Special Litwriture

"Ne Nuntium Necare"

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Special Litwriture **is a case digest of the latest orders and opinions from the U.S. Supreme Court, Louisiana Supreme Court, and the five Courts of Appeal in Louisiana.** ***Special Litwriture*** **will be published two times a year and its goal is to keep the OPD attorneys up-to-date on the law.**

RECENT CASE LAW

ADMISSIBILITY OF EVIDENCE AT TRIAL

LA Supreme Court

State v. James C. Magee (La. 9/28/12): This first degree murder opinion had several holdings. In one section, the court held that the state could not introduce the portion of a letter from the decedent to the defendant that recounted a history of physical abuse, but permitted the state to introduce the portion of the letter that indicated the decedent's desire to not be involved with the defendant further. The Court also held that the decedent's statement shortly before her death that she was scared of the defendant was admissible.

Fourth Circuit

State v. Cyrus, 2011-KA-1175 (La. App. 4 Cir. 7/5/12): A photo identification was determined admissible in which an arguably suggestive photo line-up was used, because the defendant did not meet his burden of showing that it was prejudicial. An out of court statement by an unidentified witness corroborating the above identification was upheld as not hearsay as explaining the course of police identification and steps leading to the defendant's arrest. Additionally, even presuming that it was hearsay and a Confrontation Clause violation, there was no reasonable probability that it contributed to the verdict, thus rendering any perceived error harmless beyond a reasonable doubt.

State v. Duncan, 2011-KA-0563 (La. App. 4 Cir. 5/2/12): The court affirmed a conviction based on impeachment evidence admitted under La. C.E. art. 607(D), noting that it would also have been admissible under La. C.E. art. 801(D)(1)(a)–(c). Additionally, the court held that the one-year period during which the State must commence prosecution after a new trial has been granted under La. C.Cr.P. art. 582 is suspended until certain pre-trial evidentiary motions have become final.

Second Circuit

State v. Carper, 47,409 (La.App. 2 Cir. 11/14/12): It is OK to introduce videos of child victims that include some leading questions as long as defense has opportunity to cross-examine at trial. No mistrial necessary when juror mentioned in front of venire that he had been a juror on the previous trial.

Third Circuit

State v. Fogleman, 12-16 (La.App. 3 Cir. 10/03/12): Co-defendant's affidavit claiming responsibility not admissible as statement against interest hearsay exception because co-defendant had already plead guilty and therefore was not subject to liability.

State v. Sinegal, 2011-1217 (La. App. 3 Cir. 8/1/12): It was error for the judge to deny testimony of defense character and alibi witnesses when the defense did not provide a witness list to the state. Defense does not have to give identity of witnesses to state.

BATSON

Second Circuit

State v. Grant, 47,365 (La.App. 2 Cir. 09/20/12): Body language indicating a favor to one side over the other is sufficient race-neutral reason to overcome a Batson challenge.

BOND

Fourth Circuit

State v. Thomas, 2012-K-0586 (La. App. 4 Cir. 4/20/12): The trial court had set aside a bond forfeiture, increased the defendant's bond to $3,000, and gave the defendant credit for $2,500 previously posted. Per La. C.Cr.P. art. 342, the court cannot "give credit" for an old bond or have multiple bonds in effect at one time.

State v. Jermaine Martin, 2012-K-473 (La. App. 4 Cir. 4/2/2012): When a trial court modifies bail, Article 342 requires that the previous bail be extinguished. The trial court cannot give "credit" for a prior surety bond.

CONFRONTATION CLAUSE

LA Supreme Court

State v. Kevin Bolden (La. 10/26/12): State's DNA expert testified about DNA profiles developed by other technicians who did testify at trial. Court found that the DNA profiles developed by the other technicians were admissible and was not an error under Confrontation Clause based on Williams v. Illinois, 132 S.Ct. 2221 (2012).

MULTIPLE BILL

LA Supreme Court
State v Lewis, 12-KK-1835 (La. 11/30/2012): The state can multiple bill defendants convicted of a marijuana multiple.

Fourth Circuit
State v. Butler, 2012-K-0208 (La. App. 4 Cir. 4/23/12): The trial court held that a second multiple offender bill after the defendant had already been found not to be a multiple offender was precluded on double jeopardy grounds. In a direct application of its holding in State v. Picot, 724 So. 2d 236 (La. App. 4 Cir. 11/10/98), the court held that the principle of double jeopardy does not apply to multiple offender proceedings because they are "merely sentencing enhancements."

