

# 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.

## RECENT CASE LAW

### ADMISSIBILITY OF EVIDENCE AT TRIAL

#### LA Supreme Court

**State v. Harrison**, 14-KD-1647 (La. 9/10/14) Overruling trial court’s exclusion of prejudicial photograph, the court finds that the depiction of defendant in relevant clothing is probative, and the purported “gang sign” he was flashing was only arguable prejudicial, and not prejudicial enough to warrant exclusion.

**State v. Bourgeois**, 14-KK-0858 (La. 9/12/14) Overruling trial court’s exclusion of evidence, despite being prejudicial, because the absence of the evidence would deprive the state of its narrative momentum and cohesiveness “with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.”

#### Fourth Circuit

**State v. Greenberry**, 2014-KA-0335 (La. App. 4th Cir. 11/19/14) Statement by CW’s mother to CAC interviewer Ann Troy about defendant’s statement was non-hearsay and admissible through Ann Troy because defendant’s own statements are non-hearsay and because they were used to impeach defendant, who testified. Further the prosecutor’s comments, including reference to the defendant as a “predator” and imploring of the jury to protect the victim, did not merit a reversal of defendant’s conviction and sentence where defendant failed to prove they influenced the verdict.

#### Third Circuit

**State v. Carmouche**, KA-14-215 (La. App. 3. Cir. 07/20/2014). 412.2 evidence of an allegation that

the defendant masturbated in front of witness was admissible; further, preponderance of the evidence is appropriate standard of review for 412.2 evidence.

**State v. Gautreaux**, KA-14-0594 (La. App. 3 Cir. 11/05/2014) Late night phone call from deceased declarant describing a fire allegedly caused by defendant to hide evidence qualifies as an “excited utterance” and is a hearsay exception. Also, when a state witness with pending charges has had his past charges reviewed on cross-examination and been questioned on any inducements or rewards from the state to testify and that witness answers in the negative, it is appropriate to disallow evidence of witness’s pending charges.

**State v. Prince**, 14-740 (La. App 3 Cir. 12/10/2014) Where defendant received a package through mail while in jail, a dog discovered it contained illegal drugs, and the defendant was asked to open it in front of jail authorities, it is improper to convict the defendant with “introducing contraband into a penal institution” when defendant had no intent to receive the package and did not know why or from whom it arrived.

#### Fifth Circuit

**State v. Magee**, 13-KA-10181 (La. App. 5 Cir 09/24/2014) A recording of a telephone call between defendant and his mother, who did not testify, was inadmissible for the defense when it hinted at another admitting to the shooting rather than explicitly saying so.

**State v. Chester**, 14-KA-540 (App. 5 Cir. 11/25/2014) Because every person of proper understanding is competent to be a witness unless otherwise provided by statute, a judge’s certification of a five year old witness as competent was upheld where child was able to list name, age, location, and the difference between a truth and a lie.

### CONFRONTATION CLAUSE

#### LA Supreme Court

**State v. Hawley**, 14-KK-0282 (La. 10/15/14) Vacating a reversal and finding that breathalyzer (Intoxilyzer 5000) inspection and maintenance form

and technician qualification forms are non-testimonial and their introduction at trial did not violate Melendez-Diaz.

## DOUBLE JEOPARDY

### US Supreme Court

Martinez v. Illinois, No. 13-5967 (2014) Double jeopardy attached after jury was sworn and state was not ready because trial court granted a directed not guilty verdict.

### PRIEUR

### LA Supreme Court

State v. Hardy, 2014-KK-1569 (La. 11/21/14) Reversing the exclusion of Prieur evidence—two burglaries—for the purpose of proving intent (that is, he did not enter with innocent purpose) and finding that the prior burglaries were similar to present burglaries where they were half a mile apart, all houses were unoccupied at the time of the burglaries, entry was gained through the rear, and one of the prior burglaries was close in time to the present burglary.

