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*** **is published two times a year, and its goal is to keep the OPD attorneys up-to-date on the law.** ***Special Litwriture*** **is available on the WIKI, and there are links to the full opinions and orders cited below.**

RECENT CASE LAW

ADMISSIBILITY OF EVIDENCE AT TRIAL

Fourth Circuit

State v. Smith, 11-0664 (La. App. 4 Cir. 1/30/13): Statements made by a testifying officer regarding fingerprints "on file," and that a six person lineup had been compiled "based on defendant's previous arrest information" did not call for a mistrial, where the judge offered to admonish the jury. Prosecution's reference to "lawyering up" and to defendant's failure to come forward to the police after the incident were not violations of Miranda because they both occurred *before* the defendant arrived at the police station and was placed under arrest and Mirandized; therefore he had not relied on a promise that his silence or presence of a lawyer would be used against him.

State v. Jimmie Warner, 12-0085 (La. App. 4 Cir. 5/1/2013): A witness in this case refused to testify at trial. The witness claimed she had been threatened but did not say who threatened her. The Fourth Circuit ruled that the trial court did not abuse its discretion when it found that the forfeiture by wrongdoing hearsay exception applied even though the witness did not say who threatened her. The Court also held that the door to impeachment evidence of character or reputation is opened when a defense witness testifies about the type of work the defendant is engaged in, specifically caring for the mentally impaired.

State v. Williams, 12-0252 (La. App. 4 Cir. 4/17/2013): In a case of aggravated rape of a child, testimony of the examining doctor was admissible for the purpose of medical treatment and medical diagnosis in connection with treatment because he referred victim for treatment in the form of counseling for psychological injuries. A mandatory mistrial was properly denied where statements made by the victim's mother that the defendant had not returned borrowed VCR tapes was not the introduction of another crime or bad act because she did not accuse the defendant of being a thief, and given the context it was not an unmistakable reference to another crime or bad act.

First Circuit

State v. Lewis, 12-1616 (La. App. 1 Cir 5/2/2013): Introduction of sex offender registration card with words "forcible rape" on it from which CW identified defendant was abuse of discretion. The defendant's past and present sex offenses were twenty-five years apart. While the mere passage of time between offenses will not necessarily defeat admissibility, there must be some connexity between the crime charged and the prior crime.

CONFRONTATION CLAUSE

LA Supreme Court

State v. Magee, 12-1025 (La. 5/22/2013): The Court held that a defendant waives a Confrontation Clause violation when he calls the declarant in the defense case after the state introduced the declarant's statement in its case-in-chief.

Fourth Circuit

State v. Grimes, 11-0984 (La. App. 4 Cir. 2/20/13): This case involved five DNA profiles, three collected in a national database, CODIS, and the other two submitted after a suspect had been identified from the first three. The defendant was convicted using this DNA evidence for three counts of aggravated rape, two counts of aggravated kidnapping, and two counts of sexual battery involving two victims. The court ruled that defendant was not denied his constitutional rights to confront the analyst who actually performed the DNA tests because 1) the five reports were generated by a computer, not by a person; and 2) the "certifying" analyst on the five DNA profile reports under the NOPD item numbers did testify at trial.

Second Circuit

State v. Vallo, 47,995 (La. App. 2 Cir. 05/29/13): Where victim was unavailable because unwilling to answer questions, and where videotaped interview with victim was entered into evidence, the

defendant's right to confront the witnesses against him was violated.

DOUBLE JEOPARDY

U.S. Supreme Court

Evans v. Michigan, 11-1327 (02/02/13)

Question before the Court was whether retrial is barred when a trial court grants an acquittal because the prosecution had failed to prove an element of the offense that, in actuality, it did not have to prove. Short answer is yes; double jeopardy attaches.

