

RECENT DEVELOPMENTS IN CRIMINAL LAW

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Recent Developments In Criminal law And procedure

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SEARCHES

The Trespass Theory Re-invigorated

United States v. Jones, 132 S. Ct. 945, 946, 181 L. Ed. 2d 911 (2012)(Scalia, Thomas, Roberts, Kennedy, Sotomayor)

Facts: Police placed a GPS tracking device on the undercarriage of a defendant's wife's car and monitored movement for 30 days.

Resurgent rule: The Government's physical intrusion on a constitutionally protected area for the purpose of obtaining information constitutes a "search."

Holding:

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and *effects*, against unreasonable searches and seizures." A car is an "effect."

Placement of a GPS device on the undercarriage of a car is a physical intrusion (trespass) on an effect (a constitutionally protected area) and it was done for the purpose of obtaining information, therefore it was a search for Fourth Amendment purposes which required a validly executed search warrant (the warrant at issue was executed after it expired and in another jurisdiction).

Concurrence (Sotomayor)(mosaic theory): GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about familial, political, professional, religious, and sexual associations. Disclosed in [GPS] data ... will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on." The net result (aka mosaic) is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society."

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.

Concurrence (Alito, Ginsburg, Breyer, Kagan): The trespass doctrine is invalid. However, longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”

Society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period. But where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant.

Finally, a legislative body is best situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.

***Florida v. Jardines*, 569 U.S. ___, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (search/trespass)**

Issue: Whether using a drug-sniffing dog on a homeowner’s porch to investigate the contents of the home is a ‘search’ within the meaning of the Fourth Amendment.

Facts: A Miami-Dade police officer with a K-9 trained to alert on controlled substances - acting on a “tip” that marijuana was being grown in a certain residence - went on to the porch of the home. The K-9 sniffed the base of the front door and signaled an “alert” on the presence of narcotics. The officer, on the basis of the “alert,” secured a search warrant for the home – and the execution of the warrant revealed the presence of growing marijuana plants in the home.

Holding: The officers were gathering information in an area “immediately surrounding [defendant’s] house – in the curtilage of the house, which...enjoys protection as part of the home itself. And, they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.”

The front porch is the classic exemplar of an area adjacent to the home and to which the activity of the home life extends.

Since the officers’ investigation took place in a “constitutionally protected area,” we turn to the question of whether it was accomplished through an non-consensual physical intrusion.

A license to enter may be implied from the habits of the country, notwithstanding the strict rule of the English common law as to entry upon a close. We have accordingly recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. The implicit license typically permits the visitor to approach the home by the front path, knock promptly,

wait briefly to be received, then (absent invitation to linger longer) leave... Thus, *a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.*

But introducing a trained police dog to explore the area around the home *in hopes of discovering incriminating evidence* is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. ...*The scope of a license – express or implied – is limited not only to a particular area but also to a specific purpose.*

Thus, we need not decide whether the officers' investigation of Jardine's home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by *physically intruding on Jardine's property to gather evidence* is enough to establish that a search occurred.

For a related reason we find irrelevant the State's argument that forensic dogs have been commonly used by police for centuries. This argument is apparently directed to our holding in *Kyllo*, that surveillance of the home is a search where "the Government uses a device not in general public use" to "explore details of the home that previously would have been unknowable *without physical intrusion*." But the implication of that statement is that when the government uses a physical intrusion to explore details of the home (including its curtilage), the antiquity of the tools they bring along is irrelevant.

Concurrence: Justices Scalia, Kagan, Sotomayor and Ginsberg: The Court today treats this case under a property rubric; I write separately to note that I could just as easily have decided it by looking to Jardine's privacy interests.

Justices Alito, Roberts, Kennedy and Breyer dissented.

Is Bodily GPS Tracking A Search?

***Grady v. North Carolina*, 135 S. Ct. 1368 (2015)(GPS tracking device on person)**

The defendant, a convicted sex offender, challenged the trial court's order that he wear a device which tracked his movement by satellite monitoring. The defendant argued that this constituted an unreasonable search under *Jones*.

The North Carolina courts held that the satellite monitoring was civil in nature and denied relief because the satellite monitoring did not constitute a 'search' under the Fourth Amendment.

The Court held that the fact that the sex offender monitoring program was civil in nature *made no difference* since the Fourth Amendment applies to government action in both

the civil as well as the criminal context. The Court also held that the monitoring *did constitute a search* – and remanded for the courts below to determine whether the satellite monitoring constituted a reasonable search. “The reasonableness of a search depends on the totality of circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.”

BAC Tests

***Birchfield v. N. Dakota*, 2016 WL 3434398 (U.S. June 23, 2016)(Sotomayor/ Ginsburg concurred and dissented; Thomas concurred/dissented)(consolidated with *Bernard v. Minnesota* and *Beylund v. North Dakota*)**

Facts: All States have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) exceeding a specified level. BAC is typically determined through a direct analysis of a blood sample or by using a machine to measure the amount of alcohol in a person's breath. To help secure drivers' cooperation with such testing, the States have also enacted “implied consent” laws that require drivers to submit to BAC tests. Originally, the penalty for refusing a test was suspension of the motorist's license. Because some motorists have strong incentives to reject testing, some States, including North Dakota and Minnesota, now *make it a crime* to refuse to undergo testing.

In these cases, all three petitioners were arrested on drunk-driving charges. The state trooper who arrested Danny Birchfield advised him that refusing to submit to a blood test could lead to criminal punishment. Birchfield refused to let his blood be drawn and was charged with a misdemeanor violation of the refusal statute. After arresting William Robert Bernard, Jr., Minnesota police transported him to the station. There, officers informed him that it is a crime to refuse to submit to a BAC test. Bernard refused to take a breath test and was charged with test refusal in the first degree. The officer who arrested Steve Michael Beylund took him to a nearby hospital. The officer informed him that test refusal in these circumstances is itself a crime. Beylund agreed to have his blood drawn. The test revealed a BAC level more than three times the legal limit. Beylund's license was suspended for two years after an administrative hearing. The results in the lower courts in these cases varied.

Holding: The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests.

Taking a blood sample or administering a breath test is a search governed by the Fourth Amendment. These searches may nevertheless be exempt from the warrant requirement if they fall within, as relevant here, the exception for searches conducted incident to a lawful arrest. This exception applies categorically, rather than on a case-by-case basis.

Because the Founding Fathers didn't have BAC tests when they wrote the Constitution, the Court used the constitutional balancing test - State interest v. degree of invasion of privacy v. other less intrusive alternatives - to determine reasonableness of the search.

It concluded that the state interest in combatting drunk driving is "paramount." Other sanctions weren't working and by making it a crime to refuse to submit to a BAC test, the laws at issue provide an incentive to cooperate and thus serve a very important function.

It also concluded that the invasion of privacy in a blood test is also high (They require piercing the skin and extracting a part of the subject's body and give law enforcement a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. They also can cause anxiety for the person tested.). However, the invasion of privacy in a breath test is low (The physical intrusion is almost negligible and yield only a BAC reading (binary search revealing ONLY evidence of a crime and nothing else) leaving no biological sample in the government's possession. Finally, participation in a breath test is not likely to enhance the embarrassment inherent in any arrest.)

As for alternatives, imposition of a warrant requirement for every BAC test would likely swamp courts, given the enormous number of drunk-driving arrests, with little corresponding benefit. And other alternatives—*e.g.*, sobriety checkpoints and ignition interlock systems—are poor substitutes.

Defendant argued that warrantless BAC testing could not be justified as a search incident to arrest because that doctrine aims to prevent *the arrestee* from destroying evidence, while the loss of blood alcohol evidence results from the body's metabolism of alcohol, a natural process not controlled by the arrestee. The court concluded, however, that in both instances the State is justifiably concerned that evidence may be lost. The State's general interest in "evidence preservation" or avoiding "the loss of evidence," readily encompassed the metabolism of alcohol in the blood.

Because the impact of breath tests on privacy is slight, and the need for BAC testing is great, the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. Blood tests, however, are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant. In instances where blood tests might be preferable—*e.g.*, where substances other than alcohol impair the driver's ability to operate a car safely, or where the subject is unconscious—nothing prevents the police from seeking a warrant or from relying on the exigent circumstances exception if it applies. Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. No warrant is needed in this situation.

Sotomayor/Ginsburg: Both tests are unconstitutional searches unless exigent circumstances apply to a particular case.

Thomas: Both tests are constitutional under exigent circumstances exception.

Search of Hotel Guest Records

***City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (6/22/2015)**

Facts: Patel and other owners and operators of hotels and motels challenged the constitutionality of the city ordinance which provided that ‘hotel guest records shall be made available to any police officer of the Los Angeles Police Department for inspection’ The ordinance also provides that “whenever possible the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business.” Failure of an operator to make the records available *is a misdemeanor offense*.

Holding: Such inspections do not fall under the ‘administrative search doctrine’ applicable to ‘closely regulated businesses’. Over the past 45 years, the Court has identified only four industries that have such a history of governmental oversight that no reasonable expectation of privacy could exist. Unlike liquor sales, firearms dealing, mining, or running an automobile junk yard, nothing inherent in the operation of hotels poses a clear and significant risk to the public.

However, the Court held that a hotel owner must only be afforded an opportunity to have a neutral decision-maker review an officer’s demand to search the registry before he or she faces penalties for failure to comply. Actual review need only occur in those rare instances where a hotel operator objects to turning over the registry. For example, these subpoenas, which are typically a simple form, can be issued by the individual seeking the record, here the officer in the field, without probable cause that a regulation is being infringed....In those instances, however, where a subpoenaed hotel operator believes that an attempted search is motivated by illicit purposes, ... it would be sufficient if he or she could move to quash the subpoena before any search takes place. A neutral decision maker, including an administrative law judge, would then review the subpoenaed party’s objection before deciding whether the subpoena is enforceable.....

“Finally, we underscore the narrow nature of our holding. [Hotel operators] have not challenged and nothing in our opinion calls into question those parts of [the ordinance] that require hotel operators to maintain guest registries containing certain information.”

Chief Justice Roberts, Justices Scalia, Justice Thomas, and Justice Alito dissented.

