THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION PROGRAM

AUGUST 25, 2023

THIRD CIRCUIT JUDGES

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POST-CONVICTION RELIEF

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POST-CONVICTION RELIEF

* **<u>Denotes material added to the outline in 2023</u>**.

POST-CONVICTION RELIEF (PCR)

I. GENERAL CONSIDERATIONS

A. Definition - Application for Post-Conviction Relief

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

B. The Petitioner Must be in Custody

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

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). *See State v. Smith*, 96-1798 (La. 10/21/97), 700 So.2d 493.

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

C. Effect of Appeal

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

D. Venue

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

*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 of the Uniform Rules—Courts of Appeal.

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

a. *State ex rel. Morris v. State*, 15-1824 (La. 1/9/17), 208 So.3d 364 - "The district court's ruling summarily denying relator's post-conviction application is vacated, and the district court is directed to notify relator of any deficiencies in his application and afford relator the opportunity to correct them. *See generally State ex rel. Johnson v. Maggio*, 440 So.2d 1336, 1337 (La. 1983) (a pro-se petitioner 'is not to be denied access to the courts for review of his case on the merits by the overzealous application of form and pleading requirements or hyper-technical interpretations of court rules.')."

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

c. *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.

C. Supplementation of a PCR Application

a. "The district court is ordered to exercise its discretion and determine whether the interests of justice require that relator be allowed to amend and supplement his timely filed application for post conviction relief. La.C.Cr.P. art. 930.8 does not take away from district judges the discretion to allow amendment and supplementation of timely filed pleadings. *See State ex rel. Edge v. Whitley*, 599 So.2d 1090 (La.1992) (Calogero, C.J., concurring)." *State ex rel. Duhon v. Whitley*, 92-1740 (La. 9/2/94), 642 So.2d 1273. *See also State ex rel. Foy v. Whitley*, 92-1281 (La. 10/6/95), 661 So.2d 455. "[T]he district court was acting within its discretion when it in effect ordered supplementation of the timely-filed application for post-conviction relief, even if the supplementation were not to arrive until after the expiration of the prescriptive period." *State v. Sampson*, 02-909 (La. 2/14/03), 841 So.2d 747. *See also State v. Thomas*, 08-2912 (La. 10/16/09), 19 So.3d 466, *called into question on other ground by State v. Harris*, 18-1012 (La. 7/9/20), 340 So.3d 845; *State ex rel. Benn v. State*, 11-2418 (La. 6/22/12), 90 So.3d 1045.

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

III. PROCEDURE

A. Answer

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

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

B. Dismissal upon the Pleadings

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

C. Summary Disposition

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

D. Evidentiary Hearing

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

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

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

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

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

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

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

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

E. Right to Counsel

1. Discretionary appointment of counsel

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

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

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

2. Mandatory appointment of counsel

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

b. *State v. Robinson*, 07-145 (La.App. 3 Cir. 4/5/07) (unpublished opinion) - The trial court was ordered to appoint counsel for relator pursuant to La.Code Crim.P. art. 930.7(C). In lengthy reasons for ruling, the trial court said that it could not comply with this court's order regarding appointment of counsel because there were no attorneys on either the panel of volunteer attorneys or non-volunteer attorneys. The trial court requested that this court "make its own appointment of counsel." In response, this court instructed the trial court to order the Indigent Defender Board to comply with its duties under La.R.S. 15:145.

F. Burden of Proof

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

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

3. *State v. LeBlanc*, 06-169 (La. 9/15/06), 937 So.2d 844 - The court reinstated 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. In *State v. Trahan*, 16-2150 (La. 8/31/18), 251 So.3d 406 - Relator's claim that counsel provided ineffective assistance at trial in failing "to introduce any evidence in support of the hypothesis of innocence proposed by defense counsel [in opening remarks]" merited a full evidentiary hearing conducted in accordance with La.Code Crim.P. art. 930. No witnesses testified at the hearing held in the district court and no evidence was presented. Therefore, the supreme court was unable to adequately review relator's claim. Thus, the case was remanded to the district court to reconsider its ruling after conducting a full evidentiary hearing. On remand, the trial court denied relief. In *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 are:

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

(2) The court exceeded its jurisdiction.

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

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

(5) The statute creating the offense for which he was convicted and sentenced is unconstitutional.

(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), ___ So.3d ___ (2023 WL 3216007).

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.

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

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

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

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

erroneous legal principle. Thus, defendant was not entitled to an evidentiary hearing, and the district court did not err in summarily rejecting the claim.

m. *State v. Dressner*, 18-828 (La. 10/29/18), 255 So.3d 537, *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*, ___ U.S. ___, 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. Sentence recommendation - If the plea agreement is for the State to recommend a specific sentence, the actual sentence imposed is still reviewable on appeal. *See State v. Thibeaux*, 11-40 (La.App. 3 Cir. 8/3/11), 70 So.3d 1094. *But see State v. Holmes*, 11-533 (La.App. 3 Cir. 5/30/12) (unpublished opinion), *writ denied*, 12-1606 (La. 11/16/12), 102 So.3d 32 - There was a joint sentencing recommendation. During the plea colloquy the trial court informed relator that it was not bound by the sentencing recommendation and later stated relator could not seek review of a sentence imposed in conformity with the plea agreement. Relator was then ordered to serve the recommended sentence. Relator subsequently sought an out-of-time appeal. The trial court denied relator's request for an out-of-time appeal, stating relator waived his right to appeal the issue of guilt, and the sentence received was imposed in conformity with a plea agreement. This court found no error in the trial court's ruling.

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

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

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

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

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

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

h. *Ohio v. Clark*, 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.

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

*j. *Samia v. United States*, 599 U.S. ___, 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.

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

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

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

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

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

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

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

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 or other sentencing errors. *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.

2. Habitual Offender

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

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

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

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

e. *State v. Moore*, 14-1282 (La. 3/27/15), 164 So.3d 186 - Relator filed an application for post-conviction relief claiming he received ineffective assistance of counsel because counsel failed to object to the multiple bill on the basis that the cleansing period had lapsed. The fourth circuit refused to consider the sentencing error. The supreme court remanded the matter for consideration of the claim because the fourth circuit's opinion on appeal specifically stated the issue was preserved and could be raised via application for post-conviction relief.

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

g. *State v. Harris*, 18-1012 (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 them 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."

h. *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."

i. *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.

*j. *State v. Dugas*, 22-453 (La.App. 3 Cir. 6/21/23), ___ So.3d ___ (2023 WL 4102276) – 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.

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.

V. PROCEDURAL OBJECTIONS

A. Pending Appeal

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

B. Raised on Appeal

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

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

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

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

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

C. Failed to Raise in Trial Court

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

D. Failed to Pursue on Appeal

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

E. Successive Application

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

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

"If the court considers dismissing an application for failure of the petitioner to raise the claim in the proceedings leading to conviction, failure to urge the claim on appeal, or failure to include the claim in a prior application, the court shall order

the petitioner to state reasons for his failure. If the court finds that the failure was excusable, it shall consider the merits of the claim." La.Code Crim.P. art. 930.4(F).

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

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

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

"Notwithstanding any provision of this Title to the contrary, the state may affirmatively waive any procedural objection pursuant to this Article. Such waiver shall be express and in writing and filed by the state into the district court record."

VI. TIME LIMITATION.

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

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

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

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

*2. *State v. Loya*, 23-257 (La.App. 3 Cir. 6/21/23) (unpublished opinion) (2023 WL 4106308) - The ruling 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, finding the time limit for the state to commence trial was extended by 79 days by Supreme Court's COVID-19 orders and that Hurricane Laura interrupted prescription, is inapplicable to La.Code Crim.P. art. 930.8, including the granting of an out-of-time appeal.

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 art. 930.8 is jurisdictional; therefore, a trial court has no authority to extend the time limit provided therein.

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

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

*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.C.Cr.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

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

D. Informing Defendant of Prescriptive Period

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

2. While art. 930.8 requires the trial court to inform the defendant of the prescriptive period for seeking post-conviction relief, it does not provide a remedy for an individual defendant who is not so advised. *State ex rel. Glover v. State*, 93-2330, 94-2101, 94-2197 (La. 9/5/95), 660 So.2d 1189, *abrogated in part on other grounds by State ex rel. Olivieri v. State*, 00-172, 00-1767 (La. 2/21/01), 779 So.2d 735, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566 (2001), *and cert. denied*, 534 U.S. 892, 122 S.Ct. 208 (2001).

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

VII. EXCEPTIONS TO THE TIME LIMITATION

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

(1) The application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicated were not known to the petitioner or his prior attorneys. Further, the petitioner shall prove that he exercised diligence in attempting to discover any post-conviction claims that may exist. "Diligence" for the purposes of this Article is a subjective inquiry that **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. In *State v. Obney*, 99-592 (La.App. 3 Cir. 8/11/99), 746 So.2d 24, *writ denied*, 99-2667 (La. 5/5/00), 760 So.2d 1190, relator filed an application for post-conviction relief asserting that "the testimony of a State forensic witness in his case, which was given during a 1991 action for civil damages resulting from the death of the child victim in Relator's case, was at variance with the witness's trial testimony concerning the time of death." *Id.* at 26. The relator claimed the "documents detailing the 1991 civil trial testimony were 'obtained' by Relator's family members at an unspecified date and 'delivered' to certain attorneys 'in fall of 1997.'" *Id*. This court rejected relator's contention that there was no due diligence requirement in the discovery of the material. In denying the writ in *Obney*, the supreme court stated, "[r]esult is correct."

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

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

d. "Relator's discovery of arguably suppressed evidence allows his untimely filing without regard to his diligence in seeking the suppressed material. La.C.Cr.P. art. 930.8(A)(1); La.C.Cr.P. art. 930.8(B); *Carlin v. Cain*, 97-2390 (La. 3/13/98), 706 So.2d 968." *State ex rel. Walker v. State*, 04-714 (La. 1/27/06), 920 So.2d 213 (additional citations omitted). *But see* the two year filing requirement in La.Code Crim.P. art. 930.8(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*, ___ U.S. ___, 141 S.Ct. 1307 (2021) - States are not required to make a separate finding or 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*, __ U.S. __, 138 S.Ct. 459 (2017), - Defendant was adjudicated a third offender and sentenced under La.R.S. 15:529.1 to life without benefits for a home invasion committed as a juvenile. The court found *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010), was applicable to a defendant who was adjudicated and sentenced as a habitual offender to life without parole for an offense committed as a juvenile. The court held the sentence was illegal and could be corrected at any time and amended the sentence to delete the restriction on parole eligibility.

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

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. ___, 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), 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*, ___ U.S. ___, 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) (2023 WL 3264936) - Once a conviction is final, a case is no longer on "direct review" for purposes of *Ramos v. Louisiana*, ___ U.S. ___ 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

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

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

allegations of the petition . . . by events not under the control of the state which have transpired since the date of [relator's] original conviction . . . .' In this context, the withholding of exculpatory evidence under certain circumstances may constitute an event 'under the control of the state' for purposes of La.Code Crim.Proc. art. 930.8 B.

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

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

E. Waiver of Timeliness

"Notwithstanding any provision of this Title to the contrary, the state may affirmatively waive any objection to the timeliness under Paragraph A of this Article of the application for post conviction relief filed by the petitioner. Such waiver shall be express and in writing and filed by the state into the district court record." La.Code Crim.P. art. 930.8(D).

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) - 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 - Where application of La.R.S. 15:308 resulted in a defendant's sentence becoming illegal, the defendant could seek relief through a motion to correct illegal sentence.

g. Sate v. Richcreek, 19-735 (La.App. 3 Cir. 1/17/20) (unpublished opinion) - 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, c*ert. 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, wherein this court remanded the matter for resentencing when the sentencing range was reduced from twenty-five to one hundred years to sixteen and two-thirds to one hundred years, and Relator was sentenced to seventy 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

1. Time Limitations

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

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

2. La.Code Crim.P. art. 926.1(B) 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. La.Code Crim.P. art. 926.3. Motion for testing of evidence

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) - 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.

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. La.Code Crim.P. art. 930.10. Departure from this Title; post conviction plea agreements

"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 argued on May 2, 2023 - whether the legislature impermissibly intruded into the domain of the Executive Branch when it enacted La.Code Crim.P. art. 930.10. The Governor contends the provision violates the separation of powers because clemency is an exclusive power of the Governor.

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

LEGISLATIVE UPDATE and CASE LAW

2022–2023

2022 Legislation

La.R.S. 14:2 Definitions – **(B) Crimes of Violence** – **(8)** Aggravated kidnapping of a child; **(40)** Sexual Battery of a person with infirmities; **(56)** Battery of emergency room personnel, emergency services personnel, or a healthcare professional; **(57)** Possession of a firearm or carrying of a concealed weapon by a convicted felon in violation of La.R.S. 14:95.1(D); **(58)** Distribution of fentanyl or carfentanil punishable under R.S. 40:967(B)(4)(b); **(59)** Distribution of heroin punishable under La. R.S. 40:966(B)(3)(b).

La.R.S. 14:34.2 Battery of a Police Officer – Police officer includes juvenile detention facility officers.

La.R.S. 14:34.8 Battery of Emergency Room Personnel, Emergency Services Personnel, or a Healthcare Professional – **(B)(3)** Expands the definition of healthcare professional.

La.R.S. 14:38.5 Assault on Emergency Room Personnel, Emergency Services Personnel, or Healthcare Professional – Newly enacted.

La.R.S. 14:40.1 Terrorizing; Menacing – **(B)** – The intentional communication of information that the commission of a crime of violence, as defined in La. R.S. 14:2(B), is imminent or in progress or that a circumstance dangerous to human life exists or is about to exist, when the actions of the offender cause members of the general public to be in sustained fear for their safety, and a reasonable person would have known that such actions could cause such sustained fear; the actions of the offender cause the evacuation of a building, a public structure, or a facility of transportation, and a reasonable person would have known that such actions could cause an evacuation; and the actions of the offender cause any other serious disruption to the general public, and a reasonable person would have known that such actions could cause serious disruption to the general public.

La.R.S. 14:40.9 Unlawful Disruption of the Operation of a Healthcare Facility – Newly enacted.

La.R.S. 14:41 Rape Defined – **(D)** Rape includes penetration with an "instrumentality."

La.R.S. 14:42 First Degree Rape – **(A)(6)** Replaces physical or mental infirmity with disability; **(C)** – Defines person with a disability as a person with a mental, physical, or developmental disability that substantially impairs the person's ability

to provide adequately for his or her own care or protection. **(A)(7)** Defines first degree rape to include rapes committed during the course of burglary crimes.

La.R.S. 14:43.2 Second Degree Sexual Battery – Includes touching directly or through clothing.

La.R.S. 14:43.3 Oral Sexual Battery – **(A)(1)** Deleted the requirement that the victim under the age of 15 years not be the spouse of the offender.

La.R.S. 14:44.1 Second Degree Kidnapping – **(A)(3)** Defines "sexually abused" as the victim being subjected to any sex offense as defined in La.R.S. 15:541.

La.R.S. 14:44.2 Aggravated Kidnapping of a Child – **(B)(2)** Defines "sexually abused."

La.R.S. 14:56 Simple Criminal Damage to Property – **(C)** When there has been damage to multiple properties by a number of distinct acts of the offender which are part of a continuous sequence of events, the aggregate of the amount of the damages shall determine the grade of the offense.

La.R.S. 14:64.2.1 Carjacking; Recruitment of Juveniles – Newly created.

La.R.S. 14:65 Simple Robbery – Includes the taking of anything of value when a person is part of a group of three or more individuals and the person has the intent to take anything of value from a retail establishment that is in the immediate control of a retail employee or employer and there is a reasonable belief that a reasonable person would not intercede because of fear.

La.R.S. 14:67.12 Theft of a Catalytic Converter or Engine Control Module – Newly enacted.

La.R.S. 14:93.5 Sexual Battery of Persons with Infirmities – **(A)** Deleted the requirement that the victim not be the spouse of the offender. **(B)** Includes touching directly or through clothing.

La.R.S. 14:95.1 Possession of Firearm or Carrying Concealed Weapon by a Person Convicted of Certain Felonies – **(D)** If a violation of this Section is committed during the commission of a crime of violence as defined in La. R.S. 14:2(B), and the defendant has a prior conviction of a crime of violence, then the violation of this Section shall be designated as a crime of violence.

La.R.S. 15:168 Judicial District Indigent Defender Fund – **(F)** The district is allowed to accumulate funds for the purposes of retaining expert witnesses. The

district public defender is to determine how payments are made and which experts shall be paid. Any person who has retained private counsel, but is found to be indigent, may apply for funds for expert witnesses in the same manner as public defender clients. No court has jurisdiction to order the payment of any funds administered by the Louisiana Public Defender Board or district public defender for expert witnesses.

La.R.S. 32:300.4.1 Smoking or Vaping Marijuana in Motor Vehicles – Applies to drivers and passengers and is a secondary, nonmoving violation.

La.R.S. 40:966 Penalty for Distribution or Possession with Intent to Distribute Narcotic Drugs Listed in Schedule I; Possession of Marijuana, Synthetic Cannabinoids, and Heroin – **(B)(3)(b)** If the offender unlawfully distributes or dispenses heroin which is the direct cause of serious bodily injury to the person who ingested or consumed the substance, the offense shall be classified as a crime of violence and at least 5 years of the sentence shall be without benefits.

La.R.S. 40:967 Prohibited Acts - Schedule II, Penalties – **(B)(4)(b)** If the offender unlawfully distributes or dispenses fentanyl or carfentanil which is the direct cause of serious bodily injury to the person who ingested or consumed the substance, the offense is a crime of violence and at least 5 years of the sentence shall be without benefits.

La.R.S. 40:1021 Definitions – **(B)** Excludes rapid fentanyl test strips from the definition of drug paraphernalia.

La.Code Crim.P. art. 162.4 Search of a Person's Place of Residence; Odor of Marijuana – The odor of marijuana alone shall not provide a law enforcement officer with probable cause to conduct a warrantless search of a person's home.

La.Code Crim.P. art. 163.2 Search Warrant for Medical Records – A search warrant for medical records may be issued by a judge of either the court where the investigation for the medical records is being conducted or the court where the custodian of the medical records may be found. The warrant may be executed in any place the medical records may be found and shall be directed to any peace officer who shall obtain and distribute the medical records as directed in the warrant. The search warrant remains in effect for 180 days after its issuance. Any examination of medical records seized shall be at the direction of the attorney general, the district attorney, or the investigating agency. Any examination of the medical records may

be conducted at any time before or during the pendency of any criminal proceeding in which the medical records may be used as evidence.

La.Code Crim.P. art. 671 Grounds for Recusal of Judge – **(B)** Requires a judge to be recused when there exists a substantial and objective basis that would reasonably be expected to prevent the judge from conducting any aspect of the cause in a fair and impartial manner. **2022 Comment (i)** – This provision is intended to serve as a catch-all supplementing the mandatory grounds for recusal set forth in Paragraph A and to incorporate a clearer, more objective standard than the language of Canon 3C of the Code of Judicial Conduct, which provides that a judge should recuse himself when the judge's impartiality might reasonably be questioned.

La.Code Crim.P. art. 672 Recusal on Court's Own Motion – **(B)** Requires a judge who self-recuses to file a factual basis for the recusal prior to the cause being allotted to another judge and to provide a copy to the judicial administrator of the supreme court. **2022 Comment (b) –** A judge is "'not at liberty, nor does he have the right, to take himself out of a case and burden another judge with his responsibility without good and legal cause.'" *In re Lemoine*, 96-2116 (La. 1/14/97), 686 So. 2d 837. **2022 Comment (c)** – The fact that a judicial complaint has been filed against the judge by one of the parties, without more, is not sufficient to constitute a ground for recusal.

La.Code Crim.P. art. 674 Procedure for Recusal of Trial Judge – **(A)** Requires a motion to recuse to be filed not later than 30 days after the facts are discovered but in all cases at least 30 days prior to commencement of the trial. In the event the facts occur thereafter or could not have been discovered in the exercise of due diligence, the motion must be filed immediately after the facts occur or are discovered but prior to verdict or judgment; **(B)** – Requires the judge to act no later than 7 days after the judge receives the motion from the clerk of court; **(C)** – If the motion is not timely filed or fails to set forth facts constituting a ground for recusal, the judge who is the subject of the motion may deny it without referring it to another judge but must give written reasons for the denial.

La.Code Crim.P. art. 684 Review of Recusal Ruling – **(B)** Exclusive remedy for grant or denial of a motion to recuse a judge is via supervisory writ; **(C)** Requires the judge to advise the defendant in open court or in writing that the ruling may be reviewed only by a timely filed supervisory writ and shall not be raised on appeal.

La.Code Crim.P. art. 814 Responsive Verdicts – **(A)(12)** First Degree Rape - Makes the "under 13" variants of sexual battery, molestation, and indecent behavior

with a juvenile responsive to first degree of a child under 13; **(A)(69)** – Second Degree Kidnapping when the Victim is Sexually Abused; **(A)(70)** – Aggravated Kidnapping of a Child when the Victim is Sexually Abused; **(A)(71)** – Terrorizing.

La.Code Crim.P. art. 875.1 Determination of Substantial Financial Hardship to the Defendant – Requires a hearing to determine whether payment in full of the aggregate amount of all the financial obligations to be imposed upon the defendant would cause substantial financial hardship. However, the defendant or the court may waive the judicial determination of a substantial financial hardship. If the court waives the hearing on its own motion, the court shall provide reasons, entered upon the record, for its determination that the defendant is capable of paying the fines, fees, and penalties. The court may delay the hearing for up to 90 days to permit the parties to submit relevant evidence. The court may not waive or forgive restitution due to a crime victim without the consent of the victim. The state as well as the defendant may file a motion to reevaluate the defendant's ability to pay. A defendant cannot be incarcerated for his inability to meet his financial obligations if those financial obligations would cause substantial financial hardship. The provisions of this article apply to defendants convicted of traffic offenses, misdemeanors, and felonies. *See State v. Tucker*, 22-735 (La.App. 3 Cir. 5/31/23), ___ So.3d ___ (2023 WL 3734492), and *State v. Dauzat*, 96-16 (La.App. 3 Cir. 4/26/23), ___ So.3d ___ (2023 WL 3086034), for a discussion of the legislative history of La.Code Crim.P. art. 875.1.

La.Code Evid. art. 412.1 Victim's Attire in Sexual Assault Cases – A sexual assault victim's attire is generally inadmissible when an accused is charged with a crime involving sexual assaultive behavior or with acts that constitute a sex offense involving a victim under the age of 17 at the time of the offense.

La.Ch.Code arts. 323, 324, and 1103l; La.Code Crim.P. art. 571.1; La.R.S. 15:440.2 – Amended to define "protected person" and "child" as someone under 18. However, La.R.S. 15:283 allowing for the testimony of a protected person via closed circuit television was not amended.

2023 Legislation

La.R.S. 14:2 Definitions (B) Crimes of Violence – **(58)** Distribution of fentanyl or carfentanil that causes serious bodily injury; **(60)** Simple burglary of an inhabited dwelling when a person is present.

La.R.S. 14:62 Simple Burglary – **(B)** Adds a penalty for an offender who commits multiple simple burglaries as a part of a continuous sequence of events.

La.R.S. 14:67.13. Theft or Criminal Access of an Automated Teller Machine – Newly created.

La.R.S. 14:73.13. Unlawful Deepfakes – The creation or possession of any material that depicts a minor (under the age of 18) engaging in sexual conduct using deepfake technology. Prohibits knowingly advertising, distributing, exhibiting, exchanging, promoting, or selling a deepfake depicting a minor engaged in sexual conduct or a deepfake with a nonminor without that person's consent. The statute defines deepfake, distribute, minor, and sexual conduct.

La.R.S. 14:91.10. Unlawful Sale or Distribution of Mitragynine Speciosa (Kratom) to Persons Under age 21 – Newly created.

La.R.S. 40:967 Prohibited acts - Schedule II; Penalties – **(B)(4)** Increases the penalties regarding fentanyl and carfentanil.

La.R.S. 40:983 Creation or Operation of a Clandestine Laboratory for the Unlawful Manufacture of a CDS – **(C)(2)** Provides increased penalties for the creation or operation of a clandestine laboratory for the unlawful manufacture of a substance containing fentanyl or carfentanil.

La.R.S. 40:989.4 Unlawful Production, Manufacturing, Distribution, or Possession of Xylazine – Newly created.

La.Code Crim.P. art. 388 Additional Information Provided When Prosecuting Offenses – When authorized to provide information, the prosecuting agency shall include the following in the indictment, information, or affidavit, if provided by the booking agency: 1) Date of the offense; 2) Date of arrest or summons, if a summons was issued in lieu of an arrest; 3) The state identification number of the defendant, if one has been assigned for the offense or for any prior offenses; 4) Defendant's demographic data to include sex, race, and date of birth, if known. The information may be provided in a separate document. The booking agency is responsible for

providing the information to the prosecuting agency. Failure to comply shall not constitute grounds for a motion to quash.

La.Code Crim.P. art. 791 Sequestration of Jurors and Jury – **(C)** Requires sequestration of the jury during active deliberations in noncapital cases. Allows for the trial court, after notice to the partis and an opportunity to be heard outside the presence of the jury, to recess deliberations, allow separation without sequestration, and the return for continued deliberations on the next day of operation of the court. The article requires a lengthy admonition by the court before the jury is released and verification by each juror upon their return on the record that the admonition was followed.

La.Code Crim.P. art. 883.2 Restitution to Victim (E)(1) – Authorizes restitution to the child of a victim of vehicular homicide.

La.Code Evid. art. 404 (B) Other Crimes, Wrongs, or Acts; Creative or Artistic Expression – Creative or artistic expression is not admissible in a criminal case to prove the character of a person in order to show that he acted in conformity therewith, provided that the accused provides reasonable notice to the prosecution in advance of trial asserting that the evidence is creative or artistic expression. It may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution provides reasonable notice in advance of trial of the nature of any such evidence that it intends to introduce at trial for such purposes, or when the evidence relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding. Creative or artistic expression means the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including music, dance, performance art, visual art, poetry, literature, film, and other such objects or media.

La.Ch.Code art. 305 Divestiture of Juvenile Court Jurisdiction; Original Criminal Court Jurisdiction Over Children – Amendments regarding the number of days to file a petition/indictment and the remedy for failure to timely do so.