Fourth Circuit

State v. Jones, 12-0565 (La. App. 4 Cir. 04/23/13)

Court reverses district court's granting of defendant's motion to quash bill of information based on double jeopardy. Defendant sought to quash aggravated flight charge on grounds that it constituted double jeopardy following his pleading to several traffic violations for the same incident. Court holds that traffic violations to which defendant pled are not listed in aggravated flight statute, the facts for the traffic violation are completely different from those necessary to prove flight charge, and thus there is no double jeopardy violation.

Third Circuit

State v. Davenport, 13-39 (La. App. 3 Cir. 07/03/13): Even though the trial court did not have a legal basis to enter a judgment of acquittal in a jury trial, double jeopardy applies after trial court entered mistrial due to the erroneous ruling – defendant should not be prejudiced by the trial court's favorable substantive ruling even though there was no legal basis.

PRIEUR

LA Supreme Court

State v. Travis Henderson, 12-2422 (La. 01/04/2013): The Court held that the fact of a defendant's prior conviction is admissible if the events surrounding the conviction are admissible as *Prieur* evidence.

Fourth Circuit

State v. Nicholson, 11-0883, consolidated with 11-0681 (La. App. 4 Cir. 12/5/12): Defendant claimed district court erred in admitting evidence of prior sexual attacks, arguing that attacks were dissimilar and occurred more than twenty years ago. The court held that the prior bad acts were sufficiently similar to the events at hand – the victims were kidnapped at night, raped in the same geographical area, and subject to sexually assaultive behavior – and thus admission of other crimes evidence was in accord with Article 412.2. With respect to the remoteness in time of the prior evidence, the court stated that a lapse in time goes to the weight of the evidence, rather than admissibility, and the jury weighed the evidence and found the victim's testimony credible.

SEARCH AND SEIZURE

U.S. Supreme Court

Bailey v. United States, 11-770 (02/19/13)

Holds that seizure of defendant a mile away from a residence that was the focus of a search warrant before the search was executed violates the categorical rule established in *Michigan v. Summers*, 452 U.S. 692 (1981). *Summers* and later cases allow officers to detain occupants found within or immediately outside a residence at the moment officers execute a search warrant. None of the reasons for *Summers* ruling – officer safety, facilitating the completion of the search and preventing flight – were present when an occupant leaves premises before search is executed.

Missouri v. McNeely, 11-1425 (04/17/3)

The natural metabolization of alcohol in the blood stream does not present a per se exigency that justifies an exception to the warrant requirement for nonconsensual blood testing in drunk driving cases. Exigency must be determined based on the totality of circumstances consistent with Fourth Amendment principles. In *Schmerber v. California*, 384 U.S. 757 (1966), natural dissipation of alcohol in the bloodstream supported a finding of exigency because other factors such as delay in getting defendant to the hospital for treatment and testing, due to officer having to first investigate the accident, was present.

Florida v. Harris, 11-817 (02/19/13)

Police have probable cause to search for drugs based on a police dog's "alert" when the dog has been trained or has a certification from a training agency attesting to his reliability in a controlled setting. The Court explicitly rejected a detailed checklist of proof of a dog's reliability that the Florida Supreme Court had articulated before a court could treat a dog's "alert" be the equivalent of probable cause to search. Rather than a checklist, the Court emphasized that probable cause is a fluid concept wherein if "all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband" then the "sniff is up to snuff."

Florida v. Jardines, 11-564 (3/26/13)

Police engaged in a Fourth Amendment search without probable cause when an officer used a trained police dog to investigate the home and its immediate surroundings (porch in this case). One's home and curtilage is a constitutionally protected area and the police cannot enter it without a warrant supported by probable cause or consent.

Maryland v. King, 12-207 (6/3/13)
Fourth Amendment does not prohibit collection and analysis of a DNA sample from persons arrested but not yet convicted of felony charges. Taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth.

LA Supreme Court
State v. Kevin Gray, 13-1326 (La. 06/28/13): Officers encountered the defendant in public and smelled marijuana emanating from his backpack. Under the plain smell doctrine, the officers could seize and search the backpack.