## SEARCH AND SEIZURE

### US Supreme Court

Heien v. North Carolina, 13-604 (2014) Officer's belief that having only one working brake light was a traffic violation was a good faith interpretation of state law, and despite being wrong did not merit suppression of the evidence subsequently discovered in a traffic stop.

### LA Supreme Court

State v. Ingram, 10-KK-0896 (La. 10/10/14) Reinstating a trial court's suppression of evidence due to the trial court's broad discretion to make credibility determinations.

State v. Hayes, 2014-KK-1999 (La. 12/08/14) Reversing suppression when cocaine found during a traffic stop where officers conducted a valid stop of vehicle in which defendant was a passenger. Officers could remove defendant from vehicle and conduct a patdown after he admitted to possessing an open container, a misdemeanor offense.

### Fourth Circuit

State in the Interest of J.W., 2014-CA-0291 (La. App. 4th Cir. 10/29/14) unprovoked flight while grabbing waistband in a high-crime area sufficient to provide reasonable articulable suspicion under Terry.

### Fifth Circuit

State v. Murphy, 14-KA-437 (La. App. 5 Cir. 10/15/2014) When one detective relies on the evidence given by a confidential informant to another detective and that information proves to be predictive, subsequent tips by that informant give the first officer reasonable suspicion.

## SENTENCING

### LA Supreme Court

State v. Baskin, 13-KO-2747 (La. 06/13/14) Conviction as a fourth offender overturned when federal harboring of aliens conviction with no Louisiana corollary was used as a predicate offense.

State v. I.C.S., 2013-CK-1023 (La. 7/1/14) Holding that adults who entered pleas to sexual misconduct that occurred when they were juveniles had to register as sex offenders, even though they would not have had to if they had pled when they were juveniles.

State v. Kondylis, 14-K-0196 (La. 10/3/14) Noting, in dicta, that 890.1 departures are available even after multiple billing.

### Second Circuit

State v. Herrington, No. 49,323-KA consolidated with No. 49-324-KA (La. App. 2 Cir. 11/19/2014) Due to ambiguity in La. R.S. 14:62.2, only the first year of a sentence for simple burglary may be imposed without benefits. Nonetheless, the trial court did not abuse its discretion in ordering consecutive sentences for separate crimes where the court felt the defendant had a high likelihood of recidivism, was likely an addict, and put multiple people in danger.

### Third Circuit

State v. Montgomery, KA-14-389 (La. App. 3. Cir. 12/17/2014) In a habitual offender hearing, the State offered three pieces of evidence: a bill of information, an indictment, and an appeal motion for bond reduction. All three presented the name of defendant, his birthday, and reference to a criminal charge. This was sufficient.

State v. Day, 14,708 (La. App 3 Cir. 12/23/2014) Where several witnesses from schools, court, and support services testify that child victim was malnourished and neglected, but that victim was an occasionally violent and often difficult child, a 30 year sentence to the caregiver shocks the conscience.

## SUFFICIENCY OF EVIDENCE

**State v. Hamed**, 2013-KA-1655 (La. App. 4<sup>th</sup> Cir. 8/13/14) Element of intent not proven in worthless checks case where defendant was agent of company that issued checks and state did not prove he had personal knowledge of deficient account balances.

### Second Circuit

**State v. Sullivan**, No. 49,183-KA (La. App. 2 Cir. 08/13/2014) Whether a weapon is dangerous is a factual question for the jury. The jury was not clearly wrong in finding rubber soled shoes to be a dangerous weapon when they inflicted serious injury.

### Third Circuit

**State v. Mire**, KA-14-435 (La. App. 3 Cir. 10/08/2014) Where State was unable to provide a sensible motive to murder when defendant shot his friend accidentally on a hunting trip and subsequently lied about the events and acted strangely according to witnesses, the court found that specific intent for second degree murder was not met and entered a finding of negligent homicide.

### IDENTIFICATIONS

#### Fourth Circuit

**State v. Allen**, 2013-KA-0195 (La. App. 4th Cir. 7/2/14) Court found lineup procedure was not suggestive where detective instructed victim that suspected shooter was included in photo lineup.