State v. Chapman, 2012-K-0207 (La. App. 4 Cir. 4/25/12): The defendant entered a guilty plea with certain conditions, including testimony. The plea agreement noted that failure to testify would result in the forfeiture of the plea bargain. However, the plea agreement did not mention the possibility of a filing of a multiple bill. The court found that the plea would not be considered knowing and voluntary if the state were to file such bill, which it had not yet done, and reversed to allow the defendant to withdraw her guilty plea.

Second Circuit
State v. Robinson, 47,427 (La.App. 2 Cir. 10/03/12): Where more than 10 years have elapsed since previous conviction used in multiple bill proceeding, state must prove discharge date beyond a reasonable doubt.

COMPETENCY

Third Circuit
State v. Rains, 12-615 (La.App. 3 Cir. 11/07/12): Defense must file motion alleging reasons why re-appointment of a sanity commission is needed prior to trial, specifically stating that the defendant's mental status has deteriorated, in order to have the right to a sanity commission. If a defendant testifies at the grand jury, that testimony is admissible against the defendant at trial.

PRIEUR

Fourth Circuit
State v. Barnes, 2012-K-0630 (La. App. 4 Cir. 6/4/12): Court held that evidence of both prior and subsequent crimes is admissible under La. C.E. art. 404(b) to prove intent. In addition, the court held that other crimes evidence introduced to prove intent may be admitted in a possession with intent to distribute case even if the defendant states that he will not contest intent.

State v. Jemdry Guity, 2011-KA-0907 (La. App. 4 Cir. 7/11/12): Held that the state need not prove Prieur evidence by a preponderance of the evidence as long as there is "sufficient evidence to support a finding by the jury that defendant committed the similar act." The court did not elaborate on that standard, but analogized to federal law.

Second Circuit
State v. Howard, 47,495 (La. App. 2 Cir. 11/14/12): In a battery case against his girlfriend, former complaint of domestic violence was admissible as Prieur to show defendant's deviant attitude toward women he's dating. Maximum consecutive sentences for simple battery and second-degree battery for first felony offender were not excessive given defendant's significant history of misdemeanor arrests.

Fifth Circuit
State v. Trim, 12-115 (La.App. 5 Cir. 10/16/12): (defense appeal): State's evidence that defendant was suspect in previous murder was not inadmissible as Prieur evidence because the intent was not to show that the defendant actually committed previous murder. Late disclosure of discovery evidence about defendant's status as suspect was cured by continuance and the fact that defendant was already aware of his status as suspect.

PROBABLE CAUSE

Fourth Circuit
State v. Robert Jenkins, 2012-K-1100 (La. App. 4 Cir. 8/21/12): Magistrates cannot find no probable cause after a defendant is arrested on a judicial warrant. Those defendants are not entitled to a *Gerstein* hearing.

SEARCH AND SEIZURE

LA Supreme Court
State v. Cure, 11-K-2238 (La. 7/2/2012): Defendant was a passenger in a car in a high crime area. Officers had reasonable suspicion to stop the car. The Court held that officers could open the car door because they had authority to order the occupant out of the car.

State v. Fredrick Washington (La. 11/16/12): Court finds that police can legally enter a house with an

open door after announcing presence to extinguish candles, and that seizing contraband viewed during extinguishing candles is not an unreasonable search and seizure.

State v Milton, 2012-KK-2537 (La. 12/14/2012): During a traffic stop, a police officer noticed a crumpled, brown paper bag near defendant. Officer asked for bag from defendant, defendant complied, and the officer found crack cocaine and paraphernalia. Appellate court threw out the evidence on the basis that the evidence gathered, though "asked for," was essentially a command during a traffic stop since the defendant could not leave. The Supreme Court reversed, finding that the asking and voluntary production of the evidence was a request for consent to search that was granted by the defendant (so long as the driver knew that they had the ability to refuse the search).

Fourth Circuit

State v. Marcel Hayes, 2011-KA-1080 (La. App. 4 Cir. 8/15/12): Motion to suppress was properly denied when officers leaned into the back seat of a car after a traffic stop. Although they were not looking for evidence related to the traffic stop, the windows and door were open and the gun in the back seat was in a plain view, so leaning in the car did not require probable cause.

State v. Lanoir, 2012-K-0574 (La. App. 4 Cir. 4/30/12): Grant of suppression was reversed. Officers observed defendants meet in a parking lot known for trafficking and drive to a different location in separate cars. Two defendants exited their cars. One gave the other, who looked nervous, some currency in exchange for an object wrapped in newspaper. Both got back in their cars. Each car was then stopped. The buyer was arrested and placed in the back of a police car. An officer got into the car and drove it off the highway for safety reasons, during which time he smelled marijuana. The officer searched the car and found a big bag of marijuana. The seller was stopped and arrested. His car was promptly searched, wherein the officer found marijuana and cash.