State v. Terrance Turner, 13-0180 (La. 03/01/2013): An officer stopped a defendant and handcuffed and detained him in an office for an hour while awaiting a K-9 unit to sniff the defendant's luggage. The Court found that the officer was diligent in requesting a K-9 and, therefore, the investigatory stop did not become a de facto arrest.

State v. Phillip Lampton, 12-1547 (La. 04/05/13): Officers saw an individual walking in the Iberville development, whom they recognized not to be a resident of the development. The defendant produced a Texas ID, and officers arrested him for trespassing because of the Texas ID. The court held that this stop and arrest were legal, and reversed the suppression of the fruits of a search incident to arrest. The court held that officers' testimony about "No Trespassing" signs in the development was sufficient to establish probable cause that the defendant was trespassing.

State v. Dearieus Duheart, 13-1105 (La. 06/14/13): The defendant was stopped in his car for violating a statute that the district court found to be unconstitutionally vague. The district court suppressed evidence found after the stop. The Supreme Court held that a suppression hearing is not the proper forum to challenge the constitutionality of the underlying statute. The Court reversed suppression because all statutes are presumptively valid unless they have previously been held unconstitutional.

Fourth Circuit
State v. Guillot, 12-0726 (La. App. 4 Cir. 04/17/13): Court rejects the defendant's claim that an anonymous tip combined with officer's observations were insufficient to justify an investigatory stop and search of his car as officer only observed talking and did not witness any illegal activity prior to initiating the stop. The court held that although the detective failed to observe the defendant exchange drugs, the officer's training and experience and his corroboration of the tip – in combination with the fact a young child was left in the car that they believed contained illegal drugs – established the requisite reasonable suspicion needed to conduct an investigatory stop.

State v. Roland A. Thomas, 12-0852 (La. App. 4 Cir. 05/29/2013): Officers approached a group of males in front of a house in a high-crime area. The defendant walked away and reached toward his pockets. Officers had reasonable suspicion to stop him and conduct a pat-down.

Second Circuit
State v. Gates, 47,894 (La. App. 2 Cir. 05/15/13): Where an officer operating in another jurisdiction failed to ask for permission from an officer of that jurisdiction before making a traffic stop, that stop could not be reasonable and evidence found after the stop can be suppressed.

SENTENCING

U.S. Supreme Court
Alleyne v. United States, 11-9335 (06/17/13)
Explicitly overrules *Harris v. United States*, 536 U.S. 545 (2002) because it is inconsistent with the Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Court held that facts that increase the mandatory minimum sentences are elements and must be submitted to the jury and found beyond a reasonable doubt just as facts increasing statutory maximums, as in *Apprendi*, must be submitted to the jury and found beyond a reasonable doubt.

LA Supreme Court
State v. Giovanni Brown, 12-0872 (La. 05/07/13): The Court held that Graham v. Florida does not prevent trial courts from sentencing a juvenile defendant to consecutive term-of-year sentences that exceed his life expectancy.

State v. Bernard Noble, 12-1923 (La. 04/19/13): The Court reversed the trial judge's downward departure for a triple offender convicted of marijuana third offense. The trial court had downward departed to five years. The court held that downward departures must be "exceedingly rare," and the defendant's support for his children and convictions for simple possession did not qualify him as an exceedingly rare case.

Fourth Circuit
State v. McCarthy, 12-0342 (La. App. 4 Cir. 03/27/13): Defendant appeals restitution order – $25,000 for theft of copper pipes and wiring – as excessive. Court holds that defendant failed to preserve for review that issue of an excessive sentence given that his counsel did not file a motion to reconsider the sentence.