La.Ch.Code art. 897.1 Disposition After Adjudication of Certain Felony-Grade Delinquent Acts – Adds carjacking to the list of offense requiring secure placement with DPSC for those 14 and older and provides a timeframe for modification eligibility.

Case Law Update

State v. Jones, 21-1465 (La. 10/14/21), 326 So.3d 244 – There is no Double Jeopardy prohibition against retrying a defendant on convictions that were ultimately vacated in accordance with *Ramos*.

State v. Brown, 16-998 (La. 1/28/22), 347 So.3d 745, *cert. denied*, ___ U.S. ___, 143 S.Ct. 886 (2023) – A writ denial by the supreme court has no precedential value.

State v. Major, 22-387 (La. 3/9/22), 333 So.3d 1231 – The trial court erred in severing the trial of the defendant from that of his co-defendants. Defendant's motion to sever until his preferred counsel of choice was reinstated to the practice of law was made on the week before trial and long after counsel was suspended. Thus, it came too late.

State v. Watson, 22-719 (La. 5/1/22), 338 So.3d 1169 – The trial court abused its discretion in denying the written, joint motion to continue filed 10 days before trial. The court cited La.Code Crim.P. art. 713 cmt. a, which states, "This article negates the idea that when both parties agree to a continuance the court may nevertheless refuse it."

State v. Brown, 21-1336 (La. 6/29/22), 345 So.3d 988 – Return of a nonresponsive verdict operates as an acquittal of the crime charged, causing jeopardy to attach. Attempted aggravated flight from an officer is a non-crime.

State v. Julian, 22-578 (La.App. 3 Cir. 10/13/22) (unpublished opinion) – The court found the trial court erred in declaring La.Code Crim.P. art. 493.2 unconstitutional and ordered the trial court to disregard/ignore the language in La.Code Crim.P. art. 493.2 stating, "ten of whom must concur to render a verdict."

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 – The time limit for the state to commence trial was extended by 79 days by the supreme court's COVID-19 orders, and Hurricane Laura interrupted prescription.

State v. Mitchell, 22-1126 (La. 11/8/22), 349 So.3d 976 – La.Code Crim.P. art. 313 is not applicable solely in proceedings instituted against those charged with domestic violence. Article 313(A) applies to defendants charged with domestic abuse, (B) to persons in custody charged with the commission of an offense, and (C) applies to

persons charged with a sex offense who have been previously convicted of a sex offense.

State v. Rowe, 22-206 (La. 12/9/22), 354 So.3d 1187 – For the purpose of applying La.R.S. 14:403.10, which addresses immunity in drug-related overdose cases, "overdose" means an acute medical condition, including, but not limited to, extreme physical illness, decreased level of consciousness, respiratory depression, coma, mania, hysteria, or death that is the result of consumption or use of a controlled substance, or a condition a **lay person** would reasonably believe was a drug-related overdose.

State v. Neveaux, 23-183 (La. 3/28/23), 358 So.3d 39 – Recusal under La.Code Crim.P. art. 671(B) was necessary where victim was a sheriff's officer; the judge's wife was a sergeant with the sheriff's office, knew the victim, and directed traffic at the scene of the crime; and the judge may have attended the victim's funeral.

State v. Spicer, 23-570 (La. 6/26/23), 363 So.3d 1222 – Recusal under La.Code Crim.P. art. 671(B) was necessary where the decedent was a Mandeville Police Officer; the judge attended the funeral of the decedent; the judge's former law partner represented the defendant's father in a case in which the defendant was the alleged victim; and an attorney who worked at the judge's former law office was the brother of a Mandeville Police Officer who provided first aid to one of the victims and participated in the collection of some of the evidence in the case.

State v. Goffnerm, 23-464 (La. 3/31/23), 358 So.3d 851 – Mistrial as to one jointly tried defendant is applicable to all defendants.

State v. Davis, 23-156 (La.App. 3 Cir. 4/4/23) (unpublished opinion), *writ denied*, 23-564 (La. 6/21/23), ___ So.3d ___ (2023 WL 4101235) – The DA's office was recused by trial court order on May 5, 2021, and the AG's office did not seek supervisory review of that ruling. The AG filed a motion to vacate the May 5, 2021 ruling on December 22, 2022. The motion to vacate, which the trial court denied, was essentially a motion to reconsider the merits of the 2021 recusal. This court concluded the AG failed to allege any new evidence or new authority in opposition to the recusal. The court cited *Clement v. Am. Motorists Ins. Co.*, 98-504, p. 4 (La.App. 3 Cir. 2/3/99), 735 So.2d 670, 672, *writ denied*, 99-603 (La. 4/23/99), 742 So.2d 886, wherein the court stated, "[W]e believe an exercise of our supervisory jurisdiction to reach the merits in this case would render Rule 4–3 of the Uniform Rules—Courts of Appeal meaningless," and denied the AG's writ application.

State v. Irvin, (La.App. 3 Cir. 4/21/23) (unpublished opinion) – Defendant moved to declare La.R.S. 14:403.7 unconstitutional because 1) the statutory definitions of "caretaker" and "physical custody" were ambiguous, vague, and unconstitutionally indefinite; 2) the statute impermissibly compelled incriminatory speech; and 3) the statute established an irrebuttable presumption of guilt from proof of a certain fact. Defendant's writ application was denied. La.R.S. 14:403.7 provides: A. (1) A child's caretaker shall report to an appropriate authority that a child is missing within two hours of the expiration of the period provided for in Paragraph (2) of this Subsection. (2) For purposes of this Subsection, there shall be a presumption that a child is missing and that the child's caretaker knew or should have known that the child is missing when the caretaker does not know the location of the child and has not been in contact with nor verified the location or safety of the child: (a) With regard to a child over the age of thirteen, for a period of twenty-four hours. (b) With regard to a child thirteen years of age or younger, for a period of twelve hours.

State v. Washington, 22-258 (La. 5/3/22), 337 So.3d 153 - If the factfinder is presented with sufficient evidence that an offender committed acts at a certain age, a defendant can be sentenced in accordance with that age. Defendant was 15 when he first raped the victim, the last rape occurred when the defendant was 20, and the jury verdict gave no indication of whether the jury found defendant guilty of rapes he committed as an adult or whether he was only guilty of rapes he committed as a juvenile. *State v. Washington*, 54,064 (La.App. 2 Cir. 1/12/22), 332 So.3d 784.

State v. Chandler, 22-1506 (La. 5/5/23), ___ So.3d ___ (2023 WL 3263972) – The seating of the juror, an employee of the district attorney, alone did not establish prejudice under *Strickland.*

State in Interest of W.C., 23-262 (La.App. 3 Cir. 5/16/23) (unpublished opinion) – The juvenile court was not required to hold a contradictory hearing before denying OJJ's Motion to Reconsider Motion to Modify Disposition. *See also State in Interest of C.M.*, 23-337 (La.App. 3 Cir. 6/16/23) (unpublished opinion).

State v. Bickham, 23-541 (La. 5/31/23), 361 So.3d 450 – The Code of Criminal Procedure does not authorize an order "closing" discovery.

State v. Honore, 23-637 (La. 6/7/23), 361 So.3d 960 – The state's authority to determine whom, when, and how it shall prosecute does not extend to controlling when the trial court sets the case for trial.

State v. Shallerhorn, 22-1385 (La. 6/27/23), ___ So.3d ___ (2023 WL 4195566) – A defendant charged with first degree murder can elect a bench trial where the state had given formal notice that it will not seeking the death penalty.

Counterman v. Colorado, 600 U.S. ___, 143 S.Ct. 2106 (2023) – The case involved numerous messages sent to a Facebook user that were interpreted by their recipient as threatening, leading to the sender's conviction under a Colorado state stalking law. The Court considered if the sender knew or understood the statements could be interpreted as "true threats" unprotected by the First Amendment, or if a test that a reasonable person would understand the statements as threatening was enough to remove the speaker's First Amendment protections. The Supreme Court said the State must prove in true-threats cases that the defendant had some subjective understanding of his statements' threatening nature, but the First Amendment requires no more demanding a showing than recklessness.

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION PROGRAM

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ERRORS PATENT

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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. 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. __, 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, in which punishment is necessarily confinement at hard labor, the jury must be composed of twelve jurors, all of whom must concur to render a verdict. 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. __, 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*, __ U.S. __, 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*, __ U.S. __, 138 S.Ct. 1175 (2018); *State v. Guillory*, 10-1175 (La.App. 3 Cir. 4/6/11), 61 So.3d 801. A statement by defense counsel that he has "no objection to sentencing" constitutes an express waiver. *See State v. Boyd*, 17-749 (La. 8/31/18), 251 So.3d 407. 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. Toby*, 22-386 (La.App. 3 Cir. 3/8/23), 358 So.3d 289; *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; *State v. McCoy*, 16-948 (La.App. 3 Cir. 5/10/17), 219 So.3d 538, *writ denied*, 17-1151 (La. 5/25/18), 242 So.3d 1232. This error is also considered harmless if the defendant received a mandatory life sentence. *See State v. Craft*, 22-553 (La.App. 3 Cir. 2/1/23), 355 So.3d 1237; *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. Snider*, 22-786 (La.App. 3 Cir. 4/12/23), __ So.3d __ (2023 WL 2905542); *State v. Trahan*, 22-388 (La.App. 3 Cir. 11/16/22), 352 So.3d 1072, *writ denied*, 22-1819 (La. 4/25/23), 359 So.3d 982; *State v. Heard*, 22-378 (La.App. 3 Cir. 11/23/22), 353 So.3d 326. This court has also ordered correction of the Uniform Commitment Order in cases where it conflicts with the sentencing transcript. *See State v. Walker*, 22-695 (La.App. 3 Cir. 4/19/23), __ So.3d __ (2023 WL 2995443); *State v. Coutee*, 22-345 (La.App. 3 Cir. 10/26/22), 353 So.3d 210;

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. 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. 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), __ So.3d __ (2023 WL 2905542); *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 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. 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. 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.

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. 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. 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 2017, La.Code Crim.P. art. 893 was amended to change the probationary period for most offenses from a five-year maximum to a three-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 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 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.

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. Toby*, 22-386 (La.App. 3 Cir. 3/8/23), 358 So.3d 289; *State v. Ramos*, 21-129 (La.App. 3 Cir. 10/6/21) (unpublished opinion) (2021 WL 4571762), *writ denied*, 21-1799 (La 2/15/22), 332 So.3d 1182; *State v. Obrien*, 17-922 (La.App. 3 Cir. 4/4/18), 242 So.3d 1254, *writ denied*, 18-663 (La. 2/18/19), 265 So.3d 769. However, if the defendant is to be resentenced, notice of the time limitation is to be given at resentencing rather than by written notice. *See State v. Ervin*, 17-18 (La.App. 3 Cir. 12/13/17), 258 So.3d 677; *State v. Bentley*, 15-598 (La.App. 3 Cir. 2/3/16), 185 So.3d 254.

A common error occurs when the trial court erroneously advises the defendant that he has two years from the *date of sentencing* to file for post-conviction relief. Louisiana Code of Criminal Procedure Article 930.8 states that a defendant has two years from the *finality of his conviction and sentence* to apply for post-conviction relief. When this error occurs, the trial court is ordered to correctly notify the defendant of the provisions of Article 930.8 by written notification, or at resentencing if resentencing is required. *See State v. Humphrey*, 22-724 (La.App. 3 Cir. 3/29/23), __ So.3d __ (2023 WL 2669536); *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 without stating that the two years begins to run from finality of the conviction and sentence. *See 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; *State v. Thomas*, 16-578 (La.App. 3 Cir. 4/19/17), 217 So.3d 651, *writ denied*, 17-1153 (La. 8/31/18), 251 So.3d 411.

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 25, 2023

CRIMINAL APPEALS AND SUPERVISORY WRIT APPLICATIONS

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CRIMINAL APPEALS AND SUPERVISORY WRIT APPLICATIONS – THE BASICS

I. APPEALS

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

1. Appealable?

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

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

i. Rulings that are appealable:

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

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

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

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

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

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

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

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

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

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

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

ii. Rulings that are NOT appealable:

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

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

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

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

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

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

gg. Convicted but not yet sentenced

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

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

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

kk. Denial of a motion to correct illegal sentence such as those filed pursuant to *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012) and *Montgomery v. Louisiana*, 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 penalty that is possible under the statute, not the actual sentence imposed. Even if the defendant waived the right to a jury trial, if he had the right, the case is triable by jury for jurisdictional purposes.

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

However, if a defendant is charged with a misdemeanor in which the punishment may be a fine in excess of $1,000 or imprisonment for more than 6 months, the case shall be tried by a jury of six jurors. *See* La.Code Crim.P. art. 779. When misdemeanor charges are charged by separate bills of information and the aggregate potential penalty of the offenses exceeds 6 months imprisonment or a fine of $1,000, the defendant is entitled to a jury trial. Whenever two or more misdemeanors are joined in the same bill of information, the maximum aggregate penalty shall not exceed imprisonment for more than 6 months, a fine of more than $1,000, or both. *See* La.Code Crim.P. art. 493.1.

3. Timely?

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

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

c. Untimely-filed motions for appeal are considered applications for post-conviction relief seeking out-of-time appeal. La.Code Crim.P. art. 930.2; *State v. Santiago*, 22-607 (La. 3/7/23), 359 So.3d 540 (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) and (C).

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

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

C. Errors Patent – See separate Errors Patent outline.

D. Standards of Review

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

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

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

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

2. Abuse of discretion

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

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

Once an appellate court has determined that the trial court erred (abused its discretion), the harmless error analysis is utilized in certain situations. The proper analysis

for determining harmless error is not whether, in a trial that occurred without the error, a guilty verdict surely would have been rendered but whether the guilty verdict actually rendered in the trial was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081 (1993).

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

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

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

In deciding whether a sentence is shocking or makes no meaningful contribution to acceptable penal goals, an appellate court may consider several factors including the nature of the offense, the circumstances of the offender, the legislative purpose behind the punishment and a comparison of the sentences imposed for similar crimes. While a comparison of sentences imposed for similar crimes may provide some insight, "it is well settled that sentences must be individualized to the particular offender and to the particular offense committed." Additionally, it is within the purview of the trial court to particularize the sentence because the trial judge "remains in the best position to assess the aggravating and mitigating circumstances presented by each case." *State v. Smith*, 02-719, p. 4 (La.App. 3 Cir. 2/12/03), 846 So.2d 786, 789, *writ denied*, 03-562 (La. 5/30/03), 845 So.2d 1061 (citations omitted). "[T]he trial judge need not articulate every aggravating and mitigating circumstance outlined in art. 894.1[;] the record must reflect that he adequately considered these guidelines in particularizing the sentence to the defendant." *State v. Smith*, 433 So.2d 688, 698 (La.1983).

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

b. La.Code Crim.P. art. 881.1(E)

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. By conference decision, a rehearing may also be sought when a writ application is denied as untimely pursuant to Uniform Rules—Courts of Appeal, Rule 4–3.

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

II. SUPERVISORY WRIT APPLICATIONS

A. Deficiency review – See Appendix 2.

1. Procedural Bars

a. Timeliness - post-conviction relief applications ("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)– (4).

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

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

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

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

2. Contents - See Appendix 3 for complete listing, but the important things 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 and La.Code Crim.P. art. 912.1(C).

3. Priority of handling writs

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

b. Pretrial

i. Next hearing date

ii. Trial date

iii. No date

iv. Stayed

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

d. Misdemeanor or Probation revocation

e. Any request for expedited consideration

f. Post-conviction relief

B. Review of the merits

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

2. Typical issues

a. Pre-trial

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

ii. Habeas corpus (*See* La.Code Crim.P. art. 352 *et seq*. If a pleading alleges a true habeas corpus claim, the pleading must be filed in the parish where the petitioner is incarcerated. La.Code Crim.P. art. 352. The Louisiana Supreme Court has recognized that criminal habeas corpus proceedings essentially deal with pre-conviction complaints concerning custody. *State ex rel. Glover v. State*, 93-2330 (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 (*See* La.Code Crim.P. art. 701 – time limits for filing bill, arraignment, and for commencing trial after filing of motion for speedy trial. *See also State v. Varmall*, 539 So.2d 45 (La.1989) - if bill is filed prior to hearing on 701 motion, issue of pre-trial release is moot); motion to quash (time limitations - *See* La.Code Crim.P. art. 571 *et seq.*);

iv. Double jeopardy – (*See* La.Code Crim.P. art. 591 *et seq.*; *State v. Green*, 16-32 (La.App. 3 Cir. 5/13/16) (unpublished opinion), *writ denied*, 16-1126 (La. 11/18/16) – Defendants filed a motion to quash the charging instrument arguing they should be sentenced under the 2015 changes made to the possession of marijuana statute despite their offenses 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/Other Crimes (*See State v. Prieur*, 277 So.2d 126 (La.1973);

vii. Right To Counsel (*See 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) – "The trial court erred in denying Defendant's motion on the grounds that he is currently represented. *See State v. Melon*, 95-2209 (La. 9/22/95), 660 So.2d 466, and *State v. Alexander*, 07-1236 (La.App. 3 Cir. 4/9/08), 980 So.2d 877. Accordingly, this case is remanded to the trial court with instructions to hold a hearing regarding Defendant invoking his right to self-representation. *See State v. Whatley*, 03-655 (La.App. 3 Cir. 11/5/03), 858 So.2d 751";

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

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

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

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

a stamp to reflexively deny all pro-se filings by a represented defendant is inadequate to safeguard the defendant's rights while ensuring the efficient and orderly administration of criminal justice.

Thibodeaux, 236 So.3d at 1255–56.

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

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

d. Production of Documents - *State v. ex rel. Simmons v. State*, 93-275 (La. 12/16/94), 647 So.2d 1094 – indigent defendants are entitled to copies of certain documents free of charge (transcript of guilty plea, bill of information or grand jury indictment, court minutes, document committing them into custody, and transcript of evidentiary hearings on pcr); otherwise, they must demonstrate a particularized need for a document to receive it free of charge; particularized need is demonstrated by filing a timely pcr which sets out specific claims of constitutional errors requiring the requested documentation for support. *State ex rel. Bernard v. Criminal District Court*, 94-2247 (La. 4/28/95), 653 So.2d 1174. If the time limit for filing pcr has lapsed and Relator does not prove an exception, he/she is not entitled to documents. *State ex rel. Fleury v. State*, 93-2898 (La. 10/13/95), 661 So.2d 488. The right to request documents can also be waived as a condition of a guilty plea.

e. Motion to Correct Illegal Sentence – An illegal sentence may be corrected at any time. La.Code Crim.P. art. 882. Inmates often title their pleadings "Motion to Correct Illegal Sentence," but usually the pleadings are in the nature of an application for post-conviction relief. Only those claims relating to the legality of the sentence itself under the applicable sentencing 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 – 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 – Be sure to include the status of the case, the reasons for expedited consideration, and a specific time within which action is sought (as a separate page and properly noted in the index). **If the status of the case changes during the pendency of the writ, you must notify the court of said change**.

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

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

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

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

5. Service Upon All Interested Parties — A copy of the writ application must be sent to the trial court and all 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 4–4.

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

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 to all attorneys and the trial court.

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

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

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

III. MISCELLANEOUS

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

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

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

D. If a video or DVD admitted into evidence is submitted with a writ, Third Circuit, Local Rule 31 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.

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

DEFICIENCY REVIEW PROCEDURE

1. INITIAL EVALUATION OF WRIT

A. Priority of the Writ Application
   1. Bail
   2. Pretrial
      a. Next hearing date
      b. Trial date
      c. No date
      d. Stayed
   3. Misdemeanor or Probation revocation
   4. Post-conviction relief
   5. Any request for expedited consideration

B. Case Details
   1. Name of Defendant
   2. Attorney-filed or pro se
   3. Docket number
   4. Parish/Judicial District
   5. Ruling Judge
   6. Trial court/District court docket number
   7. Judicial Recusals

2. CASE HISTORY

A. Charges
   1. Type (Information or Indictment)
   2. Offense date(s)
   3. Filing date
   4. Offenses/statutes/ordinances
   5. Amendments
      a. Date of Amendment
      b. Alteration of charges

B. Convictions
   1. Type of proceeding
      a. Jury trial
      b. Bench trial
      c. Plea
         1. Crosby reservations
         2. No contest/Alford
   2. Date of Proceeding
   3. Convictions

C. Sentences
   1. Bargained-for/PSI
   2. Date of Proceeding
   3. Sentences

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

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

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

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

3. WRIT HISTORY

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

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

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

3. Date of filing
4. Issues/Replies presented

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

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

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

4. WRIT APPLICATION

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

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

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

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

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

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

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

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

IV. PREPARATION TO PROCEED

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

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

d. Priority

2. Notes
    a. Note any procedural bars
    b. Note any deficiencies
    c. Include any helpful cites or information
3. Recusals (Judges who worked on the case 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 / KM / KH _____

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

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

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

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

Reviewer: _____ Date: _____

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 25, 2023

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

***Smith v. Acadian Ambulance*, 22-626 c/w 22-664 (La.App. 3 Cir. 3/22/23), 363 So.3d 564. (Bradberry, J. writing; Pickett and Kyzar, JJ.)**

Michael Smith appealed a trial court judgment which dismissed his amending petition filed against Lafayette General Medical Center by granting its exception of prescription.

HELD: ***Reversed and Remanded.*** Mr. Smith brought his wife to LGMC and was hit by an Acadian ambulance when exiting through the emergency room exit. The ambulance ran over his right foot and ankle. He initially filed suit against Acadian and its insurer but added LGMC by amending petition in response to the Defendants' intention to add LGMC as a party on the verdict form. The trial court dismissed Mr. Smith's claim against LGMC after granting its exception of prescription finding that Mr. Smith's amended petition did not relate back to the date of filing of the original petition.

We found that the "relation back" concept does not apply in determining whether a newly-added defendant is a joint tortfeasor when a suit has been instituted against a correctly named and timely-sued joint tortfeasor. The "relation back" concept typically applies when the wrong party has been named as the original defendant. Thereafter, we conducted a de novo review since the trial court applied the wrong legal standard. After reviewing the amending petition, we found that the Mr. Smith's claims against LGMC occurred contemporaneously with that of the claims against Acadian Ambulance to contribute to his accident. Mr. Smith established that LGMC was a joint tortfeasor with the other Defendants.

***In re: Dana Broussard (Medical Review Panel)*, 22-559 (La.App. 3 Cir. 2/23/23), 359 So.3d 73. (Wilson, J., writing; Gremillion & Perret, JJ.)**

This medical malpractice suit presents the issues of the date of discovery of the patient's cause of action and the application of the "uncalled witness" rule as set forth in *Driscoll v. Stucker*, 04-589 (La. 1/19/05), 893 So.2d 32, and its corresponding adverse presumption.

After Mrs. Broussard requested the formation of a Medical Review Panel, the two defendant physicians each filed an exception of prescription, alleging that her complaint, dated September 8, 2021, was filed well beyond the applicable prescriptive period. The trial court sustained the exceptions, finding "that there were multiple occasions where the plaintiff displayed signs of constructive notice prior to September of 2020" and that the doctrine of contra non valentem was inapplicable because there was "no evidence that anyone intentionally concealed the results of an MRI or any x-rays."

Mrs. Broussard wanted to rely on the doctrine of contra non valentem to establish that the date of discovery was some fifteen months after the date of the alleged malpractice. She argued that she was evaluated by four different physicians between the date of a cervical discectomy and the date of a panoramic x-ray, which showed that some of the hardware placed in her neck was out of position, and that these physicians knew or should have known of the hardware effacement shown on an October 16, 2019 MRI but failed to advise her that the hardware was out of place.

On appeal, alleging that the two defendant physicians did not testify at the hearing on their exceptions of prescription, Mrs. Broussard attempted to invoke the "uncalled witness" rule because she needed the corresponding adverse presumption to establish that the two defendant physicians concealed critically important medical information in order for contra non valentem to apply.

HELD: ***Affirmed.*** This court found that Mrs. Broussard's theory was not supported by either the jurisprudence or the evidence submitted at the hearing on the exceptions of prescription and that the medical records and Mrs. Broussard's own testimony established that she had constructive notice of her malpractice claim prior to the alleged date of discovery. The records of Mrs. Broussard's primary care physician contained documents noting that Mrs. Broussard told healthcare providers as early as October 23, 2019, that hardware from the surgery performed by one of the defendant doctors was "pushing" on esophagus. In fact, Mrs. Broussard's medical records from multiple physicians indicated that Mrs. Broussard related her complaints of "discomfort" in her throat to the hardware placed during the surgery and that these complaints started almost immediately after the surgery. Then, based on our conclusion that there was no error in the trial court's finding that there were multiple occasions, prior to September of 2020, where Mrs. Broussard displayed constructive notice of her claim, we held that Mrs. Broussard could not avail herself of the negative inference provided by the "uncalled witness" rule because she did not meet her burden of proof on the defense of contra non valentem. *See McCauley v. Stubbs*, 17-933, p. 7 (La.App. 3 Cir. 4/25/18), 245 So.3d 41, 46-47 [quoting *Braud v. Cenac*, 03-1696, p. 5 (La.App. 3 Cir. 7/14/04), 879 So.2d 896, 901, *writ denied*, 04-2101 (La. 11/15/04), 887 So.2d 484], wherein this court stated that "to defeat a well-founded exception of prescription, it is 'necessary for a plaintiff to prove ill motive or intentional concealment on the physician's part.' Without such proof the exception must be maintained." We further found that there was no abuse of discretion in the trial court's refusal to apply the adverse presumption because Mrs. Broussard, as the party seeking to avail itself of the negative inference, bore "the burden of proof on the issue that would be addressed by the witness's testimony[.]" *Moretco, Inc. v. Plaquemines Par. Council*, 12-430, p. 18 (La.App. 4 Cir. 3/6/13), 112 So.3d 287, 296-297 (footnotes omitted), *writ denied*, 13-724 (La. 5/17/13), 118 So.3d 376.

Peralez v. HDI Global Specialty SE, et al, **22-343 (La.App. 3 Cir. 11/9/22), 353 So.3d 235, *writ denied*, 22-1795 362 So.3d 424. (Panel: Perret, J., writing, Gremillion & Conery, JJ.)**

Plaintiff, Ida Peralez, was injured at a McDonald's on July 9, 2020. Plaintiff faxed filed her petition for damages to the clerk of court on July 9, 2021 and filed the original petition on July 26, 2021. Thereafter, Defendants filed exceptions of prescription alleging Plaintiff failed to comply with La.R.S. 13:850. In response, Plaintiff argued that prescription was suspended under La.Civ.Code art. 3472.1 due to Hurricane Laura and the Governor's corresponding emergency declaration, which Plaintiff alleged gave her an additional thirty days within which to file suit.

