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 the links to the full opinions and orders cited below can also be found on the WIKI.**

RECENT CASE LAW

ADMISSIBILITY OF EVIDENCE AT TRIAL

US Supreme Court

Kansas v. Cheever**, 571 U.S. __ (2013):** The Court held that the Fifth Amendment does not prohibit the state from introducing evidence from a court ordered mental evaluation of a defendant to rebut defendant's expert testimony in support of a defense of voluntary intoxication. In this capital case, a defense expert opined that the defendant's methamphetamine use rendered him incapable of premeditation. In rebuttal, state introduced the testimony of a psychiatrist ordered by the court to evaluate the defendant who concluded that methamphetamine did not impair his brain. This ruling reaffirms the Court's prior holding in *Buchanan v. Kentucky*, 483 U.S. 402 (1987): where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal.

CONFRONTATION CLAUSE

Fifth Circuit

State v. Lang, 13-21 (La. App. 5 Cir. 10/9/13): Text messages between acquaintances not testimonial for confrontation clause. Conspiracy sentences must be given with the benefit of parole (even if the crime is murder).

DOUBLE JEOPARDY

Fourth Circuit

State v. Mills, 12-851 (La. App. 4 Cir. 7/3/13): The defendant's conviction for possession of cocaine and possession of drug paraphernalia violated double jeopardy. The state offered a crack pipe with cocaine residue to support the defendant's conviction. The Court held that the cocaine and PDP convictions were based on the same evidence because the state used the residue to prove that the pipe was paraphernalia.

Third Circuit

State v. Davenport, 12-0039 (La. App. 3 Cir. 7/10/13): Judgment of acquittal implicates double jeopardy, even when judge erroneously granted a MJOA in a jury trial. Mistake of law by judge does not mean that defendant does not get jeopardy benefit of acquittal.

State v. Bowles, 13-0080 (La. App. 3 Cir. 10/9/13): Underlying felony committed as part of a second degree kidnapping (in this case, armed robbery) is an essential element for double jeopardy purposes, although no double jeopardy when there are "two takings" as in this case.

State v. Davis, 13-0275 (La. App. 3 Cir. 10/23/13): Sigh… it was NOT double jeopardy nor prejudicial for the state to be allowed a continuance after the entire jury had been sworn individually but not as a group, and then later pick a whole new jury. It was within the court's discretion to refuse to swear in the picked jury over defendant's objection.

PRIEUR

Fifth Circuit

State v. Kiger, 13-69 (La. App. 5 Cir. 10/30/13): Previously uncharged 404(B) and 412.2 evidence can be admitted even if defendant was a minor at the time the prior bad acts occurred.

Third Circuit

State v. Raines, 13-0304 (La. App. 3 Cir. 11/13/13): (1) the fact that D had been in two same-sex relationships thirty years prior to an alleged sexual battery on a male was not relevant and therefore not admissible as *Prieur;* (2) officer stating that D had told him that he had previously been accused of inappropriate touching, which was not part of *Prieur* notice, called for a mistrial.

First Circuit

State v. Robertson, 13-1301 (La. App. 1 Cir. 8/19/13): Reciprocal discovery of documents, tangible objects, reports, and tests the defendant "intends to use in evidence at the trial" is not applicable at a pretrial Prieur hearing. A "trial" is

that proceeding where the guilt or innocence of the accused is determined.

SEARCH AND SEIZURE

U.S. Supreme Court

Stanton v. Sims, 571 U.S. __ (2013): Reversed the 9th Circuit in a per curiam decision for concluding that an officer was not entitled to qualified immunity where he injured the plaintiff entering her home without a warrant in pursuit of a third party suspected of committing a misdemeanor. Court noted that federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect.

LA Supreme Court

State v. Duhe, 12-2677 (La. 12/10/13): A detective observed two individuals buy pseudoephedrine (a precursor for meth) separately and subsequently meet up in a suspicious manner. Officers then saw those two individuals meet with two other individuals in a car, conduct "counter surveillance" behavior, and exchange currency. One of the individuals in the car went into the nearby store and purchased more pseudoephedrine. The Court held that the officers had reasonable suspicion to conduct a Terry stop of the defendants and order them out of the car. The officers could also conduct a Terry "frisk" of the vehicle because the occupants outnumbered officers and methamphetamine production is associated with weapons. Officers, therefore, lawfully seized pseudoephedrine in the car.