State v. Dowdell, 2011-KA-1221 (La. App. 4 Cir. 08/22/2012): An officer, who had an arrest warrant, pursued a defendant into an abandoned house. The defendant's motion to suppress the evidence found in this house was denied. The motion was properly denied because a defendant retreating into the residence of a third party without that party's permission has no reasonable expectation of privacy in that house.

State v. Lampton, 2011-KA-0775 (La. App. 4 Cir. 7/11/12): Reversed CDC ruling after a *Crosby* plea. Because the State failed to produce evidence that non-residents may not walk through a housing project without trespassing. The arrest for trespass was therefore illegal, and the subsequently discovered evidence should have been suppressed.

SENTENCING

Fourth Circuit

State v. Netter, 2011-KA-0908 (La. App. 4 Cir. 6/6/12): The court held the following sentence not excessive: five years at hard labor, suspended, for one count of first degree injuring public records and two and one-half years for each of five counts of attempted first degree injuring public records placing the defendant on five years active probation. Additionally, the court vacated and remanded the sentence for failure to specify which counts the probation applied to and for failing specifically to suspend each of the sentences.

Second Circuit

State v. Wortham, 47,431 (La.App. 2 Cir. 11/14/12): Court was mandated to impose probation revocation consecutively when it happened immediately after guilty plea and sentencing on new offense, even when revocation occurred as part of the same hearing as guilty plea.

Third Circuit

State v. Iburg, 12-401 (La.App. 3 Cir. 11/07/12): Okay for trial court to deny defendant's withdrawal of Alford plea, even though defense counsel told him that in accordance with the plea, the state would recommend the sentence run concurrently with a sentence in Utah, the state made no such recommendation, and the sentence was imposed consecutively.

Fifth Circuit

State v. Thibodeaux, 12-300 (La. App. 3 Cir. 10/24/12): Defendant was a lifer who was sentenced to 50 years; judge did not give reasons for departing below the minimum life sentence. Judge could depart, but had to give reasons to justify doing so showing why the defendant is exceptional.

State v. Bruce, 11-991 (La.App. 5 Cir. 10/30/12): Life sentence for quad charged with aggravated arson was unconstitutionally excessive, because fire had been put out quickly without injury to human life, and defendant's priors were all non-violent and spread out in time.

SEX OFFENDER REGISTRATION

Fourth Circuit

State v Jones, 2011-KA-1141 (La. App. 4 Cir. 09/05/2012): Defendant was charged with failure to register as a sex offender. Detective informing defendant that changing locations would require additional fees and re-registration is not entrapment, as it is not seen as coercing the defendant to not re-register.

SUFFICIENCY OF EVIDENCE

LA Supreme Court

State v. Jerome Bryant (La. 10/16/12): For purposes of a burglary, entry occurs when any part of the body passes the threshold of a structure. Testimony that the defendant kicked in a door was sufficient for a jury to find that he entered the structure.

State v. Satonia Small (La. 10/16/12): Defendant was charged with second degree murder after leaving her child home alone overnight when a fire developed and the child died. Defendant's criminally negligent act of leaving her young children alone in the middle of the night was not a "direct act" of killing, but was instead a criminally negligent act of lack of supervision which resulted in her child's death. For second degree murder and felony murder, there needs to be some sort of agency in the death. Mere lack of supervision is not sufficient for second degree murder.

State v. Trahan, 11-K-1609 (La. 7/2/2012): Defendant shot her boyfriend/husband. Defendant also told police that she accidentally shot decedent after a fight. A rational trier of fact could find that the deliberate shooting of someone at close range supports a finding of specific intent to kill.

Fourth Circuit

State v. Interest of S.P, 2011-CA-1598 (La. App. 4 Cir. 05/02/12): Reverses the delinquency adjudication based on the offense of simple burglary. While smashing a window constitutes evidence of the intent to damage the vehicle, it does not necessarily constitute evidence of an intent to enter the vehicle as would be required to find defendant guilty of attempted simple burglary.

State v Frost, 2011-KA-1658 (La. App. 4 Cir. 09/05/2012): Contractor failed to perform contracted actions for client and failed to then repay client money that was deposited for work. Intent to permanently deprive theft victim of property does not need to occur contemporaneously with or coincidental to the initial taking of the property. Intent may be formed after taking possession of the property.

