issue in *Collins v. Chambers*, 24-484 (La.App.4 Cir. 8/8/24), ___ So.3d ___ (2024 WL 3711721).

Act 298 of the 2024 Regular Legislative Session amended La.R.S. 18:493 (Time for objecting to candidacy) and 47:1508 (Confidentiality of tax records) to allow the Department of revenue to execute an affidavit in lieu of live testimony for the purposes of proceedings objecting to candidacy.

Notes on Question 8

In re Chu, pending before the Supreme Court (scheduled to be heard on 9/4/24)

The attorney downloaded the entire shared drive multiple times onto a flash drive. She performed legal work for Sam and communicated with Sam and her attorneys. The evidence shows that Sam responded to the attorney on multiple different threads.

The attorney was terminated nine days after the print job was found.

The judges, including the attorney's supervisor, and senior staff members of the court submitted a complaint to the ODC. At the hearing committee, Appellate Judge, who had since resigned from the bench, indicated that he was coerced into signing the complaint.

The attorney later ran for a seat on the court of appeal from which she was fired in July 2020. (She lost). In August 2020, a warrant was issued for her arrest, and in October she was charged with malfeasance in office and crimes against intellectual property. She pled no contest to one count of crime against intellectual property in October 2022.

Disciplinary proceedings were stayed pending the conclusion of the criminal case against the attorney.

The hearing committee (HC) and disciplinary board (DB) reached different conclusions on whether the attorney's conduct violated Rules 3.5(a), 3.5(b), and 3.5(d).

<u>Rule 3.5(a)</u>
The HC found no violation -- this rule addresses actions that are directed at a judge (bribery or intimidation), and the attorney's actions were not directed toward a judge.

The DB found a violation -- the attorney, by violating of the law and communicating the information she found to Sam, sought to surreptitiously influence the judges of the court.

<u>Rule 3.5(b)</u>
The HC found a violation – she communicated with Sam about a case in which Sam was a party.

The DB found no violation – the rule prohibits communication with a judge or court official, and the attorney did not communicate with a judge or court official concerning the lawsuit.

Rule 3.5(d)

The HC found no violation – while her activities did ultimately disrupt the tribunal (the recusal of all the judges), she did not intend such a disruption.

The DB found a violation – by improperly funneling confidential court documents to Sam and assisting her with the preparation of her case, the attorney's conduct was clearly intended to influence the case before the panel. Such conduct can be described as intentionally disruptive conduct, aimed at improperly affecting the outcome of the case.

No violation of Rule 8.4(e). The attorney never implied an ability to improperly influence the judges.

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION PROGRAM

August 23, 2024

RECENT DEVELOPMENTS - CRIMINAL LAW

Presentation and Written Materials by:
Jeff Slade, Senior Research Attorney

Central Criminal Staff:

Sandi Aucoin Broussard - Director

Jeff Slade and Reba Green - Senior Research Attorneys;
Melissa Sockrider, Bobbie Kirkland,
Beth Fontenot, and Dustin Madden - Research Attorneys;
Ashley Guillory, Hunter Thibodeaux, and Andrew DeLeo - Law Clerks

CLE 2024

Recent Developments in Criminal Law

***State v.* [*Carlos Anthony*] *Toby*, 22-481 (La.App. 3 Cir. 4/19/23), 363 So.3d 1260:**

A jury convicted Defendant of conspiracy to commit second degree murder but not guilty of second degree murder. This court acknowledged that the evidence was "broadly indicative of wrongdoing" but was insufficient to support the conspiracy charge. In other words, the evidence did not prove that Defendant was part of an agreement to murder the victim.

A key problem with the State's case was the two-mile radius of the CellHawk cellphone location evidence. The approximate nature of the location evidence placed the State's theory in the realm of impermissible speculation rather than permissible inference. *Id*. at 1264.