The trial court first found the operative filing date was July 26, 2021, and that Plaintiff did not meet the requirements of La.R.S. 13:850. Then, the trial court concluded that La.Civ.Code art. 3472.1 did not provide Plaintiff with an additional thirty days to file her petition. Plaintiff appealed the trial court's finding that prescription was not suspended.

HELD: AFFIRMED.

Louisiana Civil Code Article 3472.1 became effective June 25, 2020, only two months prior to Hurricane Laura. The Legislature acted to grant the supreme court the power to suspend prescription deadlines in the face of an emergency, instead of relying on the Governor to initially do so. Paragraph A sets forth that power and indicates that the supreme court may suspend prescription *up to* ninety days on its own once a state of emergency or disaster is ordered. La.Civ.Code art. 3472.1(A). Paragraph B then provides the application that any suspension of prescription declared using the power set forth in Paragraph A will have, providing that the right to take advantage of the suspension will end sixty days after the termination of the suspension. This court declined to read the statute in light of La.Civ.Code art. 3472, as suggested by Plaintiff, finding that article 3472.1 is a superseding statute and an exception to the general rule for emergency declarations. This court also declined to find any ambiguity in the statute.

After reviewing similar cases, this court concluded that La.Civ.Code art. 3472.1 permits the supreme court to suspend prescriptive and peremptive periods up to ninety days following a state of emergency or disaster declaration. The right to file pursuant to this suspension, however, terminates sixty days after the suspension. Paragraph B clearly limits the effect of the power set forth in Paragraph A. Plaintiff filed her claim more than sixty days after the termination of the suspension; thus, her claim was prescribed. **(*Update:** Louisiana Civil Code Article 3472.1 has since been amended by 2022 La. Acts No. 469, § 1, which became effective on August 1, 2022.)

CIVIL PROCEDURE

***Cofer v. Rapides Parish Sheriff's Office,* 22-611 (La.App. 3 Cir. 3/29/23) (unpublished opinion). (Panel: Fitzgerald, J., writing; Gremillion & Perry, JJ.)**

In 2013, Stormy Cofer was arrested and held at the Rapides Parish Detention Center. While in custody, Stormy alleges that certain deputies subjected her to unwanted physical and sexual contact. In 2015, Stormy filed suit against various defendants, including then-Sheriff William Earl Hilton, Deputy John William Benjamin, and Donald Brown. In 2022, the defendants filed a motion to dismiss Stormy's suit as abandoned. The trial court granted the motion and signed an Order dismissing Stormy's suit with prejudice on May 5, 2022. Stormy appealed. On appeal, Stormy alleged that the trial court erred when it granted, with prejudice, Defendants-Appellees' Motion to Dismiss Due to Three Year Abandonment. Stormy concedes that while dismissal was appropriate, she asserts that her suit should have been dismissed without prejudice.

Held: Affirmed as Amended. The third circuit noted that a dismissal on grounds of abandonment may only be made without prejudice. *See, e.g., Argence, L.L.C. v. Box Opportunities, Inc.*, 11-1732, p. 4 (La.App. 4 Cir. 5/23/12), 95 So.3d 539. After a de novo review, the third circuit agreed that the suit should have been dismissed without prejudice. As such, the third circuit amended the trial court's order of dismissal to read "without prejudice" and affirmed.

***Thibodeaux v. McNeese State University*, 22-450 (La.App. 3 Cir. 1/25/23), 354 So.3d 903, *writ denied*, 23-265 (La. 4/18/23), 359 So.3d 519. (Panel: Pickett, C.J., writing, Perry & Thierry, JJ.)**

Plaintiff filed suit to recover damages associated with her alleged wrongful termination. Louisiana Attorney General (AG) filed declinatory exceptions of insufficient service citation and/or service of process, and/or lack of personal jurisdiction and dilatory exception of subject-matter jurisdiction, prematurity, and vagueness/ambiguity. The trial court upheld the exception of insufficient service of citation and service of process, finding a 2012 amendment to La.R.S. 13:5107, required plaintiff to serve the AG within ninety days of filing her suit, and dismissed the plaintiff's claims because she had not done so.

HELD. Reversed. Prior to the 2012 amendment, La.R.S. 13:5107 allowed service and citation to be made on the attorney general of Louisiana, any other proper officer or person, department, board, commission, or agency head or person, depending upon the identity of the named defendant. A plaintiff's request for service of citation on the only named defendant satisfied the requirements of La.R.S. 13:5107(A) and (D). *Whitley v. State, Bd. of Supervisors*, 11-40 (La. 7/1/11), 66 So.3d 470. The 2012 amendment to La.Code Civ.P. art. 13:5107 did not affect this holding and requires dismissal of a plaintiff's suit only if a named defendant is not served within ninety days of suit being filed. *Brown v. Chesson*, 20-730 (La. 3/24/21), 315 So.3d 834.

DISCOVERY

***Acadiana Renal Physicians v. Our Lady of Lourdes Regional Medical Center, Inc.*, 23-372 (La.App. 3 Cir. 6/28/23), _ So.3d _ (Panel: Stiles, J., writing; Gremillion and Bradberry, JJ.)(Bradberry, J. concurs).**

Plaintiffs filed suit against Our Lady of Lourdes Hospital, asserting that the hospital failed to pay nephrologists for performing on-call services despite it paying physicians in other specialties for those services. Plaintiffs advanced causes of action under the Louisiana Monopolies Act, and the Louisiana Unfair Trade Practices Act. Plaintiffs thereafter pursued discovery of information associated with revenues generated by physicians receiving pay from OLOL. Although OLOL objected to the requests, the trial court issued an order compelling OLOL to produce certain, specified information. In the months that followed, OLOL engaged a third party to harvest documents potentially including the information sought. OLOL's counsel began reviewing the documents for responsiveness. Three months later, Plaintiffs filed a motion for discovery sanctions and alleged that OLOL had failed to produce any documents in response to the trial court's discovery order. OLOL responded that the law firm was in the process of reviewing the 170,000 documents it had gathered. The trial court denied the motion for sanctions but ordered OLOL to respond more quickly to its earlier discovery order. The trial court further ordered OLOL to identify the search terms and methods used in its e-discovery review.

Plaintiffs appealed the trial court's denial of sanctions. While the appeal was pending, Plaintiffs filed a Motion to Strike Appellee's Brief asserting that OLOL violated Local Rules –

Court of Appeal, Third Circuit, Rule 28 by attaching discovery responses that had not been introduced into evidence.

HELD: ***Motion to Strike Appellee's Brief Denied. Affirmed***.

The panel first addressed the motion to strike, noting that Rule 28 is inapplicable to non-evidentiary attachments allowed in practice to facilitate the court's understanding of the issues involved. The motion was thus denied as the attached discovery responses were helpful in consideration of the trial court's refusal to award discovery sanctions, particularly given the expedited appellate process associated required in the antitrust matter.

On the merits, the panel left the trial court's refusal to award sanctions undisturbed as the trial court acted within its discretion in accepting OLOL's explanation for its laborious, ongoing process of reviewing the 170,000 documents gathered. The panel also rejected Plaintiffs' further contention that the trial court's order did not require adequate cooperation with Plaintiffs as to search protocol and methods. Although it recognized Plaintiffs' frustration with the slow pace of the discovery process, the panel noted the short period of time that had lapsed between the order compelling OLOL to produce the documents and Plaintiffs' motion for sanctions. Further the parties' offered conflicting accounts of discovery since that time.

APPELLATE PROCEDURE

***Hartman v. Hartman (Adgia)*, 22-103 (La.App. 3 Cir. 12/7/22), 355 So.3d 114. (Panel: Gremillion, J., writing, Pickett & Conery, JJ.)**

In this contentious ongoing custody battle, the mother, a licensed Louisiana attorney for more than twenty-five years, "appealed" the trial court's written joint custody implementation plan (JCIP) that reduced the agreements made in court to writing. The appeal consisted of five pages of which three paragraphs referencing nothing in the record, any law, any argument, or any facts, asserted that "there was no reason for the Judge to issue a separate different written judgment six months later with respect to the same claims, as the verbatim transcript record constituted a formal Judgment." The mother's appeal was dismissed for failing to comply with Uniform Rules-Courts of Appeal, Rule 12.4 (B)(3)-(4). Furthermore, after reviewing the entire record, the mother was sanctioned $5,000 for frivolous appeal. The mother made baseless and untruthful claims that she did not understand common legal principles, that she did not agree to things that she plainly agreed to multiple times on the record, that she did not understand what was going on, and made various other inappropriate claims and comments.

CRIMINAL LAW AND PROCEDURE

***State v. Stevens,* 22-746 (La.App. 3 Cir. 4/5/23), _ So.3d _, 2023 WL 2778495. (Panel: Pickett, C.J., writing; Kyzar & Bradberry, JJ.)**

The state appealed the trial court's grant of the defendant's motion to quash. On December 7, 2021, the defendant filed a motion to quash asserting that the state failed to commence trial within two years of his November 29, 2018 indictment for first degree rape. In defense of the defendant's motion, the state asserted that the closure of courts caused by Hurricane Laura in August 2020 interrupted the two-year time limitation for the state to proceed to trial on defendant's charge as provided by La.Code Cr.P. art. 579(A)(2).

REVERSED. The mandatory court closures following Hurricane Laura constituted a "cause beyond the control of the state" interrupted La.Code Cr.P. art. 579(A)(2)'s time period and caused it to run anew. *See State v. Simmons*, 22-208 (La.App. 3 Cir. 10/19/22), 350 So.3d 599, *writ denied*, (La. 2/7/23), 354 So.3d 675.

***State of Louisiana v. Earl James Darby*, 22-617 (La.App. 3 Cir. 2/23/23) (unpublished opinion). (Wilson, J., writing, Gremillion & Perret, JJ.)**

Defendant shot and killed a man in his home after discovering the man naked in his home with his girlfriend. Defendant pled guilty to manslaughter, in violation of La.R.S. 14:31, and was sentenced to twenty-five years at hard labor and ordered to pay $150 for the cost of the presentence investigation. He appealed his sentence, asserting that it is constitutionally excessive.

HELD: *Affirmed.* Defendant asserted that the trial court did not adequately weigh and consider the mitigating factors that he was a first-felony offender with significant community support, an excellent work history, and children for whom he was providing. Under La.R.S. 14:31, the penalty for manslaughter is imprisonment at hard labor for not more than forty years. Trial courts have wide discretion in the imposition of sentences within the statutory limits. La.Code Crim.P. art. 894.1 lays out the sentencing guidelines. The record revealed the trial court adequately considered both aggravating and mitigating circumstances. Considering the nature of the crime, the nature and background of the offender, and the sentences imposed for similar crimes, the Defendant's twenty-five out of a possible forty-year sentence was not excessive.

***State v. Young*, 22-584 (La.App. 3 Cir. 2/8/23), 357 So.3d 506 (Panel: Gremillion, J., writing, Perret and Wilson, JJ.)**

Defendant was convicted of *attempted* molestation of a juvenile under thirteen and sentenced to ten years at hard labor and to wear an ankle monitor for the remainder of his life. Defendant appealed the portion of his sentence relating to the requirement of a lifelong ankle monitor arguing that La.R.S. 14:81.2(D)(3) does not apply to offenders who are only convicted of attempt to commit the crime and because defense counsel rendered ineffective assistance in failing

to challenge the constitutionality of the statute as the requirement violates the Fourth Amendment of the U.S. Constitution and Article 1, Section 5 of the Louisiana Constitution.

Affirmed. The statute states that a person will be fined or imprisoned or both, *in the same manner* as for the offense attempted. Lifetime ankle monitoring for completed offenses has been upheld and a review of the legislative intent in enacting the statute requires a conclusion that lifetime electronic monitoring applies to a person convicted of attempted molestation of a juvenile under the age of thirteen.

Regarding the ineffective assistance claim, the record was insufficient for us to determine if the ankle monitoring constitutes an unconstitutional search, thus Defendant's claim was related to post-conviction relief and the trial court was ordered to address the constitutional claim.

***State v. Kenton Crooms*, 22-663 c/w 22-664 (La.App. 3 Cir. 2/8/23), 357 So.3d 505. (Bradberry, J. writing; Perret and Fitzgerald, JJ.)**

The State appeals the granting of motions to quash for improper venue filed by Defendant brothers Robert and Kenton

HELD: *Affirmed.* Eric Stansbury of Vidor, Texas was found dead on the passenger floorboard of his Ford truck, dead from a gunshot wound, in Abbeville. The victim had been shot three times: twice in the head and once mid-thigh. A detective's report indicates that the Defendants and a female passenger were traveling from Lake Charles back to Houston when their Dodge truck ran out of gas. The victim stopped and offered to bring Robert to get gas. When Robert returned, he told the female passenger to walk home, and the Defendants drove away in both the victim's truck and the Dodge truck. The victim's truck was reported as a suspicious vehicle on a vacant lot the next afternoon. It was later determined that jewelry, credit cards, tools, and other items had been stolen from the victim.

The State argued that venue was proper in Vermilion Parish under La.Code Crim.P. art. 611(A) because "the murder was confected during the course and scope of any variety of robbery." The State did not dispute or submit any evidence to contradict Defendants' assertion that the killing took place in Texas.

This court found that the felony-murder was not a continuous and ongoing transaction. The evidence established that the victim was more than likely killed in Texas and control of the truck occurred in Texas. Any taking of items in Vermilion Parish occurred hours after the killing. Finding no abuse of discretion, we affirmed the motions to quash for improper venue.

***State in the Interest of C.N.*, 22-80 (La.App. 3 Cir. 6/1/22) (unpublished opinion). (Panel: Perret, J., writing, Ezell & Fitzgerald, JJ.)**

C.N., a juvenile, was adjudicated delinquent for inciting to riot resulting in death, a violation of La.R.S. 14:329.1, 14:329.2, and 14:329.7, and accessory after the fact to second degree murder, a violation of La.R.S. 14:25. C.N. appeals and alleges there was insufficient evidence to support the convictions.

The facts adduced at the trial showed that C.N. and two friends encountered a group of girls at a movie theater, including the victim, M.L. Several of those girls made insulting remarks, but C.N. and her friends left. C.N. notified R.B.

R.B. eventually joined C.N. and the other two girls and the foursome went to Walmart, where M.L.'s group was standing outside calling for R.B. to fight. C.N.'s group continued inside the store and looked for mace. When they were unsuccessful, they decided to steal and arm themselves with pocketknives. Thereafter, the girls stopped to charge C.N.'s phone. While charging her phone, C.N. received a phone call that M.L.'s group was livestreaming on Instagram claiming they were about to fight. In response, C.N. began livestreaming and titled the video feed "Fittin' to Fight." Eventually, M.L.'s group entered Walmart and a fight ensued between M.L. and R.B in which R.B. fatally stabbed M.L. C.N.'s group then ran out of Walmart and found a ride back to the theater. After eluding the police, C.N. and R.B. were apprehended. At trial, C.N.'s Instagram video was admitted into evidence as were the Walmart surveillance videos.

HELD: ADJUDICATIONS AFFIRMED; DISPOSITION VACATED AND REMANDED WITH INSTRUCTIONS.

First, despite finding several errors patent, only one required the court's attention: the disposition imposed was indeterminate as separate dispositions for each offense were not imposed. As a result, this court vacated the dispositions and remanded for the trial court to impose a separate disposition for each adjudication and enter into the record a written judgment of the dispositions in accordance with La.Ch.Code art. 903. The juvenile court was also ordered to advise C.N. of the time limitation for filing an application for post-conviction relief at the new disposition hearing.

As to C.N.'s adjudication, this court affirmed. C.N. argued that the evidence was insufficient to prove she was an accessory after the fact to second degree murder, arguing that R.B. did not commit second degree murder because she acted in self-defense or that the offense was manslaughter. This court disagreed. There was no evidence that M.L. or anyone in her group was armed. Based on the record, it was clear that R.B. stabbed an unarmed person. Thus, even if the victim was advancing on R.B., the latter's response used disproportionate force in response and the homicide was not justified. Considering *State v. Mincey*, 08-1315 (La.App. 3 Cir. 6/3/09), 14 So.3d 613, this court concluded that R.B.'s act of killing of M.L. was not justified pursuant to La.R.S. 14:20. Thus, justification does not negate C.N.'s adjudication as an accessory. Additionally, there was no evidence that M.L. had any intention of escalating the altercation beyond a fistfight. As in *State v. Logan,* 45,136 (La.App. 2 Cir. 4/14/10), 34 So.3d 528, *writ denied*, 10-1099 (La. 11/5/10), 50 So.3d 812, a factfinder could reasonably conclude that an average person would not lose self-control and stab another person under these facts. Thus, the State proved the underlying felony beyond a reasonable doubt and that C.N. was an accessory to second degree murder.

C.N. also asserted that the evidence was insufficient to prove she incited a riot. C.N. argued that the evidence at the adjudication proceeding did not establish that she took any action to incite or procure other people to engage in the altercation at issue. However, C.N. contacted R.B. to inform her that M.L.'s group was at the theater, acknowledged that she knew R.B. was going to fight,

admitted to livestreaming on Instagram about fighting, and acknowledged that her actions set in motion the events at issue. This court concluded that the factfinder could rationally have determined that C.N. knew that a group fight would develop from her initial contact with R.B., as the latter had animosity toward some of the other girls. The other group had about seven girls; C.N. was with two other girls and R.B. joined them due to C.N.'s contact. C.N. knew that R.B. intended to fight and that R.B. had contacted her sisters to come. For those reasons, this court affirmed the adjudication.

***State v. Marcel N. Dugar,* 22-461 (La.App. 3 Cir. 1/25/23), 354 So.3d 881. (Perry, J., writing; Conery & Vidrine, JJ).**

Defendant appealed his convictions and resulting sentences for unauthorized entry of an inhabited dwelling and aggravated kidnapping of a child. Defendant argued there was insufficient evidence to support the aggravated kidnapping conviction, he was denied his constitutional right to self-representation, and his thirty-year sentence for the aggravated kidnapping conviction was unconstitutionally excessive.

HELD: ***Reversed and Remanded.*** Defendant unequivocally asserted his right to self-representation, which the trial court denied without offering reasons or analysis. Defendant did not acquiesce to the trial court's offer he "help" his court-appointed counsel. Defendant has a constitutional right of self-representation, and the record indicates Defendant did not vacillate from his wish to represent himself. Further, Defendant's request was not a dilatory tactic as it was made months ahead of trial. Thus, Defendants convictions and sentences were reversed, and the case was remanded for a new trial.

***State v. Jason Ray Craft,* 22-553 (La.App. 3 Cir. 2/1/23), 355 So.3d 1237. (Bradberry, J. writing, Kyzar and Stiles, JJ.)**

Defendant appeals his conviction of the first-degree rape of his girlfriend's thirteen-year-old daughter, for which he was sentenced to life in prison.

HELD: ***Affirmed.*** Evidence was sufficient to prove vaginal intercourse beyond a reasonable doubt as found by the jury. The victim reported penile penetration to her mother and a doctor, and the physical evidence supported this condition. The doctor found a healed hymenal tear consistent with penetration and DNA evidence further confirmed the claim.

There was also no error in the trial court's determination that Defendant had the mental capacity to proceed to trial. Two doctors agreed that he was competent to stand trial. The one doctor who opined that Defendant had brain injury from a beating in jail, did agree that he could read reports and discuss them with his attorney.

DNA evidence was properly admitted because Defendant was aware of the requested lab notes early on but did not request them until later. Furthermore, Defendant failed to ask the trial

court to order the State to provide a detailed account so that issue not properly before the appellate court. Regarding the victim's cell phone, Defendant did not argue to the trial court regarding spoilation of evidence, bad faith, or inability to prepare a defense so those arguments also not properly before the appellate court.

Lastly, the trial court did not err in allowing the State to unilaterally amend the bill of indictment once trial started. The additional date was considered an integral part of the actual rape with the addition of July 1 to the original listed June 30 date because the date of the offense is not an essential element of aggravated rape. The admission of expert reports was harmless error because they were cumulative of the testimony presented so Defendant did not suffer any prejudice.

***State v. Sedrick Tennessee*, 22-668 (La.App. 3 Cir. 2/23/23), 358 So.3d 565. (Panel: Pickett, C.J., writing, Wilson & Ortego, JJ.)**

The defendant was convicted of second degree murder. The victim picked up the defendant and Lewis at 1 am. While on the side of the road in rural Concordia Parish, the defendant and the victim got into a fight. Lewis, who had walked away to relieve himself, returned to the vehicle, brandished his gun, and told the victim and the defendant to chill out. When the victim did not chill out, Lewis shot the victim in the head. The defendant drove away in the victim's vehicle. The defendant argued on appeal that (1) there was insufficient evidence that he was principal to a robbery or attempted robbery; (2) the trial court erred in admitting into evidence statements made by Lewis to prosecutors that were only produced to the defense the day of trial; (3) the trial court erred in allowing gruesome photographs to be admitted; (4) the trial court erred in allowing the state to support the credibility of Lewis before it had been attacked; and (5) the trial court should have granted the defendant's challenge for cause of a juror who expressed concern about exposure to COVID -19.

Held: Affirmed. There was sufficient evidence presented to show that the defendant was trying to rob the victim when Lewis shot and killed the victim. After Lewis disposed of the victim's body, the defendant took the vehicle, removed the victim's personalized plate from it, had the vehicle cleaned, and headed to Baton Rouge/New Orleans with the intent to sell the vehicle. The evidence viewed in the light most favorable to the prosecution supported a finding that the defendant was a principal to robbery, and thus to send-degree murder under the felony-murder doctrine. The court held that Lewis's statements were not exculpatory, the defense did not request a continuance to reconsider trial strategy, and defense counsel thoroughly cross-examined Lewis and the warden to whom he gave the statement. The remaining assignments of error were also found to lack merit, and the defendant's conviction was affirmed.

***State v. Nathaniel Trahan*, 22-388 (La. App. 3 Cir. 11/16/22), 352 So.3d 1072, *writ denied*, 359 So.3d 982. (Panel: Gremillion, J., writing, Conery & Perret, JJ.)**

Defendant plead guilty to the first-degree murder of his girlfriend's toddler. He was sentenced to life without benefits. On appeal, Defendant argued that that the application of the cruelty to juveniles statute as the basis for his first degree murder charge is a violation of

Amendment 8 of the U.S. Constitution and La.Const. art. 1, §20. Cruelty to juveniles can result from criminal negligence which defendant argues cannot be the basis of a first degree murder prosecution and the state cannot seek the death penalty when the underlying felony can be committed negligently. Defendant's argument fails because if the jury finds the underlying crime of cruelty to a juvenile was committed negligently, the crime falls under the felony-murder provision of second degree murder. Defendant also argues that the cruelty to juveniles statute as a basis for his first degree murder prosecution does not narrow the class of persons eligible for the death penalty. A death sentence requires one statutory aggravating circumstances of which there are ten. The narrowing function has been performed because the class of individuals that are death-eligible is limited to those who have the specific intent to kill or cause great bodily harm.

EVIDENCE

***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. (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.

***Lawrence Franks and Robbie Franks v. State National Insurance Company, et. al.*, 22-169 (La.App. 3 Cir. 1/25/23), 355 So.3d 1174, *writ denied*, 23-259 (La. 4/18/23), 359 So.3d 512. (Savoie, J. writing; Gremillion & Wilson, JJ.)**

Plaintiffs claimed that Mr. Franks was severely injured in an auto accident while he was being transported in a medical van to a rehabilitation hospital following a stroke he had several days prior. A jury found in favor of Plaintiffs and awarded Mr. and Mrs. Franks with damages. A judgment in accordance with the verdict was rendered March 12, 2021.

Mr. Franks passed away while Defendants' writ application on the denial of their motion for JNOV and/or new trial was pending, and ultimately the appeal of the initial judgment was dismissed without prejudice because of his death. Mrs. Franks, as the provisional administrator of Mr. Franks' estate, was substituted as a party, and Defendants then sought to reopen evidence based on Mr. Franks' death and its impact on future damages. The trial court denied the motion and Defendants appealed.

Held: Affirmed. Given that a verdict had already been rendered on the evidence presented, and Mr. Franks was alive at that time, there was no abuse of discretion on the part of the trial court in denying Defendants' motion to re-open evidence and/or motion for new trial. Defendants' other assignments of error concerning the trial judge's limitation of discovery and exclusion of deposition testimony of medical providers who were not retained as experts and deferred to Mr. Franks' neurologist's opinions concerning causation, as well as other evidentiary and quantum issues also lacked merit.

CONTRACTS

***Miller v. Morrison Environmental Services, Inc.* 22-606 (La.App. 3 Cir. 3/23/23) ___So.3d ___. (Gremillion, J., writing; Perry & Fitzgerald, JJ.)**

Plaintiffs entered into a pre-construction subterranean termite contract when they built their home in 1994. The contract contained a provision that limited the pest control's liability "to the cost of repairs (labor and materials only) and in no event shall the Company's liability for property damages exceed the limits of insurance required under LA RS 3:3367(C)(2)." Louisiana Revised Statutes 3:3367(C)(2) does not mention insurance; that provision is actually found in Subsection (C)(1). Both parties filed motions for summary judgment. The trial court ruled in favor of the pest control company, finding that Subsection (C)(1) limited its liability to $100,000.

In reversing the summary judgment, we relied upon the Civil Code articles regarding vices of consent, specifically those dealing with error. Error only vitiates consent when it concerns a cause of the contract. Courts are only allowed to reform a contract when error is mutual. The party seeking reformation of a contract bears the burden of proving mutual error by clear and convincing proof. If the error is excusable, rescission for error is allowed; inexcusable error will not support rescission. And lastly, errors in particular provisions are severable unless it can be presumed that the parties would not have entered into the contract absent the erroneous provision. All of these findings are factual, and the parties failed to address cause, mutuality, or excusability, Therefore, summary judgment was not appropriate.