State v. Walter Jackson, 2011-KA-1280 (La. App. 4 Cir. 8/22/12): One count of felony carnal knowledge of a juvenile reversed for insufficient evidence where the state failed to introduce specific evidence meeting elements of the crime as to the date alleged in the bill of information. Other counts affirmed.

State in the Interest of A.D., 2011-CA-1802 (La. App. 4 Cir. 6/6/12): Court held that there was sufficient evidence for the Juvenile Court judge to adjudicate the defendant delinquent for armed robbery. The victim had told an investigating officer that the gun used in the robbery appeared to be plastic, which the court found still established that this was a highly charged encounter in which the victim had a fear of serious bodily harm. Additionally, the court vacated and remanded for a new disposition hearing and resentencing due to the Juvenile Court judge's mistaken assertion to the defendant after sentencing that there was a possibility of early release.

State in the Interest of J.W., 2012-CA-0048 (La. App. 4 Cir. 6/6/12): The court held that there was sufficient evidence for the Juvenile Court to adjudicate the defendant delinquent for possession of stolen property. Properly admitted evidence that the defendant had discarded a backpack upon seeing that he was being followed by a police officer and subsequent flight when asked to stop together were held to establish beyond a reasonable doubt that the defendant knew or should have known the backpack was stolen.

State in the Interest of J.W., 2012-CA-0049 (La. App. 4 Cir. 6/6/12): A juvenile could not be adjudicated delinquent for possession of stolen property when the only evidence presented was: (1) circumstantial evidence showing that the juvenile knew or should have known that he possessed other stolen property and (2) that someone he was with knew or should have known that the property at issue was stolen.

State v. Wilson, 2011-KA-1166 (La. App. 4 Cir. 6/13/12): The court found evidence that copper wiring was being cut, evidence that a chain had been cut with a bolt-cutter leading to the school with the wiring cut, and evidence that the defendant was found in the room with the cut wiring was sufficient to prove burglary.

State v. McDavis, 2011-KA-0888 (La. App. 4 Cir. 4/18/12): Officers discovered firearms in plain view in the glove box and on the floor on the back seat during a routine traffic stop of a rental car. The rental car agency offered evidence that such weapons would have been found if left. The court found this evidence sufficient for a jury to find, at a minimum, constructive possession in a felon in possession charge.
A police officer testified that he had previously met the defendant in a law enforcement capacity. Because the officer's reference to a prior crime was ambiguous, the trial court's decision not to provide admonishment for the comment was not prejudicial.

State v. Davis, 2011-KA-1090 (La. App. 4 Cir. 5/16/12): An officer observed the defendant approached by a woman, following which the two engaged in "an obvious exchange." Officers approached, at which point the woman threw an

object on the ground, which later tested positive for crack cocaine. The defendant fled when the police arrived despite being told to stop. When he was apprehended moments later, $16 was found on his person. The court found sufficient evidence that the defendant had transferred possession or control of crack cocaine to an intended recipient.

Fifth Circuit
State v. Terry, 47,425 (La. App. 2 Cir. 11/21/12): Evidence was sufficient to support charge of molestation of a juvenile when adult CW testified that defendant gave her, before kindergarten age (year unspecified), an excessively passionate kiss, and may have possibly touched her vagina.

SUPPRESSION OF STATEMENTS/CONFESSIONS

Fourth Circuit

State v. Taiwan Branch, 2012-K-1436 (La. App. 4 Cir. 10/26/12): Court held that it was an abuse of discretion to suppress a statement as a *Miranda* violation under the circumstances of this case. The arresting officer testified that *Miranda* warnings were given and that defendant acknowledged such warnings. The officer could not, however, recall how the defendant acknowledged his *Miranda* rights.

TRIAL PROCEDURE

LA Supreme Court
State v. Darryl E Patterson (La. 7/2/12): The prosecution cross-examination of Defendant violated Doyle v. Ohio by focusing on post-arrest as well as pre-arrest failure to tell police of exculpatory information that the defendant told to the jury during trial. Allowing impeachment using post-arrest silence was not shown to be harmless beyond a reasonable doubt, and requires reversal of conviction.

State v. Harris, 2011-KA-0715 (La. App. 4 Cir. 4/25/12): The court held that a defendant's being advised "clearly and unequivocally that he [has] a right to be tried by jury" is sufficient to find a of a jury trial waiver knowing and voluntary.

Fourth Circuit
State v. Patterson, 2011-KA-0648 (La. App. 4 Cir. 08/24/2012): During trial, the court denied the defense's motion to backstrike a juror. A defendant has a statutory right to employ a backstrike, but the erroneous denial of that right is subject to the harmless error analysis. The district court erred in precluding the backstrike because the defendant was able to show he was prejudiced by this decision.