Cellphones

Contents

***Riley v. California*, 134 S. Ct. 2473, 2477, 189 L. Ed. 2d 430 (2014)(search of cell phone)(combined with *U.S. v. Wurie*)**

Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley incident to the arrest seized a cell phone from Riley's pants pocket. The officer accessed information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs and videos that the detective found, the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley's gang membership. Riley moved to suppress all evidence that the police had obtained from his cell phone. The trial court denied the motion. The California Court of Appeal affirmed.

Wurie was arrested after police observed him participate in an apparent drug sale. At the police station, the officers seized a cell phone from him and noticed that the phone was receiving multiple calls from a source identified as "my house" on its external screen. The officers opened the phone, accessed its call log, determined the number associated with the "my house" label, and traced that number to what they suspected was Wurie's apartment. They secured a search warrant and found drugs, a firearm and ammunition, and cash in the ensuing search. Wurie was then charged with drug and firearm offenses. He moved to suppress the evidence obtained from the search of the apartment. The District Court denied the motion. The First Circuit reversed.

Holding: The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

1) Search Incident to Arrest: A search of digital information on a cell phone does not further the government interests identified in *Chimel*, and implicates substantially greater individual privacy interests than a brief physical search.

A. Danger. Digital data stored on a cell phone cannot itself be used as a weapon. Officers may examine the phone's physical aspects to ensure that it will not be used as a weapon, but the data on the phone can endanger no one. To the extent that a search of cell phone data might warn officers of an impending danger, e.g., that the arrestee's confederates are headed to the scene, such a concern is better addressed through consideration of case-specific exceptions to the warrant requirement, such as exigent circumstances.

B. Destruction of Evidence. The Government argued that, even if the cell phone is physically secure, information on the cell phone remains vulnerable to remote wiping and data encryption. As to remote wiping, law enforcement currently has technologies of its own for combatting the loss of evidence. Finally, law enforcement's remaining concerns in a particular case might be addressed by responding in a targeted manner to urgent threats of remote wiping, or by taking action to disable a phone's locking mechanism in order to secure the scene,

2) Mosaic Theory. Cell phones differ in both a quantitative and a qualitative sense from other objects that might be carried on an arrestee's person. Notably, modern cell phones have an immense storage capacity. Before cell phones, a search of a person was limited by physical realities and generally constituted only a narrow intrusion on privacy. But cell phones can store millions of pages of text, thousands of pictures, or hundreds of videos. This has several interrelated privacy consequences. 1) A cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record. 2) The phone's capacity allows even just one type of information to convey far more than previously possible. 3) Data on the phone can date back for years. 4) An element of pervasiveness characterizes cell phones but not physical records. A decade ago officers might have occasionally stumbled across a highly personal item such as a diary, but today many of the more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives. 5) The scope of the privacy interests at stake is further complicated by the fact that the data viewed on many modern cell phones may in fact be stored on a remote server. Thus, a search may extend well beyond papers and effects in the physical proximity of an arrestee.

Cell Site Location Information (CSLI)

United States v. Davis, 12-12928, 765 F.3d 498 (11th Cir. 2015) (en banc)

Facts. The FBI obtained cell site location information (CSLI) from the provider of Davis's cellphone under the provisions of the Stored Communication Act which allows the government to obtain the data either by obtaining a warrant (which required the showing of probable cause) or by obtaining a court order (which only required the showing of "reasonable ground to believe" the information will be "relevant and material to an ongoing investigation"). The FBI relied on the court order provision rather than the warrant provision. The site data was used to prove that the defendant made calls from locations near the site of the various robberies which constituted the Hobbs Act violations for which he was indicted and convicted.

Panel Holding. On original hearing the Eleventh Circuit panel held that cell phone site location information (CSLI) is protected by Fourth Amendment guarantees against warrantless searches. The panel held that CSLI was within the subscriber's reasonable expectation of privacy and that the obtaining of that data without a warrant was a Fourth Amendment violation.

It found that "[i]n light of the confluence of the three opinions in the Supreme Court's decision in [United States v. Jones], we accept the proposition that the privacy theory is not

only alive and well, but available to govern electronic information of search and seizure in the absence of trespass.” The government’s warrantless gathering of the defendant’s CSLI is more like communications data than it is like GPS information. It is private in nature rather than being public data that may warrant privacy protection only when its collection creates a sufficient mosaic to expose what would otherwise be private.

Nevertheless, applying the “good faith reliance on a court order” theory of *Leon*, the court of appeals affirmed Davis’s conviction.

En banc holding: The full court reversed the en banc panel’s decision regarding the need for a warrant to obtain CSLI from a provider. The en banc court held that a subpoena issued pursuant to the requirements of the Stored Communication Act was sufficient to obtain such records.

The court engages in a very thorough and thoughtful discussion of the expectations of privacy in information *provided to a third party provider* and in the reasonableness of the securing of such information following the requirements of the Stored Communication Act.

***United States v. Graham*, No. 12-4659, 2016 WL 3068018 (4th Cir. May 31, 2016)
(Winn, Floyd, Thacker concurring in part, dissenting in part)**

Facts: The defendant, Graham, and co-defendant, Jordan, were convicted of various federal offenses arising from a series of armed robberies of various business establishments located in Baltimore City and Baltimore County. The government used CSLI evidence to establish the defendants’ proximity to the locations of the robberies. The government obtained the cell site location information *for a 221 day period* from the provider pursuant to two court orders issued under the Stored Communications Act. The site information was obtained relative to two cell phones seized when the defendants were arrested. The district court denied the defendants’ motion to suppress the cell site information.

Holding: Government did not violate defendants’ Fourth Amendment rights in obtaining historical cell-site location information from defendants’ cell phone provider without a warrant in order to deduce defendants’ approximate locations at times that crimes took place; defendants had no reasonable expectation of privacy in that historical location information, as they voluntarily conveyed such information to cell phone provider by making and receiving calls and texts on their phones, the data was non-content routing information, and government obtained court order directing provider to disclose the information, pursuant to the Stored Communications Act (SCA).

A panel of the Fourth Circuit had been one of the last holdouts when a panel held that the obtaining of the CSLI in this case violated the Fourth Amendment rights of the defendants (but upheld the conviction under the Good Faith exception to the exclusionary rule).

***United States v. Guerrero*, 768 F. 3d 351 , 2014 WL 4476565 (USCA 5th Cir.
9/11/14) (CSLI/Stored Communications Act/Remedy)**

The government's failure to follow the requirements of the Stored Communications Act in securing historical cell site location data from the provider did not require suppression of the data. The court said that Congress did not provide for suppression as a remedy for non-compliance. The court of appeals also noted that the Supreme Court's decision in *Riley* did not overrule the court of appeals earlier decision in *Historical Cell Site*, 724 F. 3d 600 (5th Cir. 2013) in which the court found no 4th Amendment privacy interest in the site location data conveyed to the third party provider.

See also La. Senate Bill 182, Acts 2015, No. 165 enacting the Kelsey Smith Act.

It provides for disclosure to law enforcement officers of "device location" by providers of commercial mobile services under specified circumstances: (a) a call for emergency services initiated from the device of the user and (b) an emergency situation that involves the risk of death or serious bodily harm to the device user. The request for disclosure can be by electronic or other written request by a law enforcement supervisor.

Computers and Third Parties

***United States v. Weast*, No. 14-11253, 2016 WL 321329 (5th Cir. 1/2016) (search of computer)**

Facts: A Fort Worth Police Department officer used peer-to-peer file sharing software to search for computer users sharing child pornography. Officer Watkins located an IP address whose corresponding user appeared to be sharing child pornography. He then used the peer-to-peer software to download six files shared by the user. The files had been stored on a computer that the user had nicknamed "Chris," and they contained apparent child pornography. Officer Watkins used a publicly accessible website to determine the internet service provider (ISP) associated with the IP address from his search. A subsequent subpoena to that ISP revealed that the IP address was registered to Larry Weast. Law enforcement officers executed a search warrant at Weast's residence, where they found his son, Chris. The officers seized computer equipment from Chris's bedroom, including a hard drive that was later found to contain child pornography.

Shared with 3P/Peer to peer software. Citing *Riley v. California*, Weast claimed that Officer Watkins violated his Fourth Amendment rights by using peer-to-peer software, without a warrant, to identify his IP address as possibly linked to child pornography and to download data that Weast had made available for sharing. The district court denied Defendant's motion to suppress, reasoning that Weast had no reasonable expectation of privacy in the information accessed through the software and website.

"We have never explicitly stated whether IP addresses or files shared through peer-to-peer networks are subject to a reasonable expectation of privacy. However, other circuits have concluded that they are not. As the Third Circuit has explained, "[f]ederal courts have uniformly

held that subscriber information provided to an internet provider, including IP addresses, is not protected by the Fourth Amendment's privacy expectation because it is voluntarily conveyed to third parties. Similarly, other courts have consistently held that Fourth Amendment protections do not extend to data shared through peer-to-peer networks.

Weast acknowledges much of this unfavorable precedent, but argues that *Riley* should be understood to have wiped the slate clean. In *Riley*, the Supreme Court held that the Fourth Amendment prohibits warrantless searches of arrestees' cell phones. That case relied on the presumption that the arrestees had a reasonable expectation of privacy in the information on their cell phones. Unlike those arrestees, however, Weast had already voluntarily shared all of the information at issue in this case. He broadcast his IP address far and wide in the course of normal internet use, and he made the child pornography files and related data publicly available by downloading them into a shared folder accessible through a peer-to-peer network. Such behavior eliminates any reasonable expectation of privacy in the information, rendering *Riley* inapposite.

Our recent decision in *Guerrero* (CSLI data) reinforces this conclusion. In that case, we held that *Riley* did not overrule our precedent withholding Fourth Amendment protection from cell phone location data passively transmitted to service providers. The reasoning of *Guerrero* easily extends to the facts now before us; IP addresses and peer-to-peer-shared files are widely and voluntarily disseminated in the course of normal use of networked devices and peer-to-peer software, just as cell phone location data are disseminated in the course of normal cell phone use. For this reason, Weast's Fourth Amendment rights were not violated when Officer Watkins accessed his IP address and shared files.