This court affirmed the convictions of Defendant's brother; a key point was that DNA evidence put him near the scene. *State v.* [*Shavis Breon*] *Toby*, 22-386 (La. App. 3 Cir. 3/8/23), 358 So. 3d 289, *writ denied*, 23-491 (La. 12/5/23), 373 So. 3d 714.

***State v. Lee,* 22-1827 (La. 9/8/23), 370 So.3d 408:**

State's attorney general moved to vacate a postconviction plea agreement that had resulted in a district court's vacating the defendant's second degree murder conviction and life sentence. The district court accepted the defendant's guilty plea to manslaughter and implemented an agreed-upon sentence of thirty-five years.

The supreme court vacated the district court's action, reinstated the original conviction and sentence, and declared La.Code Crim.P. art 930.10 unconstitutional. The court held that the offending Code Article violated the constitutional separation of powers as it infringed on the governor's pardon power.

***State in the Interest of L.D.*, 23-529 (La.App. 3 Cir. 8/30/23), 370 So.3d 803:**

District court had authority to order secure custody in a Juvenile case. This court has repeatedly held to this effect.

Also, the Office of Juvenile Justice/OJJ's disobedience of the district court's order constituted constructive contempt.

***State v. Gamboa*, 22-806 (La.App. 3 Cir. 9/13/23), 370 So.3d 1260, *writ denied*, 23-1376 (La. 4/9/24), 382 So.3d 842:**

The defendant's guilty plea was valid and constitutional, even though he alleged the plea negatively affected his immigration status. His original brief and PCR application conceded he knew the plea could have such a negative effect, and he failed to demonstrate that the plea subjected him to automatic deportation.

***State v. McKinney*, 23-162 (La.App. 3 Cir. 10/4/23), 372 So.3d 957, *writ denied*, 23-1450 (La. 4/16/24), 383 So.3d 149:**

Thirty-year sentence was not excessive for vehicular homicide; the defendant's blood-alcohol level was .173, and his actions not only killed a man but endangered members of the victim's running group. Also, the district court suspended seven years and did not impose a fine.

***State v. Eakins*, 23-95 (La.App. 3 Cir. 10/18/23), 373 So.3d 462:**

The evidence was sufficient to demonstrate that Defendant downloaded child pornography onto his computer. He proposed a hypothesis that his friend downloaded the pornography; however, the defendant's computer contained images of young females while his friend's computer contained images of young males.

Also, the defendant's computer was set up in a sophisticated manner, at least in part to conceal the pornography. The friend's system was not at the same level, and he apparently sought pornography via Facebook.

The defendant challenged the use of an agent's testimony to suggest that the defendant's friend was gay. However, the agent did not testify as an expert, she simply read the friend's Facebook messages in which he stated he was gay and was looking for images of young males. [Although there was no contemporaneous objection, the defendant objected via written motion before trial, thus preserving the issue for review.]

***State v. Coutee*, 22-665 (La.App. 3 Cir. 10/25/23), 373 So.3d 486:**

State demonstrated the defendant was not justified in killing her estranged husband during meeting to exchange physical custody of children. Evidence indicated premeditation, and surveillance footage showed the victim walked to the defendant's vehicle rather than charging it.

On another issue, the district court did not abuse its discretion in refusing to excuse two prospective jurors for cause. Each of the two stated they could put aside their preconceived opinions and properly apply the law. Notably, the court did excuse a third venireman, as it was not convinced the man could put aside his opinion on justification doctrine.

On appeal, the defendant also challenged the seating of the man who became the jury foreman, but she had failed to preserve the issue, as she had not challenged the man for cause.

The defendant also raised an ineffective assistance of counsel claim, but this court relegated the matter to the post-conviction relief process. The record did not include the defendant's pretrial strategic discussions with counsel.

Also, the defendant argued the district court applied the wrong standard at the hearing on her motion for new trial by using the *Strickland* ineffective assistance of counsel standard. However, the defendant raised *Strickland* at the hearing and could not be heard to complain that the district court addressed her argument.