State v. Larry Legania, 2011-K-1618 (La. App. 4 Cir. (04/25/12): Court remands case to trial court for hearing on defendant's alibi witness claim, which wasn't addressed in earlier trial court proceedings. On remand trial court instructed to consider defendant's claim that trial counsel's failure to call a witness constituted ineffective assistance of counsel.

State v. Williams, 2011-KA-0954 (La. App. 4 Cir. 4/18/12): During opening statements, the prosecutor stated, "You are not going to hear from JuC. JuC was murdered within the last six months." The defendant was on trial for second degree murder, and there was evidence introduced at trial that the victim and JuC may have had an intimate relationship. Evidence was also introduced that JuC was married to the defendant. The court held that it was not a violation of La. C.Cr.P. art. 770 because the prosecutor's statement was not an unambiguous reference to another crime. The court went on to state that even if it were an error, it was harmless because the defendant failed to show that JuC's murder inflamed the jury and contributed to the verdict.

State v. Lanoir, 2012-K-0574 (La. App. 4 Cir. 4/30/12): The court found no abuse of discretion in the exclusion of evidence that a testifying police officer witness had been untruthful in failing to report as required use of force in an arrest—the complaint against the officer for the incident, however, was "non-sustained."
There was evidence in the case that the defendant had gold teeth. Several of the State's witnesses had no recollection of the assailant having gold teeth. In closing, the prosecutor stated that the defendant "does have a defined lower lip, [sic] we haven't had the opportunity to hear him speak." The court held that because of the legitimate purpose for which the statement was offered, it was not an abuse of discretion to deny a motion for mistrial for improper reference to the defendant's decision not to testify in his own defense.

First Circuit
State v. Mattire, 2011 2390 (La.App. 1 Cir. 09/21/12): Trial judge properly denied challenge for cause for two jurors who were friends of the judge, including a first cousin of the judge. Judge is neutral party and therefore rules regarding relations to parties on one side of the case do not apply.

MISICELLANEOUS

Louisiana Supreme Court

State v. Dale Dyer (La. 10/26/12): Surveillance tapes viewed by an investigation officer but not collected because the officer did not believe that they would assist in the follow-up investigation of the case does not warrant a special jury instruction

that evidence under state control and not produced was not produced because it would not have aided the state. State is not required to collect all evidence of conceivable significance, and opportunity to have evidence under state control is not the same as having the evidence under state control.

State v Baumberger, 12-KK-2053 (La. 12/14/2012): State does not need to disclose social security number of a defendant's deceased wife (his murder victim). Defendant failed to show that the duty to disclose information in discovery supersedes federal law to maintain confidentiality of social security numbers.

Fourth Circuit

State v. Micah Short, 2012-K-0882 (La. App. 4 Cir. 6/14/12): Trial court erred in granting respondent's discovery request for records contained in police investigatory file prior to the institution of prosecution; production is not required until the defendant has been indicted or charged by bill of information.

State v. Jermaine Martin, 2012-K-1271 (La. App. 4 Cir. 8/24/12): Severance of counts of PWIT Marijuana and 95.1 reversed as an abuse of discretion because despite prejudice, the facts were straightforward and unlikely to confuse jury, and evidence was all found in the same location at the same time.

State in the Interest of G.E., 2011-CA-1558 (La. App. 4 Cir. 5/16/12): The court confirmed that it is not a double jeopardy violation to charge both distribution and possession with intent to distribute when it is established both that the defendant actually sold the drug and possesses other drugs he intends to distribute. Additionally, the court held that there was sufficient evidence to adjudicate the defendant delinquent on the following evidence: an undercover officer bought marijuana and cocaine outside from a man outside a house; the man retreated into the house before delivering the drugs; the defendant was found inside the house near hidden crack cocaine; and the defendant had one of the bills used in the drug transaction.

Fifth Circuit

State v. Davis, 12-453 (La.App. 5 Cir. 11/27/12): When an omnibus motion is filed, it suspends the Art. 578 speedy trial time limitation period until the judge rules on the preliminary pleas made in the motion. Additionally, the state exercised due diligence in obtaining the presence of the defendant by having the court issue orders to various sheriffs' offices requesting the presence of the defendant at various court hearings.

State v. Grayson, 12-563 (La.App. 5 Cir. 12/18/12): Police sold car two weeks after Defense filed motion to preserve evidence. No bad faith because police never served with the order. Also, exculpatory nature of fingerprints on the car were not immediately apparent.