Is Reading the Magnetic Strip on a Credit Card a Search?

***United States v. Bah*, 794 F.3d 617 (6th Cir.) cert. denied sub nom. *Harvey v. United States*, 136 S. Ct. 561 (11/30/2015)**

Facts. Officer 1 stopped a rental vehicle driven by Mamadou Bah for speeding in a construction zone. During the traffic stop, officers placed Bah under arrest for driving on a suspended license and detained passenger Harvey for “investigatory purposes” after discovering approximately 72 credit, debit, and gift cards in the rental car's glove compartment and trunk.

Officer 2 —also without a warrant—then used a magnetic card reader, or “skimmer,” to read the information encoded on the magnetic strips of 18 credit, debit and gift cards in the passenger compartment. A skimmer is a device similar to that used at gas stations, restaurants, and grocery stores to read the “magstripe,” or magnetic strip, on cards. The magstripe of any credit, debit, or prepaid gift card typically contains limited, unique information: an account number, bank identification number (the six-digit number that identifies a particular financial institution), the card expiration date, the three digit “CSC” code, and the cardholder's first and last name. With the exception of the bank identification number and a “few other additional,

unique identifiers,” the information stored on the magstripe should mirror that provided on the front and back of the card. The magstripe does not typically contain an individual's birth date, social security number, mailing address, blood type or other personal data. Because financial transactions may be conducted using only the data printed on the front and back of a card, accessing the information stored on the magstripe is not always necessary to make a charge. An encoding device is required to change, or re-encode, the data on a magstripe.

Upon scanning the 18 cards, Officer 2 found that a “majority, if not all” of the magstripes had been re-encoded so that the financial information they contained did not match the information printed on the front and backs of the cards. The re-encoded account numbers had been either stolen or compromised, and a number of the associated accounts had already incurred fraudulent charges.

Holding: Police did not conduct a search when using a ‘skimmer’ to read the magnetic strip of credit cards seized from the defendants. There was no physical intrusion into a constitutionally protected space when the officer, legally possessing the card, slid the card through the scanner.

Furthermore, the defendants did not have a reasonable expectation of privacy in the limited information found in the ‘electronic strip’. Even assuming that Bah and Harvey held a subjective expectation of privacy in the magnetic strips—strips that include their account number, a bank identification number, the card's expiration date, a three digit “CSC” code, and, at times, the cardholder's first and last name—neither Bah nor Harvey held a reasonable expectation of privacy in the magnetic strips. Because the information on the magnetic strips, with the possible exception of a “few other additional, unique identifiers,” mirrors that information provided on the front and back of a physical credit, debit or gift card, and the magnetic strips are routinely read by private parties at gas stations, restaurants, and grocery stores to accelerate financial transactions, such an expectation of privacy is not one that society is prepared to consider reasonable.

No Knock Warrants

***State v. Ashworth*, 2015-517 (La. App. 3 Cir. 11/25/15), 178 So. 3d 1148 (search warrant/no-knock entry)**

Facts: Officer requested a no knock warrant, as he routinely did in cases involving drug dealers, for 328 North Frusha Drive. The warrant he received said 1014 Davis St. The officer executed the warrant at the North Frusha address.

Holdings:

Error in Warrant. Search warrant's incorrect statement of address to be searched as “1014 Davis Street,” rather than “328 North Frusha Drive,” was typographical error that did not render warrant invalid; affidavit seeking the warrant identified the specific, particular location,

including the correct address, search at correct address was not lucky happenstance but was result of planned operation based on prior illegal activity involving known drug dealer, officers involved in executing warrant at all times knew intended location through close communication and coordination, and given that town was small with small police department, search of wrong premises was much less likely to occur. Incorrect address did not render the warrant invalid.

Issuance of no knock warrant. Determination of reasonable suspicion or probable cause necessary to justify a no-knock search warrant requires analysis of the events leading up to the search.

Law enforcement had reasonable suspicion of threat of physical violence or likelihood that evidence would be destroyed, as required to justify no-knock entry to execute search warrant, even though detective always asked for no-knock warrant in cases involving drug dealers; detective requested no-knock warrant based on knowledge of prior search warrant related to suspected involvement in armed robbery by occupant of premises, prior drug purchases, and defendant's history of being known drug dealer and dangerous man, and magistrate who signed warrant considered defendant's criminal history and was same magistrate who had signed previous warrant. No knock warrant and entry were justified.

Search on Curtilage Incident to a Stop

State v. Moultrie, 2014-1535 (La. App. 1 Cir. 10/23/15)(search)

Facts: Defendant was stopped at the end of a driveway, about 30 feet from a grill next to a trailer. Officers searched the grill and found drugs.

Holding: A search incident to a *Terry* investigatory stop must, considering the totality of the circumstances, be narrowly tailored to ensure the safety of the officers during questioning of the individual. The testimony of the agents established that the defendant was detained at the street, some thirty feet from the grill. Under the totality of the circumstances, opening the grill exceeded the limited scope of the permissible search justified by the stop.

Exigent circumstances. The trial court had determined that the officers were justified in opening the grill by the exigent circumstances exception to the warrant requirement. Exigent circumstances are exceptional circumstances which, when coupled with probable cause, justify entry into a protected area that, without those exceptional circumstances, would be unlawful. The Supreme Court has defined "exigent circumstances" as "a plausible claim of specially pressing or urgent law enforcement need." Exigent circumstances may arise from the need to prevent the offender's escape, minimize the possibility of a violent confrontation which could cause injury to the officers and the public, and preserve evidence from destruction or concealment.

An officer needs both probable cause to search and exigent circumstances to justify a non-consensual warrantless intrusion into private premises. Probable cause for a search exists when facts within the officer's knowledge and of which he has reasonable and trustworthy

information are sufficient to justify a reasonable man in the belief that the place to be searched will contain the object of the search. Thus, it was incumbent on the State to prove that the agents had probable cause to believe that the grill contained contraband or evidence of a crime. While law enforcement's reasonable suspicion for an investigatory stop may ripen into probable cause to search a closed container such as the subject grill, the State failed to prove any such facts here.

At the time the grill was searched, the agents had not seen the defendant interact with anyone else, had not seen any other people or vehicles in the area when they arrived, had not seen the defendant holding or discarding any objects, and had not seen the defendant near the grill, much less touching the grill or placing anything into it. Once the agents activated their blue lights and exited their undercover unit, the defendant remained at the end of the driveway approximately thirty feet from the grill. Agent Renfro testified that the lid of the grill was slightly askew and dew on its handle had been disturbed. The agents admitted, however, that they were aware of other people in the nearby trailers, although they did not see them.

At the motion to suppress hearing, when asked what made him think there may be weapons, contraband, or narcotics in the area, Agent Renfro responded, "Because of the—the area is a high crime area. We found several things before." The agents' knowledge of the area supports their decision to stop and question the defendant relative to a potential crime. However, the agents did not develop probable cause to search the closed grill or to arrest the defendant until after the grill was opened. Consequently, the warrantless search was not justified by the exigent circumstances exception.

The State also failed to affirmatively show that the search of the grill was justified under any other exception to the warrant requirement. The search of the grill violated the defendant's constitutional rights and, under the facts presented, warrants application of the exclusionary rule barring the drug evidence seized as a result of the illegal search. We therefore reverse the ruling of the trial court.

McDONALD, J. dissents. I do not believe the grill was located within the curtilage of the trailer. I do not believe the defendant had a reasonable expectation of privacy in illegal drug activities in the yard. More specifically, the defendant could not have had a reasonable expectation of privacy inside of a grill that he did not own, which was near a trailer that he did not live in. Even if the grill at issue was owned by the defendant's mother and the grill was considered on the curtilage, the defendant as a non-owner and non-resident still had no reasonable expectation of privacy in the trailer or its yard, or in objects in the yard he did not own.

Exclusionary Rule

***Utah v. Strieff*, 2016 WL 3369419 (U.S. June 20, 2016)(5-3)(Sotomayor, Kagan, Ginsburg dissenting)**

Facts: Narcotics detective Douglas Fackrell conducted surveillance on a South Salt Lake City residence based on an *anonymous tip* about drug activity. The number of people he observed

making brief visits to the house over the course of a week made him *suspicious* that the occupants were dealing drugs.

After observing respondent Edward Strieff leave the residence, Officer Fackrell detained Strieff at a nearby parking lot, identifying himself and asking Strieff what he was doing at the house. He then requested Strieff's identification and relayed the information to a police dispatcher, who informed him that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell arrested Strieff, searched him, and found methamphetamine and drug paraphernalia.

Strieff moved to suppress the evidence, arguing that it was derived from an unlawful investigatory stop. The trial court denied the motion, and the Utah Court of Appeals affirmed. *The Utah Supreme Court reversed, however, and ordered the evidence suppressed.*

Holding: The evidence Officer Fackrell seized incident to Strieff's arrest is admissible based on an application of the attenuation factors from *Brown v. Illinois*, 95 S.Ct. 2254 (1975). In this case, there was no flagrant police misconduct. Therefore, Officer Fackrell's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest.

Discussion: As the primary judicial remedy for deterring Fourth Amendment violations, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality." *Segura v. United States*, 104 S.Ct. 3380. But to ensure that those deterrence benefits are not outweighed by the rule's substantial social costs, there are several exceptions to the rule. One exception is the attenuation doctrine, which provides for admissibility when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance. See *Hudson v. Michigan*, 126 S.Ct. 2159.

As a threshold matter, the attenuation doctrine is not limited to the defendant's independent acts. The doctrine therefore applies here, where the intervening circumstance is the discovery of a valid, pre-existing, and untainted arrest warrant. *Assuming, without deciding, that Officer Fackrell lacked reasonable suspicion to stop Strieff initially*, the discovery of that arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to his arrest.

Three factors articulated in *Brown* lead to this conclusion.

(1) The "temporal proximity" between the initially unlawful stop and the search, favors suppressing the evidence. Officer Fackrell discovered drug contraband on Strieff only minutes after the illegal stop.