TORTS

***Alisa Alan Durkheimer v. Tranise L. Landry*, 22-418 (La.App. 3 Cir. 5/10/23), __ So.3d __ (Kyzar, J., writing; Savoie & Ortego, JJ.)**

Plaintiff suffered injuries to her neck and lower back injuries when she was rear-ended by another driver. However, she had a history of neck and back issues as a result of her history as a competitive ski racer. Defendant claimed that her neck and back issues were based on her past ski injuries and compensated her for a soft tissue injury despite the fact that she had not suffered any issues in the eighteen prior to the accident. Plaintiff eventually underwent two neck surgeries as a result of this accident. She filed suit against the driver and her insurer, as well as her UM carrier, seeking penalties and attorney fees based on her UM carrier's bad faith in refusing to settle her claim. During the jury trial, the trial court denied defendant's motion for directed verdict. At the close of the trial, the jury rendered a verdict finding the driver 100% at fault and awarded plaintiff $700,000.00 in damages. It further held that the UM carrier was arbitrary and capricious or without probable cause in failing to pay plaintiff $325,000.00 to plaintiff. Thereafter, the trial court reduced the damages awarded to plaintiff to its policy limits and based on its unconditional tenders to $430,201.52. It further awarded plaintiff penalties in the amount of 50% of $325,000.00, $297,567.17 in attorney fees, and court costs. Both parties appealed.

HELD: ***Affirmed and Rendered.*** On appeal, the court found no abuse of discretion by the trial court in allowing plaintiff's introduction of certain exhibits into evidence, in instructing the jury as to the *Housley* presumption, and in allowing her expert witness, a chiropractor certified in accident reconstruction/accident biomechanics, to testify. The court further found no error in the trial court's denial of defendant's summary judgment, directed verdict, and JNOV motions, and it affirmed the jury's finding of bad faith on the part of defendant. In regard to plaintiff's appeal, the court affirmed the trial court's reduction of the damage award to the UM policy limits and affirmed the trial court's award of penalties pursuant to La.R.S. 22:1892, rather than La.R.S. 22:1973. The court also awarded plaintiff additional attorney fees for work performed by her counsel on appeal.

***Jena Rougeau v. Hospital Service District No. 2 of Beauregard Parish*, 22-749 (La.App. 3 Cir. 7/26/23), __ So.3d __ (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.

MERCHANT LIABILITY

***Gerry Sexton v. Travelers Indemnity Company of Connecticut, et al*, 22-546 (La.App. 3 Cir. 2/23/23), 357 So.3d 947. (Wilson, J., writing, Gremillion & Perret, JJ.)**

Plaintiff sued a grocery store and its insurer after tripping and falling over a pallet of watermelons. The trial court found that the pallet was not unreasonably dangerous and granted defendants' motion for summary judgment.

HELD: ***Affirmed***. La.R.S. 9:2800.6 governs negligence claims brought against a merchant by a customer. Plaintiff was required to prove the condition of exposed corners presented an unreasonable risk of harm that was foreseeable. Defendants presented evidence establishing that the complained of condition was open and obvious due to visible warning signs at the exposed corners of the pallet, and was therefore not unreasonably dangerous. Plaintiff failed to submit sufficient evidence of any genuine issue of material fact to defeat the motion for summary judgment.

***Pannell v. City of Scott*, 22-538 (La.App. 3 Cir. 2/1/23), 355 So.3d 1279. (Bradberry, J. writing; Kyzar and Stiles, JJ.)**

Patricia and Richard Pannell filed suit against Cowboys night club in Scott for the death of their daughter when she was hit by a car exiting the parking lot when the club closed. A jury found that the parking lot was unreasonably dangerous but that it was not the substantial factor in the accident.

HELD: ***Affirmed.*** The trial court did not err in admitting the deposition testimony of a witness who lived in Round Rock, Texas at the time of the accident. The Plaintiffs were on notice that Cowboys wanted to use her deposition and counsel confirmed on the day of trial that she was still living in Texas at a distance greater than 100 miles from Lafayette so she was unavailable pursuant to La. Code Civ.P. art. 1450.

There was no error in the jury's finding that the parking lot created an unreasonable risk harm requiring the trial court to grant Cowboys' motion for directed verdict or requiring this court to reverse the jury's finding. While no evidence was presented that BAC Three was required to have signage, striping, or traffic personnel, there was evidence that the situation in the parking lot was chaotic with all the exiting vehicles and people crossing between the vehicles. There was also no error in the jury's finding that the condition in the parking lot was not a substantial factor in the death of the Pannell's daughter. Evidence established that she was running at a sprint through the parking lot, she was almost hit once and never stopped, and then ran into the truck that eventually hit her.

INSURANCE

***Perkins v. King*, 22-547 (La.App. 3 Cir. 2/8/23), 358 So.3d 538, *writ denied,* 23-348 (La. 5/2/23), 360 So.3d 12 (Panel: Gremillion, Judge writing, Perret and Wilson, Judges.)**

Plaintiff appealed the trial court's grant of summary judgment finding that it was not covered under the Defendant homeowners' insurance policy for the intentional assault and battery of Plaintiff by Defendants and Defendants' guests at a wedding.

Affirmed. Although Plaintiff admitted that the policy did not provide coverage for the Defendants' (husband and wife who actively engaged in the assault at the wedding) intentional acts, he argued that the policy provided coverage for the negligence of the Defendants in allowing eight of their guests to foreseeably assault plaintiff.

Jurisprudence (*Posecai v. Wal-Mart*) relating to the duty of a store to patrons to prevent reasonably foreseeable criminal acts was inapplicable to the current facts in which the homeowners and the gang of guests intentionally assaulted the Plaintiff. Moreover, social policy requires that when the insured homeowners participate in the assault, there can be no coverage for their guests who participated; otherwise, a homeowner has an incentive to have others commit crimes on their properties to avoid the intentional act exclusion.

There was no "occurrence" under the terms of the policy. Plaintiff argues that the intentional assault was an "accident" because whether an event constitutes an accident is determined from the perspective of the victim. Although there are some limited circumstances where this holds true (i.e. corporate liability for employees' intentional acts) this is not one of those cases because the homeowners actively participated in the assault. Moreover, no definition of "accident" would include the facts that occurred in the case. "Accident" is a commonly understand word that does not include the intentional assault of a wedding guest. Moreover, there was no "negligent enabling" as argued by the Plaintiff. There simply was no negligence in this case, only intentional acts and intentional enabling.

***Faulkner v. Tyler*, 22-532 (La.App. 3 Cir. 2/1/23), 362 So.3d 921, *writ denied*, 361 So.3d 449. (Kyzar, J., writing; Bradberry & Stiles, JJ.)**

Plaintiffs filed suit against the driver and her insurer and against defendant, the employer's UM provider, after husband was injured in a car accident while in the course and scope of his employment. Cross motions for summary judgment were filed by defendant and plaintiffs on the issue of UM coverage. Following a hearing, the trial court held that the UM rejection forms executed by the employer were invalid. Judgment was rendered granting plaintiffs' motion and denying defendant's motion. Defendant appealed.

HELD: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED. On appeal, the court affirmed the judgment denying defendant's motion, finding that a genuine issue of material fact existed because the two UM rejection forms executed by the employer listed "Chartis Insurance" as the issuing insurance company. Pursuant to Bulletin 08-02, a properly completed UM rejection form must contain the company name, group name, or the insurer's logo. Here, the two policies were issued by two different insurance companies, both polices indicated

that they were purchased from member companies of AIG. Although the affidavit of an AIG underwriter stated that AIG Property, which was formerly known as Chartis, was an affiliated company of AIG, she presented no evidence establishing the actual relationship of Chartis to AIG or when and under what circumstances Chartis ceased to be known by that name and became AIG Property. The court further reversed the judgment granting plaintiffs' motion, as plaintiff, in supporting their motion, stated that they were submitting all of the exhibits attached to defendant's motion. However, the only exhibit actually attached to their motion was the husband's affidavit. Based on this exhibit, the court held that burden of proof never shifted to defendant.

***Savoy v. Kelly-Dixon*, 22-318 (La.App. 3 Cir. 11/23/22), 353 So.3d 981, *writ denied*, 22-1852 (La. 2/24/23), 356 So.3d 337. (Panel: Gremillion, J., writing, Conery & Perret, JJ; Conery dissents.)**

The Lafayette City Government appealed the trial court's grant of summary judgment finding that it was not covered under its mower's insurance policy. A teenager attempted to cross Evangeline Thruway on a bicycle and claimed that grass obstructed his view and that of the driver who injured him.

Affirmed. Although required by LCG's contract with the mower, the mower failed to name it as an additional insured under its policy. LCG argued it was an additional insured under the ongoing operations endorsement. The mower was not mowing at the time of the accident. LCG argued that it failed to hand-trim around a fence which presented a genuine issue whether the operation was ongoing or had been put to its "intended use." The mowing operation had been put to its intended use in as much as the mower would not return until the next mowing cycle. Whether the mower failed to hand trim did not constitute an ongoing operation. If it did, every act of negligence involving an omission would constitute an ongoing operation. LCG next claimed coverage under the commercial general liability portion of the mower's policy relating to indemnification. This portion of the policy provided coverage to the mower, the named insured, for liability it may have for indemnification. It did not provide coverage for the party the insured contracted with and agreed to indemnify. LCG was not covered under the supplemental payments portion of the policy in which the insurer agrees to defend an indemnitee if certain conditions are met. Nothing in the provision transforms an indemnitee into an insured and the insurer had no duty to defend LCG. Finally, LCG was not a third party beneficiary (stipulation pour autri) because the policy between the mower and LCG had no effect on the insurance company. There would be no reason to name an additional insured if every indemnitee was a third-party beneficiary.

***Gautreaux v. Louisiana Farm Bureau Casualty Insurance Co., et al.*, 22-294 (La.App. 3 Cir. 12/29/22), 362 So.3d 896, *writ denied*, 23-399 (La. 5/16/23), 360 So.3d 837 (Ortego, J., writing, Cooks, Chief Judge; Fitzgerald, J., dissents with reasons).**

Plaintiff/insured filed petition for damages, penalties, attorney fees and class certification against insurer, Defendant/Appellant, Farm Bureau, asserting claims for breach of contract, bad faith, and that Farm Bureau use of their Mitchell WCTL computer program did not meet the

statutory requirements of La.R.S. 22:1892(B)(5) for determining the actual cash value of insured's total loss vehicles. Following the trial court granting class action status to plaintiff, and other similarly situated policy holders, plaintiff and defendant each filed various motions for summary judgment and motions for partial summary judgment. The trial court granted Plaintiffs' noncompliance motion for summary judgment and denied Defendant's cross-motion; and granted in part and denied in part Defendant's other three motions for partial summary judgment.

HELD: Affirmed and Remanded for Further Proceedings.
La.R.S. 22:1892(B)(5) governs and provides three exclusive methods of determining the actual cash value of a total loss vehicle. The court held that the computer software utilized by Farm Bureau to determine actual cash value for total loss vehicles did not comply with statute authorized methods, stating: "We find that Plaintiffs have carried their burden of producing prima facie evidence that Farm Bureau's use of the Mitchell WCTL program, by law, does not comply with La.R.S. 22:1892(B)(5)." Additionally, and for reasons stated in this opinion, found that "Farm Bureau's appeal of their partial motion for summary judgment as to bad faith and fraud is dismissed, and remanded to the trial court for further proceedings."

MEDICAL MALPRACTICE

***Lejeune v. Fontenot,* 22-244 (La.App. 3 Cir. 1/4/23), 362 So.3d 911, *writ denied,* 23-452 (La. 5/16/23), 360 So.3d 839 (Panel: Ortego, J., writing; Savoie & Kyzar, JJ.).**

Patient brought action for medical malpractice against surgeon, alleging that surgeon breached standard of care in performing gynecological surgery. Surgeon filed exception of prescription. The District Court, 27th Judicial District Court, St. Landry Parish, granted exception. Patient then filed petition for nullity, alleging fraud or ill practices by surgeon's counsel. In response, the surgeon filed exception of no cause of action, and moved for attorney's fees. District Court granted surgeon's exception and denied motion for attorney's fees. Patient appealed. Surgeon cross appealed.

HELD: Affirmed.
As a preliminary matter, the Defendant contends that this appellate court cannot address Lejeune's assigned error because she did not properly plead an action of absolute nullity of the trial court's judgment granting Defendant's exception of prescription based on a lack of subject matter jurisdiction. The court found that an exception of subject matter jurisdiction can be raised as any time.
*Canal/Claiborne, Ltd. v. Stonehedge Dev., LLC.*14-664 (La. 12/9/14), 156 So.3d 627. Furthermore, "the court has a duty to examine subject matter jurisdiction *sua sponte*, even where litigants have not raised the issue." *Adkins v. City of Natchitoches,* 14-491, p. 8 (La.App. 3 Cir. 11/5/14), 150 So.3d 646. Accordingly, the court conducted a de novo review using the same criteria that governs any court's adjudication of whether a court has subject matter jurisdiction.

Lejeune's contention was that the trial court lacked subject matter jurisdiction because her claim with the Patient's Compensation Fund had been dismissed by operation of law, as to a failure to timely appoint an attorney chairperson timely, R.S. La.40:1231.8(A)(2)(c). Defendant had sought and was granted a discovery docket in district court for discovery purposes.
Citing La.Const. art 5, Section 16, which grants a district court "original jurisdiction over all civil and criminal matter," the court found that a medical malpractice claim, such as the one originally alleged by Lejeune, is a civil matter. Although, there is a temporal limitation of the district court's ability to exercise that jurisdiction when hearing a medical malpractice claim, this barring of commencement of an action in a district court prior to the claim's presentation to a medical review panel, that merely adds an administrative process prior to adjudication by a district court. Finding that regardless of when the medical review panel was dismissed, the district court had subject matter jurisdiction over Defendant's exception of prescription, this assignment of error was without merit.

Lejeune's final assignment of error was that the district court erroneously granted Defendant's exception of no cause of action, dismissed her petition for action of nullity. The court, citing La.Code Civ.P. art. 2004, and relevant jurisprudence, found that Lejeune's petition for nullity, even if all facts alleged therein are taken as true, must fall. Specifically, the court found that Lejeune's petition for nullity makes no allegations of fact or presented any evidence or connection as to how the judgment granting Defendant's exception of prescription deprived Lejeune of her legal right to pursue and protect her claims in district court. Also finding this assignment of errors was without merit.

As to Defendant's cross-appeal and request for attorney's fees. The court, citing La. CCP art. 2004, found no error in the trial court's denial of Defendant's motion for attorney's fees.

***Dickson v. Odudu,* 22-48 (La.App. 3 Cir. 10/5/22), 349 So.3d 146. (Panel: Perret, J., writing, Pickett & Kyzar, JJ.)**

The Louisiana Patient's Compensation Fund Oversight Board appealed the trial court's judgment granting Dr. Odudu's exception of prematurity in which he argued he was a qualified healthcare provider for purposes of the Louisiana Medical Malpractice Act when the plaintiff's claim arose.

In August 2019, the plaintiff filed a request for a medical review panel asserting that Dr. Odudu committed malpractice while treating him in September 2018. The Patient Compensation Fund (PCF) initially notified the plaintiff that Dr. Odudu was a qualified healthcare provider (QHP) enrolled in the fund but later informed him that Dr. Odudu was not enrolled in the fund. Therefore, the PCF asserts the plaintiff is not entitled to have his claim reviewed by a medical review panel. The plaintiff filed suit against Dr. Odudu. Dr. Odudu then filed a petition for declaratory relief and a dilatory exception of prematurity against the Oversight Board. In his exception of prematurity, Dr. Odudu argued that he was a QHP with the PCF covered by a claims-made medical malpractice liability policy from May 1, 2018, to May 1, 2019, and that prior to the termination of the claims-made policy, the policy was amended to provide occurrence coverage which covered any loss suffered during the policy term, regardless of when the claim was asserted.

Dr. Odudu amended and supplemented his petition for declaratory judgment, asserting, in part, that pursuant to a "tail coverage" policy endorsement to his malpractice policy, he was a QHP

with the PCF when the plaintiff filed his claim. Dr. Odudu contracted with medical staffing agencies as an independent contractor to provide emergency room services at different hospitals. He asserted that although he worked for different staffing agencies at different times, he had always been a QHP. He supported his claim with an affidavit by the administrator of National Fire and Marine Insurance Company that provided malpractice coverage to the network of the subsidiaries that Dr. Odudu worked for from May 1, 2018, to May 1, 2019. The affiant explained that when the network Dr. Odudu worked for ceased operations, the network purchased a tail that allowed "the reporting of claims first made against insureds between May 1, 2019 and May 1, 2021." The plaintiff filed his claim in September 2019; therefore, Dr. Odudu was insured at all times pertinent to the plaintiff's claim.

The Oversight Board did not dispute Dr. Odudu had underlying coverage. Instead, it argued the network paid a lower amount for PCF coverage at each location but had to purchase tail coverage for each subsidiary that ceased operations. The Board further argued the network did not pay the PCF tail surcharge that became due when the subsidiaries Dr. Odudu worked for ceased operations in December 2018 and May 2019. The PCF points out that two other subsidiaries of the network Dr. Odudu worked for had purchased PCF tail coverage when they ceased operations. Lastly, the Board argued that the network did not purchase PCF tail coverage when the last subsidiary Dr. Odudu worked for ceased operations and that underlying insurance coverage for medical malpractice claims "does not automatically equate to PCF coverage for said claim if the proper PCF surcharge" was not paid.

HELD: AFFIRMED.

This Court found that while Dr. Odudu was registered twice as a qualified provider with the PCF due to his work with two subsidiaries insured by the NF&M policy, he was only required to pay one surcharge to the PCF to be a "qualified" health care provider and have PCF coverage. Accordingly, the two-year tail coverage that the network purchased when the last subsidiary he worked for ceased doing business on May 1, 2019, had PCF coverage for the medical practice claim the plaintiff filed on August 27, 2019.

The Court agreed with the rationale in *St. Paul Fire and Marine Ins. Co. v. Eusea*, 99-2117 (La.App. 1 Cir. 9/22/00), 775 So.2d 32, *writs denied*, 01-472, 01-536 (La. 4/27/01), 791 So.2d 116, 117, for the proposition that "Louisiana law is clear that a physician cannot be partially qualified by the PCF; he is simply qualified." Further, she relies on *Bickham v. LAMMICO*, 11-900, p. 7 (La.App. 4 Cir. 02/01/212), 90 So.3d 467, 472, *writ denied*, 12-782 (La. 5/25/12), 90 So.3d 413 wherein the fourth circuit found that "a separate surcharge is not required to be paid to the PCF on behalf of a qualified healthcare provider for each malpractice insurance policy covering the provider." The court further stated that the "Act does not mandate a healthcare provider pay multiple surcharges in order to achieve qualified status. Moreover, qualification is a status granted to healthcare providers, not insurance companies. Only the healthcare provider can take steps to qualify under the Act and avail himself of the Act's benefits." *Id.* at 472.

***Olson v. Louisiana Patient's Compensation Fund Oversight Board*, 21-637 (La.App. 3 Cir. 6/8/22), 344 So.3d 67. (Panel: Kyzar, J., writing, Ezell & Perret, JJ.)**

In plaintiff's original medical malpractice suit filed in Lafayette, the trial court sustained the Patient Compensation Fund Oversight Board (the Board) exceptions of ambiguity, vagueness, and prematurity. Plaintiff appealed from this judgment. Prior to the third circuit's ruling on her appeal, plaintiff filed suit in Baton Rouge, seeking damages based on the Board's arbitrary and capricious actions towards her. She further sought declaratory judgment setting out the duties and obligations owed by the Board under the medical malpractice act to her and other similarly situated plaintiffs. Subsequently, the third circuit reversed the Lafayette judgment and rendered judgment approving plaintiff's settlement with the health care providers. Thereafter, plaintiff amended her Baton Rouge petition, adding a claim for excess damages and future medical expenses against the PCF. She further added as defendants the Patient Compensation Fund (the Fund) and the Board's board members and requested a jury trial to determine the malpractice amount owed to her by the Fund, up to $500,000, as well as court costs, litigation expenses, past medical expenses exceeding $100,000, and future medical expenses. Plaintiff then moved to dismiss her Lafayette suit against the health care providers and their insurer in the, reserving her right to prosecute her claim against the Fund and the Board in Baton Rouge. The trial court dismissed her action in Lafayette in full without prejudice, reserving her right to proceed in Baton Rouge.

Following the dismissal of her suit in Lafayette, the Board, in Baton Rouge, raised an exception of prescription, which was sustained, as well as an exception of lack of subject matter jurisdiction, which the trial court raised on its own motion. On appeal, the first circuit dismissed plaintiff's appeal, finding that it lacked subject matter jurisdiction to consider it as the judgment lacked the appropriate decretal language. Subsequent to this judgment, the Board filed an exception of no cause of action, which the trial court granted. Plaintiff again appealed, but the first circuit again dismissed the appeal as it lacked the appropriate decretal language.

Six months later, plaintiff, invoking diversity, filed suit in federal court against the Fund, the Board, its nine board members, and its executive director and claim's manager. In addition to claims for excess damages and future medical expenses, plaintiff alleged that the Board violated the duties it owed her under the medical malpractice act by failing to settle her claim promptly and fairly. The Board moved to dismiss her claim based on a lack of subject matter jurisdiction, improper venue, failure to state a claim upon which relief can be granted, and failure to join parties. The federal court dismissed plaintiff's claim because she failed to satisfy the mandatory requirements of the medical malpractice act. On appeal, the U.S. Fifth Circuit affirmed the dismissal, holding that plaintiff could not circumvent the procedural requirements of La.R.S. 40:1231.4(C) by litigating her claim in federal court. It further dismissed plaintiff's bad faith claims against the Board, finding that the medical malpractice act imposed no duties on the Board to compensate medical malpractice claimants fairly and promptly.

Prior to the federal court opinions, plaintiff again instituted suit in Lafayette, naming the Board, its executive director, and its claim's manager as defendants (defendants), and the health care providers as nominal defendants. In addition to medical expenses, future general and compensatory damages, future medical care, past court costs, and litigation expenses, plaintiff sought damages based on the defendants' bad faith and breach of their fiduciary duties in failing

to evaluate and settle her claim in a fair and prompt manner. Defendants responded by filing numerous exceptions, including an exception of lis pendens, which the trial court sustained pending the outcome of plaintiff's federal court action. Once plaintiff's federal suit was dismissed, defendants reset their exceptions. Following a hearing, the trial court sustained the exception of lack of subject matter jurisdiction, finding that plaintiff was required to bring her excess damage claim in her original medical malpractice suit. The trial court further sustained the exception of lis pendens with regard to any remaining claims. Plaintiff appealed.

On appeal, the appellate court reversed the trial court's judgment sustaining the exception of lack of subject matter jurisdiction. The court held that plaintiff followed the procedure set out in La.R.S. 40:1231.4(C) in her original Lafayette suit when she served a copy of her petition seeking approval of her settlement with the health care providers and the Board. She then filed the petition in the trial court, more than ten days after the Board received notice of the petition. The health care providers' insurer answered the petition and the Board filed written objections to the settlement, as well as an amended peremptory exception of no cause of action, dilatory exception of vagueness and ambiguity, and an answer. Although the trial court initially sustained the exception of prematurity, plaintiff's settlement was approved on appeal. Based on the foregoing, the court held that the health care providers' liability for $100,000 was established. Although plaintiff dismissed her Lafayette suit before judgment regarding the Board's excess liability and her need for future medical care was established, the court found that she was not precluded from litigating these issues in the second Lafayette suit because her prior suit was dismissed without prejudice. The court further reversed the trial court's judgment dismissing plaintiff's non-medical malpractice claims against defendants, finding that the trial court had jurisdiction over these claims as it has original jurisdiction over all civil claims. Finally, the court held that once the trial court dismissed plaintiff's claims based on a lack of subject matter jurisdiction, it lacked jurisdiction to sustain defendants' exception of lis pendens.

TERMINATION OF PARENTAL RIGHTS

***State in the interest of Z.C.*, 22-731 (La.App. 3 Cir. 2/15/23) (unpublished opinion). (Wilson, J., writing, Pickett & Ortego, JJ.)**

In this termination case, the mother appeals the judgment of the trial court terminating her parental rights to the minor child Z.C. after child was adjudicated a child in need of care and placed into foster care through the Department of Children and Family Services.

HELD: ***Affirmed***. La.Ch.Code art. 1015(5)(b) provides that parental rights may be terminated when abandonment of the child has been demonstrated by the parent's failure to provide significant contributions to the child's care and support for a period of six consecutive months. La.Ch.Code art 1015(6) similarly provides for termination when at least one year has elapsed since the child was removed, there has been no substantial compliance with the case plan, and there is no reasonable expectation of significant improvement. The trial court was not manifestly erroneous in finding that the mother had failed to comply with her case plan, and given the child's age and

need for permanency, it was unlikely that the mother's ongoing mental health and substance abuse issues would improve in the near future. The child was in an adoptive placement; thus, termination was in the best interest of the child.

***State in the Interest of M.B.*, 21-532 (La.App. 3 Cir. 2/23/22), 335 So.3d 305. (Pickett, J., writing, court sitting en banc.)**

In this parental rights case, appointed appellate counsel for the mother whose parental rights to her child were terminated filed a brief stating that there were no issues which merit reversal. She also asked to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

HELD: Affirmed; Motion to Withdraw Denied; Remanded. After a review of the record, this court found that the trial court did not err in terminating the parental rights of the mother. However, this court found that the procedure outlined in *Anders* is not appropriate for a civil case. The Supreme Court in *Anders* found that appointed appellate counsel for a criminal defendant can ask to withdraw if there are no errors justifying an appeal. The court, on its own motion, considered the matter en banc to make clear that the procedure outlined by *Anders* is not applicable to termination of parental rights cases, and overruled cases from the circuit which reached the opposite conclusion.

***W.P.H. Applying for Adoption of A.A.B., E.J.B, and G.K.B.*, 22-141 (La.App. 3 Cir. 10/12/22), 349 So.3d 1120. (Panel: Gremillion, J., writing, Savoie & Wilson, JJ.)**

Reversed. The father, a disbarred attorney, had his parental rights to his three biological children terminated in favor of a religious farmer who advocated the use of heavy farm equipment by very young children, whose household the trial court preferred. The trial court erred in its application of the intrafamily adoption statute. While a biological parent's consent is not required when he has failed to provide child support for six months or failed to visit for at least six months, the best interests of the children is always the basic consideration. Even if the trial court did not err in finding that the father did not pay child support for at least six months, it was not in the children's best interest to have their father's rights terminated. Moreover, the trial court excluded the judgment rendered in a different parish finding that the mother and prospective adoptive father led a concerted effort to deprive the father of his visitation rights. This highly relevant evidence was improperly excluded when considering the children's best interests. The mother even testified that once the adoption proceedings began, she decided to stop all communication with the biological father. The children had a long-standing relationship with their father and there was no evidence (only vague complaints about morals) whatsoever that the father was anything but loving toward his children or that it would be in their best interest if all contact with him was severed.