SEX OFFENDER REGISTRATION

LA Supreme Court

State v. Joe Bob Clark, 12-1296 (La. 05/07/13): The Court reversed a motion to quash a failure to register charge based on the trial judge's conclusion that the defendant's sex offender registration period had expired. The Court held that the trial court could consider this in a motion to quash when the state and defense stipulated to the relevant facts. In this case, the defendant was convicted in Texas for a crime that, at the time, would require a 10-year registration in Louisiana. The defendant moved to Louisiana after the 10-year period would have expired. The Court held that the 10-year period began when the defendant moved to Louisiana.

State v. Isaiah Overstreet, Jr., 12-1854 (La. 03/19/2013): The Supreme Court reversed the district court's ruling that laws requiring registration for NGRI sex offenders are unconstitutional. The Court reversed the ruling because the defendant did not plead the specific reason that the statute was unconstitutional and because the trial court ruled on a basis not offered by the defendant. The Court held that a trial court cannot find a statute unconstitutional on a ground not offered by the person seeking to have the statute held unconstitutional.

SUFFICIENCY OF EVIDENCE

Fourth Circuit
State v. Brown, 12-0853 (La. App. 4 Cir. 02/06/13): Court upholds burglary conviction, stating that one may be a principal to burglary without having personally entered the burglarized structure.

State v. Brown, 12-0710 (La. App. 4 Cir. 4/24/13): In a second degree cruelty to juvenile conviction, a lost tooth, a root canal, and instructions to use antibiotics and pain medicine upon discharge from the hospital is enough to show protracted and obvious injury.

State v. James Kenny Jr., 11-1819 (La. App. 4 Cir. 05/29/2013): The court reversed the defendant's vehicular homicide conviction. In a vehicular homicide case, the state must prove that the defendant's intoxication caused the decedent's death. In this case, no witness saw the defendant's car strike the victim – witnesses only saw the defendant's car dragging the victim. The court stated that the key inquiry was whether the defendant's intoxication prevented him from avoiding striking the victim. The court held that the state's evidence was not sufficient to determine causation.

SUPPRESSION OF STATEMENTS/CONFESSIONS

U.S. Supreme Court
Salinas v. Texas, 12-246 (07/13/13): A defendant who is not in custody and is talking voluntarily to police without having been advised of Miranda rights must assert his Fifth Amendment privilege during his conversation with the police if he does not want his silence to be used against him later in trial. In this case, defendant Salinas voluntarily spoke to the police. When asked whether casings found at a murder scene would match his gun, he did not answer and instead clenched his hands, looked down and shuffled his feet. State used Salinas' reaction to the officer's question about his gun during the interview as evidence of guilt. Since Salinas failed to explicitly say something to indicate that his silence was a claim of his Fifth Amendment right, the state could use his silence against him

Fourth Circuit
State v. John H. Spells, 12-1148 (La. App. 4 Cir. 05/29/2013): The defendant argued self-defense, and the state referenced the defendant's failure to contact 911 or police. The Court held that the state may refer to a defendant's pre-Miranda silence.

TRIAL PROCEDURE

LA Supreme Court
State v. Timothy Bazile, 12-2243 (La. 05/07/13): The Court upheld the federal constitutionality of the Louisiana constitutional provision providing that jury trial waivers are irrevocable. The Court also held that a defendant seeking a judge trial must elect a judge trial 45 days before the initial trial setting.

State v. Billy R. Lewis, 12-1021 (La. 03/19/13): The Court held that parties have the right to exercise back strikes before the entire panel is sworn. When the trial court erroneously denies a back strike, appellate courts should apply a harmless error rule. The burden is on the state to show that the error is not harmless, and the test is whether "the guilty verdict actually rendered in this trial was surely unattributable to the error." In finding reversible error, the court emphasized the importance of defense counsel's identification on the record of the juror it would backstrike.

Fourth Circuit
State v. Smith, 11-0664 (La. App. 4 Cir. 1/30/13): In order to preserve a backstrike error, a defendant who does not seek supervisory review "must, prior to the swearing in by the court of the full complement of jurors, identify the specific jurors whom he would have challenged but for the trial court's ruling."