(2) In contrast, "the presence of intervening circumstances," strongly favors the State. The existence of a valid warrant, predating the investigation and entirely unconnected with the stop, favors finding sufficient attenuation between the unlawful conduct and the discovery of

evidence. That warrant authorized Officer Fackrell to arrest Strieff, and once the arrest was authorized, his search of Strieff incident to that arrest was undisputedly lawful.

(3) The third factor, “the purpose and flagrancy of the official misconduct,” also strongly favors the State. Officer Fackrell was at most negligent, but his errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights. After the unlawful stop, his conduct was lawful, and there is no indication that the stop was part of any systemic or recurrent police misconduct.

Dissent: Sotomayor/Ginsburg: “This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.”

“[A] basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right. ... [The] “exclusionary rule” removes an incentive for officers to search us without proper justification. *It also keeps courts from being “made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”* When courts admit only lawfully obtained evidence, they encourage “those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.” But when courts admit illegally obtained evidence as well, they reward “manifest neglect if not an open defiance of the prohibitions of the Constitution.”

“Writing only for myself, and drawing on my professional experiences, I would add that unlawful “stops” have severe consequences much greater than the inconvenience suggested by the name.....”

Kagan/Ginsburg: Justice Kagan focused on the application of prongs two and three of the attenuation exception.

“Move on to the purposefulness of Fackrell's conduct, where the majority is less willing to see a problem for what it is. The majority chalks up Fackrell's Fourth Amendment violation to a couple of innocent “mistakes.” But far from a Barney Fife-type mishap, Fackrell's seizure of Strieff was a calculated decision, taken with so little justification that the State has never tried to defend its legality.”

“Finally, consider whether any intervening circumstance “br[oke] the causal chain” between the stop and the evidence. The notion of such a disrupting event comes from the tort law doctrine of proximate causation. And as in the tort context, a circumstance counts as intervening only when it is *unforeseeable*—not when it can be seen coming from miles away. For rather than breaking the causal chain, predictable effects are its very links.

Fackrell's discovery of an arrest warrant—the only event the majority thinks intervened—was an eminently foreseeable consequence of stopping Strieff. As Fackrell testified, checking for outstanding warrants during a stop is the “normal” practice of South Salt Lake City police.”

SEIZURES/CUSTODY

***Rodriguez v. United States*, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (4/21/2015)(traffic stop/dog sniff)**

The Court held that a traffic stop cannot be extended beyond the “time needed to handle the matter for which the stop was made.” The Court held that the seven to ten additional minutes needed for the police officer’s dog to conduct a sniff were not shown to have been justified by independent reasonable suspicion to believe the defendant was engaged in illegal activity. The additional minutes elapsed after the officer issued a warning ticket. The Court recognized that the officer may conduct certain unrelated checks, such as driver’s license checks, checking for outstanding warrants, and inspecting insurance papers and automobile registration. All such activities are part of the officer’s mission and included “ordinary inquiries incident to the traffic stop”. Such inquiries are related to highway and officer safety – and not related to “ordinary crime control”. The Court held that dog sniffing for controlled dangerous substances is not an ordinary incident of a traffic stop.

In remanding to the court of appeals, the Court noted that the issue of whether reasonable suspicion to extend the stop was present was to be determined on remand.

***United States v. Winters*, 782 F.3d 289 (6th Cir.) *cert. denied*, 136 S. Ct. 170, 193 L. Ed. 2d 138 (2015) (traffic stop/dog sniff)**

The court of appeals found that the circumstances facing the officer provided the officer with reasonable grounds to suspect that the defendant, stopped for a speeding violation, was engaged in trafficking of controlled dangerous substances. Thus, following the logic of *Rodriguez*, the court of appeals held that the dog sniff which occurred during the extended period was not conducted during a period of unlawful seizure. While noting that it was a ‘close case’, the court of appeals found that the officer’s observation of the nervousness of the occupants and the bizarre explanation of the travel plans of the occupants gave the officer, based on the experience of the officer, reasonable suspicion to extend the stop for a dog sniff.

Reasonable Suspicion/Probable Cause

***Heien v. North Carolina*, 135 S. Ct. 530 (2014) (reasonable suspicion/mistake of law)**

Facts: A police officer stopped the defendant for a ‘brake light’ violation, believing that the law required that both rear brake lights be in working order – when only one of defendant’s lights was working. After issuing a warning ticket, the officer asked for consent to search – which was given. The officer became suspicious when the defendant acted in a nervous fashion and when the two occupants of the vehicle gave “inconsistent answers about their destination.” The search resulted in the discovery of cocaine and defendant was charged with attempted trafficking of cocaine.

The North Carolina brake light statute *had not been construed* by the courts and the officer “reasonably, even if mistakenly, read the vehicle code to require that both brake lights be in good working order.”

Trial court: When the defendant moved to suppress the cocaine, the court found that the statute did not require that both brake lamps function in working order – and ordered the evidence suppressed.

State Supreme Court: The Supreme Court of North Carolina reversed the judgment of the court of appeals – finding that the officer’s ‘mistake of law’ was reasonable and that the evidence was admissible.

Holding: “...Reasonable men make mistakes of law ... and such mistakes are not less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer’s understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.”

The Court noted that the statute had not previously been construed by the North Carolina courts and that the wording of the statute caused the officer to “suddenly confront a situation in the field as to which the application of a statute was unclear – however clear it may later become.”

***United States v. Spears*, No. 14-11267, 2016 WL 279020 (5th Cir. Jan. 21, 2016)
(stop/reasonable suspicion)**

Facts: Officers were conducting surveillance of a house wherein a confidential informant had informed them drug distribution activity was taking place. After about 30 minutes of surveillance, Loera arrived at the New York House driving a silver sport utility vehicle. Shortly thereafter, defendant arrived at the House driving a white truck with an Oklahoma license plate. A third, blue car either arrived near this same time or was already parked in the driveway when surveillance began. The driveway extended all the way down the side of the house, behind the house, and into the backyard. Spears backed his truck into the driveway towards the

back of the house—in between the house and the fence—in a manner that completely obstructed the driver's side and the passenger's side of the truck from the view of the officers on the street. They could not see whether Spears exited his truck, entered or exited the house, or talked to Loera. At this time, Spears was unknown to the officers, and he had not previously been identified as a suspect connected with drug activity, the House, or Loera. Spears drove away from the House ten to twenty minutes after he arrived, and an officer followed him.

After another officer witnessed Spears commit a traffic violation, he was pulled over by the officer following him. As the officer approached Spears's truck, he observed Spears rummaging around the center console of the truck. The officer asked Spears for his identification and insurance, which he provided, and a few other questions. After speaking with Spears for approximately one minute, the officer returned to his patrol car. After approximately four and half minutes in the patrol car, the officer exited the patrol car and began speaking with Spears again. The officer testified that while he was questioning Spears, Spears appeared nervous, was not giving straight answers, was evasive in responding to questions, and was very non-compliant. When the officer asked Spears where he was coming from, Spears said he was coming from visiting a relative, which the officer believed was an untrue statement. When asked, Spears said he did not have any weapons in the truck, but he did not consent to a search of the truck. The officer then instructed Spears to step outside the truck, but he refused.

When a second officer arrived, they again asked Spears to step outside the truck. Again Spears initially refused, but he complied approximately one minute after being asked. After the pat down, the officers instructed Spears to sit in the back of the patrol car to wait for a drug-sniffing dog to arrive. He complied after protesting for approximately two minutes. When Spears first entered the back of the patrol car, approximately sixteen and a half minutes had elapsed since he was first pulled over. No drug-sniffing dogs were available. While still unable to locate a dog, the officers detaining Spears were informed by other officers that they had found a large, vacuum-sealed bag of money in Loera's sport utility vehicle after stopping Loera. Upon receiving this information, the officers collectively decided there was probable cause to search Spears's truck, and they proceeded to do so. Almost forty minutes had elapsed from the time Spears was initially stopped until the time the search began. In their search, the officers found a semiautomatic handgun in the center console, a backpack that contained approximately \$59,800 in cash, a counterfeit money detector, and a laundry bag that smelled of marijuana.

The United States contends the traffic stop was initially justified because the officers had a reasonable suspicion that Spears had committed or was about to commit a drug crime. The United States claims the following facts created this reasonable suspicion: Spears visited the House, he backed his truck into the driveway in a manner that obstructed the driver's side and the passenger's side of the truck from the view of the officers, he had an out-of-state license plate, multiple vehicles arrived at the House near the time Spears arrived at the House, and Spears stayed at the House for only ten to twenty minutes.

Holding: Visiting a house linked to drug activity is similar to being in a high-crime area. While a person's presence in an area known to be high in crime is a relevant contextual consideration in the reasonable suspicion analysis, such presence, standing alone, is not enough to support a reasonable suspicion that anybody found there is involved with drugs. The fact that Spears visited the House, which was linked to drug activity in several ways, is relevant; however, this fact alone is not enough to support a reasonable suspicion that he is involved with drugs. The officers had no way of differentiating Spears from a law-abiding visitor; for example, a maintenance technician visiting to work on the house, or a relative visiting for social purposes only.

For these reasons, additional suspicious activity is needed to give rise to a reasonable suspicion that Spears had committed or was about to commit a crime. In answer to the State's arguments, the court found the following: The fact that Spears backed into the driveway of the New York House was of little persuasive value. An out-of-state driver's license and license plates could not suffice to create reasonable suspicion of criminal activity. There were many innocent reasons for multiple cars to arrive at a house around the same time in the morning, even if only staying a short amount of time. None of those facts were probative enough to support a reasonable suspicion finding in the case.

The court was mindful that each fact was not to be treated in isolation and that facts which by themselves appear innocent may in the aggregate rise to the level of reasonable suspicion. Nonetheless, it did not find the totality of the circumstances at the time of the stop created a reasonable suspicion of a drug crime or any other criminal activity.

The stop. The government also argued that certain things during the stop lead to reasonable suspicion: Spears lied about where he was coming from; he appeared nervous; he was evasive, non-compliant, and argumentative; and there was a backpack inside his vehicle in plain view.