DOMESTIC RELATIONS

***Rigmaiden v. Dellafosse*, 22-816 (La.App. 3 Cir. 3/29/23), ___ So.3d ___ (Panel: Stiles, J., writing; Wilson & Ortego, JJ.).**

Mr. Rigmaiden and Ms. Dellafosse entered into an initial consent judgment providing that their minor child would live primarily with Ms. Dellafosse while Mr. Rigmaiden would exercise alternating weekends of physical custody. After Ms. Dellafosse moved with the child to Alaska, Mr. Rigmaiden exercised lengthier periods of physical custody in the summer. However, Ms. Dellafosse began to experience periods of homelessness and instability, and, in June 2020, Alaska child services informed Mr. Rigmaiden that Ms. Dellafosse was arrested for DUI. Mr. Rigmaiden filed a petition for ex parte sole custody order. Before the matter was heard, a series of orders and joint judgments granted Mr. Rigmaiden sole custody of the child on an interim basis. By those interim orders, Ms. Dellafosse was granted increasing periods of physical custody after she returned to Louisiana. On consideration of Mr. Rigmaiden's petition in May 2022, the trial court denied the request for an ex parte award of sole custody and entered a judgment of joint custody. The trial court noted that the threat of harm existing at the time Mr. Rigmaiden filed the petition had subsided and Ms. Dellafosse demonstrated better economic and mental stability. The trial court awarded the parties alternating custody of the child in two week intervals but did not designate a domiciliary parent. Mr. Rigmaiden appealed, questioning the award of joint custody, the alternating periods of physical custody, and the failure to designate a domiciliary parent.

HELD: ***Affirmed in part; Reversed in part and rendered. Remanded***. The panel reviewed the trial court's assessment of the best interest factors of La.Ch.Code art. 134, finding no abuse of discretion in the trial court's award of joint custody. The trial court correctly observed that Ms. Dellafosse had improved the stability she was able to offer the child. However, the trial court abused its discretion in its order that the parties alternate physical custody of the child in two week intervals. Such constant upheaval, the panel explained, undermined the benefits associated with the two years of stability Mr. Rigmaiden had provided while the child was in his care. Moreover, while Ms. Dellafosse demonstrated greater stability than when the child came into Mr. Rigmaiden's sole custody, the improvements in her employment, housing, and mental health only manifested in the short period immediately before trial. With the balance of the best interest factors in favor of Mr. Rigmaiden, the panel determined that he should be designated the domiciliary parent and assigned the larger share of physical custody with Ms. Dellafosse assigned physical custody on alternating weekends. As Ms. Dellafosse's mental health and living situation were fluid until shortly before trial, the panel found that Ms. Dellafosse's physical custody must be supervised. The matter was remanded to the trial court for further designation of the terms of supervision, delineation of the physical custody schedule, and for a specific implementation order in keeping with La.R.S. 9:335.

***Harvey, et ux. v. Harper*, 22-744 (La.App. 3 Cir. 3/1/23), 358 So.3d 988 (Panel: Ortego, J., writing; Pickett & Wilson, JJ.).**

After much litigation and previous rulings, Plaintiffs, as paternal grandparents, and defendant, the natural mother of the minor child, Cheyenne, entered into a stipulated consent

custody agreement, wherein the Harveys were granted the temporary custody of the minor child, subject to supervised visitations to Ms. Harper, which was accepted by the trial court and a Consent Judgment, signed on November 9, 2018. Prior to this consent judgment, the defendant, by her own admission, was suffering from serious untreated substance abuse and mental issues that overwhelmed her ability to care for Cheyenne, resulting in the parties agreeing and the Harveys assuming the physical custody and primary responsibility for their minor grandchild, Cheyenne, in January of 2018.

Ms. Harper filed her Motion to Modify Custody on June 13, 2022, requesting that she be granted sole custody of Cheyenne, with reasonable visitations to the Harveys. It is undisputed that for the period of January of 2018 to December 31, 2022 the Harveys, as the custodial non-parents, were the primary care givers of Cheyenne. On July 15, 2022 a full hearing on this custody issue was heard, and evidence taken from all parties, including the entire record of this litigation dating back to April 3, 2018. After receiving post-trial memoranda from the parties, the trial court granted Ms. Harper's Motion to Modify the November 2018 Consent Judgment, granting the Harveys and Ms. Harper joint custody of Cheyenne, with the Harveys to be designated domiciliary "parents" through December 24, 2022, and then designating Ms. Harper to become domiciliary parent thereafter, with specified visitations to all parties. The Harveys appealed this December 24, 2022 Judgment, alleging the trial court erred when if found the best interest of the minor child, Cheyenne, was to modify the consent judgment of November 9, 2018.

HELD: Reversed and Rendered.

While acknowledging Ms. Harper has the highest priority and constitutional protection as to her minor child, Cheyenne, so too as the parent seeking to modify the current consent custody judgment of November 9, 2018, she bears the burden of proof of a "material change in circumstances" as well as the "best interest" of the minor child in her requested modifications. The court, citing the Louisiana Supreme Court case of *Tracie F.* 188 So.3d 231 (La. 3/15/16), and its two-step burden of proof applicable to stipulated custody award this court reviewed the trial court's decision to modify the previous stipulated custody judgment of the court, and as the Court stated in *Tracie F.*, that in all child custody determinations, including actions to modify custody, must be centered squarely on "best interest" of the child, by reference to La. Civ. Code arts. 131 and 134. "Factors for ascertaining the best interest of the child are set forth in La. C.C. art. 134." *Id.* at 248, and in its current form, there are fourteen such factors.

Interestingly enough, after applying these 14 factors, the trial court determined, pursuant to the evidence presented at trial, that nine of these factors (1,2,3,7,8,9,11,12, and 13) were either irrelevant or favored neither party; ***none*** favored Ms. Harper; and that factors 4, 5, 6, 10 and 14 favored the Harveys. Yet notwithstanding these fact findings, the trial court rendered judgment in favor of Ms. Harper and granted her request to modify these parties long-standing custody arrangement and their stipulated consent custody order.

After a thorough review of the factual evidence contained in the record, including the trial court's findings, and the evidence presented as to the 14 factors set forth in Article 134, the court found that the trial court manifestly erred when it discounted those critical, original and continuing problems, specifically as to her lack of stable housing, reliable transportation, and her history of

continuing substance abuse issues. Additionally, finding Ms. Harper, as movant, carried her burden of proof to establish both a "material change in circumstances" and that her proposed modifications would be in this minor child's "best interest" as to Ms. Harper's request to modify the stipulated judgment of November 9, 2018. Thus, the trial court's judgment of December 24, 2022, granting Ms. Harper's Motion to Modify Custody was reversed and vacated; and ordered that the stipulated custody decree of November 9, 2018 be *immediately* reinstated in full force and effect.

***Ellis v. Heinzen*, 22-67 (La.App. 3 Cir. 10/26/22), 354 So.3d 678, *writ denied*, 22-1710 (La. 1/25/23), 354 So.3d 7. (Panel: Kyzar, J., writing, Pickett & Perret, JJ.; Pickett, J., dissents.)**

Plaintiff and defendant entered into a separate property regime prior to their marriage. Pursuant to the agreement, neither party would have an economic claim on the other after the marriage terminated. During the marriage, the parties acquired property and a home, which they each paid funds to purchase. After plaintiff filed for divorce, defendant answered and reconvened for divorce. He further requested exclusive use and occupancy of the property, or alternatively, that he receive a rental reimbursement from plaintiff if she had exclusive use of the property. Following a hearing, the hearing officer recommended that plaintiff be given exclusive use of the home and that defendant's request for rental reimbursement be deferred until the property was partitioned. Plaintiff then filed an exception of no cause of action arguing that defendant was not entitled to rental reimbursement under the terms of the prenuptial agreement. Following a hearing, the trial court awarded plaintiff exclusive use of the home, ordered her to pay the mortgage notes, and based on the parties' stipulations, held that plaintiff waived her right to reimbursement for the mortgage payments she paid and defendant waived his right to rental reimbursement.

Subsequent to the parties' divorce, defendant moved to determine the application of the prenuptial agreement on their ownership of the home. He claimed that each party was entitled to a 50% ownership of the property, whereas plaintiff claimed she owned a greater interest based on the mortgage payments made by her after she was granted exclusive use. Following a hearing, the trial court awarded each party 50% ownership in the property and held that neither party was entitled to reimbursement from the other party. Plaintiff filed a writ application on this ruling, which was denied. During the subsequent partition hearing, plaintiff sought to have the house sold at public auction, but defendant requested that it be partitioned by private sale. Judgment was rendered, ordering the house sold at private sale. Plaintiff appealed from this judgment as well as the two interlocutory rulings.

On appeal, the court held that the prenuptial contract entered into by the parties was a valid commutative contract, whose terms were clear and unambiguous. Thus, the trial court's enforcement of its terms was neither legally nor manifestly erroneous. The trial court's interlocutory and final judgments were based, in part, on the parties' stipulations entered into during open court where plaintiff stipulated that defendant would waive his rental reimbursement claim if plaintiff had use of the home and paid the monthly mortgage payments, and defendant stipulated that if plaintiff had use of the home and made the mortgage payments, he would waive his rental reimbursement claim. The court further affirmed the trial court's assessment of all court costs to plaintiff.

EXPROPRIATION

***Lafayette City-Parish Consolidated Government v. Lucile B. Randol Heirs, L.L.C.*, 21-778 (La.App. 3 Cir. 8/3/22), 362 So.3d 639**, ***writ denied*, 22-1533 (La. 12/6/22), 351 So.3d 368. (Panel: Kyzar, J., writing, Pickett & Savoie, JJ.)**

Pursuant to its comprehensive parish-wide drainage project, LCG expropriated via quick taking 16.054 acres belonging to defendant by filing a petition in the trial court and depositing $1,400,000 in the registry of the court. The subject property was chosen as the location for two detention ponds. LCG's petition was approved by the trial court. Defendant objected to the expropriation by filing two peremptory exceptions of unconstitutionality. In its second exception, it claimed that LCG's expropriation of its property was unconstitutional due to a lack of a public purpose because it already owned property, located adjacent to the subject property, on which to locate the detention ponds and because the detention ponds would not resolve the existing drainage problems due to bottlenecks created by undersized and poorly maintained downstream culverts. Following a hearing on the exceptions, the trial court overruled the first exception, but took the second exception under advisement. Thereafter, it rendered judgment sustaining the exception, finding that LCG failed to comply with the standards set forth in La.R.S. 19:139 et seq. in expropriating the property. It held that LCG failed to comply with the statutory requirements of La.R.S. 19:139.1(3)(b)(ii) because although the supervising engineer certified that the location of the detention ponds on defendant's property was in accordance with the best modern practices, his certification was invalid because LCG lacked a written best modern practice by which to guide his certification. LCG appealed from this judgment.

On appeal, the court first held that the proper procedural vehicle for challenging LCG's expropriation was through a motion to dismiss rather than through a peremptory exception. However, reviewing the matter as a motion to dismiss, the court held that the trial court legally erred in finding that LCG acted arbitrarily, capriciously, or in bad faith based on its misinterpretation of the term "best modern practices." The court found that the term "best modern practices" historically related to the design and construction of highways in accordance with the best engineering practices and experiences as well as the minimum safety standards approved by the American Association of State Highways and Transportation Officials. Finding no such standard pertaining to the design and construction of drainage projects, the court held that the term meant that an engineer should utilize the best engineering practices and experiences in locating and constructing the drainage project, in accordance with the engineering professional's acceptable minimum standard of care. After performing a de novo review of the record, the court held that defendant failed to prove by clear and convincing evidence that LCG acted in bad faith or so capriciously or arbitrarily that its action in choosing the location for the detention ponds was without an adequate determining principle or was unreasoned. Because LCG considered and weighed long-range planning, location, cost, and safety in choosing the location for the detention ponds, it did not abuse its discretion by selecting defendant's property as the site for the detention ponds. Although defendant's expert opined that LCG could better reduce flooding along the coulee by improving the coulee's channels so that it could handle a 100-year storm, in the absence of statutory or industrial standards requiring LCG to design to such a standard, this was merely the expert's own personal opinion.

***Southland Engine Co. v. State of Louisiana, through DOTD*, 22-205 (La.App. 3 Cir. 12/21/22), 353 So.3d 1081, *writ denied*, 23-67 (La. 3/28/23), 358 So.3d 518. (Kyzar, J., writing, Perry & Wilson, JJ.)**

Plaintiffs, the owners/lessee of property located along a stretch of highway running parallel to U.S. Highway 90, filed suit against DOTD and its contractor, alleging claims of inverse condemnation and negligence. DOTD moved for summary judgment on the grounds that plaintiffs would be unable to prove that access to their property was substantially impaired during the project's construction. Judgment was granted in favor of DOTD, dismissing all of plaintiffs' claims because plaintiffs could not prove that access to their property was substantially impaired. Plaintiffs appealed.

HELD: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED. The judgment dismissing plaintiffs' inverse condemnation claim was affirmed because they failed to prove that the damage suffered by them was peculiar to their property, rather than the type of damage suffered by all of the businesses located on that stretch of highway as all five businesses, including plaintiffs, suffered the same inconveniences as a result of the project. Although plaintiffs claimed that the damages they suffered damages were peculiar to their property due to the nature of their business, this same specified type of inconvenience was also suffered by a nearby business. However, the judgment dismissing plaintiffs' negligence claims was reversed as DOTD's evidence revealed genuine issues of material fact regarding its monitoring of its contractor's construction activities.

SERVITUDES

***Fourth Ward Drainage District 1 v. Rachel L. Bertrand*, 22-525 (La.App. 3 Cir. 1/25/23), 355 So.3d 1201, *writ denied*, 23-267 (La. 4/18/23), 359 So.3d 518 (Panel: Stiles, J., writing, Kyzar and Bradberry, JJ.).**

The Fourth Ward Drainage District sent formal notice by certified letter seeking access to Defendant's property in order to exercise its servitude of right-of-way of 100 feet over and across the bank of a drainage ditch located on Ms. Bertrand's property. Ms. Bertrand resisted access and instead demanded that certain conditions be met. Finding Ms. Bertrand's demands onerous, the District filed a Petition for Access to Property for Inspection and Maintenance Work, citing La.R.S. 38:113 and La.R.S. 38:215.1 in its plea for a court order authorizing its access for purposes of inspection, surveying, cleaning, clearing, and excavation on the property.

As the suit proceeded, Ms. Bertrand agreed to allow the District limited access for inspection and survey but continued to object to the District's proposed maintenance, which included adding a drop pipe and lowering the ditch's berms in certain areas. When the merits of the Drainage District's suit reached trial, both parties presented experts regarding the efficacy of the proposed maintenance in addressing instances of flash flooding in the area. The trial court concluded, however, that the District could not prevail on its demand as its initial, formal notice seeking access cited only the need for inspection and survey, not maintenance. The trial court

rendered final judgment finding that the District failed to carry its burden and awarded Ms. Bertrand both attorney fees and costs. The District appealed.

HELD: ***Reversed and Rendered; Remanded***. The panel concluded that the trial court's construction of the notice requirement of La.R.S. 38:215.1 was overly narrow in light of the circumstances of the underlying multi-year litigation. The statute does not require a particularized designation of the type of "maintenance activities" anticipated but instead focuses on a drainage district's need to access property within the "normal course" of the district's duties. The trial court's focus on the wording of the five-year-old certified letter providing initial notice ignored the progression of the case and Ms. Bertrand's actual notice of the proposed maintenance. Namely, Ms. Bertrand attended public meetings regarding the District's proposal and received particularized notice of the suggested maintenance by the filing of the lawsuit. Ms. Bertrand engaged her own expert on the topic and litigated the matter over several days. Accordingly, the panel concluded that the trial court erred in determining that the initial, five-year-old notice was procedurally deficient. On the merits, the panel concluded that the District met its burden of proof under La.R.S. 23:113 as it established its jurisdiction over the subject drainage district and further demonstrated the public benefit offered by the proposed maintenance work. The panel therefore rendered judgment in favor of the District and remanded the matter for the trial court's assessment of attorney fees and costs awarded under La.R.S. 38:215.1(B).

EMPLOYMENT LAW

***Sonnier v. Diversified Healthcare-Lake Charles, LLC*, 22-420 (La.App. 3 Cir. 4/26/23), 2023 WL 3085450 (Panel: Gremillion, J., writing, Kyzar and Thierry, JJ.)**

Defendant nursing home, Plaintiff's employer, appealed the trial court's judgment in her favor pursuant to a whistleblower claim following her termination. Plaintiff was awarded $458,727 under a variety of legal theories including abuse of rights and LUTPA.

Affirmed as amended. Plaintiff, the assistant director of nursing, instructed a co-worker not to alter the date on an elderly patient's record which would indicate that the patient's bedsore pre-dated her arrival at Defendant's place of business. She also told her to remove the record once the date had been changed. Plaintiff advised her supervisor, the director of nursing, that it was wrong to ask the employee to change the date and it didn't matter because the nursing home was going to receive a citation from the department of health anyway.

Plaintiff fell under the protection of the Whistleblower Statute, although barely. Courts have used varying levels of objecting and reporting in order to meet whistleblower status with the classic Whistleblower being a person who reports to an outside agency or the press. Based on the Whistleblower Statute, La.R.S. 23:967, Sonnier would receive protection from retaliatory firing if she 1) advised her employer of a violation of law that was a workplace act or practice, 2) she objected to the illegal activity, 3) she was retaliated against for doing so. Pursuant to a manifest error review, we found these requirements were met.

Plaintiff's petition set forth a violation a law, namely forgery in violation of La.R.S. 14:72 because Plaintiff's co-worker forged a patient's record at the behest of the Director of Nursing. It was a workplace act or practice attributable to Defendant because testimony revealed that several people were aware of the particular instance of date-changing on the patient's records and there was testimony that it was commonplace for the director to ask employees to change dates.

Plaintiff advised Defendant of the crime when she advised the Director of Nursing that it was wrong to falsify the records. Even though the Director was the person who instigated the falsification, the director was in charge of hundreds of employees. Plaintiff could not report any higher because of the close relationship between the director and the CEO and she feared she would be fired.

Plaintiff "objected" and therefore satisfied the disclosure portion of the statute when she told the co-worker that falsifying the record was wrong and when she told the director of Nursing that it was wrong and jeopardized the nurse's license.

Finally, Defendant retaliated based on the timing of Plaintiff's termination shortly after Department of Health concluded its inspection and based on testimony showing an overwhelming lack of credibility on the part of the Director of Nursing and the CEO.

The trial court legally erred in finding that Defendant's termination was an abuse of rights. Abuse of rights is a very rare and limited exception that cannot be used to vitiate the employment at will doctrine that has a strong foothold in Louisiana law for over 200 years. Despite this legal error, we affirmed the damage award as it was not manifestly erroneous in light of her valid Whistleblower claim.

Similarly, a wrongful termination in violation of the Whistleblower statute is not an unfair trade practice under LUTPA because terminating an at-will employee is not an unfair trade practice. The Whistleblower statute was the proper mechanism for asserting wrongful termination. Nevertheless, this legal error did not affect the trial court's award of damages.

WORKERS' COMPENSATION

***Bykiia Ceaser v. Lake Charles Care Center*, 22-572 (La.App. 3 Cir. 4/26/23), ___ So.3d ___. (Perry, J., writing; Savoie & Stiles, JJ).**

The employer suspensively appealed the judgment of the workers' compensation judge (WCJ) which awarded the claimant medical expenses, indemnity benefits, a penalty, and attorney fees. The employer also disputed that the claimant's injuries were caused by her on-the-job accident.

The WCJ found that the on-the-job accident, at the very least, aggravated the claimant's prior back injuries; thus, her claim was compensable. The WCJ further included the claimant's wages from her part-time job, which was not the job of injury, and which equaled approximately

thirty-two hours, in its calculation of the claimant's average weekly wage and its resulting determination of the claimant's indemnity benefits.

HELD: ***Affirmed as amended.*** This court found no clear error in the WCJ's finding that the accident at issue caused the claimant's injuries, but this court did find the WCJ committed legal error in calculating its award of indemnity benefits. Specifically, under La.R.S. 23:1021(13)(a), the claimant is limited to no more than forty hours. This court further found the WCJ applied the wrong legal standard (arbitrary and capricious) in awarding the claimant a penalty and attorney fees. However, after applying the correct legal standard (reasonably controverted), this court declined to vacate the penalty and attorney fees which were awarded to the claimant for the employer's failure to pay indemnity benefits.

Hatchell v. St. Michael PFU, LLC, **22-46 (La.App. 3 Cir. 3/1/23), 358 So.3d 596. (Kyzar, J., writing, Pickett, Perret, Wilson & Ortego, JJ.)**

Employee, who was injured as a result of a previous work-related accident and still receiving SEBs, was involved in three subsequent motor vehicle accidents, two of which she settled without obtaining employer's prior approval. Employee continued receiving treatment related to her work-related accident subsequent to these accidents; however, employer refused to pay TTD benefits after employee underwent surgery on the grounds that these benefits were prescribed as it had been more than one year since she last received these benefits. After employee filed a disputed claim, employer alleged that employee forfeited her right to workers' compensation benefits as the subsequent accidents had aggravated her work-related injury, and she failed to obtain its approval before settling these claims. Although the WCJ held that employee had suffered aggravated an aggravation of her work-related injury, she held that employer failed to prove the amount of credit it was entitled to from employee's settlements. Employee appealed.

HELD: AFFIRMED IN PART AS AMENDED; REVERSED IN PART; RENDERED; AND REMANDED. On appeal, the court affirmed the finding that employee's work-related injury was aggravated by her subsequent accidents. However, it reversed the WCJ's finding that employee forfeited her right to future workers' compensation benefits as employer presented no evidence establishing that it paid benefits to her as a result of the aggravation. Based on this finding, the court awarded employee penalties and attorney fees and remanded the matter for further proceedings.

Preciado vs. Beaucoup Crawfish of Eunice, **22-594 (La.App. 3 Cir. 2/8/23), 357 So.3d 517. (Bradberry, J., writing, Perret & Fitzgerald, JJ.)**

Three immigrant worker Plaintiffs were recruited for temporary work at Beaucoup's Eunice facility as crawfish peelers. As part of the yearly job application process, Beaucoup began to process H-2B visas for potential applicants. Applicants would then travel to a United States consulate in Mexico to obtain required work visas. If the visa was obtained, the workers would travel to the border and onto Eunice, Louisiana, to the Beaucoup facility to complete the application process. Beaucoup hired a bus to carry workers as a courtesy and to make travel easier.

Workers would then return to Mexico at the end of the contract, as dictated by the visa requirements. If a worker completed fifty percent of their contract, per diem travel expenses were given to the workers upon their return across the border.

On March 12, 2021, the bus carrying the workers was traveling to the United States consulate in Monterrey, Mexico, in order for the Plaintiffs to obtain their visas and was then to continue onto the United States and Beaucoup. However, the bus never reached the consulate, as it rear ended another vehicle in Coahuila, Mexico, causing various injuries to the Plaintiffs.

The Plaintiffs filed workers' compensation claims, alleging their injuries occurred while in the course and scope of employment with Beaucoup, claiming they had employee status because Beaucoup had taken an interest in their transportation. Beaucoup filed a motion for summary judgment asserting no employment relationship had been established, as the Plaintiffs had not completed the hiring process. The workers' compensation judge granted Beaucoup's motion for summary judgment and dismissed Plaintiffs' claims with prejudice. Plaintiffs appealed.

HELD: ***Affirmed***. The trial court did not err in granting Beaucoup's motion for summary judgment where the Plaintiffs failed to meet their burden of proving they had completed the application process to become employees. The Plaintiffs had not obtained their visas to enter the United States at the time of the accident. Without the required visa, the Plaintiffs could not enter the country and employment would be legally and physically impossible. Further, none of the Plaintiffs ever reached Beaucoup's facility in 2021 and no employment packets were completed for that year. Counsel for Plaintiffs stipulated that the Plaintiffs "had not yet signed on the dotted line of the contract" prior to the accident occurring. Moreover, it was uncontroverted that no wages were paid to any of the Plaintiffs in 2021. Accordingly, Beaucoup could never have the ability to control or dismiss the Plaintiffs and the totality of the circumstances did not show an employer-employee relationship existed at the time of the accident.

***Brister v. E. K. Const. Co., Inc*, 22-409 (La.App. 3 Cir. 2/1/23), 355 So.3d 1233. (Perry, J., writing, Pickett & Thierry, JJ.)**

This workers' compensation case involved an unwitnessed work accident. After conducting a hearing, the WCJ applied the two element test enunciated in *Bruno v. Harbert Int'l Inc.*, 593 So.2d 357 (La.1992). Finding the worker's testimony alone was insufficient to prove that an accident occurred at work and the medical records had no mention of the work accident, the WCJ rejected the worker's claim. We affirmed, noting that corroboration of the worker's testimony was available but was not utilized.

As an aside, the opinion observed that the appellant's brief failed to reference specific page numbers of the record, a requirement of Uniform Rules—Courts of Appeal, Rule 2-12.4(A)(2014). At that time, Rule 2-12.4(A)(2014) provided as follows, "**The court may disregard** the argument on an assignment of error or issue for review if suitable reference to the specific page numbers of the record is not made." Despite the failure to provide such references, the court found it had discretion to address appellant's argument. The opinion further dropped the following footnote:

> Effective January 1, 2023, the wording of Uniform Rules—Courts of Appeal, Rule 2- 12.4 (B)(3) (emphasis added) has been amended. It now states,

> "The court may not consider the argument on an assignment of error or issue for review if suitable reference to the specific page numbers of the record is not made." Mr. Brister's brief was filed before the amendment to Uniform Rules—Courts of Appeal, Rule 2-12.4(B)(3) took effect; thus, it does not fall under the amendment noted above.