#### Second Circuit.

**State v. Long**, No. 49,398-KA, (La. App. 2 Cir. 12/17/14) During a photo lineup, when the defendant's head is the only one which is cocked to the side, and the defendant is the only person wearing a red lanyard, the reliability of the identification outweighs the suggestiveness of the procedures involved per the factors in *Manson v. Brathwaite*.

### SUPPRESSION OF STATEMENTS/CONFESSIONS

#### LA Supreme Court

**State v. Marshall**, 2013-K-2007 (La. 12/9/14) Manslaughter conviction reinstated after holding that the prosecutor's use of defendant's post-arrest silence against him was "unquestionably harmless" based on weight of the evidence and criminal history of defendant.

#### First Circuit

**State v. OBrien**, No. 2014-KA-0899, (La. App. 1. Cir. 12/23/2014) Where there is the allegation that

mental illness prevented a knowing and intelligent waiver of trial, supported by the offer of testimony by medical professionals, it was error for trial court to deny an evidentiary hearing on the issue in defendant's motion for a new trial.

### TRIAL PROCEDURE

#### La. Supreme Court

**State v. Bender**, 2013-K-1794 (La. 9/3/14) Overruling the Fourth Circuit's *Knighen* rule, which required the prosecutor to provide prior arrest records to the defense upon request if those records are being used as race neutral reasons in response to a *Batson* challenge. The Court held that the defense bears the burden of establishing pretextual reasons, so the defense can question a juror about alleged priors if necessary—the state need to not back up its assertions.

**State v. Mickelson**, 2012-KA-2539 (La. 9/3/14) Reversing a first degree murder conviction for failure to strike a juror for cause when the juror indicated he would not consider mitigating factors in sentencing phase.

**State v. Perkins**, 2013-K-1917 (La. 9/3/14) Vacating the Fourth Circuit reversal of a conviction for failure to grant a self defense instruction. Court holds that self defense instructions regarding possession of a weapon need not be given when the defendant was incarcerated at the time of the incident.

**State v. Faggin**, 2014-K-0326 (La. 10/24/14) Reversing the trial court's grant of a motion to quash for valid medical prescription, where the prescription was for a household member. Whether or not the medications were in fact being transported for a family member is a fact question and affirmative defense that is not properly subject to a motion to quash.

#### Fourth Circuit

**State v. Simms**, 2013-KA-0575 (La. App. 4th Cir. 6/18/14) Defendant's motion for mistrial was denied where defendant, despite contemporaneous objection and subsequent motion for mistrial, failed to articulate grounds for the objection to preserve the issue for appellate review. Defendant also failed to prove clear prejudice based on decision not to testify where State repeatedly noted that the defense failed to rebut the prosecution's story.

**State v. Pierre**, 2013-KA-1195 (La. App. 4th Cir. 7/9/14) Upon review of the four *Barker* factors for a speedy trial violation, the court reversed the trial court's grant of defendant's motion to quash. Regarding the second *Barker* factor (the reasons for

delay), the court found the trial court's conclusion that the State committed "official negligence" by delaying the case for nine years, significant periods of which defendant was in State custody (incarcerated in the St. Charles Parish Correctional Center), was incorrect where the State bears no affirmative duty to find a defendant who fails to appear for trial once actual notice has been received. The court also notes that a significant period of elapsed time (2,709 days) may be attributed to the defendant since he was not incarcerated during that time. The court found the third and fourth *Barker* factors were not satisfied where defendant never asserted his right to a speedy trial prior to filing the motion to quash and State did not fail to demonstrate "reasonable diligence" where it had no knowledge that defendant was incarcerated in another parish (rejecting trial court's reliance on *Ervin*), respectively.

**State v. Cobb**, 2013-KA-0431 (La. App. 4th Cir. 6/25/14) Court reversed trial court's ruling to sustain motion to quash based on a speedy trial violation, finding that defendant failed to properly enter the arresting officer's affidavit bearing the date of her arrest warrant into evidence or request a bill of particulars, and the bill of information itself alleged a valid date of commission and institution of the prosecution.