However, the court held the following: *Minor, insignificant, illusory, or reconcilable inconsistencies in a defendant's story are not probative of criminal activity.* There was no evidence that any of the officers knew that Loera was not a relative of Spears or that none of Spears's relatives lived at the House. The only evidence regarding Spears's nervousness is the officer's testimony that Spears "was nervous"; the officer did not explain why he thought Spears was nervous or name any physical displays of nervousness. The non-descriptive, general statement that Spears was nervous was not sufficiently persuasive to create reasonable suspicion. Spears eventually complied with all instructions and answered all questions within approximately two minutes of being asked. His level of evasiveness, non-compliance, and argumentativeness did not rise to such a level that it alone created a reasonable suspicion of a criminal activity under the specific facts of this case. While the court was considerate of law enforcement's experience with backpacks in drug transactions, the very common occurrence of having a backpack in a vehicle and the multitude of innocent uses for a backpack in a vehicle renders the presence of a backpack in Spears's vehicle of little persuasive value.

***United States v. Davis*, 620 F. App'x 295, 296-97 (5th Cir. 2015) (stop/reasonable suspicion for extended detention/Pit Bulls!)**

Facts: A trooper stopped Davis for speeding on Interstate 45. When the trooper approached Davis's car, he spotted a large pit bull in the back seat barking and lunging at the window. Because of the dog, the trooper asked Davis to step out of the car. While exiting the vehicle, Davis warned the trooper that the dog was not friendly. Davis handed the trooper his driver's license but was unable to offer proof of car insurance. Because of the heat and road noise, the trooper had Davis sit in the front passenger seat of his police car.

Once inside the car, the trooper began a computer check of Davis's driver's license and the vehicle's license plate, both of which were issued in Ohio. While running the check, he questioned Davis about his trip. Davis said he was traveling to Dallas to visit his uncle and then planned to return to Houston, where he was signed to a record label as a rapper. The trooper was suspicious of the "turnaround trip" because of the dog's presence and what he called the "lived in look" of Davis's vehicle. He also observed that Davis sweated, stuttered, evaded eye contact, and appeared "abnormally nervous." The trooper noted that Davis continued to sweat while sitting in the air-conditioned patrol car. *While in the car, Davis again mentioned that the dog was not friendly.* The frequent comments about the dog's dangerousness gave Smith the impression that Davis did not want him to go near the car. *Smith had learned in interdiction classes that large dogs are sometimes used to deter searches while transporting narcotics.*

After informing Davis that he was going to issue a warning for speeding, the trooper noticed on the computer that Davis had prior drug charges. When he asked Davis about his criminal history, Davis made what the trooper perceived to be conflicting statements before stating that he did not want to talk about his history. The trooper later said that based on the fact that Davis's vehicle was registered to a third party, his nervousness, the pit bull in his car, his criminal history, his "implausible travel plans," and I-45's reputation as a "known drug corridor," the trooper asked Davis whether there was anything illegal in his vehicle. Davis said there was not. At this point, 14 minutes after the stop, the trooper requested permission to search Davis's vehicle. Davis refused. Thereafter, Smith contacted the DPS canine unit which arrived 30 minutes later and 51 minutes after the initial stop. Upon arrival, the canine immediately alerted to Davis's car and, in the search, officers recovered a handgun and cocaine.

Davis was charged with possession with intent to distribute cocaine, possession of a firearm during the commission of a drug-trafficking offense, and possession of a firearm by a convicted felon.

Holding: Factors such as nervousness, inconsistent stories, criminal history, use of another's vehicle, an out-of-state driver's license and license plates, and presence on a known drug-trafficking corridor may not suffice to create reasonable suspicion of criminal activity. To constitute articulable facts that support a reasonable suspicion of wrongdoing, such factors must be coupled with more concrete evidence that suggests the commission of a specific offense. For example, evidence that a vehicle contained drugs, such as alterations to gas tanks or tires or the fact that the defendant provided false or implausible information regarding his travel plans. Officers must identify specific inconsistencies. The evidence of the implausibility of Davis's travel plans was minimal. Travel plans whose implausibility are merely trivial or illusory do not suffice to justify an extended detention.

Most compelling were the circumstances surrounding the pit bull in Davis's car. The trooper knew from prior training that such dogs are often used to deter car searches when transporting narcotics. Additionally, *Davis warned the officer twice* that the dog was not friendly. During the second such instance he was sitting in the patrol car, and the trooper had not asked about the temperament of the dog or indicated that he intended to approach Davis's car. Thus, when Davis abruptly reiterated the warning, the trooper reasonably suspected that Davis was attempting to deter him from recovering illegal materials contained within the car.

We recognize that dogs accompany many travelers, and that if those dogs are unfriendly toward strangers, most owners would advise those approaching their vehicles to be wary. But the additional, out-of-context warning issued by Davis while sitting inside the patrol car sets this case apart from the typical example. Taking this interaction together with the other factors enumerated by the trooper, including the trooper's training regarding dogs and Davis's nervousness, criminal history, and presence on a known drug-trafficking corridor, we hold the trooper possessed reasonable suspicion to prolong Davis's stop until the canine unit arrived.

Resisting Arrest

***State v. Fairman*, 15-67 (La. App. 5 Cir. 9/23/15), 173 So. 3d 1278, 1286 (custody/resisting arrest)**

Facts/Holding. Probable cause to arrest defendant occurred after the officers approached defendant to speak with him and were met with violent resistance. Defendant did not simply "ignore" Deputy Smith's outstretched hand and continue to walk towards the exit as defendant argues. Instead, defendant slapped the officer's hand and started an altercation with the officers resulting in his arrest. Thus, the battery/resistance was not justified and in defense of an unlawful arrest because the battery is the reason defendant was arrested.

He claims that there is a double jeopardy violation under the "same evidence test," because the evidence required to support a finding of guilt of battery of a police officer producing an injury requiring medical attention also supports a conviction of battery of a police **14 officer.

Excessive Force

***Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (11/2015)(excessive force)**

Facts: Officers went to execute arrest warrant. Suspect fled in car. Motorist reportedly was intoxicated, he had led police on 25-mile chase at speeds of between 85 and 110 miles per hour on interstate freeway. Twice during his flight he had threatened to shoot police officers if they did not abandon their pursuit, and he was approaching an officer who was manning spike strips that had been placed on freeway, thereby posing a risk to that officer. DPS Trooper Mullenix also responded. He drove to the Cemetery Road overpass, initially intending to set up a spike strip there. Upon learning of the other spike strip positions, however, Mullenix began to consider another tactic: shooting at Leija's car in order to disable it. Mullenix had not received training in this tactic and had not attempted it before, but he radioed the idea to Rodriguez.

Rodriguez responded “10–4,” gave Mullenix his position, and said that Leija had slowed to 85 miles per hour. Mullenix then asked the DPS dispatcher to inform his supervisor, Sergeant Byrd, of his plan and ask if Byrd thought it was “worth doing.” Before receiving Byrd's response, Mullenix exited his vehicle and, armed with his service rifle, took a shooting position on the overpass, 20 feet above I–27. Respondents allege that from this position, Mullenix still could hear Byrd's response to “stand by” and “see if the spikes work first.” Approximately three minutes after Mullenix took up his shooting position, he spotted Leija's vehicle, with Rodriguez in pursuit. As Leija approached the overpass, Mullenix fired six shots. Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled two and a half times. It was later determined that Leija had been killed by Mullenix's shots, four of which struck his upper body. There was no evidence that any of Mullenix's shots hit the car's radiator, hood, or engine block.

Holding: Qualified immunity for public officials protects all but the plainly incompetent or those who knowingly violate a clearly established right. A “clearly established right,” for purposes of determining whether a public official is entitled to qualified immunity, is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. A case directly on point is not required, but existing precedent must have placed the statutory or constitutional question beyond debate. Officer Mullenix was not liable.

***Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470, 192 L. Ed. 2d 416 (6/22/2015)
(excessive force)**

Facts: In this case, an individual detained in a jail prior to trial brought a 42 USC §1983 claim against several jail officers, alleging that they used excessive force against him. The officers conceded that they intended to use the force that they used. But the parties disagreed about whether the force used was excessive.

Holding: The Court framed the issue as whether, to prove an excessive force claim, a pretrial detainee must show that the officers were *subjectively* aware that their use of force was unreasonable, or only that the officers' use of that force was *objectively* unreasonable. The Court concluded that the standard is an objective one and held that a reasonable officer would not have known the force was excessive.

Failure to Render Care

***Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 278-79 (5th Cir.
11/10/2015) (custody/failure to render care)**

Facts: The Mason's filed suit against the Lafayette City Parish Government claiming that an officer did not render care after a shooting. The officer called an ambulance, left to put the dog into the police vehicle, and returned to render first aid but found others addressing Mr. Mason's wounds so did not render further assistance.

The Mason's found fault with the fact that the officer did not personally participate in Mr. Mason's care. They alleged that Lafayette's police policy requires an officer to "immediately ... determine the physical conditions of any injured person and render first aid." They also sought to hold the officer liable for the inadequate care by others because Mr. Mason was dragged by his legs from the scene of the shooting to a nearby breezeway. They argued that an officer violated the Eighth and the Fourteenth Amendments when, with deliberate indifference, he failed to render aid to Mr. Mason after he was shot.

Holdings:

Eighth Amendment. The Court held that the Eighth Amendment did not apply in the case because no adjudication of Mr. Mason's guilt had occurred.

Due Process. The Due Process Clause requires the government to provide medical care to persons who have been injured while being apprehended by the police. The plaintiff must show that an officer acted with subjective knowledge of a substantial risk of serious medical harm, followed by a response of deliberate indifference. Deliberate indifference is an extremely high standard to meet. A plaintiff must show that the officials refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.

The officer's conduct did not rise to the level of deliberate indifference. A failure to follow official policy, by itself shows, at most, negligence and cannot support a finding of deliberate indifference. The officer's decision to place the dog, which had been attacking Mr. Mason, in the police car, and to defer to other officers to attend to Mr. Mason, cannot fairly be described as showing "a wanton disregard for [Mr. Mason's] serious medical needs." Additionally, when addressing deliberate indifference, we must evaluate an official's conduct individually rather than collectively so long as multiple officials are not acting in unison. The other officers' decision to drag Mr. Mason, if deliberate indifference, cannot give rise to liability for *this* officer. The officer was entitled to judgment as a matter of law on the deliberate indifference claims.