Regarding the jury instruction, the defendant complained that the district court improperly discussed the aggressor doctrine. This court held that even if error occurred, it was a trial error rather than structural error, and thus reversal was not required.

***State v.* [*Douglas Paul*] *James*, 23-238 (La.App. 3 Cir. 10/25/23), 373 So.3d 509:**

The sixty-eight-year-old victim was delivering a newspaper to a client at about three in the morning. Defendant, who was the client's thirty-three-year-old grandson, pulled up with his brother and two friends and demanded to know why the victim was on the property. The victim told the defendant to ask his grandfather. Unsatisfied by this answer, the defendant and his brother punched the victim. Ultimately, the victim suffered a fractured right eye socket and lost vision in his left eye.

This court held the evidence established the intent to inflict serious bodily injury and the force used was too excessive to support a justification defense.

Although there were contradictions in the victim's testimony, the State's evidence was sufficient even without it.

Additionally, the defendant's eight-year sentence, with one year suspended, plus three years' probation with fees, costs, and a $2,000 fine, was not excessive.

***State v. McLendon*, 23-298 (La.App. 3 Cir. 11/22/23), 374 So.3d 435, *writ denied*, 23-1672 (La. 6/19/24), 386 So.3d 1080:**

The evidence adduced at trial was sufficient to support the defendant's two convictions for first degree murder. This court acknowledged that "[t]he credibility of almost every lay witness was at issue in this case." 374 So.3d at 445. However, credibility was a matter for the jury.

***State v. Artis*, 23-348 (La.App. 3 Cir. 12/6/23), 375 So.3d 644:**

In a motion to suppress, the defendant challenged investigator's warrantless search for his cell phone location; the district court denied the motion. This court held the district court did not err, as exigent circumstances justified the search. The defendant was fleeing from the location of a violent crime (aggravated second degree battery), and police were seeking limited information; i.e., the defendant's location. [The case also has an insufficiency claim pursuant to *Jackson v. Virginia*, but it is a lay-up.]

***State v. Smith*, 23-334 (La.App. 3 Cir. 12/6/23), 375 So.3d 654:**

A jury convicted the defendant of aggravated assault with a firearm, aggravated second degree battery, and possession of a firearm by a convicted felon, based on his extended beating of his girlfriend.

On appeal, the defendant's claim that the district court made him rush his decision whether to seek mistrial was not preserved by a contemporaneous objection.

The defendant also challenged the district court's denial of his motion for new trial. However, he did not properly raise the argument in his written motion, thus the district court did not abuse its discretion in denying the motion. The defendant claimed he did not have enough time to consult with counsel, but the record did not demonstrate a violation of the defendant's right to counsel.

***State v. Hawkes*, 23-234 (La.App. 3 Cir. 12/6/23), 375 So.3d 1063, *writ denied*, 23-1655 (La. 5/21/24), 385 So.3d 243, *and writ denied*, 24-69 (La. 5/21/24), 385 So.3d 244:**

The defendant alleged a misapplication of La.Code Crim.P. art. 401, which was amended in 2021 and now allows jury service by people with prior felony convictions, so long as they have not been indicted, incarcerated, or subject to DOC supervision in the five-years period preceding jury service.

The venire member at issue had completed her parole in 1997, so she was eligible to serve. However, the error was a mere statutory violation and not "structural error." There was no contemporaneous objection, so the issue was not preserved for review. Also, the venire member's name was never drawn for examination, so she wouldn't have served anyway.

***State v. Burns*, 23-115 (La.App. 3 Cir. 12/6/23), 375 So.3d 1074:**

This court upheld the defendant's second degree murder conviction 15 years after the event, based largely upon his incriminating statements to three witnesses.

Notably, this court found that a fourth witness was unreliable. This court stated that the witness's ability to perceive the pertinent event was impaired by various factors. The witness was driving between 55 and 60 miles per hour when he purportedly saw the defendant, it was nighttime, the area was unlit, and he saw the defendant only in profile. Further, the witness's testimony identifying the victim's vehicle was "perplexing." For one thing, the tire tracks found at the scene did not match the victim's automobile. *Id*. at 1086-87, 1094, 1106-07.