***Boudreaux v. Take 5, LLC*, et al, 22-42 (La.App. 3 Cir. 10/5/22), 362 So.3d 786, *opinion on rehearing*, (La.App. 3 Cir. 12/14/22), 353 So.3d 1034. (Pickett, J., writing, Kyzar & Perret, JJ.)**

Claimant who worked for defendant changing oil on automobiles filed suit to recover wages, medical benefits, penalties, and attorney fees when his employer refused to pay for injuries he claimed were caused by his work. Claimant testified he was injured after having to work a long busy day and frequently had to use a breaker bar and band wrench to loosen overtightened oil filters. His testimony was uncontradicted and supported by medical evidence. Employer's insurer initially approved medical treatment but then refused to pay. The workers' compensation judge awarded Claimant all the relief he sought. Claimant answered the appeal seeking an award of attorney fees.

HELD: AFFIRMED. Contrary to Employer's arguments, the workers' compensation judge did not err in concluding Claimant proved he suffered a compensable injury after repeatedly performing a routine task which he identified with sufficient particularity the time, place, and manner of the manifestation of his injury. The answer to the appeal was not in the record and was this denied. On rehearing, we found that the appellant did file an answer to the appeal in the lower court that was not included in the record on appeal and awarded attorney fees for work done on appeal.

***Hayes v. Church's Chicken*, 22-395 (La.App. 3 Cir. 2/1/23), 355 So.3d 738. (Perry, J., writing; Perret & Fitzgerald, JJ).**

Darrellyn Hayes filed a workers' compensation claim on behalf of her deceased daughter, Fabeka. Fabeka, an employee of Church's Chicken in New Iberia, was murdered by her estranged boyfriend while closing the restaurant at the end of her shift. Darrellyn sought death benefits, burial expenses, penalties, attorney fees, costs, and judicial interest. The workers' compensation judge found Fabeka's death occurred within the course and scope of her employment but did not arise out of her duties with Church's Chicken.

HELD: Affirmed. Under La.R.S. 23:1031(E), a death is not compensable under Louisiana's workers' compensation statutes if it arises "out of a dispute with another person or employee over matters unrelated to the injured employee's employment." The evidence clearly established that Fabeka's murder was unrelated to her employment and arose out of a domestic dispute.

***Demarest v. NI Welding Supply, LLC*, 22-231 (La.App. 3 Cir. 11/9/22), 352 So.3d 1067. (Panel: Fitzgerald, J., writing, Cooks & Ortego, JJ.)**

Plaintiff, Joseph Demarest, was formerly employed by NI Welding Supply LLC. He allegedly hurt his back in the course of employment. Two weeks later, he filed a disputed claim for compensation against NI Welding and its insurer, The Gray Insurance Company. Defendants reconvened, claiming that Joseph willfully made false statements for the purpose of obtaining compensation benefits. Following trial, the WCJ issued a final judgment and denied all claims. Joseph appealed.

Held: Affirmed. The court explained that there were two permissible views of the evidence. The WCJ believed Defendants' version, finding that Joseph did not prove that his back symptoms were caused or aggravated by a work-related accident. "[W]here there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable." *Rosell v. ESCO*, 549 So.2d 840, 845 (La.1989). And when two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Id*. As such, the third circuit held that the WCJ did not manifestly err in finding that Joseph failed to meet his burden of proof as to causation.

ATTORNEY FEES

***Fawvor v. Caswell*, 21-704 (La.App. 3 Cir. 2/23/22), 335 So.3d 323. (Panel: Pickett, J., writing, Wilson & Fitzgerald, JJ.)**

The defendant purchased a business from the plaintiffs for $510,000, agreeing to pay the purchase price in installments. When the defendant failed to timely make the first payment on the note, the plaintiffs accelerated the payment and demanded the full purchase price. The plaintiffs also sought attorney fees of 25% of the purchase price. The plaintiffs filed a motion for summary judgment for the full price and attorney fees in the amount of $127,500. The defendant did not dispute that the full purchase price was due but argued that the attorney fee award sought was unreasonable. The trial court granted the motion for summary judgment in part and awarded the plaintiffs the full purchase price less payments made subsequent to the filing of the petition. The trial court denied summary judgment on attorney fees, finding 25% was unreasonable given the amount of work done to secure the judgment. The trial court then issued a judgment awarding $7,500 in attorney fees. The plaintiff appealed, seeking review of the attorney fees awarded.

HELD: Affirmed in part, reversed in part; and remanded. The trial court properly rejected the plaintiffs' demand for $127,500, as there was no evidence introduced to support that amount. While the promissory note did say that in the event of default, the lender would pay "reasonable attorney's fees . . . . not in excess of 25%," that did not automatically entitle the plaintiffs to the maximum fee. Further, the trial court properly refused to consider the prospect of future work. The trial court erred, though, in awarding $7,500 in attorney fees in the absence of any evidence to support that award.

PUBLIC RECORDS REQUESTS

***Zillow, Inc. v. Aguillard*, 22-520 (La.App. 3 Cir. 1/25/23) 354 So.3d 870. (Gremillion, J., writing, Perret and Wilson, JJ.):**

In the ongoing struggle between Zillow, an internet real estate web service, and the Tax Assessors of the State, Zillow sought a writ of mandamus from the trial court requiring the Calcasieu Parish Assessor to allow it to purchase the parish's assessment rolls from Software & Services, LLC, which compiles "native data" formatted records for the assessor to be sent to the Calcasieu Sheriff and the Louisiana Tax Commission. The assessor resisted this action. The trial court granted Zillow's request for a writ of mandamus, and the assessor appealed.

The assessor had provided the requested information to Zillow in .pdf format. We noted that the only person against whom a writ of mandamus is requested is the records custodian. In the present case, the assessor had provided the requested records, just not in the format requested. A party who requires records in a specific format can reproduce the records itself, but the custodian is only required to reasonably cooperate in the requestor's efforts. *See Title Research Corp. v. Rausch*, 450 So.2d 933 (La.1984).

FRAUD: NULLITY OF CASH SALE DEED

***Chandler Groceries, Inc. v. Ali*, 2022-63 (La.App. 3 Cir. 9/28/22), 348 So.3d 904, *writ denied*, 22-1611 (La. 1/11/23), 352 So.3d 985. (Panel: Kyzar, J., writing, Pickett & Perret, JJ.)**

Owner of property consisting of a lot and building housing a convenience store and gas station brought action against purchaser, alleging that cash sale of property was the product of fraud on behalf of purchaser, and seeking to annul the sale. Following a bench trial, the District Court, 9th Judicial District, Rapides Parish, No. 268,231, Patricia E. Koch, J., issued judgment in favor of owner. Purchaser appealed.

HELD: AFFIRMED.

We held that the purported cash sale deed did not meet requirements for an authentic act or an authenticated act, that the deed was produced and executed fraudulently by purchaser, that the purchaser's fraud vitiated consent of owner, that the trial court's failure to award damages to owner was warranted where there was little to no proof of damages other than speculation, and the trial court was barred from awarding attorney fees to owner as there was no contractual or statutory basis for such.

Facts were that the owner/alleged seller stated he did not sign the document purporting to be the cash sale, the witnesses testified they did not witness the document but recalled signing a document for a liquor license, the notary admitted that the witnesses were not present when she signed, nor did the parties sign in her presence. The document recorded was a three page document, that conveniently had the signature block set up exclusively on page three, standing by itself.

***The Sweet Lake Land & Oil Co, LLC v. Oleum Operating Co., L.C., et al.*, 21-169 (La.App. 3 Cir. 12/7/22), 354 So.3d 740 (On Remand), *writ denied*, 23-34 (La. 3/7/23), 357 So.3d 349. (Panel: Conery, J., writing, Pickett & Perret, JJ.; Pickett concurs in the result.)**

Sweet Lake filed this legacy oilfield matter against BP and other operators in 2010. Sweet Lake advanced tort and contract claims and pursued regulatory remediation against BP in particular. A jury rejected the private damages claims against the operators and found BP solely responsible for environmental damage on the property. The trial court referred the matter to LDNR for development of a most feasible remediation plan pursuant to La.R.S. 30:29. The trial court also issued an interim award of fees and costs pursuant to La.R.S. 30:39(E). The award included all fees and costs incurred by Plaintiffs during pursuit of both the remediation against BP as well as the unsuccessful private and contract claims against BP and operators AKSM and Oleum.

On initial review, a majority of the panel affirmed the award of fees and costs as well as the trial court's judgment casting BP liable *in solido* for the fees and costs with AKSM and Oleum. *See Sweet Lake Land & Oil Co. v. Oleum Operating Co.* 21-169 (La.App. 3 Cir. 12/1/21) (2021 WL 5630004). BP sought review of the entirety of that original opinion. The supreme court granted BP's writ application in part and remanded for the panel "to determine what costs and fees were attributable 'to producing that portion of the evidence that directly relates to the establishment of environmental damage.' La.R.S. 30:29(E)." *Sweet Lake Land & Oil Co. v. Oleum Operating Co.*, 22-497 (La. 9/20/22), 345 So.3d 1022. The supreme court also ordered reconsideration of "the finding of solidary liability, when the attorney fees and costs were expressly authorized by statute against one defendant, but not by the others." *Id.*

Reversed In Part; Affirmed as amended and rendered. Remanded. The panel noted that the supreme court's first directive focused entirely on costs and fees awardable under La.R.S. 30:29(E). The panel concluded therefore that fees and costs must be determined with a focus on those attributable to the limited purpose of establishing "environmental damage," a defined term within the statute, and that the fees and costs must be attributable solely to the legislatively provided remediation measures arising from activities subject to LDNR's jurisdiction. The panel reversed the trial court's judgment to the extent it cast judgment against BP for *all* attorney fees, expert fees, and costs incurred and afterwards amended the award with reference to affidavits submitted in the evidentiary record in the trial court which excised fees and costs related to AKSM and Oleum. As amended, the judgment awarded a total of $1,469,228.39 in expert fees and costs and $2,615,961.05 in attorney fees and costs, with legal interest on those awards from the date of the trial court's judgment until paid. Noting that the proceedings related to remediation were continuing, the panel remanded the matter for further proceedings and reserved Sweet Lake's authority to file further motions to assess fees and costs incurred since the trial court's judgment.

Given the supreme court's direction as to the scope of fees and costs available, the panel explained that since BP was the sole party responsible for the remediation under La.R.S. 30:29, BP, alone, must be cast in judgment for the fees and costs attributable to the environmental damage. While AKSM and Oleum had contractual obligations, neither had responsibility for the

obligation of the statutorily provided remedial measure. As La.R.S. 30:29 provides the only authority for the award of fees and costs, the panel amended the judgment to cast BP, alone, in judgment for those fees and costs.

OIL AND GAS PRODUCTION—RESTORATION

***Litel Explorations, LLC v. Aegis Dev. Co., LLC*, 21-741 (La.App. 3 Cir. 4/6/22), 337 So.3d 940, *writ denied*, 22-756 (La. 9/27/22), 346 So.3d 787. (Panel: Perret, J., writing, Gremillion & Wilson, JJ.)**

Surface owner brought action against prior operator of abandoned oil well and others, alleging that surface owner's two separate tracts of land were contaminated by exploration and production activities. Louisiana Department of Natural Resources (DNR), Office of Conservation, intervened, and filed a supplemental and amending petition for intervention to add other prior operators of abandoned well as defendants, which was granted.

Defendants, Pioneer Natural Resources, Inc. and Gary Production Company, filed motions for partial summary judgment arguing that they were not responsible parties from whom costs of controlling or plugging well could be recovered under the oilfield conservation emergency statute.

The trial court granted defendants' partial motion for summary judgment and the Office of Conservation appealed. The Office of Conservation argued that both Pioneer and Gary, being prior operators of the well, are on the hook for the restoration costs expended by the fund because the well was orphaned and there was no site-specific trust fund ever established for the well.

HELD: AFFIRMED.

This court held that the declaration of emergency for abandoned oil well precluded recovery of response costs from non-responsible parties. Although this court agreed with the Office of Conservation's argument that for typical abandoned wells, La.R.S. 30:93A(1)-(3)[1]

[1] Louisiana Revised Statutes 30:93 (emphasis added), titled "Recovery of site restoration costs; emergency costs," provides in pertinent part:

> A. If the assistant secretary undertakes restoration of an orphaned oilfield site under this Part or responds to any emergency as provided in R.S. 30:6.1, the secretary shall seek to recover all costs incurred by the secretary, assistant secretary, penalties, and other relief from any party who has operated or held a working interest in such site, or who is required by law, rules adopted by the department, or a valid order of the assistant secretary to control, clean up, close, or restore the oilfield sites or other facilities, structures, or pipelines under the commissioner's jurisdiction pursuant to R.S. 30:1 et seq. in accordance with the following:

(1) All oilfield sites for which there is no site-specific trust fund shall be restored with monies provided by the fund. Except for the responsible party, the secretary shall not be authorized to recover restoration costs from parties which formerly operated or held a working interest in an orphaned oilfield site unless restoration costs for a particular orphaned oilfield site including support facilities exceed two hundred fifty thousand dollars. Recovery of costs under this Paragraph shall be from the parties in inverse chronological order from the date on which the oilfield site was declared orphaned.

(2) For each oilfield site which becomes orphaned and for which a site-specific trust fund has been created and is fully funded under the provisions of R.S. 30:88(F), recovery of costs shall be against only the responsible party, and the site shall be restored in the following manner:

(a) Using funds in the site-specific trust fund established for the specific site.

(b) Using funds collected from any responsible party in such site where the site-specific trust fund is insufficient.

(c) If funds collected under Subparagraphs (a) and (b) of this Paragraph are insufficient to fully restore said orphaned oilfield site, the fund shall provide funds necessary to make up any deficiency.

(3) If the oilfield site does not meet the provisions of R.S. 30:88(F) and restoration costs exceed two hundred fifty thousand dollars, recovery of costs shall be from the parties in inverse chronological order from the date on which the oilfield site has been declared orphaned, except that a party shall be exempt from liability for restoration of an orphaned oilfield site as provided for in this Part in which said party had an operating or working interest if, and only if, the party complies with all of the following:

(a) The party makes full and reasonable timely contribution to the Oilfield Site Restoration Fund.

(b) The party creates a site-specific trust account for the restoration of the oilfield site and is in compliance with the terms and conditions of the site-specific trust account.

(c) The party makes full disclosure in compliance with R.S. 30:88(G) in the transfer of an oilfield site.

(d) The party complies in full with any penalty assessment which has become final under this Part for any violation under this Part.

(e) The party is not determined to be an individual, partnership, corporation, or other entity which is an operator or working interest owner in an oilfield site determined to be orphaned.

provides for recovery from not only the "responsible party" but also prior operators and working interest owners, we held that the clear and unambiguous language utilized by the legislature in La.R.S. 30:93A(4), 30:86E(5), and 30:86(G) creates a separate and distinct limitation as to recoupment of costs incurred pursuant to a response to any emergency as provided in La.R.S. 30:6.1. Specifically, La.R.S. 30:93A(4) (emphasis added) provides "For a response to <u>any</u> emergency as provided in R.S. 30:6.1, recovery of costs <u>shall</u> be against the responsible party." When the Office of Conservation declared an emergency and spent funds from the restoration fund in response to the emergency, it limited its recovery to the "responsible party," which, according to La.R.S. 30:82(11),[2] is the last operator and its working interest partners.

(f) The party is not determined to be a partnership, corporation, or other entity for which a general partner, an owner of more than twenty-five percent ownership interest, or a trustee has held a position of ownership or control in another partnership, corporation, or other entity which is an operator or working interest owner in an oilfield site determined to be orphaned.

(g) The party complies with all reviews of site-specific trust accounts as set forth in this Part, including additional contributions thereto if deemed necessary.

(4) <u>For a response to any emergency as provided in R.S. 30:6.1, recovery of costs shall be against the responsible party.</u>

[2] Louisiana Revised Statutes 30:82(11) defines a "Responsible party" as follows:

[T]he operator of record according to the office of conservation records, who last operated the property on which the oilfield site is located at the time the site is about to be abandoned, ceases operation, or becomes an unusable oilfield site, and that operator's partners and working interest owners of that oilfield site. A working interest owner is the owner of a mineral right who is under an obligation to share in the costs of drilling or producing a well on the oilfield site.

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION PROGRAM

August 25, 2023

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;
Morgan Sharp, Ashley Guillory, and Hunter Thibodeaux - Law Clerks

Recent Developments in the Law 2023

State v. Kidd 22-227 (La.App. 3 Cir. 9/14/22), 348 So.3d 243, _writ denied_, 22-1596 (La. 1/25/23), 354 So.3d 9:

Defendant charged with two counts of first-degree murder; he sought to suppress a pretrial statement to police, citing *Miranda*. [Occurred after Hurricane Laura.]

[Headnote 2, 3] Defendant's remark "I'm going to have to get an attorney," was not a clear and unambiguous invocation of his right to counsel. "Dude, I'm done. I want to get an attorney, man," *was* such an invocation.

State v. Hargrove, 22-158 (La.App. 3 Cir. 9/28/22), 348 So.3d 933:

Conviction for possession of heroin.

[Headnote 8] Defendant's refusal to identify himself constituted "resisting an officer." La.R.S. 14:108. *But see Gaspard*, 93-173 (La.App. 3 Cir. 10/6/93), 625 So.2d 368.

Jimmerson, 21-742 (La.App. 3 Cir. 9/28/22), 348 So.3d 944, _writ denied_, 22-1559 (La. 6/21/23), 362 So.3d 430:

Conviction for first degree rape.

[Headnotes 4, 5] Police sergeant's lay testimony and doctor's expert testimony vouching for the victim's credibility was improper – and not harmless.

State v. Gragg, 22-377 (La.App. 3 Cir. 9/21/22), 348 So.3d 254:

Defendant was convicted of aggravated crime against nature; on appeal, this court remanded to determine the identity of a venire member who made a prejudicial remark. On remand, it was determined that the speaker did not serve on the jury.

[Headnote 10] The district court did not err by enhancing sentence pursuant to La.R.S. 14:89.1(C)(2), even though the provision was not specifically listed in the charging instrument. The bill contained all the relevant information upon which

La.R.S. 14:89.1(C)(2); further, the record showed Defendant was aware of said sentencing exposure. Defendant made a similar argument regarding the jury instructions. The district court's position was that the bill covered the entirety of La.R.S. 14:89.1. This court held the errors were harmless.

[Headnote 11] Videotape evidence was properly admitted, although Defendant argued the victim was not a "protected person," pursuant to La.R.S. 15:440.2 because she was eighteen at the time of trial. This court held she qualified as a "protected person" because she was seventeen when she gave the recorded interview.

***State v. Edwards*, 22-983 (La. 11/1/22), 348 So.2d 1269, cert. denied, U.S. , 143 S.Ct. 1098 (2023):**

Insanity-acquitted Defendant released because he was not "mentally ill" for purposes of the controlling law, even though dangerous. La.R.S. 28:2.

***State v. Allen*, 22-508 (La. 11/1/22), 348 So.3d 1274:**

[Headnote 3] On post-conviction relief, habitual offender life sentence vacated due to ineffective assistance of counsel. Counsel failed to raise *Dorthey* (possible downward departure from statutorily mandatory life sentence) or mitigating facts.

State v. Gleason, 21-1788 (La. 11/10/22), 349 So.3d 977:

Defendant died while appeal was pending; the supreme court ordered the district court to enter a notation that the conviction removed the presumption of innocence, but that said conviction was neither affirmed nor denied on appeal.

***State v. Lee*, 22-1314 (La. 11/16/22), 349 So.3d 988:**

A rape case. The entirety of the victim's 911 call was admissible as an 'excited utterance." The alleged rape was clearly a traumatic event; also, the purpose of the call was to relay emergency information. Finally, while the call may have been lengthy, this could be ascribed to the use of a translator as a go-between on the call.

***State v. H.B.*, 22-157 c/w 22-221 (La.App. 3 Cir. 10/19/22), 350 So.3d 214, *writ denied*, 22-1691 (La. 2/7/23), 354 So.3d 672:**

District court adjudicated juvenile as a delinquent for first degree rape.

[Headnotes 3-5] One victim/witness was three-years old at trial, and her testimony was often meandering. The testimony did not establish that the Juvenile raped her, so this court reduced the adjudication to sexual battery.

***State v. Deville* 22-317 (La.App. 3 Cir. 10/19/22), 349 So.3d 1158:**

Jury convicted Defendant of possession of a firearm by a convicted felon. Defendant raised a *Batson* challenge, as the State peremptorily struck the only African-American member of the first two venire panels. However, this was insufficient to establish a discriminatory purpose.

***State v. Reddick*, 21-1893 (La. 10/21/22), 351 So.3d 273:**

The jury-unanimity rule of *Ramos* does not apply retroactively.

[Headnote 3] *Teague* analysis modified to remove "watershed" exception with three sub-factors: purpose of new rule, extent of reliance on the previous rule, and the effect of retroactivity on the administration of justice. *Id.* at 281.

***State v. Pilcher*, 21-1226 (La. 10/21/22), 351 So.3d 358:**

Defendant had been convicted of two counts of second degree murder as a fifteen-year-old . He sought parole eligibility pursuant to *Miller v. Alabama* and *Montgomery v. Louisiana*. Case hinged on which subsection of La.R.S. 15:574.4 governed.

Pursuant to La.R.S. 15:574.4(G), which was a provision passed to implement *Miller* and *Montgomery*, the district court correctly denied parole eligibility. *Id.* at 362.

***State v. Ryder*, 22-358 (La.App. 3 Cir. 10/26/22), 353 So.3d 855:**

Warrantless search of defendant's memory cards was valid, as facts available to detective conferred a reasonable belief that the homeowners who authorized the search had authority to do so.

***State in the Interest of R.R.B*. 22-397 (La.App. 3 Cir. 10/26/22), 353 So.3d 883, *writ denied*, 22-1725 (La. 3/28/23), 358 So.3d 496:**

Teen stabbed another teen in a Wal-Mart. The juvenile defendant responded to the victim's aggression with disproportionate force.

***State v. Trahan*, 22-388 (La.App. 3 Cir. 11/16/22), 352 So.3d 1072, *writ denied*, 22-1819 (La. 4/25/23), 359 So.3d 982:**

Defendant argued the State could not seek the death penalty for first degree murder where the underlying felony, cruelty to juveniles, may be committed either negligently or intentionally. However, the question of whether the underlying felony was committed negligently or intentionally was a question for the factfinder. *Id.* at 1079.

***State v. Deville*, 22-350 (La.App. 3 Cir. 11/23/22), 354 So.3d 99:**

Attempted first degree murder for slicing open the face of Turkey Creek's police chief.

[Headnotes 1 & 2] Although a statutory citation was missing from the bill of information, the error was harmless.

***State v. Simien*, 22-338 (La. App. 3 Cir. 11/30/22), 354 So.3d 144, *writ denied*, 22-1847 (La. 6/21/23), 362 So.3d 427:**

Drug prosecution.

[Headnotes 8-11] Family relationship to law enforcement did not preclude jury service.

[Headnote 15] No error in State's allusion in closing to witnesses who were not called by Defendant, as it was a response to argument made in Defendant's close.

***State v. Lewis*, 22-346 (La.App. 3 Cir. 12/14/22)0, 354 So.3d 213:**

First degree murder.

[Headnotes 20-23] Confrontation Clause violation was harmless, as Defendant admitted shooting the victim, along with other facts pertinent to the crime.

***State v. Forrester*, 22-509 (La.App. 3 Cir. 1/11/23) 354 So.3d 845:**

Molestation of a juvenile under thirteen.

[Headnotes 2-9] A maximum sentence was warranted, as the crime was "particularly heinous." The victim was Defendant's two-and-a-half-month-old daughter.

***State v. Dugar*, 22-461 (La.App. 3 Cir. 1/25/23), 354 So.3d 881:**

Aggravated kidnapping/unauthorized entry.

[Headnote 4] Defendant did not agree to hybrid representation; his failure to re-assert his right to self-representation and his apparent consultation with counsel did not constitute acquiescence.

***State v. Rowe*, 22-206 (La. 12/9/22), 354 So.3d 1187:**

Possession of methamphetamine; Defendant filed motion to quash.

[Headnote] District court manifestly erred by denying motion to quash, as Defendant presented sufficient evidence that he suffered a drug-related overdose and needed medical assistance. He was immune from prosecution pursuant to La.R.S. 14:403.10.

State v. Benoit, 22-310 (La.App. 3 Cir. 11/30/22), 355 So.3d 68:

Defendant was convicted of manslaughter and obstruction of justice.

[Headnote 15] Defendant's sentence of forty years, the maximum for manslaughter, was excessive. He was a nineteen-year-old first felony offender with a fiancé, a very young daughter, and a solid work history.

***State v. Guillory*, 22-549 (La.App. 3 Cir. 1/25/23), 355 So.3d 1211:**

Defendant entered a guilty plea to stalking while a protective order was in place.

[Headnote 8] The district court allowed Defendant to enter a guilty plea without ruling on his competency to proceed. Remanded for an evidentiary hearing to determine whether a *nunc pro tunc* hearing on competency was feasible. If such a hearing was found to be possible, then the district court was directed to rule on Defendant's competence. After that hurdle, the district court was to proceed accordingly.

***State v. Crooms*, 22-663, 22-664 (La.App. 3 Cir. 2/8/23), 358 So.3d 152:**

First degree murder; the district court granted the Defendant's motion to quash for improper venue.

[Headnotes 11-13] The State's theory was felony-murder, i.e., a killing pursuant to an armed robbery. The evidence indicated that victim was killed in Texas and his truck was taken in Texas, therefore, Vermilion Parish, Louisiana was not the proper venue for trial.

***State v. Young*, 22-584 (La.App. 3 Cir. 2/8/23), 357 So.3d 506:**

Defendant convicted of attempted molestation of a juvenile.

[Headnote 1] The electronic monitoring requirement set forth in La.R.S. 14:81.2(D)(3) applied to attempted offense.

State v. Honore, 23-637 (La. App. 3 Cir. 6/7/23), 361 So.3d 960:

A murder prosecution.

[Headnotes 1-2] The district court abused its discretion by selecting a new trial date in March 2024; the supreme court had remanded with instructions to set a

date that would allow Defendant time to respond to some of the State's forensic evidence. The supreme court remanded with instructions to set a trial date in 2023.

***State v. Chandler*, 22-1506 (La. 5/5/23), 362 So.3d 347:**

Defendant convicted of manslaughter.