COUNSEL

***United States v. Weast*, No. 14-11253, 2016 WL 321329 (5th Cir. 1/26/2016) (self representation)(petition for cert docketed 6/15/2016)**

Issue: Weast claims that the court denied him his Sixth Amendment rights by refusing to let him represent himself at trial.

Facts: After Weast repeatedly disrupted pretrial hearings, the district court entered a lengthy and detailed order detailing his obstreperous conduct up to that point. The court explained that Weast consistently refused to answer basic questions (e.g., what his name was and whether he was pleading guilty or not guilty), interrupted the court ad nauseam, and “barraged the court with bizarre filings.” His behavior showed no sign of abating over time, and he ignored numerous entreaties from the bench to change tack. The court concluded that Weast was pursuing “a deliberate and calculated defense strategy to so disrupt the proceedings that they cannot go forward in a meaningful way,” and determined that absent a change in behavior, he could not be allowed to represent himself.

Unfortunately, no such change occurred between the time the order was entered and the time of trial. Weast filed more nonsensical motions, and was, if anything, more disruptive than before in a pretrial appearance before the court, a remote appearance during the trial (but outside the presence of the jury) to determine whether he would testify, and sentencing proceedings after the trial.

Holding:

1) Need not disrupt trial. These antics justified the district court's decision. The trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.” Weast acknowledges this basic principle, but nonetheless claims error on two grounds. First, he argues that the court could not be sure he would disrupt trial without actually letting him represent himself at trial; that is, only if he disrupted his actual trial could the court constitutionally deny him self-representation. This principle is nowhere in our case law. Indeed, in *Vernier*, an unpublished case, we commented that “a defendant's request to represent himself at trial may be rejected if it is intended to cause delay or some tactical advantage” or if pretrial behavior suggests that the defendant intends to disrupt the trial. We also noted that “[o]ther circuits hold that a trial court may deny the right of self-representation when evidence indicates that the defendant intends to use the right to delay or disrupt the trial.” The facts in this case closely track those in *Long*, in which we found that the defendant “may well have” waived self-representation through similar pretrial conduct, and *Brock*, in which the Seventh Circuit concluded that similar behavior did waive self-representation. And in

Vernier, we upheld a denial of self-representation based solely on pretrial conduct, although that conduct suggested a strong risk of violence (unlike here). Given this precedent, the district court was not legally required to allow Weast to disrupt the trial itself in order to appoint him counsel against his wishes.

2) *No need to provide audio-video link*. Weast argues that he could have represented himself without causing problems by participating in the trial through the audio/video link, subject to the judge's ability to mute the line. But the district court reasonably concluded that such an arrangement would not prevent undue disruption. Even after being removed from the courtroom, Weast continuously interrupted proceedings, refused to answer questions, and delivered nonsensical rants through the audio/video link, forcing the court to repeatedly mute him. His conduct was no better when he briefly returned to the courtroom during a pretrial hearing.

***State v. Tucker*, 2013-1631 (La. 9/1/15), reh'g denied (Oct. 30, 2015) (Conflict/Ineffective assistance)**

Facts: During jury selection, prospective juror Latisha Griffin changed her views on the death penalty overnight. A brief recess followed after which defense counsel informed the court they believed someone had spoken with this prospective juror and persuaded her to change her answers. Griffin was examined and admitted that she had received a three-way telephone call the night before in which Tucker urged her to change her answers to questions about the death penalty.

Defense counsel then moved to withdraw based on a conflict of interest resulting from being witnesses to jury tampering by their client.

Holding: The trial court denied the motion.

***Luis v. United States*, 136 S. Ct. 1083, 1084-85, 194 L. Ed. 2d 256 (5/30/2016) (Kennedy, Alito, Kagan dissenting)(Thomas concurring)**

Facts: A federal statute provides that a court may freeze before trial certain assets belonging to a defendant accused of violations of federal health care or banking laws. Those assets include (1) property “obtained as a result of” the crime, (2) property “traceable” to the crime, and (3), as relevant here, other “property of equivalent value.” 18 U.S.C. § 1345(a)(2). The Government charged Sila Luis with fraudulently obtaining nearly \$45 million through crimes related to health care. In order to preserve the \$2 million remaining in Luis' possession for payment of restitution and other criminal penalties, the Government secured a pretrial order prohibiting Luis from dissipating her assets, *including assets unrelated to her alleged crimes*.

Holding: The Sixth Amendment right to counsel grants a defendant “a fair opportunity to secure counsel of his own choice” that he “can afford to hire.” The Supreme Court

has consistently referred to the right to counsel of choice as “fundamental.” Here, the property was untainted, *i.e.*, it belongs to Luis. As described in *Caplin & Drysdale* and *Monsanto*, the Government may be able to freeze “tainted” assets—*e.g.*, loot, contraband, or property otherwise associated with the planning, implementing, or concealing of a crime - before trial. However, insofar as innocent funds are needed to obtain counsel of choice, the Sixth Amendment prohibits the court order sought here. Breyer and the plurality decided the case on a property ownership basis whereas Justice Thomas held it was strictly a 6th Amendment case. The dissenters disagreed with both.

***United States v. Bryant*, 136 S. Ct. 1954, 1956-57 (2016)(unanimous)**

Facts: In response to the high incidence of domestic violence against Native American women, Congress enacted a felony offense of domestic assault in Indian country by a habitual offender. 18 U.S.C. § 117(a). Section 117(a)(1) provides that any person who “commits a domestic assault within ... Indian country” and who has at least two prior final convictions for domestic violence rendered “in Federal, State, or *Indian tribal court* proceedings ... shall be fined ..., imprisoned for a term of not more than 5 years, or both....”

Respondent Michael Bryant, Jr., has multiple tribal-court convictions for domestic assault. When convicted, Bryant was indigent and was not appointed counsel. For most of his convictions, he was sentenced to terms of imprisonment not exceeding one year's duration. Based on domestic assaults he committed in 2011, Bryant was indicted on two counts of domestic assault by a habitual offender, in violation of § 117(a).

Issue: This case raises the question whether § 117(a)'s inclusion of tribal-court convictions as predicate offenses is compatible with the Sixth Amendment's right to counsel.

The Sixth Amendment guarantees indigent defendants appointed counsel in any state or federal criminal proceeding in which a term of imprisonment is imposed, *but it does not apply in tribal-court proceedings*. The Indian Civil Rights Act of 1968 (ICRA), which governs tribal-court proceedings, accords a range of procedural safeguards to tribal-court defendants “similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.” In particular, ICRA provides indigent defendants with a right to appointed counsel *only for sentences exceeding one year*.

Holding: The Supreme Court has held that a conviction obtained in state or federal court in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent proceeding “to support guilt or enhance punishment for another offense.” However, it has also held that “an uncounseled *misdemeanor* conviction, valid under *Scott* because *no prison term* was imposed, is also valid when used to enhance punishment at a subsequent conviction.”

Because Bryant's tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution.

EVIDENCE

Hearsay

State v. Koederitz, 2014-1526 (La. 3/17/15), 166 So. 3d 981 (hearsay/domestic violence)

Facts. The defendant was charged with second degree battery and false imprisonment of the victim, his estranged girlfriend.

When the victim first appeared at an emergency room for treatment of serious injuries, she identified the defendant as the perpetrator of the domestic violence which caused her injury. She also identified the defendant as the cause of her injury in an interview with a psychiatrist she saw for treatment of depression. The psychiatrist changed her medication and gave advice on avoidance of the situation which created the domestic violence.

Eventually, she reported the matter to the police who arrested the defendant. At defendant's trial, the victim was unavailable *because she had committed suicide*. Prior to trial, the defense counsel moved to prohibit the state from offering evidence of her identification statements to the physician and to the psychiatrist. The state also intended to offer portions of a letter written by the victim to the defendant (assuming proper authentication) in which she advised defendant of her 'apparent resolve' to end their relationship.

The trial court granted the defendant's motion but the Supreme Court reversed.

Holding: The Court noted that the identity of the individual who caused an injury is not usually admissible under La.C.Evid. 803(4) as 'pertinent to diagnosis and treatment'. However in cases of domestic abuse as in cases of child abuse, the identity of the person who caused the harm assumes a much heightened significance because in such cases the "identity of the perpetrator plays an integral role in medical treatment and diagnosis in connection with treatment."

Similarly , the portions of the letter written prior to the injuries expressing the victim's intent to terminate the relationship was admissible to establish the victim's then existing state of mind under La. C. Evid. 803.

Justice Crichton, concurring, noted the importance of deletion of inadmissible material which was included in the otherwise admissible statements.

State v. Mullins, 2014-2260 (La. 1/27/16)(hearsay; results of IQ test)

Facts. The State alleged that Defendant engaged in sexual intercourse with J.W., who was prevented from resisting or consenting because she suffers from a mental infirmity due to an IQ of 70 or below. Defendant was charged with and convicted of aggravated rape and sentenced to life in prison.

He argues that allowing Dr. Mark Vigen, the State's expert psychologist, to testify as to the results of IQ testing that he did not administer or score violated the Confrontation Clause of the United States Constitution. He also argued that the lower court erred in allowing the introduction of a letter Dr. Vigen, prepared in advance of trial, which was based on information gained from persons who did not testify.

We begin by examining Dr. Vigen's testimony. He testified on direct examination as to the victim's IQ score, which, based on the results of the victim's IQ testing, he opined was 63, below the score of 70 which the statute makes the minimum IQ required for consent. He further testified on direct examination as to when the IQ test was performed, how the test was performed, what the test was designed to measure, how the test measures a subject's aptitude versus the aptitude of others, and how the IQ score was derived. Dr. Vigen also revealed that he interviewed the victim before and after the test was administered, but that he had not personally administered or scored the test. Defendant's counsel did not object to this testimony.

At the close of Dr. Vigen's direct examination, the State offered into evidence a letter authored by Dr. Vigen which contained the results of the IQ test administered to J.W. Defendant's counsel objected, reasoning that he had not had the opportunity to cross examine the doctor about the contents of the letter. The trial court sustained the objection "for now," and allowed Defendant's counsel to cross examine Dr. Vigen about the contents of the letter.