State v. Carter, 13-1952 (La. 12/2/13): An unknown informant provided police with a tip that the defendant would be getting off of a Greyhound bus with a large amount of narcotics. The tipster correctly identified the defendant's stop on the bus route. The tipster also stayed in touch with police throughout the investigation and responded to police calls. The Court found that this made the tip sufficiently reliable to constitute reasonable suspicion.

Fourth Circuit

State v. Howard, 12-1117 (La. App. 4 Cir. 7/3/13): In this case, officers believed a defendant was storing narcotics in his house. Before stopping the defendant, the officers saw him conduct narcotics transactions with individuals whom they did not arrest. These individuals may have seen officers arrest the defendant. After arresting the defendant, officers took him to his house and conducted a warrantless search of the house. The Court held that exigent circumstances did not justify the warrantless search, even though officers expressed concern that occupants of the home might destroy drugs. The Court held that the officers created any exigency by taking the defendant back to his house. Officers' subsequent acquisition of a search warrant did not cure the illegal entry because the warrant was based on items observed during the warrantless search.

Fifth Circuit

State v. Williams, 13-170 (La. App. 5 Cir. 9/18/13): Search warrant for a residence means cops are also allowed to search vehicles located on the property. Also notable about this case is that JPSO got DNA evidence from a baggie of cocaine located in a house and matched it to the defendant. Maybe useful when they try to say they can't or don't do that.

State v. Aston, 12-955 (La. App. 5 Cir. 9/4/13): There is no expectation of privacy in computer files shared publicly on a file-sharing network. There is also no expectation of privacy in subscriber information – your name, physical address, and IP address – given to an internet service provider, and no violation if the ISP turns that information over to the government via administrative subpoena.

SENTENCING

LA Supreme Court

State v. White, 13-1525 (La. 11/8/13): The Court reversed a trial court's finding that the defendant was not a multiple offender. The Court found it sufficient that the state's fingerprint expert testified that the defendant's fingerprints matched the fingerprints on the conviction records. The Court rejected the trial court's concerns that the defendant's name appeared in various records with different initials and that the state produced no photograph of the defendant. Significantly, for a conviction without fingerprints, the Court found it sufficient that the records contained the defendant's name and FBI number.

State v. Tate, 12-2763 (La. 11/5/13): The Court held that Miller v. Alabama, which prohibits mandatory life without parole for juvenile homicides, is not retroactive. The Court held that Miller does not apply retroactively because it is a procedural, not substantive, rule.

Fifth Circuit

State v. Marse, 13-155 (La. App. 5 Cir. 7/30/13): "Home incarceration" pursuant to La. C. Cr. P. art. 894.2 can only be imposed as a condition of probation where there is a suspended sentence, it is not a form of incarceration itself. I.e. a sentence that must be imposed "without the benefit" cannot be satisfied by home incarceration.

Third Circuit

State v. Harris, 13-0133 (La. App. 3 Cir. 12/11/13): Guy gets LWOP as a quad for selling .69 grams of weed to an undercover. Upheld, but forceful dissent

by Judge Cooks arguing that this is shocking to the conscience that has some good language.

Second Circuit
State v. Lewis, 48,373 (La. App. 2 Cir. 9/25/13): Portion of defendant's sentence ordering jail time in default of payment of his fines is vacated because defendant is indigent and represented at trial by a public defender.

State v. Sellers, 48,515 (La. App. 2 Cir. 11/20/13): Persons suffering from mental retardation are generally less culpable, and defendant's diminished mental capacity should have warranted a less than the maximum sentence. Trial court abused its discretion by imposing the maximum sentence in this case for aggravated battery and attempted incest because of the defendant's mental problems and social dysfunction.

State v. Davis, 48,161 (La. App. 2 Cir. 8/7/13): Defendant with a prior manslaughter conviction and a second degree battery conviction is not a fourth felony offender for purposes of the habitual offender law of La. R.S. 15:529.1 when he is convicted of two aggravated battery occurring together and arising from the same event, i.e., they couldn't use one of the two aggravated battery to make the other aggravated battery the 4th.

First Circuit
State v. Reine**,** 13-0921 (La. App. 1 Cir. 9/20/13): At a sentencing hearing, through no fault of defendant, his retained attorney was not present. The court then appointed an attorney to represent the defendant. These circumstances constitute a deprivation of the defendant's right to counsel of choice. This is a structural error, not subject to a harmless error analysis.