[Headnotes 12-15] Any deficiency in Defendant's trial counsel's failure to challenge district attorney's secretary for cause did not prejudice said defendant, due to overwhelming evidence of guilt.

***State v. Alexander* 22-1205 (La. 5/5/23), 362 So.3d 356:**

Post-Conviction Relief review of a second degree murder conviction.

[Headnotes 9-10] No rational juror could conclude that Defendant either shot the victim or was part of a plan to rob said victim. A jury's verdict cannot be based upon speculation.

***State v. Irvin*, 22-151 (La.App. 3 Cir. 4/21/23) (unpublished opinion) [pre-trial writ]:**

Juvenile victim and Defendant's son were friends. Juvenile visited Defendant's house to see son; Defendant left to go pick up her boyfriend. While she was gone, the victim became agitated, threatened suicide, then left. After she returned, Defendant, along with boyfriend and son, drove around looking for the victim but did not report him missing for four days.

In her pre-trial writ, Defendant claimed that La.R.S. 14:403.7, which requires caretakers to report missing juveniles in twelve to twenty-four hours, is unconstitutional.

This court held the statute is constitutional, as it is neither vague nor overbroad, does not implicate self-incrimination, and does not create an irrebuttable presumption of guilt.

***State v. Vaughn* 22-214 (La. 5/5/23), 362 So.3d 363:**

Conviction for robbery and obstruction of justice.

Case in which a resentence was pending was not on "direct review" for purposes of *Ramos* and *Reddick*.

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION

PROGRAM – AUGUST 25, 2023

ETHICS

Presentation and Written Materials by:

Shelli Caballero, Law Clerk for the Honorable Sharon Darville Wilson

MICHELE (Shelli) S. CABALLERO is one of Judge Sharon Darville Wilson's law clerks at the Louisiana Court of Appeal, Third Circuit. She started at the court in 2004 as one of the Honorable David J. Painter's law clerks. After Judge Painter's retirement at the end of 2014, Shelli worked on the court's civil staff until September of 2021, when she joined Judge Wilson's staff. Prior to working at the court, Shelli was a partner at Woodley Williams Law Firm, LLC. She received her juris doctorate from the Paul M. Hebert Law Center in 1993 after graduating from Louisiana State University with a bachelor's degree in English. Topics of previous presentations include: A How To Guide For Filing Civil Appeals And Filing And Responding To Civil Writs In The Third Circuit; The Effects of Bad Legal Writing on Professionalism in the Practice of Law; Begin With the End in Mind: How to Be a Good Dead Lawyer (with Judge Ward Fontenot, Mark Judson, Dustin Madden, Deanne Pinner, and Dr. Delma Porter); ethical considerations in a lawyer's move to a competing firm; and basic rules of grammar in legal writing. She is a member of the Louisiana State Bar Association, the Southwest Louisiana Bar Association, and was active in the Albert Tate, Jr. American Inns of Court. Shelli is a native of Baton Rouge, Louisiana, but has lived in Lake Charles since 1995.

I DO NOT WANT TO "C" YOU IN THE OFFICE OF DISCIPLINARY COUNSEL

Legal ethics set forth the standards of conduct required of an Attorney; professionalism includes what is more broadly expected. Section 1. Rule 3(c) of the "Rules of Continuing Legal Education" as amended by the Louisiana Supreme Court on May 23, 1997. Generally, ethics rules tell us what we cannot do and professionalism deals with what we should do.

In "Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks,"[1] the Federal Judicial Center lays out the "5 Cs" as a simplistic way to remember the categories of a law clerk's ethical obligations. The "5 Cs" are: (1) Confidentiality; (2) Conflicts of Interest; (3) Caution; (4) Community; and (5) Career. According to the Federal Judicial Center, "[t]he rule to always look both ways before crossing a street provides guidance in approaching an ethics question: move cautiously and carefully. You are responsible for conducting yourself according to the ethics guidelines. Train yourself to stop, think, and evaluate before you take an action – inside or outside of work – that may have ethical implications." This presentation will focus on those "5 Cs" in hopes that we will not "C" any of us in the office of disciplinary counsel.

[1] This pamphlet was prepared by the federal judiciary's ethics committee, known as the Judicial Conference Committee on Codes of Conduct, in cooperation with the Federal Judicial Center.

1. CONFIDENTIALITY

"Judicial law clerks hold a unique and critical position in our legal system. They play a central part in the functioning of the judiciary, oftentimes writing the first draft of their judge's opinions and serving as their trusted researcher and sounding board. Moreover, they are privy to the many highly confidential processes and private information behind the important work of the judiciary. It stands to reason the comprehensive set of ethical duties that bind the world of lawyers and judges should also provide guidance for judicial law clerks. The most important among those ethics rules is a duty of confidentiality." Gregory Bischoping. *Reconceiving Ethics for Judicial Law Clerks*. 12 St. Mary's J. on Legal Malpractice & Ethics 58 (2022).

Canon 3(D) of the Code of Conduct for Judicial Employees defines the duty of confidentiality as follows:

> (1) A judicial employee should avoid making public comment on the merits of a pending or impending action and should require similar restraint by personnel subject to the judicial employee's direction and control. This proscription does not extend to public statements made in the course of official duties or to the explanation of court procedures.
>
> (2) A judicial employee should not use for personal gain any confidential information received in the course of official duties.
>
> (3) A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties. A former judicial employee should observe the same restriction on disclosure of confidential information that applies to a current judicial employee, except as modified by the appointing authority. This general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee or former employee from reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person.

What is the definition of confidential information? It generally includes information received through your clerkship that is not part of the public record and more specifically includes information about the decision making process. It can also include information about the timing of a decision or other judicial actions. Maintaining the Public Trust Ethics for Federal Judicial Law Clerks, Fourth Edition, Federal Judicial Center 2013. Even the content of casual conversations among judges and judicial employees can be subject to the rule of confidentiality.

The obligation applies to communications with your family, friends, and colleagues. The obligation is continuing and does not end when the case is completed or when your service to the court concludes.

The leak of Justice Samuel Alito's majority opinion in *Dobbs v. Jackson Women's Health*, ___ U.S. ___, 142 S.Ct. 2228 (2022), is a recent and shocking example of a breach in the duty of confidentiality. The leak became public on May 2, 2022. Shortly after the leak, SCOTUSblog posted: "It's impossible to overstate the earthquake this will cause inside the Court, in terms of the destruction of trust among the Justices and staff. The leak is the gravest, most unforgivable sin." The Marshal of the Supreme Court and her staff conducted months of forensic analysis and interviewed almost one hundred employees, but, more than a year later, the source of the leak has not been identified. According to the Marshal's Report of Findings & Recommendations (January 19, 2023), it is unlikely that someone outside the court was responsible for the leak, but "[t]he pandemic and resulting expansion of the ability to work from home, as well as gaps in the Court's security policies, created an environment where it was too easy to remove sensitive information from the building and the Court's IT networks, increasing the risk of both deliberate and accidental disclosures of the Court-sensitive information."

2. CONFLICTS OF INTEREST

Canon 3(F) of the Code of Conduct for Judicial Employees states as follows:

(1) A judicial employee should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a judicial employee knows that he or she (or the spouse, minor child residing in the judicial employee's household, or other close relative of the judicial employee) might be so personally or financially Guide to Judiciary Policy, Vol. 2A, Ch. 3 Page 7 affected by a matter that a reasonable person with knowledge of the relevant facts would question the judicial employee's ability properly to perform official duties in an impartial manner.

(2) Certain judicial employees, because of their relationship to a judge or the nature of their duties, are subject to the following additional restrictions:

(a) A staff attorney or law clerk should not perform any official duties in any matter with respect to which such staff attorney or law clerk knows that:

(i) he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(ii) he or she served as lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law had served (during such association) as a lawyer concerning the matter (provided that the prohibition relating to the previous practice of law does not apply if he or she did not work on the matter, did not access confidential information relating to the matter, and did not practice in the same office as the lawyer), or he, she, or such lawyer has been a material witness;

(iii) he or she, individually or as a fiduciary, or the spouse or minor child residing in his or her household, has a financial

interest in the subject matter in controversy or in a party to the proceeding;

(iv) he or she, a spouse, or a person related to either within the third degree of relationship (as defined above in § 310.30), or the spouse of such person (A) is a party to the proceeding, or an officer, director, or trustee of a party; (B) is acting as a lawyer in the proceeding; (C) has an interest that could be substantially affected by the outcome of the proceeding; or (D) is likely to be a material witness in the proceeding;

(v) he or she has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has Guide to Judiciary Policy, Vol. 2A, Ch. 3 Page 8 expressed an opinion concerning the merits of the particular case in controversy.

(b) A secretary to a judge, or a courtroom deputy or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff, should not perform any official duties in any matter with respect to which such secretary, courtroom deputy, or court reporter knows that he or she, a spouse, or a person related to either within the third degree of relationship, or the spouse of such person (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) has an interest that could be substantially affected by the outcome of the proceeding; or (iv) is likely to be a material witness in the proceeding; provided, however, that when the foregoing restriction presents undue hardship, the judge may authorize the secretary, courtroom deputy, or court reporter to participate in the matter if no reasonable alternative exists and adequate safeguards are in place to ensure that official duties are properly performed. In the event the secretary, courtroom deputy, or court reporter possesses any of the foregoing characteristics and so advises the judge, the judge should also consider whether the

Code of Conduct for United States Judges may require the judge to recuse.

(c) A probation or pretrial services officer should not perform any official duties in any matter with respect to which the probation or pretrial services officer knows that:

(i) he or she has a personal bias or prejudice concerning a party;

(ii) he or she is related within the third degree of relationship to a party to the proceeding, or to an officer, director, or trustee of a party, or to a lawyer in the proceeding;

(iii) he or she, or a relative within the third degree of relationship, has an interest that could be substantially affected by the outcome of the proceeding.

(3) When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining Guide to Judiciary Policy, Vol. 2A, Ch. 3 Page 9 that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such matter so as to avoid a conflict or the appearance of a conflict of interest. A judicial employee should observe any restrictions imposed by his or her appointing authority in this regard.

(4) A judicial employee who is subject to canon 3F(2)(a) should keep informed about his or her personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of a spouse or minor child residing in the judicial employee's household. For purposes of this canon, "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(a) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the employee participates in the management of the fund;

(b) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(c) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(d) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(5) A member of a judge's personal staff should inform the appointing judge of any circumstance or activity of the staff member that might serve as a basis for disqualification of either the staff member or the judge, in a matter pending before the judge.

We must keep in mind that: "Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct. These expectations extend to those who make up the contemporary judicial family, the judge's law clerks and secretaries. Because a magistrate's sole law clerk was initially a member of the plaintiff class in this suit, had before her employment with the magistrate expressed herself as convinced of the correctness of its contentions, and accepted employment with its counsel before judgment was rendered, we hold that the magistrate erred in refusing to disqualify himself. We, therefore, reverse the judgment and remand for a new trial before a judge or another magistrate." *Hall v. Small Bus. Admin.*, 695 F.2d 175, 176–77 (5th Cir. 1983).

3. CAUTION

Caution should be "a theme that unites all of your ethical obligations, but you need to exercise special caution in three areas: political activities, online activities, and gifts." Maintaining the Public Trust Ethics for Federal Judicial Law Clerks, Fourth Edition, Federal Judicial Center 2013.

Political Activities

Canon 5 of the Code of Conduct for Judicial Employees states as follows:

> A. Partisan Political Activity
>
> A Judicial Employee Should Refrain from Inappropriate Political Activity A. Partisan Political Activity A judicial employee should refrain from partisan political activity; should not act as a leader or hold any office in a partisan political organization; should not make speeches for or publicly endorse or oppose a partisan political organization or candidate; should not solicit funds for or contribute to a partisan political organization, candidate, or event; should not become a candidate for partisan political office; and should not otherwise actively engage in partisan political activities.
>
> B. Nonpartisan Political Activity
>
> A member of a judge's personal staff, lawyer who is employed by the court and assists judges on cases, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, and district court executive should refrain from nonpartisan political activity such as campaigning for or publicly endorsing or opposing a nonpartisan political candidate; soliciting funds for or contributing to a nonpartisan political candidate or event; and becoming a candidate for nonpartisan political office. Other judicial employees may engage in nonpartisan

> political activity only if such activity does not tend to reflect adversely on the dignity or impartiality of the court or office and does not interfere with the proper performance of official duties. A judicial employee may not engage in such activity while on duty or in the judicial employee's workplace and may not utilize any federal resources in connection with any such activity.

Online Activities

Online Activities "can also pose a threat to multiple ethical obligations, including your responsibilities to maintain confidentiality, to preserve the appearance of impartiality and the independence of the judiciary, and to uphold the dignity of the court." Maintaining the Public Trust Ethics for Federal Judicial Law Clerks, Fourth Edition, Federal Judicial Center 2013.

When conducting online activities: (1) know your court's social media and social networking policy; (2) think before you post; (3) speak for yourself, not the court; (4) abide by all confidentiality provisions; and (5) remember that you are restricted from engaging in partisan pollical activities and fund-raising activities that could compromise judicial integrity. Social Media and Social Networking Policy. United States District Court, Northern District of Illinois.

Gifts

The general rule is that no judicial employees (including law clerks) should solicit or accept a gift from anyone whose interests may be impacted by work done by the court. You should also "endeavor to prevent any household family member from soliciting or accepting any gift that the judicial employee may not accept." Maintaining the Public Trust Ethics for Federal Judicial Law Clerks, Fourth Edition, Federal Judicial Center 2013. There are exceptions for bar-related functions, ordinary social hospitality, and certain scholarships or fellowships.

4. COMMUNITY

Canon 4(A) of the Code of Conduct for Judicial Employees states as follows:

> A judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves. Subject to the foregoing standards and the other provisions of this code, a judicial employee may engage in such activities as civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, and recreational activities, and serve in the military reserves. A judicial employee may also speak, write, lecture, and teach. If such outside activities concern the law, the legal system, or the administration of justice, the judicial employee should first consult with the appointing authority to determine whether the proposed activities are consistent with the foregoing standards and the other provisions of this code. With the exception of an appointment relating to service in the military reserves, a judicial employee should not accept a governmental appointment that has the potential for dual service to and/or supervision by independent branches of government (including state courts) or different governments during judicial employment.

"While judges appropriately expect confidentiality, professionalism, and courtesy from their clerks, expectations that law clerks should be socially isolated from lawyers or free from political expression are both unrealistic and unfair." Greenstein, Marla N. Judicial Ethics and Law Clerks. The Judge's Journal. Vol. 61, No. 3, Summer 2022.

Abstain from giving legal advice to neighbors, friends, or volunteer organizations.

5. CAREER

The Federal Judicial Center cautions that "[i]t is not enough to simply learn and follow the Code of Conduct and other related ethics rules, however. You also need to familiarize yourself with and follow your judge's ethical guidelines. These guidelines may differ from chambers to chambers. Your judge may impose restrictions that go beyond the Code."

When clerkships are for a finite amount of time or when a career-clerk decides to leave the court, conflicts of interest are of paramount importance. Gifts and benefits offered to the clerk upon accepting employment with a law firm or other employer also present ethical questions.

Looking forward, what role will artificial intelligence (AI) have on legal ethics? Will AI be able to provide streamlined access to justice, free from human bias? "The ethical consideration for us all is to maintain that human strength while adapting to the enormous information revolution that artificial intelligence provides. . . . Wisdom will require the ability to use artificial intelligence to enhance integrity and impartiality, tempered by human judgment." Marla N. Greenstein. AI and a Judge's Ethical Obligations. ABA Journal 2020 Winter.

EXCERPTS FROM THE ABA MODEL CODE OF JUDICIAL CONDUCT

Rule 2.3(B): A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

Rule 2.8(B): A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

Rule 2.9(D): A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

Rule 2.10(A): A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B): A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(C): A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

REFERENCES

ABA Model Code of Judicial Conduct. https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/. Accessed 1 June 2023.

Bischoping, Gregory. *Reconceiving Ethics for Judicial Law Clerks*. 12 St. Mary's J. on Legal Malpractice & Ethics 58 (2022).

Code of Conduct for Judicial Employees. https://www.uscourts.gov/sites/default/files/guide-vol02a-ch03.pdf. Accessed 1 June 2023.

Dobbs v. Jackson Women's Health, ___ U.S. ___, 142 S.Ct. 2228 (2022).

Greenstein, Marla N. AI and a Judge's Ethical Obligations. ABA Journal 2020 Winter.

Greenstein, Marla N. Judicial Ethics and Law Clerks. The Judge's Journal. Vol. 61, No. 3, Summer 2022.

Hall v. Small Bus. Admin., 695 F.2d 175 (5th Cir. 1983).

Rubin, Alvin B., and Larua B. Bartell. Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges. Federal Judicial Center. Revised 1989.

Maintaining the Public Trust Ethics for Federal Judicial Law Clerks, Fourth Edition, Federal Judicial Center 2013. https://oscar.uscourts.gov/assets/Maintaining_Public_Trust.pdf. Accessed 1 June 2023.

Office of the Marsal, Supreme Court of the United States. Marshal's Report of Findings & Recommendations (January 19, 2023).

Potter, Park B., Jr. "Law Clerks Gone Wild: The State-Court Report." Ohio Northern University Law Review. Vol. 38: Iss. 1, Article 2.

https://digiitalcommons.onu.edu/onu_law_review/vol38/iss1/2. Accessed 1 June 2023.

Resource Packet for Developing Guidelines on Use of Social Media By Judicial Employees. Committee on Codes of Conduct. Judicial Conference of the United States. April 2010. https://www.uscourts.gov/sites/default/files/socialmedialayout_0.pdf. Accessed 1 June 2023.

Social Media and Social Networking Policy. United States District Court, Northern District of Illinois.

THIRD CIRCUIT JUDGES' ASSOCIATION
CONTINUING LEGAL EDUCATION PROGRAM

AUGUST 25, 2023

PROFESSIONALISM

Presentation and Written Materials by:

Matthew Couvillion – Administrative General Counsel to
Chief Judge Elizabeth Pickett

Sources of Professionalism Obligation

- Lawyer's Oath
- Louisiana Code of Professionalism (See District Court Rule 6.2)
- The Code of Professionalism in the Courts (See District Court Rule 6.3)
- Rules for Continuing Legal Education
- Code of Civil Procedure (Articles 371 & 863)
- Rules of Professional Conduct (See LSBA Articles of Incorporation)
- Code of Judicial Conduct
- Supreme Court Committee on Judicial Ethics Advisory Opinions
- Jurisprudence
- Uniform Rules of the Courts of Appeal (Rule 2-12.2)
- Uniform Rules of the District Courts

For a good primer on the basics of professionalism, visit

https://www.lsba.org/Professionalism/

Code of Professionalism

The legal profession is a learned calling. As such, lawyers should act with honesty and integrity and be mindful of our responsibility to the judicial system, the public, our colleagues, and the rule of law. We, as lawyers, should always aspire to the highest ideals of our profession.

- **My word is my bond.**

Moise v. Baton Rouge General Medical Center, 22-623 (La.App. 1 Cir. 4/20/23), 2023 WL 3028635.

The issue in Moise was whether the medical malpractice action had been abandoned. This lawsuit was against non-qualified healthcare providers. There was another petition filed against two QHCPs, and the medical review panel was pending as to those defendants. One of the attorneys for the non-QHCP defendants filed an ex parte motion for dismissal on the grounds of abandonment. The plaintiff filed motion to set aside the order of abandonment. He attached an affidavit alleging that he had an informal agreement with another of defendants' attorneys to stay the proceedings in both lawsuits pending the MRP opinion. The plaintiff also introduced a letter from the defendants' attorney sent during the three- year abandonment period suggesting that the two suits be consolidated. The trial court dismissed the suit as abandoned. On appeal, the first circuit reversed:

> "As evidenced by Mr. Remson's letter to Mr. Mouton on August 13, 2020, both Mr. Mouton and more importantly, Mr. Remson, clearly indicated that the parties were working together as professionals to handle both cases in the most effective method to reduce the cost of litigation. Unlike most informal negotiations and correspondence that does not interrupt the abandonment period, the informal agreement in this case had the laudable goal of handling the malpractice cases in both a professional and a cost-saving method to the clients. Clearly the abandonment statute is not meant to dismiss this type of action. " (Pages 10-11)
>
> "The court recognizes the professional conduct of both Mr. Mouton and Mr. Remson in their handling of this case. We note that the Louisiana Code

of Professionalism contained in District Court Rule 6.2 states that an attorney's word is his bond. Further, District Court Rule 6.2 states that attorneys "will cooperate with counsel and the court to reduce the cost of litigation ...." It is apparent from the actions of the attorneys in this case that their "word was their bond" and the informal agreement between the attorneys was intended to reduce the cost of litigation by limiting the cost in the first filed suit until the completion of the medical malpractice review process and the filing of the second lawsuit. At that time, Mr. Remson acknowledged in writing that the two lawsuits should be consolidated." (Footnote 5)

- **I will conduct myself with honesty, dignity, civility, courtesy and fairness and will not engage in any demeaning or derogatory actions or commentary toward others.**

Hicks v. USAA General Indemnity Co., 21-840 (La. 3/25/22), 339 So.3d 1106, *denying rehearing*, 347 So.3d 735.

The underlying facts in Hicks concern an auto accident. The plaintiff sued for damages. The defendant insurer sought to compel an additional medical examination pursuant to La.Code Civ.P. art. 1464. The issue decided by the supreme court was whether the defendant established "good cause" for an AME, and what "good cause" means. The trial court found there was not "good cause," and indicated the defendant's expert, Dr. Harrod, could examine plaintiff's medical records and the depositions of plaintiff's physicians and testify based on those records. So, the defense wanted Dr. Harrod to examine plaintiff, and the plaintiff successfully stopped that examination. In closing arguments at the trial, plaintiff's counsel made the following argument:

> [T]he context in which he is presented in this case is diabolical.... You know, [Dr. Harrod] came into this case and he never saw the patient. He said multiple times in order to make a decision, to make an opinion, he'd have to see him, and he didn't see him..... But when [Dr. Harrod's] wearing a Defense hired gun hat, he changes all of this, critical of everything they say and do. He cannot be believed, he's just not credible. He's not seen this patient.

During deliberations, the jury asked if Dr. Harrod "was allowed to see" the plaintiff. The court did not answer the question. The plaintiff's argument worked, and the jury rendered a unanimous verdict for Mr. Hicks and awarded nearly $1.3 million. The court of appeal affirmed. The supreme court defined "good cause" for the purposes of CCP 1464, determined that there was good cause shown to warrant an AME and remanded for a new trial. On rehearing, Justice Crichton, who wrote the original opinion, concurred in the denial of rehearing, and wrote:

> I also write separately to call attention to the principles of professionalism I believe are implicated here. . . .[C]ertain conduct in this case fails to meet these basic obligations. Most glaringly, plaintiff's counsel referred to the defense expert as "diabolical" to the jury after actively opposing the physician's examination throughout the course of discovery. This conduct falls short of the aspirations of the professionalism guidelines to conduct oneself with the utmost integrity and fails to adhere to the oath every lawyer of this state takes to conduct himself with "fairness, integrity, and civility" and "abstain from all offensive personality."

The last two quotations are from the Lawyer's Oath, which is reprinted at the end of this presentation.

- **I will not knowingly make statements of fact or law that are untrue or misleading and I will clearly identify for other counsel changes I have made in documents submitted to me.**

State v. S.A.A., 2020 WL 5798511, 2020-Ohio-4650.

The defendant was convicted of eleven counts of rape and four counts of gross sexual imposition against two child sisters. This was the second trial of the defendant after the first guilty verdict was reversed for Ohio due process reasons. The main issue in this appeal was whether the trial court erred in allowing the full videos of the forensic interviews to be played for the jury in addition to the in-court testimony of the two "prosecuting witnesses." The defendant alleged that those recorded interviews included evidence of a crime against a third child and allegations of voodoo and harming animals, and that they were cumulative. The convictions were upheld, and the defendant will

serve the rest of his life in jail. For our purposes, here's where the professionalism angle comes in: In the first appeal which reversed the conviction, the court of appeal held that the judge and the prosecution should not refer to the two alleged victims as "victims." The prosecutor argued, in opposition to a motion in limine by the defense to enforce the reviewing court's ruling at the second trial, that the court of appeal was wrong, and he would continue to call them "victims" or "sexual abuse survivors." He also filed a motion in limine "parroting and twisting" the appellate court's ruling, that the defendant should not be referred to as "defendant" but as the "alleged child rapist." The dissenting judge, in footnote 10, stated:

> The State's counsel in the second trial exhibited exceedingly poor judgment and failed to live up to key tenets of Ohio's "A Lawyer's Creed" in not offering respect and courtesy to the Court, in not offering "fairness, integrity and civility" to those involved in the second trial, in "knowingly mak[ing] misleading or untrue statements of fact or law" and in apparently failing to "recognize that [his] actions and demeanor reflect upon our system of justice and our profession" and not conducting himself "accordingly."

The prosecutor withdrew his motion to call the defendant an "alleged child rapist," but this judge pointed out that he did not appreciate the filing, as it was clearly a misstatement of the law. I would note that I have never found such language to be helpful or persuasive in a brief or at oral argument.

- **I will be punctual in my communication with clients, other counsel and the court. I will honor scheduled appearances and will cooperate with other counsel in all respects.**

Matter of Brown, 854 P.2d 768 (Ariz.1993)
Matter of Brown, 910 P.2d 631 (Ariz.1996)
In re Brown, 96-918 (La. 6/28/96), 675 So.2d 735 (reciprocal discipline)

Mr. Brown was licensed in Louisiana and Arizona. He worked in private practice, and initially worked with a partner. When his partner left, he was overwhelmed and did not take care of business. There were at least four different matters for which he had complaints filed against him, all from the same period of time. The charges against him were failure to communicate with clients, failure to cooperate with other counsel, failure to appear at court

hearings, failure to inform clients, courts and counsel of his suspension, and failure to withdraw from representation. And, as you might expect, there was an added count for failure to cooperate with the disciplinary investigation. The Arizona court specifically stated that it found Mr. Brown had no dishonest motive. Nevertheless, he was suspended for nine months, and his suspension was reciprocated by the Louisiana Supreme Court. I mention this case for two reasons: (1) to remind us that the aspirational rules of professionalism sometime intersect with the rules of ethics that have teeth and can result in sanctions; and (2) sometimes intent does not matter.