***State v. Portalis*, 23-395 (La. App. 3 Cir. 12/6/23), 375 So.3d 1113:**

The defendant struck two victims with her automobile; this resulted in convictions for attempted second degree murder and aggravated battery. The district court then sentenced the defendant to concurrent sentences of 10 years and 5 years.

However, the court granted the defendant's motion to reconsider sentence and imposed two concurrent 10-year sentences, suspended, and three years of active probation. The sentences were concurrent, but the probation periods were consecutive.

This court noted that placing the defendant on probation is prohibited by statute. La.R.S. 14:30.1. Also, the district court did not conduct an analysis of the viability of downward departures from the statutory minimum sentences. This court vacated the sentences and remanded for resentencing, leaving open the possibility that the district court could apply the analysis in *State v. Dorthey*, 623 So.2d 1276 (La. 1993) and order a downward departure from the statutory minimum terms. It instructed the district court to develop the record regarding consideration of the pertinent sentencing factors.

This court reiterated that, by statute, the sentence for attempted second degree murder could not be suspended and the defendant could not receive probation for that charge.

***State v. Chatman*, 23-187 (La.App. 3 Cir. 12/6/23), 376 So.3d 301:**

The defendant killed a pregnant woman and her gestating child. Convictions for second degree feticide and manslaughter did not violate the double jeopardy prohibition. Killing an unborn child is an element of feticide, while killing a (post-birth) individual is an element of manslaughter.

***State v. Ford*, 23-718 (La.App. 3 Cir. 12/13/23), 377 So.3d 900, *writ denied*, 24-78 (La. 3/7/24), 380 So.3d 573:**

Louisiana's law prohibiting a convicted felon from possessing a firearm is constitutional. *See also U.S. v. Rahimi*, 602 U.S. __, 144 S.Ct. 1889 (2024).

***State v. Cooper*, 23-456 (La.App. 3 Cir. 12/20/23), 377 So.3d 923:**

The State charged the defendant with second degree murder. Said defendant moved for a change of venue. He noted the victim was the parish attorney's godson; he also alleged extensive media publicity regarding this charge and a previous case. The district court granted the motion.

This court applied the seven-part test from *State v. Bell*, 315 So.2d 307 (La. 1975) and determined the record did not demonstrate prejudice sufficient to support the district court's ruling. *Id*. at 929, 942-46. In a final footnote, this court left open the possibility that the defendant could re-urge a motion to change venue if voir dire revealed bias.

***State ex rel. Robinson v. Vannoy*, 21-812 (La. 1/26/24), 378 So.3d 11, *rehearing granted*, 21-812 (La. 3/21/24), 382 So.3d 27.:**

After the defendant's conviction and death sentence for four counts of first degree murder, the Louisiana Supreme Court addressed the effect of *Brady* violations. The State failed to disclose favorable treatment of a jailhouse informant, serology notes, "and other crime scene evidence." *Id*. at 45.

Thus, the supreme court reversed and remanded for a new trial.

***State v. Randle*, 23-350 (La.App. 3 Cir. 1/31/24), 379 So.3d 858:**

A trial jury convicted the defendant of second degree murder. The defendant argued that her husband/accomplice coerced her, but the coercion defense is not available for murder. La.R.S. 14:18(6). She further argued this defense should be available to her, since she was guilty of felony-murder and did not pull the trigger. This court held the argument did not accord with jurisprudence, stating: "The coercion defense simply does not apply to any case in which the defendant is charged with murder." *Id*. at 867.

Regarding the specific facts of this case, the defendant was not coerced, as the evidence showed she was a full participant in the crime, which included a kidnapping and armed robbery. Her actions included shoplifting the items used to bind the victim. Also, she and her husband/accomplice were stopped for a traffic violation in the midst of the crime, in a car registered to the victim. As this court stated, she "calmly lied" to the officer during the stop. Meanwhile, the victim was a prisoner in his own residence.