SUFFICIENCY OF EVIDENCE

LA Supreme Court
State v. Bourgeois, 13-609 (La. 12/6/13): The complainant provided a contract offer to the defendant. The defendant made obvious amendments in his counteroffer but also made subtle amendments (including the addition of a provision obligating the complainant to pay defendant $950,000) in a manner that made it appear that he had not made the amendments at all. The complainant accepted the counteroffer and recorded the contract. The Supreme Court held that the defendant's subtle amendment was sufficient to constitute a forgery because he made the amendment in a way that made it appear that no amendment had been made. The Court also found the evidence sufficient to constitute a filing of false public records, even though the complainant filed the contract, because the complainant's filing the record was a necessary consequence of the agreement.

State v. Smith, 12-2358 (La. 12/10/13): The defendant was charged with distribution of cocaine after an officer observed him give a white object to an unknown individual who placed the object in his mouth. Officers then searched the house of the defendant and his brother and found cocaine. Officers had also conducted a controlled buy at the house with defendant's brother. The Court held that the identity of the white object could be established through circumstantial evidence and found the circumstantial evidence sufficient to support the conviction.

Fourth Circuit
State v. Mack, 12-625 (La. App. 4 Cir. 6/19/13): The Court found that the evidence was insufficient to convict the defendant of principal to second-degree murder. The state established that the defendant threatened the decedent, made a phone call, and that the decedent was shot twenty minutes after the defendant called the co-defendant/shooter. The Court found that this circumstantial evidence was not sufficient to exclude every reasonable hypothesis of innocence.

Fifth Circuit
State v. Phillips, 13-154 (La. App. 5 Cir. 12/12/13): (1) BB gun could be considered dangerous weapon for purposes of armed robbery because it created a "highly charged atmosphere" where there was a danger of serious bodily harm that could be created by victim or other witnesses intervening, believing the BB gun to be real. (2) State did not meet burden of proving prior federal conviction at multiple bill hearing when probation officer's testimony did not show that D was represented by counsel at time of guilty plea (and it was IAC because defense counsel didn't object).

Third Circuit
State v. Williams, 13-0156 (La. App. 3 Cir. 10/16/13): Possession of property stolen in recent burglary does not create presumption that D committed the burglary. Court also doubts broken dash light is to be considered a "thing of value" for theft. Insufficient evidence to convict D of burglary when CW said that he thought D was only in his car to rest

State v. Oliphant, 13-0473 (La. App. 3 Cir. 11/20/13): Decent sufficiency of the evidence case. Inconsistent statements and circumstantial DNA evidence cannot carry the state's burden.

SUPPRESSION OF STATEMENTS/CONFESSIONS

Fourth Circuit
State v. Marshall, 12-650 (La. App. 4 Cir. 7/31/13): In this case, the defendant took the stand and claimed self-defense. At trial, the prosecutor asked

the defendant why he invoked his right to remain silent, post-Miranda, when officers questioned him. The Court held that this constituted a due process violation because the prosecution used the invocation of rights suggest that the defendant's subsequent assertions of self-defense were false.

Second Circuit
State v. Parker, 48,339 (La. App. 2 Cir. 10/9/13): When sanity is an issue in statement suppression (specifically schizophrenia), the state must prove that the defendant's mental state did not preclude the voluntary giving of a confession.

TRIAL PROCEDURE

Fourth Circuit
State v. Bender, 12-1682 (La. App. 4 Cir. 7/17/13): The Court held that a Batson violation occurred when the prosecutor cited a prior conviction as a race neutral reason but did not disclose a copy of the venire's rap sheets. A prior conviction cannot be a race neutral reason if rap sheets are not disclosed to defense counsel. The Court noted that it is critical that defense counsel noted that she had not received any rap sheets.

State v. Hankton, 12-375 (La. App. 4 Cir. 8/2/13) An interesting historical discussion of Louisiana's non-unanimous felony jury rules, and their racist roots. Unfortunately for Mr. Hankton, the Court ultimately finds that he failed to adequately preserve his rights on this issue. However, it does seem to indicate that the 4th Circuit is open to future creative challenges on this issue. Worth a read.

State v. Perkins, 12-0662 (La. App. 4 Cir. 7/31/13) Trial court judge (Keva Landrum-Johnson) denied jury instruction of self defense in jailhouse aggravated battery/95.1 (shank) case. Trial court reasoned that without defense testimony, there was no evidence to support self-defense, so the instruction was not warranted. 4th Circuit ruled that the obvious injuries on the defendant were sufficient, even without a defense case, to support a self defense instruction, and the trial court committed reversible error in denying the instruction. (N.B.—OPD alum Powell Miller wrote the appeal, if you want more info).