Cross examination revealed that Jeri Jones, who was not present in court, had administered and scored the test, and that another technician, Tabitha Rawls, also not in court, had re-checked the scores. Dr. Vigen, still on cross examination, explained the standard deviation of the test and the margin of error for the test. He explained that the margin of error was plus or minus five points, so that the victim's actual IQ, with a ninety-five percent reliability, was between fifty-eight and sixty-eight.

At the conclusion of Defendant's cross examination of Dr. Vigen, the State again offered the letter into evidence. Defendant's counsel again objected, first arguing that the letter was not the best evidence of the victim's IQ, that the letter contained hearsay, and that the person who administered the test was not present in court to testify about the test. The trial court overruled the objection and allowed the letter to be introduced into evidence.

Holding: In the context of laboratory analysis and expert testimony, the Supreme Court has issued a series of opinions which offer several rationales. In the plurality opinion, *Melendez–Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), four justices held that certificates verifying that bags of powder were cocaine were testimonial because they were created for the primary purpose of providing evidence at trial. Further, the opinion held that where analysts' affidavits included testimonial statements, defendants were entitled to be confronted with the analysts themselves. One justice concurred because, in his view, the affidavits were testimonial due to their formal nature (Justice Thomas concurring). Four justices dissented, stating that the laboratory technicians who produced the certificates were not witnesses against the defendant because they did not have personal knowledge of some aspect of the defendant's guilt.

In *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), five justices found that a formal laboratory certificate identifying a defendant's blood alcohol level was testimonial and, therefore, not admissible without the testimony of the analyst who had conducted the testing, because it was created for the purpose of aiding in a police investigation. The opinion further held that the testimony of another analyst familiar with the procedures was not enough to establish admissibility.

In *Williams v. Illinois*, 132 S.Ct. 2221 (2012), yet another plurality opinion, four justices determined that the Confrontation Clause was *not* violated when the state's DNA expert testified on the basis of a report by another DNA expert who did not appear at trial that the DNA profile of a blood sample taken from the defendant matched the DNA profile taken from biological traces found on the victim of a sexual assault. The opinion offered two reasons for their finding. First, the expert's reliance on the report was not offered to prove the truth of the matter asserted because the results of the DNA test were relayed by the expert solely for the purpose of explaining the assumptions on which his opinion rested, and, second, the DNA profile was produced before the defendant was identified as a suspect and was not inherently inculpatory. Again, Justice Thomas concurred because the report lacked the solemnity required of testimonial evidence. The remaining four justices found that it was “open-and-shut” that when the state prosecuted the defendant for rape based in part on the DNA profile at issue, that the defendant should have the opportunity to cross-examine the witness who produced the evidence against him.

1. Testimony: Here, the State's expert, Dr. Vigen, testified as to the results of an IQ test he did not personally administer. The IQ test was administered in order to provide evidence at trial that the victim had an “intelligence quotient of seventy or below,” which is an essential element of the crime of aggravated rape. The technician who administered the test did not testify in court. Based on these facts, under the admittedly murky rules laid out by the United States Supreme Court, the results of the IQ test are clearly testimonial in nature.

Were the argument to be made that Dr. Vigen's reliance on the test results was not offered to prove the truth of the matter asserted, but only to explain the assumptions upon which his opinion was based, as was the case in *Williams*, the argument would fail for several reasons. First, in response to a question asking for the victim's IQ score as indicated by the IQ test, Dr. Vigen stated, “Sixty-three.” There was no premise in the prosecutor's question, as there was in

Williams. Next, as the *Williams* plurality admitted, in the event of a jury trial, as was the case here, without “an evaluation of the risk of juror confusion and careful jury instructions, the testimony could not have gone to the jury.” Finally, this Court has stated that the *Williams* holding is no more broad “than the particular circumstances that led to the convergence of the votes of five Justices to uphold the judgment of the Illinois appellate courts ...” *State v. Bolden*, 2011–2435 (La.10/26/12), 108 So.3d 1159, 1161. Those circumstances include the testing having been conducted before the defendant was identified or targeted as a suspect. Here, the testing was done after Defendant was identified and its primary purpose was to provide evidence at Defendant's trial.

The State argues that experts such as Dr. Vigen are allowed to testify as to their opinion based upon data provided to the expert which may or may not be admissible into evidence. Nothing in Dr. Vigen's testimony indicates, however, that he used anything other than the IQ test results to form his “opinion” as to the victim's IQ. When an expert merely repeats or summarizes the content of hearsay, his testimony cannot reasonably be considered an “opinion,” as it operates as little more than circumvention of the hearsay rules.

However, because Defendant did not make any objection to any of Dr. Vigen's testimony, he failed to preserve any error as to Dr. Vigen's testimony.

2. The letter. The letter also contained hearsay statements. It was a statement made by Dr. Vigen prior to his testimony in court, and was offered to provide evidence of the victim's IQ. As such, it is hearsay. Further, although Dr. Vigen may have authored and signed the letter, he had no personal knowledge of the test and sub-test scores. He obtained these scores from the technician who conducted and graded the test. The declarant of the test scores was the technician, not Dr. Vigen. The letter, which was itself hearsay, contained hearsay information. Hearsay within hearsay is admissible only if each part of a combined statement conforms with an exception to the hearsay rule. La.Code Evid. art. 801. No exception applies to either level of hearsay in the letter. Because the letter, itself, was hearsay, and it contained the hearsay statement of a technician who did not testify at trial, the trial court erred in allowing its introduction into evidence. Verdict reversed.

GUIDRY, J., dissented. The contents of the letter were merely cumulative when compared to the substance of Dr. Vigen's direct testimony. Thus, he disagreed with the majority's reasoning as to why introduction of the letter was not harmless. The majority had stressed the importance of the contents of the letter, which was written by Dr. Vigen, as containing all of the test results, including the scores of the sub-tests, and found that the additional scores bolstered the credibility of Dr. Vigen. But the IQ test result itself, which pertained to an essential element of the charged offense, was set forth in the letter, and that result had already been introduced in evidence by virtue of Dr. Vigen's testimony, which is otherwise substantive evidence.

***State v. Aguilar*, 2015-1230 (La. 9/18/15)(hearsay/forfeiture by wrongdoing)**

Facts. The State established by a preponderance of the evidence that the victims (the defendant's girlfriend and their daughter) recanted their testimony and ultimately became

uncooperative with the prosecution of the case after the defendant repeatedly violated the protective order forbidding the defendant from contact with the victims.

The lower courts both found the victims were unavailable as witnesses within the meaning of La.Code Evid. art. 804(A). Thus, to introduce the victims' out of court statements, the State was required to show that the defendant engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarants as witnesses. La.Code Evid. art. 804(B)(7); *Giles v. California*, 128 S.Ct. 2678 (2008).

Holding. The district court erred in denying the State's motion to introduce the victims' statements at trial. There is no requirement in the codal article that the defendant must engage in violence or employ threats of physical violence to cause fear in the victim in order to procure the witness's unavailability. The link between the defendant's actions and the victim's unavailability may be established when a defendant puts forward to a witness the idea to avoid testifying, either by threats, coercion, persuasion, or pressure. Here, the defendant, in violation of the protective order, repeatedly suggested and encouraged the victims to recant their statements to the police and to avoid testifying against him at trial, thereby applying pressure on the witnesses through persistent contact. Because the witnesses' unavailability is a logical outgrowth of the defendant's actions in this domestic violence case, the forfeiture by wrongdoing doctrine is properly applied.

Other Crimes Evidence

State v. Robertson, 2015-2095 (La. 2/5/16)(other crimes evidence)(Per curiam)

Facts. The defendant, Michael Robertson, is charged with the first degree murder of his eight-year-old son, Xzayvion Riley, in the 19th Judicial District Court, Parish of East Baton Rouge.

At issue here are four acts the trial court deemed inadmissible or admissible only for a limited purpose: (1) In November 2008, the defendant battered and abused Xzayvion by injuring his face with a belt; (2) In August 2010, the defendant battered and abused Xzayvion by injuring his neck and bruising his upper and lower body and groin area; (3) In February 2012, the defendant battered and abused Xzayvion by breaking his leg and subsequently neglecting to seek medical treatment; and (4) Xzayvion's sister observed the defendant hit and punch Xzayvion "a lot" in the years leading up to his death and observed the defendant force Xzayvion to run for unspecified periods of time.

Holding: We find that the trial court abused its discretion in excluding these four incidents or permitting the state to introduce them only for a limited purpose.

We specifically find: (1) The trial court abused its discretion in finding the November 2008 incident inadmissible as "too remote" from the charged crime. The victim was only eight years old at the time of his murder, and acts of abuse perpetrated against him in the years before his death are not so remote as to negate their probative value. (2) The trial court abused its discretion in finding the August 2010 incident admissible only in part, specifically in its finding

that the injuries to Xzayvion's neck were more prejudicial than probative. (3) The trial court abused its discretion in permitting the introduction of the fractured femur and lacerations/bruises for the purpose of showing the defendant's identity only. (4) The trial court abused its discretion in deeming the acts observed by Xzayvion's sister to be inadmissible. The evidence she will testify about has independent relevance as set forth in article 404(B).

***State v. Coleman*, 2016 WL 765557, 2014-0402 (La. 2/26/16)**

Facts: In 2003, Defendant was indicted for the first degree murder of 70-year-old Julian L. Brandon, Jr. The evidence showed that Coleman and his girlfriend, Brandy, shot Mr. Brandon in the head and stabbed him numerous times. They also attempted to kill his wife by placing a pillow over her head and shooting her. She survived.

On February 17, 2005, a jury returned a unanimous verdict of guilty as charged, and unanimously imposed the death penalty, having found all four aggravating circumstances urged by the state. On appeal, the Supreme Court found a violation of the rule in *Batson v. Kentucky*, 106 S.Ct. 1712 (1986) and vacated defendant's conviction and sentence, remanding for a new trial. *State v. Coleman*, 06–0518 (La.11/2/07), 970 So.2d 511. On February 3, 2012, on retrial, a jury returned a verdict of guilty as charged, and, having found the same four aggravating circumstances as found at his first trial, unanimously agreed to impose the death penalty.