The record indicated that prior to the crimes at issue, the defendant had an affair with the victim while her husband was away for the Job Corps program. The victim bought her a car, and she realized he was well-situated financially.

This case includes a discussion of spousal privilege regarding trial testimony. A notable point is that spousal communications are not privileged if they are shared with a third party. The analysis includes a brief reference to the particular features of La.Code Evid. art. 504 and La.Code Evid. art 505.

Finally, the defendant claimed her trial counsel was ineffective for failing to explore the issue of coercive control of an intimate partner. This court stated that any evidence on this issue would relate to her defense of justification by coercion. Any such evidence was irrelevant and thus inadmissible. In light of this conclusion, the defendant failed to establish ineffective assistance of counsel.

***State v. Sugastume*, 22-1824 (La. 12/8/23), 379 So.3d 1243:**

To preserve a challenge to the denial of a challenge cause, a defendant must make a contemporaneous objection. La.Code Crim.P. art. 800(A).

***State v. Williams*, 23-506 (La.App. 3 Cir. 2/7/24), 380 So.3d 192:**

In a prosecution for possession with intent to distribute a controlled dangerous substance and for illegal carrying of weapons with drugs, the State introduced other-acts evidence of the defendant's drug-related arrest two months after the discovery of the offense at issue.

This court held the other-acts evidence was admissible pursuant to La.Code Evid. art. 404(B) as the other act was pertinent to the issue of the defendant's intent regarding the possession with intent to distribute charge.

***State v. White*, 23-604 (La.App. 3 Cir. 3/6/24), 381 So.3d 946:**

A jury convicted the defendant of domestic abuse battery (child endangerment) and second degree battery. Regarding the robbery, the evidence demonstrated that the defendant's act of punching his girlfriend and breaking her nose facilitated the subsequent taking of her car. Regarding domestic abuse battery, the evidence demonstrated the defendant lived with his girlfriend and her

daughter, albeit off & on, therefore he was a "household member" for purposes of the relevant statute.

Also, the district court's erroneous use of the word "intimidation" in the jury instruction regarding second degree battery was harmless. In so holding, this court noted the evidence against the defendant clearly demonstrated the defendant inflicted serious bodily injury.

This court did not address the defendant's excessive-sentence claim, as he failed to file a motion to reconsider sentence in the district court. La.Code Crim.P. art 881.1, Uniform Rules—Courts of Appeal, Rule 1–3.

Finally the district court did not abuse its discretion in denying the defendant's motion to continue the sentencing hearing, as his new counsel received his appointment more than a month before sentencing.

***State v.* [*Dillon Mathew*] *James*, 23-518 (La.App. 3 Cir. 3/6/24), 381 So.3d 958:**

The defendant in this case is the accomplice and brother of the defendant in *State v. James*, 23-238 (La.App. 3 Cir. 10/25/23), 373 So.3d 509.

***State v. Epps*, 23-681 (La.App. 3 Cir. 3/13/24), 381 So.3d 1023:**

There was an insufficient factual basis in the record to support the *Alford* plea. This court remanded for an evidentiary hearing.

***State v. Perkins*, 23-524 (La. App. 3 Cir. 3/20/24), 381 So.3d 1050:**

A jury convicted the defendant of first-degree rape for anal sex with his minor, mentally-impaired step-grandson.

The district court did not err by denying the defendant's motion to suppress, as his admission was made *before* investigators made any potentially coercive statements.

Also, the district court did not abuse its discretion by denying the defendant's motion for mistrial. The testifying officer had a background as a corrections officer and had encountered anal sex numerous times while doing that

job. Thus, the officer's testimony that the smells of fecal matter he encountered at the scene were indicative of anal sex were within his knowledge and experience.