First Circuit
State v. Mattire, 11-2390 (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.

JURISDICTION

LA Supreme Court
State v. Cecil Redditt, 13-0295 (La. 04/19/13): The state charged an Alabama defendant with racketeering for selling drugs in Alabama that had been transported through Louisiana by a criminal organization. The court held that Louisiana courts had jurisdiction over the Alabama defendant because the drugs had been transported through Louisiana, even though the defendant's acts occurred in Alabama.

MISCELLANEOUS

U.S. Supreme Court
Chaidez v. United States, 11-820 (2/20/13)
The Court ruled that its holding in *Padilla v. United States*, 559 U.S. __(2010), is not retroactive, meaning a person whose conviction became final before the Court decided *Padilla* cannot benefit from it. In *Padilla v. United States*, 559 U.S. __(2010), the Court held that the Sixth Amendment requires an attorney to provide advice to a criminal defendant about the risk of deportation arising from a guilty plea. Because this is a new rule announced by the Court, it is not retroactive under the principles set out in *Teague v. Lane*, 489 U.S. 288 (1989). The Court for the first time in *Padilla* addressed whether a lawyer's failure to provide advice about a non-criminal consequence (i.e. deportation) falls under the test articulated in *Strickland v. Washington*, 466 U.S. 668 1984) for assessing claims of ineffective assistance of counsel, and not merely how the test should be applied to the underlying facts.

LA Supreme Court
State v. Craig Oliphant, 12-1176 (La. 03/19/13): The Court held that vehicular homicide is a crime of violence because it involves the use of physical force against another. The Court rejected the argument that the term "use" in 14:2 requires intentional use. The Court said that the use of force element was satisfied by the defendant's intoxicated driving. The Court also said that the use of a car in a vehicular homicide entails the use of a "dangerous weapon."

State v. Mazen Hamdan, 12-1986 (La. 03/19/13): Crimes from outside Louisiana count as felonies for multiple bill purposes if the crime, if committed in Louisiana, would be a felony. In this case, the court held that district courts can consider the facts underlying a non-Louisiana conviction – and are not confined simply to the charging document – to consider whether the crime would be a felony in Louisiana.

State v. David Hardy, 13-0301 (La. 03/15/2013): In this CODIS case, the trial court ordered the state to preserve all biological evidence and prohibited the state from testing biological evidence without the presence of a defense representative. The state objected and offered to provide the defense with half of the biological material that was collected. The Court held that the state's offer was sufficient and that the trial court did not have the discretion to order that a defense representative be present for testing.

Fourth Circuit
State v. Tran, 12-1219 (La. App. 4 Cir. 4/24/13): Court affirms trial court's granting of a motion to quash charge of possession of Schedule IV drug without a prescription. Production of the original prescription bottle is sufficient, but is not the exclusive means of proof of a valid prescription. A pharmacy's Patient History Report discloses virtually all of the same information as the original prescription bottle. Lousiana law stating that prescriptions are "only valid" for a period not to exceed six months does not render a tablet which was timely dispensed pursuant to the possession of a valid prescription to be unlawfully possessed by the patient if the prescription is more than six months old.

State v. Nicholson, 11-0883, consolidated with 11-0681 (La. App. 4 Cir. 12/5/12): Defendant appeals his conviction and sentences for aggravated rape, kidnapping, and sexual battery. Applying the "law of the case" doctrine, the court found that review of the writ application was without error as the defendant failed to present any new evidence or facts subsequent to the court's initial ruling on his writ.

Fifth Circuit
State v. McKinnies, 12-335 (La. App. 5th Cir. 5/16/2013): Trial court did not abuse its discretion by granting a motion for a new trial "in the interests of justice" without specifying reasons other than he had a reasonable doubt in the defendant's guilt.