- **I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.**

Environmental Specialists, Inc. v. Wells Fargo Bank Northwest, 291 Va. 111 (2016).

This a suit to enforce a mechanics lien. ESI, the plaintiff, filed suit against several defendants, including Wells Fargo, who was timely served. Counsel for Wells Fargo did not learn about this suit until over one year later, and immediately asked ESI for an extension of time to file an answer. ESI's counsel refused to grant an extension, so Wells Fargo moved to file an answer out of time. Meanwhile, ESI filed a motion for a default judgment. Both motions were heard at the same hearing. The trial court granted Wells Fargo's motion to file a late answer, imposed costs of $1200 against ESI because counsel "failed to voluntarily extend the time in which Wells Fargo might file its answer," and denied the motion for default judgment as against Wells Fargo. The parties then settled, but in the judgment rendered by the trial court memorializing the settlement, it included the $1200 in costs payable by ESI to Wells Fargo for the motion to file a late answer. ESI appealed the sanction. The Virginia Supreme Court reversed the $1200 sanction, specifically stating that their version of CCP article 863 imposed an overarching duty to "act professionally."

Louisiana Code of Civil Procedure article 863(A) requires that an attorney sign all pleadings. Section B explains that the signatory makes the following certification:

> [T]he signature of an attorney or party shall constitute a certification by him that he has read the pleading; that to the best of his knowledge,

> information or belief formed after reasonable inquiry it is well grounded in fact; that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; that that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Section C allows a court to impose sanctions if the certification is made in violation of the article.

The Virginia Supreme Court then embarked on an extended discussion of the professionalism movement, beginning with a speech by Chief Justice Warren Burger in 1984. It talks about the development of codes of professionalism across the country and the specific orders issued in Virginia. Then it stated:

> [T]he principles of professionalism are aspirational, and . . . . they "shall not serve as a basis for disciplinary action or for civil liability." Moreover, the principles themselves recognize that conflicts may arise between an attorney's obligations to a client's best interests and the professional courtesy of agreeing to an opposing counsel's request for an extension of time. . . . [I]n this case, counsel may not have been acting in his client's best interests if he had agreed to the requested extension of time. In fact, ESI directed counsel not to agree to the requested extension.

Sometimes there is tension between your obligation to your client and their best interests and the aspirational goals of professionalism. Your client's best interests have to come first, or you may have an ethics problem. In this case, granting an extension would mean the prospect of having to try a case that ESI had already won by default. That was not in ESI's best interest, especially since Wells Fargo really wasn't taking care of its business.

- **I will not abuse or misuse the law, its procedures or the participants in the judicial process.**

Russell v. Snelling Personnel, 01-2134 (La.App. 1 Cir. 10/9/02), 835 So.2d 672.

The issue in the workers' comp case that I want to discuss has to do with discovery. The claimant sent discovery requests to the employer on April 27. The claimant gave the employer an informal two-week extension to respond. The claimant sent defense counsel correspondence on June 6 and June 27 seeking outstanding discovery. The defendant responded with incomplete discovery. The claimant sent a final letter on August 14 seeking discovery. As a last resort, the claimant filed a rule to show cause why an order compelling discovery should not issue pursuant to CCP article 1469. Before the hearing on the rule, defendant responded to the discovery completely. The WCJ awarded attorney fees of $2,500 based on 1469. The appellate court reversed that award, stating that there was no order to compel ever issued because defense counsel responded before the hearing on the rule to show cause. Therefore, sanctions were not on the table. The opinion points out the problem with this and urges the legislature to consider amending 1469:

> "[A] party who wishes to delay discovery is allowed to sit back and wait to be ruled into court and yet still avoid discovery sanctions by answering discovery a day before the hearing." (Fn. 5 of the opinion)
>
> "Defense counsel's behavior is the type which the first four canons of the Code of Professionalism attempt to prevent." (Fn. 1 of the concurrence)

The legislature has not amended this part of article 1469. The concurring judge specifically calls out defense counsel for his unprofessionalism.

- **I will cooperate with counsel and the court to reduce the cost of litigation and will not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party.**

Bowes v. McIntire, 345 So.3d 1109 (La.App. 5 Cir. 7/6/22).

Russell also obviously implicates this canon of the Code of Professionalism. In *Bowes*, the court found that unprofessionalism can come at a cost. This is a suit on open account filed by an attorney (Bowes) to recover fees owed for his representation of another attorney (McIntire) in an intervention suit related to mass tort litigation. Basically, McIntire and his co-counsel in the mass tort litigation had a dispute over the division of legal fees. Bowes filed the request

for a jury trial too late. Also, Bowes and Palmer get agitated with McIntire because they think he's withholding discoverable documents. The trial judge denied the motion for a jury trial. When McIntire asked about it after the hearing, Bowes did not respond. Then a pleading drafted by Bowes and Palmer was not satisfactory to McIntire.

The three met on June 14, and Bowes presented McIntire with invoices for their work, and said he would provide no more services unless McIntire approved the invoiced amount. Bowes later sent McIntire a letter of discharge. When McIntire did not sign the letter promptly, Palmer sent a copy of a motion to withdraw that would be filed unless McIntire agreed to discharge Bowes and Palmer from representation, citing McIntire's refusal to cooperate. McIntire went and picked up his file, but noted he was still considering the invoiced charges. This all occurred in about three months. The trial court awarded only $20,000 for Bowes services, less than the $34,000 requested. The court of appeal affirmed that award, finding:

> It was appropriate for the trial court to reduce Bowes' fees due to his lack of professionalism in withdrawal, and court's finding that the motion to withdraw 'focuses on the grounds that are most negative for their client,' despite other innocuous grounds. Furthermore, a lawyer who releases a client without reasonable justification is not entitled to be paid for the all the hours worked for which the client does not get full value.

The client, McIntire, had some pretty solid grounds to want to let Bowes go, including his failure to timely ask for a jury trial. The lawyer basically attempted to harass his client into paying a bill which the court found was not fully owing.

- **I will not engage in personal attacks on other counsel or the court or use the threat of sanctions as a litigation tactic.**

Mitchell v. Mitchell, 2023 WL 545060 (Ca.Ct.App. 2023)(counsel)
In re A.N.L., 2022 WL 17493236 (Ca.Ct.App. 2023)(court)

The important facts in *Mitchell* are these: James and his three siblings are beneficiaries of their late father's family trust. The stepmother is the beneficiary of the trust. The siblings did not think the stepmother should

receive any assets. They sued, and the result was that separate trusts were established for each of the four siblings, and grandma Georgia was named trustee. Then grandma Georgia and the three siblings who are not James start fighting over the management of the assets of the trusts. These three reach an agreement with grandma in 2010 to distribute the assets to each of these three siblings. Turns out grandma Georgia wanted to keep getting the checks her son had been sending while he was alive. What about James? Well, he was on trial for the murder of his girlfriend, so he had more pressing legal matters to attend to.

In January 2020, James, who has been incarcerated since 2011, asked for an accounting of his trust. When grandma failed to respond to the court order for an accounting, James sued for breach of trust and sought dissolution. The attorney who had represented the trustees back in 2010, Melbostad, asked to be relieved as counsel of record because grandma Georgia had dementia and knew nothing and he had not dealt with any of the trusts for 10 years. The probate court ordered the attorney to provide an "informal" accounting. Melbostad dutifully complied and provided an "informal" accounting and a detailed supporting declaration. In it, he explained that James share of the trust assets, about $261,000, had been spent on criminal defense lawyers. Since there were no legal grounds to support James' filing, his attorney resorted to attacking the court and the lawyer who previously handled the trust business. The appellate court was having none of it:

> [A]n opening brief is not an appropriate vehicle for an attorney to 'vent his spleen' (*quoting Pierotti v. Torian* (2000) 81 Cal.App.4th 17)
>
> . . . .
>
> Appellant's unwarranted attacks on the court and opposing counsel also reflect poorly on the profession. Impugning the character of opposing counsel is almost never appropriate, and in this case as we have noted, the charges were wholly unfounded.

James' lawyer had no support for his contention that there were ex parte communications between Melbostad and the court. He also claimed that Melbostad changed the court's order without any evidence to support the claim.

In *ANL*, the trial court terminated the parental rights of the mother and the father to their two children. In his brief, the father's counsel accused the court of "stonewalling" and having a "predetermined agenda of adoption." She alleged that the trial court "misapplied the case law in a prejudicial attempt to justify termination." The appeals court admonished the attorney, stating in colorful language,

> [C]ounsel's language "lurched off the path of discourse and into the ditch of abuse." (quoting In re Mahoney (2021) 65 Cal.App.5th 376, 381)
>
> This kind of over-the-top, anything-goes, devil-take-the-hindmost rhetoric has to stop. If you think the court is wrong, don't hesitate to say so. Explain the error. Analyze the cases the court relied upon and delineate its mistake. Do so forcefully. Do so con brio; do so with zeal, with passion.

And further:

> We in the appellate courts will respect your efforts and understand your ardor. Sometimes we will agree with you.
>
> But don't expect to get anywhere—except the reported decisions—with jeremiads about ... courts whose decisions are based not on a reading of the law but on their general corruption ....

The court also admonished the father's counsel for its lack of candor. In brief, she argued the trial court refused to allow the father to present evidence of his sobriety, when it ruled one exhibit inadmissible. The court clearly allowed the father's counsel an opportunity to question the father about any matter that was relevant, including his sobriety. Also, in brief, father's counsel claimed that he had a lifelong relationship with the children as their primary caregiver. But the younger child was removed from his care when she was nine days old. These statements stretched "the record and credulity to their breaking points."

Now is a good time to talk about Rule 2-12.2 of the Uniform Rules of the Courts of Appeal. Violation of this rule could result in a contempt citation or to having the brief returned.

This rule (or a previous incarnation of it) was discussed in the next case.

■ **I will support my profession's efforts to enforce its disciplinary rules and will not make unfounded allegations of unethical conduct about other counsel.**

Galle v. Orleans Parish School Board, 623 So.2d 692 (La.App. 4 Cir. 1993).

In this workers' comp case, a bus-attendant aide was injured while at work when she attempted to lift a wheelchair that had fallen over on its side with a student in it. The trial court denied benefits, finding no accident occurred. In the opinion, the trial court summarily rejects the arguments of the claimant and affirms the judgment of the trial court. In the second assignment of error, the claimant contended that counsel for the school board knowingly allowed the bus driver to testify falsely AND informed the student in the vehicle not to appear at the trial. The fourth circuit found no evidence to support either of those contentions in the record. The claimant could have subpoenaed the student and failed to do so. The claimant also alleged there was a stipulation that there was an accident at a previous hearing. The court of appeal found no such stipulation or agreement in the record. The claimant also argued that the driver changed her testimony on advice of counsel for the school board. Again, no evidence. The court uses the terms unsupported and unfounded and devoid of evidence in finding no merit to the claimant's arguments.

The court may have awarded damages for frivolous appeal, but the school board's answer was untimely and no filing fee was paid, so the request for damages for frivolous appeal was denied. But it did explain that the language of the claimant's brief was not appreciated:

> The content of plaintiff's brief is detailed and profuse with allegations of professional misconduct, unethical and illegal behavior. Such allegations are insulting and offensive. Furthermore, these scandalous allegations are compounded by the fact that they are totally uncorroborated by any evidence. Thus, without any record evidence to support such offensive allegations, plaintiff counsel's brief is offensive to this court and in violation of Rule 2–12.4 [redesignated Rule 2-12.2].

The court declined to impose sanctions, instead issuing a reprimand. One judge dissented, finding that, while there was a lack of evidence in the record to support the claims, the lawyer arguably had a duty to report his concerns to

the court. The dissenting judge also suggested that there should have been an evidentiary hearing before issuing a reprimand, and lack of such a hearing violated his due process rights.

- **I will work to protect and improve the image of the legal profession in the eyes of the public.**

The change you want to see starts with you. Don't be a jerk. Be kind. And this includes on social media, if you dare to visit those awful places. Don't use the fact that you are an attorney as a weapon.

- **I will endeavor to improve our system of justice.**

Matter of Staples, 719 P.2d 558 (Wash. 1986).

The LSBA website has programs to help with improving the process and outcomes for citizens who find themselves in need of legal services. Access to Justice, Pro Bono opportunities, resources to increase diversity, and making the courts more accessible to those with disabilities. I know many of our judges serve on committees that have as their goal the improvement of the legal system on a macro level. On a micro level, those of us who work for the courts have a professional duty to do our jobs well.

That said, the Code of Judicial Conduct does limit the types of advocacy activities a judge can do. That includes members of a judge's staff. I have always been assured that the quickest way to get fired is for me to put a campaign sign in my yard. But what if there was an effort to move the parish seat in Sabine Parish to Zwolle? This case from the Supreme Court of Washington involved a judge who was actively involved in the campaign to move the Benton County seat from Prosser to Kennewick. Kennewick had become the population center in Benton County, and many county offices had relocated to Kennewick. The judges of the local court even got permission from the supreme court to hold court in Kennewick, where the county built a new Justice Center (I always think a justice center is where superheroes hang out). Once the new building was built and in use, none of the judges wanted to have court at the old building in Prosser. Judge Staples was very active in the campaign to move the county seat – he circulated petitions, gave speeches, and ran ads in the newspaper. He did not do any fund raising. The measure failed, and Judge Staples had a disciplinary action filed against him for his

troubles. The commission alleged he engaged in political activity not designed to better the administration of justice. The Washington supreme court disagreed:

> [J]udges have specifically been allowed to enter political activity designed for the better administration of justice. This provision exists because 'of the important and sometimes essential role of judges in legal reform.' If judges would have to remain silent, with their necessary expertise in matters of improving the law, then beneficial legal reform would be seriously impaired. Furthermore, a judge does not lose his rights as a citizen by assuming the bench.

The supreme court concluded that the interpretation of the rule as argued by the commission who brought the complaint would "have a chilling effect on the ability of those individuals who have the best knowledge of the judicial system from freely participating in its improvement."

In Louisiana, Canon 7 of the Code of Judicial Conduct covers what is and is not allowed for judges and candidates for judicial offices. Section F specifically allows for political activity to "improve the law, the legal system, or the administration of justice." You may also refer to the Supreme Court Committee on Judicial Ethics Advisory Opinions if you have a question about what may or may not be allowed, and judges can ask for an advisory opinion.

- **I will use technology, including social media, responsibly. My words and actions, no matter how conveyed, should reflect the professionalism expected of me as a lawyer.**

Arkansas Dep't of Ed. v. Jackson, 2023 Ark. 105.

Social media is a minefield that you wade into at your own risk. While it can be a useful tool, it is also very easy to take statements and relationships out of context. It's not private, no matter what your settings are. You do not stop being a lawyer when you log in.

But this case involves a different kind of use of social media. The underlying facts: the Arkansas Department of Education began implementing a newly enacted statute. A suit was filed to enjoin the implementation, specifically a portion of the law that declared certain emergency situations. This is a hotly

contested issue with an abbreviated briefing schedule. I want to draw your attention to one passage in a concurring opinion:

> Specifically, it was wholly inappropriate for the appellees' attorney to engage in partisan rancor by including in her brief to this court a tweet from a highly partisan blog discussing members of this court in relation to the case pending before us.

I found the brief, and the discussion is about whether the entire Arkansas budget will be impacted by the litigation at issue, and perhaps the justices will not get paid depending on how they rule. The concurring judge cautioned the attorneys in this case on both sides about their "tone and tenor" both publicly and before the court.

Social media is a minefield. Be wary in its use.

- **I will seek opportunities to be of service to the bench and bar and assist those who cannot afford legal help.**

Thank you all for your public service as judges or attorneys working for the court. You are of service to the bench every day. As judges and lawyers employed by the court, we are prohibited from practicing law. You can find other ways to be of assistance to people. Be generous when with your time, your non-lawyering talents, and your treasure.

- **I will be supportive of new members in the profession.**

Be patient and supportive of new lawyers. Remember your own experience as a new lawyer, and those who made you feel welcome and guided you through your early career.

- **I will stay informed about changes in the law, communication, and technology which affect the practice of law.**

United States District Court for the Northern District of Texas

We have been living with AI in some form or fashion for a while now. In law school, the newest tool on Westlaw was a natural language search instead of

a Boolean search. Now, when you search on Westlaw, the default setting is to list the results based on relevance, and the algorithm may or may not align with what is relevant to you. In your everyday life, your computer knows when you have been shopping for shoes or reading reviews about a new type of cat food, and tailors your ads on all the websites you visit to remind you to buy cat food. We are overrun with algorithms.

Generative AI is new. You should be aware that it exists, for the reasons cited by U.S. District Judge Brantley Starr of the Northern District of Texas, who now requires attorneys to certify that any document they sign will not use AI to prepare briefs, or if they do, the briefs will be checked for accuracy by a human being.

> *Mandatory Certification Regarding Generative Artificial Intelligence*
>
> All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being. These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them. Here's why. **These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath.** As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that

> they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing.

If you are familiar with scotusblog.com, you may have heard that they asked ChatGPT for three notable opinions by Justice RBG. ChatGPT cited her dissent in Obergefell. She very much did not dissent in Obergefell.

Keep in mind that images can also be manipulated and created by AI, which could impact how we in the courts ensure that pictures entered into evidence are authenticated. I also think we might be more likely to run into use of AI with pro se litigants. At any rate, our job is to scrutinize any sources of law we rely on to reach decisions, especially those we cite in opinions. As they say in Russian, "doveryay, no proveryay." Trust but verify.

The Code of Professionalism in the Courts

General Administrative Rules, Supreme Court of Louisiana, Part G, § 11.
District Court Rule 6.3

There is a great deal of overlap in the Code of Professionalism and this Code of Professionalism in the Courts.

This Code is separated into two categories: the Judges' Duties to the Court and the Lawyers' Duties to the Court. I suggest you review these periodically, as a sort of examination of conscience to make sure you are meeting the high standards expected of all of us. Some of them are self-explanatory, but I will cover a few of these tenets that are discussed in more interesting cases.

PREAMBLE

The following standards are designed to encourage us, the judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of professionalism and civility, both of which are hallmarks of a learned profession dedicated to public service.

These standards shall not be used as a basis for litigation or sanctions or penalties. Nothing in these standards alters or detracts from existing disciplinary codes or alters the existing standards of conduct against which judicial or lawyer negligence may be determined.

However, these standards should be reviewed and followed by all judges of the State of Louisiana. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards.

- **We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and authority to insure that all litigation proceedings are conducted in a civil manner.**

In the Interest of L.A.V. and S.H.V., 2022 WL 969576 (Tx. App. 2022).

LAV is a termination case against a child's mother and father, and on appeal, the father claimed the court was biased against him. The father objected to three comments by the trial court that he claimed collectively showed the trial court's bias. First, in a colloquy in response to an objection of non-responsiveness during cross-examination of the child's caretaker, the judge told the child's caregiver to trust her lawyer "will do her job when it gets around to her re-questioning you."

> Trial courts are encouraged to exercise reasonable control over the mode of examining witnesses and presenting evidence so as to avoid wasting time and to protect witnesses from harassment or undue embarrassment.

Second, during the mother's testimony, the trial court noted that she was changing her testimony in response to the father's expression. The court explained that the comment did not show bias.

> [The judge's] opinion about Mother's motivation for asking the question was based on what she heard and saw during the trial, which was not improper and does not show bias.

Third, the father gave a soliloquy that was kind of responsive to the question asked, and the trial court stated: "It's a lot of words that – I don't know if he's saying much. It's a lot of words." But the court allowed the testimony and ruled it was responsive to the question.

> At worst, the comment illustrated the judge's impatience, annoyance or dissatisfaction. Liteky v. U.S., 510 U.S. 540, 555-556 [](1994)("Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display").

The bottom line is that the judge has some leeway to control the proceedings.

- **We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.**

- **We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.**

- **We will be considerate of time schedules of lawyers, parties, and witnesses in scheduling all hearings, meetings and conferences.**

- **We will make all reasonable efforts to decide promptly all matters presented to us for decision.**

- **We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.**

- **While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.**

- **We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.**

- **We will not impugn the integrity or professionalism of any lawyer on the basis of clients whom or the causes which a lawyer represents.**

- **We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.**

- **We will not adopt procedures that needlessly increase litigation expense.**

- **We will bring to lawyers' attention uncivil conduct which we observe.**

Florida Code for Resolving Professionalism Complaints

Originally adopted in 2013, the Florida Supreme Court created professionalism panels in each of the state's local judicial circuits that are designed to offer peer-to-peer mentoring when a complaint is made about "minor or isolated instances of unprofessional conduct." Local chief judges appoint local members of the bar to provide guidance to those whose conduct is deemed unprofessional. The Florida Supreme Court in July 2023 revised the rules and re-endorsed the panels, and also made clear that professionalism rules apply to on-line communication and remote audio or video interactions with others.

- **We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.**

- **We will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge in all written and oral communications.**

- **We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.**

In re Davis, 991 N.W.2d 212 (Mich. 2023)

Judge Davis was not a model of professionalism or ethics. Here are the charges that the Michigan Supreme Court found were proven:

1. Abused her contempt powers on two occasions.
2. Summarily dismissed cases because she decided the process server used was dishonest.
3. Intentionally disconnected the recorder in her courtroom.
4. Recorded proceedings on her personal cell phone.
5. Parked in a handicap zone at a gym and left a placard in her window indicating she was there on official police business.
6. Lied to the judicial commission.
7. Obstructed court administration.

She was also accused of publishing her illicit recordings on facebook live, which was not proven. I want to talk about this last charge, which was Count 3 in the opinion. This is the only count that is discussed by the court in its analysis.

Apparently, Judge Davis did not show up to work regularly, so her chief judge required that she send him an e-mail everyday when she arrived at the office. She complied by sending the Chief Judge, other judges, and other staff members in the courthouse certain Bible passages. She argued that disciplining her for sending Bible passages violated her first amendment rights.

> Psalm 140:7-10
> Sovereign Lord, my strong deliverer, you shield my head in the day of battle. Do not grant the wicked their desires, Lord; do not let their plans succeed. Those who surround me proudly rear their heads; may the mischief of their lips engulf them. May burning coals fall on them; may they be thrown into fire, into miry pits, never to rise.
>
> Revelation 21:8
> But the cowardly, the unbelieving, the vile, the murderers, the sexually immoral, those who practice magic arts, the idolaters and all liars – they will be consigned to the fiery lake of burning sulfur. This is the second death.

After a few of these messages, the court administrator had a meeting with Judge Davis and asked her to stop sending these messages. She later responded in an email that stated, in part:

> You brood of vipers, how can you who are evil say anything good?

Which is a paraphrase of Matthew 12:34.

The court did not buy her first amendment argument.

> The Bible verses quoted by respondent were, in the context of respondent's e-mails, clearly intended to be insulting, discourteous, disrespectful, and menacing toward the recipients. The e-mails also reflect a failure to demonstrate the professionalism demanded of judges.
>
> . . .
> Respondent's refusal to simply convey that she had arrived at work as required by the Chief Judge's order amounted to insubordination and clearly interfered with multiple working relationships.

Judge Davis left the bench on January 1, 2023, and this opinion sanctioning her was handed down in June 2023. So, they barred her from holding judicial office for 6 years.

LAWYERS' DUTIES TO THE COURTS

- **We will speak and write civilly and respectfully in all communications with the court.**

- **We will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, we will notify the court and counsel, if possible.**

- **We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.**

In re Klein, 23-66 (La. 5/18/23), 2023 WL 3513886.

First, I'll note that there is an analog to this in the judges' duties – be mindful of the exigencies imposed on lawyers in a litigation practice.

In Mr. Klein's disciplinary action, Justice Crichton, in a concurrence/dissent, took Klein to task for filing fourteen different documents in the proceeding, and most of them addressed not the disciplinary action but the underlying litigation. He specifically cited this rule. I will say that in my experience, the likelihood of unprofessional language in briefs rises with each additional brief filed in a case. The need to have the last word sometimes results in words that should not be used.

The majority opinion also cited another Justice Crichton concurrence with approval in this case,

"It is unfortunate that respondent does not seem to understand that being a zealous advocate does not equate to such repugnant disrespect for the system we are charged to honor and serve." In re: McCool, 15-0284 (La. 6/30/15), 172 So. 3d 1058, 1090 (Crichton, J. concurring).

- **We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.**

Tennessee v. Driver, 2022 WL 1284978, (Tenn.Crim.App. 2022)

The defendant was charged with aggravated rape. On appeal, he argued that the prosecutor committed misconduct when it called him a liar during closing arguments. There was no contemporaneous objection, so the issue was not preserved. But the court did admonish the prosecutor, call his commenting on the truth or falsity of any testimony or evidence or the guilt of defendant unprofessional.

Lastly, at the end of the opinion, the court noted that both the defense attorney and the prosecutor used profanity during their closing arguments. The court did not approve:

> In our view, the use of profanity to advocate a position is wholly unnecessary, uncivil, discourteous, and disrespectful to the jurors. This type of language is superfluous and its likely purpose is an attempt to inflame the jury.

- **We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities in any oral or written communication to the court.**

Fox v. L.A.M., 632 So.2d 877 (La.App. 2 Cir. 2/23/94).

This lawyer sued his client for his fees for representation in a divorce case. But the lawyer began a romantic relationship while he was representing her, and the trial court found the lawyer agreed to remit any fees due. On appeal Fox made three shady arguments. Mr. Fox alleged he had a letter that showed LAM owed him money, but Fox signed the letter for LAM. He alleged the trial court altered the transcript of the trial, but the second circuit allowed him to compare the audio recording to the transcript and he could find no discrepancies. And he argued that the trial judge knew about a disciplinary complaint and her consideration of the complaint made her biased. But the judge consistently refused to allow either party to reference the complaint.

- **We will not engage in ex parte communication on any pending action. We will attempt to verify the availability of necessary participants and witnesses before dates for hearings or trials are set, or if that is not feasible, immediately after such date has been set, so we can promptly notify the court of any likely problems.**

- **We will act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they too, are an integral part of the judicial system.**

Lawyer's Oath

I solemnly swear (or affirm) I will support the Constitution of the United States and the Constitution of the State of Louisiana;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with a client's business except from the client or with the client's knowledge and approval;

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged;

I will never reject from any consideration personal to myself the cause of the defenseless or oppressed or delay any person's cause for lucre or malice.

So help me God.