***State v. Richard*, 23-523 (La.App. 3 Cir. 3/20/24), 381 So.3d 1087:**

This court held the trial evidence did not support the defendant's conviction for failure to seek assistance (La.R.S. 14:502). Said evidence did not demonstrate the defendant knew the decedent was suffering from "serious bodily injury." The defendant and another witness testified their friend was still conscious, snoring, and breathing on initial contact. They thought the decedent would "sleep it off."

Further, unconsciousness is not serious bodily injury; such an interpretation would not further the goal of the statute, i.e., the encouragement to render aid to an injured person.

Also, the evidence did not show the defendant knew that the decedent had ingested a dangerous amount of drugs.

***State v. Kent*, 23-8 (La. 3/22/24), 382 So.3d 69:**

It was improper for the State to use the defendant's prior conviction to impeach him, as the earlier incident did not contradict his trial testimony. However, the error was harmless as the other evidence adduced was overwhelming.

***State v. Savoy*, 23-259 (La.App. 3 Cir. 3/6/24), 382 So.3d 477:**

A jury convicted the defendant of second degree murder in a case based on circumstantial evidence. This court upheld the conviction, as the State excluded every reasonable hypothesis of evidence. The evidence showed that the defendant had threatened the victim with death if she reported him to police and that she had in fact reported him on the day of the murder. Also, the victim's daughter placed the defendant at the scene. Further, her testimony described clothing that matched the garb of an otherwise unidentified male seen on a neighbor's surveillance video.

In addition, no mitigation evidence supported a reduction of the conviction to manslaughter.

On another issue, the victim's statements in her applications for protective orders were admissible under the "Forfeiture by wrongdoing" exception to the hearsay rule. La.Code Crim.P. art. 804(B)(7).

Finally, the neighbor's surveillance video was admissible, as neighbor and a police officer authenticated it as the footage they viewed on the night of the offense. The defendant questioned the chain of custody, but that issue goes to weight rather than admissibility.

***State v. Thibodeaux*, 24-212 (La. 4/2/24), 382 So.3d 811 (per curiam):**

The supreme court remanded to the district court for an in camera inspection of the grand jury testimony for evidence regarding the defendant's mental health at the time of the offenses at issue. The defendant made a particularized request for such evidence in a motion for production.

***State v. Digerolamo*, 24-287 (La. 4/30/24), 383 So.3d 911 (per curiam):**

The jury's verdict was read in open court by the clerk; neither party sought polling, and the verdict was duly received and recorded. The district court then met with the jury and allowed deliberations to resume. At some point, the jury changed its verdict; months later, the district court declared a mistrial. The supreme court vacated the mistrial order and reinstated the "not guilty" verdict.

***State v. Mouton*, 23-723 (La. 5/10/24), 384 So.3d 845:**

The supreme court's order of court closure in response to Hurricane Laura suspended, rather than interrupted, the time limit for commencing trial. Therefore, the district court properly granted the defendant's motion to quash due to untimely prosecution. Also, a premature (pre-charge) motion does not suspend the time limit. Before the charge is instituted, there is no time limitation period to suspend.

***State v. Santiago*, 23-501 (La. 5/10/24), 384 So.3d 879:**

Defense counsel's comment "I thought we had seven [peremptory challenges]" did not qualify as a contemporaneous objection. *Id*. at 881-83. Without a contemporaneous objection, the issue was not preserved for appellate review.

***State v. Hopkins*, 24-399 (La. 6/5/24), 385 So.3d 1145:**

This case involves a negligent homicide charge against the owner of an electronic monitoring company. The Court held the arguments in the motion to quash amounted to a defense on the merits and so were not properly raised in such a motion.

***State v. American Electronic Monitoring, LLC*, 24-403 (La. 6/5/24), 385 So.3d 1147:**

See previous case.