State v. Thomas Henry, 12 -1093 (La. App. 4 Cir. 9/4/13) Judge Herman curtailed questions about police bias and credibility in a "cops lie" drugs case. The Fourth Ruled that despite the defense's right to full voir dire, the follow up questions about the NOPD's credibility were largely cumulative or designed to inflame the venire's prejudices.

Fifth Circuit
State v. Alfaro, 13-39 (La. App. 5 Cir. 10/30/13): State calls CW who has recanted and compels CW's testimony. CW testifies that D is innocent. D not entitled to cross CW now because CW is associated with party adverse to the state, i.e. the defendant. D convicted, gets LWOP, based on CAC tape alone even though CW vociferously recanted and no real corroborating evidence. Bad case.

State v. Sterling, 13-287 (La. App. 5 Cir. 12/12/13): Judge did not err by declining to replace juror with alternate although juror "nodded off" at several different points during the trial.

State v. Stevenson, 13-156 (La. App. 5 Cir. 7/30/13): Trial court prohibits defense from questioning arresting officer at trial about subsequent termination from department and criminal investigation for civil rights violations. Crappy defense lawyer does not proffer on the record the allegations against the sergeant. Appellate court cannot find prejudice because doesn't know what the substance of those allegations are. Defense lawyer learns lesson in preserving issues for appeal.

State v. Greenup, 12-881 (La. App. 5 Cir. 8/27/13): State using word "faggot" during rebuttal closing argument was distasteful but not improper, as it did not prey on audience's prejudice toward homosexuals (seriously), and was in response to defense argument about CW's motive to lie.

State v. Brown, 12-922 (La. App. 5 Cir. 12/12/13): It was OK for the prosecutor, in opening statement, to tell the jury there was another witness who wasn't subpoenaed and wasn't going to testify but who could corroborate what its actual witnesses were going to say. Apparently, it's OK for the State to say - I have this other witness who you won't hear from but if you did they would totally tell you that the defendant is guilty.

MISCELLANEOUS

U.S. Supreme Court
Burt v. Titlow, 517 U.S. ___ (2013): Sixth Circuit Court of Appeal fails to apply the "doubly deferential" standard under AEDPA when it reversed the state court's determination that defense counsel was not ineffective when he advised defendant to withdrawal his plea of manslaughter (7- to 15-year sentence) and proceed to trial where he was convicted of second degree murder and sentenced to 20-to 40-years. State court rejected defendant's claim that his attorney failed to learn about the case and realize the strength of the state's case prior to advising defendant to withdrawal. State court held that the attorney acted reasonably given defendant's claim of innocence.

LA Supreme Court
State v. Scott, 12-2458 (La. 8/30/13): A party may file a supervisory writ within the return date set by

the district court, even if the district court improperly sets a return date more than 30 days out.

State v. Matthews, 13-525 (La. 11/15/13): The Court reversed the trial court's order granting a motion to quash on constitutional speedy trial grounds. In this case, the state entered a *nolle prosequi* and reinstituted 17 months later. The Court held that the 17 months should not be held against the state because the defendants were not subject to restraint.

Fourth Circuit

State v. Joshua Franklin, 13-0488 (La. App. 4 Cir. 10/9/13) In order for a Motion to Quash to lie on a factual issue in a bail jumping case, the defense needed to first file a Bill of Particulars. Otherwise, the issue raised was a factual defense not appropriate for a Motion to Quash.

Fifth Circuit

State v. Davis, 13-313 (La. App. 5 Cir. 10/30/13): 14:98(A)(1)(d) and (e), which allow for an affirmative defense against DWI if you're unknowingly overly intoxicated taking a dose of prescription drugs, does not apply to controlled dangerous substances (including prescribed schedule IV drugs).

First Circuit

State v. Robertson, 13-1262 (La. App. 1 Cir. 9/9/13): The trial court instructed the prosecutor to "memorialize" (for use by the State only) witness interviews in the event the case comes back to the court for an in camera inspection. This was a violation of the district attorney's work privilege.

Second Circuit

State v. Fuller, 48,663 (La. App. 2 Cir. 12/11/13): For simple arson, the value, 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. If the amount of damage is essential for determining the grade of the offense, failure to allege the amount of damage in the bill of information is an error.