**State v. Cushenberry**, 2013-KA-0382 (La. App. Cir. 7/16/2014) Trial court's denial of defendant's motion for a mistrial was not in error where the state's untimely production of photographs and an initial police report did not prejudice defendant.

**State v. Jacques**, 2013-KA-1007 (La. App. 4th Cir. 10/29/14) Court affirmed defendant's conviction and sentence where the prosecutor's reference to defendant committing another crime during closing did not merit a mistrial.

**State v. Wells**, 2011-KA-0744 (La. App. 4<sup>th</sup> Cir. 7/11/14) Murder conviction reversed and remanded where the trial judge instructed the jury that when considering the Defendant's claim that he was justified in shooting the victim, the jury was permitted to consider whether the Defendant had an opportunity to retreat when assessing whether it was necessary for the Defendant to shoot the victim in order to preserve his own life.

**State v. Frith**, 2013-KA-1133 (La. App. 4<sup>th</sup> Cir. 10/22/14) Properly preserved objection for denial of backstrikes merits reversal of conviction.

#### **Fifth Circuit**

**State v. Patin**, 13-KA-618 (La. App. 5 Cir. 09/24/2014) Defendant waived right to object to evidence of other crimes when he failed to object at trial, even though he objected pre-trial.

#### **MISCELLANEOUS**

##### **LA Supreme Court**

**State v. E.C.**, 13-CK-2483 (La. 6/13/14) Juvenile's efforts to enroll in school deemed inadequate by Supreme Court, so probation revoked despite trial court's finding that juvenile could not enroll in mandated classes because they were not offered.

**State v. Eberhardt**, 2013-KK-2306 c/w State v. Taylor and Stevens, 2014-KA-0209 (La. 7/1/14) Foreclosed ambiguity left by State v. Draughter, holding that 14:95.1 survives all facial challenges.

**State v. McKinnies**, 2013-K-1412 (La. 10/15/14) Vacating a new trial order based on newly discovered evidence where defense failed to provide proof in the record of the newly discovered evidence.

**State v. Diggins**, 2014-KP-0018 (La. 12/9/14) Judge could rescind new trial order, which is normally only possible after a "ministerial error," when a "considered decision" was not reached because evidence came to light after the decision such that the original decision was based on incomplete evidence.

##### **Fourth Circuit**

**State v. Taylor**, 2014-KA-0151 (La. App. 4th Cir. 6/18/14) Court found district court judge did not abuse her discretion where she denied defendant's Motion for a New Trial because defendant's submission of Criminal District Court records and unauthenticated news articles documenting the arrest and conviction of New Orleans Police Officer Hunt for perjury and malfeasance in office did not constitute newly discovered evidence within the meaning of Article 851(3), since the evidence was not in existence at the time of trial (Hunt had not yet pled guilty) and the evidence would not have affected the outcome of defendant's trial.

**State v. Williams**, 2014-KA-0477 (La. App. 4th Cir. 12/17/14) Court reversed grant of defendant's motion to quash based on prescription, finding pursuant to La. C.Cr.P. art. 579 A and La. C.Cr.P. art. 580 that prescription was interrupted when defendant was serving in the military in Iraq.

**State v. Smith**, 2014-KA-0213 (La. App. 4th Cir. 12/17/14) Defendant could not be convicted of

second degree felony murder based on the predicate felony of cruelty to a juvenile. Due to Louisiana's application of the agency approach to felony murder and the interpretation of the term "offender" in the felony murder statute, defendant's negligent act of leaving her 5 year-old daughter unattended with a gun in the home did not constitute a direct act, as required by the felony murder statute.

### **Third Circuit**

**State v. Maves**, 14,683 (La. App. 3 Cir. 12/23/2014) Shooting an attacker who lunges at you or pushes a table at you is an excessive response and does not qualify as self-defense. Since defendant was a felon with a firearm, the jury instruction for justifiable homicide was not appropriate since he was not law-abiding at the time of the event.