***State v. Skinner*, 23-508 (La.App. 3 Cir. 5/15/24), 388 So.3d 505:**

The State charged the defendant with second degree murder, and a jury returned a responsive verdict of manslaughter. On appeal, this court rejected the defendant's self-defense claim. A rational factfinder could conclude that he did not reasonably believe he was in imminent danger, as he fired from a moving car after he had passed the victim. Also, some testimony indicated that the victim did not have a firearm, despite the defendant's testimony that the victim pointed a gun at him.

Also, the district court did not err by disallowing evidence that indicated the defendant feared the victim. The defendant failed to present "appreciable evidence of an overt act," as required to introduce evidence of the victim's dangerous character. Testimony that the victim lifted his shirt and showed a weapon in his waistband did not demonstrate such evidence. The defendant's testimony that the victim pointed a weapon at him was self-serving and was contradicted by his girlfriend's testimony. Therefore, it also did not qualify as a demonstration of an "overt act."

***State v. Bartie*, 23-780 (La.App. 3 Cir. 6/20/24) __ So.3d __ (2024 WL 3060022):**

The evidence was insufficient to demonstrate that the victim consumed a drug that the defendant distributed to her, as required to support a second degree murder conviction.

U.S. Supreme Court/Federal:

***McElrath v. Georgia*, 601 U.S. 87, 144 S.Ct. 651 (2024) [February]:**

McElrath killed his mother, and the State charged him with malice murder, felony-murder, and aggravated assault. The trial jury reached a verdict of "not guilty by reason of insanity" regarding malice murder; the verdict regarding each of the other two charges was "guilty but mentally ill." Georgia's supreme court concluded the two murder verdicts were "repugnant" to one another because the verdicts were based on inconsistent mental states. The court vacated both convictions and remanded. The defendant argued that he could not be retried for malice murder, due to the Constitutional bar to double jeopardy. Georgia argued the repugnant (inconsistent) verdicts were nullities.

The Supreme Court held that original jury verdict of not guilty by reason of insanity for the malice murder charge was an acquittal for double jeopardy purposes, therefore the defendant could not be retried for malice murder.

Georgia's "nullity" argument was a non-starter, as the Court assesses double jeopardy matters pursuant to federal and not state law. Pursuant to the Double Jeopardy Clause, an acquittal is identified by the factfinder's acting "on its view that the prosecution has failed to prove its case." *Id*. at 96.

***Smith v. Arizona*, 602 U.S. __, 144 S.Ct. 1785 (2024) [June]:**

When an expert repeats an absent expert's statements at trial in support of the testifying expert's opinion – and said statements provide support only if true – then the statements are being offered for their truth.

Pursuant to *Crawford. v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), an absent witness's statements are barred by the Confrontation Clause unless said witness is unavailable and the defendant has had a chance to cross-examine the

witness. However, the bar does not apply if the statements are not offered for the truth of the matter asserted.

Arizona argued the statements were offered simply to support the in-court witness's assessment, noting that state law permitted such a use. Making the point that is also stated in *McElrath*, the Court noted its Constitutional analysis is not governed by state law.

The absent lab analyst, Rast, had tested 8 items; the "substitute expert," Longini, testified regarding 4 of those items, none of which he had tested personally. Thus, what he knew was based entirely on Rast's work. Longini identified each of the tested items as quantities of illegal drugs. Longini's opinions were based on the truth of Rast's statements. Thus, Longini and the jury were relying on the truth of Rast's reported results.

This left the remaining question of whether Rast's statements were testimonial; the Court remanded the case for a determination in state court.

***U.S. v. Rahimi*, 602 U.S. __, 144 S.Ct. 1889 (2024) [June]:**

Defendant pled guilty to possessing a firearm while subject to a domestic violence restraining order. The Supreme Court held that when a defendant has been found to pose a credible threat to the physical safety of another, that defendant may be temporarily disarmed without violating the Second Amendment.

***U.S. v. Smith* __ F.4th __ (5th Cir. 2024) (2024 WL 3738050) [June]:**

Geofence (location history database) warrants are unconstitutional under the Fourth Amendment.