During the penalty phase of the proceedings, the state again presented evidence of defendant's and his girlfriend Brandy's involvement in the unrelated murder of Terrance Blaze. The evidence indicated defendant and Brandy committed the murder together in Brandy's mother's vehicle three days after the Brandon murder.

Prior to the 1st trial, the state provided the required *Jackson* notice regarding this crime, and a *Jackson* hearing was held to determine the admissibility of that evidence. Prior to the retrial, defendant filed a motion seeking an amended *Jackson* notice from the state. During a pretrial motion hearing, the state opposed the motion, asserting there was no need to file a new *Jackson* notice because one had been filed in the first trial and the evidence would be the same. The State argued, “[N]ot only are they given a *Jackson* notice, they're given a very fully developed, exactly what the witnesses said in the last trial notice, when you couple the notice that was filed plus the trial transcripts, they're on kind of an uber notice, and we don't see a need to amend it.” Nevertheless, the trial court granted the defendant's motion “out of an abundance of caution.” The state subsequently filed a supplemental *Jackson* notice that it intended to introduce evidence of defendant's prior criminal convictions as previously noticed, as well as evidence that defendant *participated in and committed* a homicide upon Terrance Blaze on or about January 2003, within days of the instant offense.

At a pretrial hearing on that same day, the state advised the court that it had filed the supplemental notice. The prosecutor stated: “We intend to use *exactly the same* testimony that

was previously adduced....” The state further clarified that the notice “alleges the date of the homicide, incorporates only by reference the transcript since that gives very precise notice of *exactly what testimony* we would adduce to meet our burden under *Jackson*.” The state also confirmed once more that it intended “to present *exactly the same* penalty phase evidence.” Despite the state's notice and repeated guarantees to defendant and the court that the evidence and testimony would be identical to that previously set forth, the state *intentionally presented contradictory testimony* that defendant, not Brandy, shot Blaze in the back of the head.

During the state's opening statement during the penalty phase, the prosecutor told the jury that defendant and Brandy killed another person, and that Mr. Blaze was shot in the back of the head *by defendant*. The state then called Captain Rogers as a witness. Rogers testified he was able to reconstruct the Blaze crime scene after examination of photographs of the vehicle in which Blaze was shot and examination of blood found on a pair of jeans and boots belonging to the defendant. The evidence indicated defendant was seated in the driver's seat of the vehicle, Blaze was shot in the back of the head while seated in the front passenger seat, and Brandy Holmes was seated in the back seat of the vehicle. *Rogers testified that the victim would have been looking to his right when the wound was inflicted with the back of his head towards the driver's side of the vehicle. The shooter would have been sitting to the left of the person in the front seat.* At the closing of the penalty phase, the state argued: “[Coleman] deserved a life sentence as soon as you said he was guilty of first-degree for which we thank you, he's at a life sentence, well, what about the death of Terrance Blaze. Does that not warrant some greater consideration of a more severe penalty?”

There is no dispute that this testimony contradicted Rogers' previous testimony. The state admits that at defendant's first trial Rogers testified it was likely *the shot came from behind* and it was *less likely* the driver was the shooter. The state likewise admits Rogers unequivocally testified at Brandy's trial that “considering that the blood stains on the right leg, on the ashtray, and on the boot are consistent with high velocity impact spatter and they can also be consistent with expired blood or blood expelled out of the mouth after it pools, *I would put the person inflicting the wound being in the back seat of the vehicle and Mr. Coleman wearing the blue jeans and the boot in the front driver's seat of the vehicle....*” Defense counsel cross-examined Rogers, attempting to point out inconsistencies between this testimony and testimony he gave at defendant's first trial. During cross-examination, Rogers could not explain his prior testimony but reiterated that he always *meant* that the shot came from the driver. He adamantly insisted that, no matter what his prior testimony was, he believes the shot came from the driver (Coleman).

Holding: Based on the facts of this case, it is clear the state failed to provide defendant with *sufficient* notice of the other crimes evidence it intended to introduce at the penalty phase. Pursuant to *Jackson*, the defendant is entitled to notice of the “exact unrelated conduct he must be prepared to meet.” While the state's written *Jackson* notice gave notice that “defendant participated in and committed a homicide upon Terrance Blaze,” the state *purposefully* misled the defendant concerning the evidence it intended to present at

the penalty phase and gave defense counsel numerous assurances that its penalty phase evidence and testimony would mimic what it presented at defendant's first trial. Thus, Rogers' testimony that defendant was the shooter in the Blaze homicide did not conform with the *Jackson* notice provided by the state.

Harmless error. Because defendant did not have notice of the change in Rogers' testimony, defendant was not able to prepare a defense to the assertion he was the shooter in the Blaze homicide. He had no forensic experts in place to challenge Rogers. He had no line of cross-examination prepared to challenge Rogers' opinion or the science on which his opinion was based. Evidence defendant was the actual shooter in the Blaze homicide thwarted defendant's reliance on residual doubt going into the penalty phase and defendant's penalty phase argument that he was merely a follower of Brandy Holmes. The state's presentation of evidence that defendant was the shooter in the Blaze homicide allowed the state to argue defendant deserved a more severe punishment than a life sentence.

Because the sentencing hearing focuses on the character and propensities of the offender, the issue of relative culpability is a critical issue in the penalty determination. There is no doubt the state's portrayal of defendant as the actual shooter in the Blaze homicide, rather than merely a principal, impacted defendant's sentencing phase mitigating factor of lesser involvement in the offense and thus was arguably material to the jury's penalty determination. There is more than a reasonable probability that the jury may not have reached a unanimous decision of death had they not heard evidence that defendant was the actual shooter in another homicide.

State v. Hamilton, 2015-1810 (La. 1/18/16)

Background: Defendant was charged with possession of a firearm by a felon and aggravated assault with a firearm. The state filed *Prieur* notice of intent to introduce evidence of two prior instances of defendant's guilty pleas to attempted possession of a firearm. The District Court, Parish of Orleans, ruled that a prior handgun crime was admissible in prosecution for felon in possession of a firearm, but neither prior was admissible in assault prosecution. Supervisory writ was sought.

Holdings: The Supreme Court held that:

- 1) district court abused its discretion in failing to consider the probative value of defendant's conviction for attempted assault rifle in possession prosecution;
- 2) unfair prejudice would have resulted from admission of evidence of defendant's prior attempted possession of a firearm conviction, which was based on his possession of an assault rifle, in aggravated assault with a firearm prosecution; and
- 3) admission of evidence of defendant's prior attempted possession of a firearm conviction, which was based on a handgun, did not result in unfair prejudice in assault prosecution.

Relevance

State v. Waterhouse, 2015-2301 (La. 1/15/16), 182 So. 3d 964

Facts: A photograph depicted, among other matters, the defendant utilizing the middle finger of one hand in an offensive gesture. The state did not dispute that the photograph at issue was taken years before the crime for which the defendant was charged. The state did not dispute that other photographs, purportedly depicting the defendant, have been found admissible. The district court ruled that the probative value of the photo was outweighed by its prejudicial effect.

Holding: The trial court's judgment was reversed and the defendant's motion to suppress was denied. "According ample discretion to the trial court, under the circumstances of this case, it is apparent the trial court misapplied the standard set forth in La.Code Evid. art. 403."

Three justices would have denied the writ: Johnson, Hughes, Weimer. Justice Weimer wrote a strong dissenting opinion.

PRETRIAL PROCEDURE

Alford Plea

***State v. Hart*, 50,295 (La. App. 2 Cir. 11/18/15)(Alford Plea)**

Facts. Defendant allegedly kidnapped, raped, and battered his wife – pulling her hair out and banging her head against the steering wheel of his car. During his arrest, he pointed guns at the police. He was charged with 10 crimes including aggravated assault on a police officer with a firearm, aggravated assault on a police officer with a firearm, unlawful use of a laser on a police officer, resisting an officer with force or violence, second degree kidnapping, forcible rape, domestic abuse battery, and possession of cocaine. At trial, his wife recanted much of her story. After her testimony, the state and defendant entered into a plea agreement.

The defendant pled guilty to aggravated battery as a part of a plea agreement where the state agreed to substitute a lesser charge instead of the forcible rape and kidnapping charges.

Holding: There is no requirement that a guilty plea be accompanied by the recitation of a factual basis for the crime. The due process clause imposes no constitutional duty on state trial judges to ascertain a factual basis prior to accepting a guilty plea. Louisiana law, unlike federal law has no statutory provision requiring accompaniment of a guilty plea by the recitation of a factual basis. Due process requires a finding of a significant factual basis for a defendant's guilty plea only when a defendant proclaims his innocence or when the trial court is otherwise put on notice that there is a need for an inquiry into the factual basis.

Hart pled guilty to aggravated battery to avoid a potential conviction for forcible rape. Any assertions now made under *Alford* notwithstanding, Hart did not protest his innocence of this offense and entered a “straight up” unqualified plea of guilty to the offense. Further, the court informed Hart that, for purposes of this plea, it considered the steering wheel of Hart's car to be a dangerous weapon under La. R.S. 14:34. The trial court's explanation ensured that Hart was fully apprised of the charge against him and the elements thereof, and Hart indicated that he understood.

Nolle Pros/Refiling

***State v. James*, 2015-1193 (La. 10/30/15)(nolle prosecute/refile)**

Facts: Defendant was indicted for second degree murder and armed robbery on April 8, 2013. On October 10, 2014, he filed a motion for speedy trial. In accordance with La.C.Cr.P. art.

702(D), the state had until February 9, 2015, to commence trial or the defendant would be released without bail. The defendant appeared on that date and announced he was ready for trial. However, the state sought a continuance indicating that its witnesses, who were law enforcement officers, had not been subpoenaed because of a problem with the court's electronic notification system. The defendant objected and noted that the state could have eschewed the electronic system and instead requested the court to issue instanter subpoenas. The trial court agreed but granted the state a one-day continuance. The next day, the state again asked for a continuance on the basis of the malfunctioning electronic system. Notably, the defense witnesses were present after being issued instanter subpoenas. The trial court denied the state's request for another continuance, so the state, as is unfortunately customary in Orleans Parish, afforded itself a continuance by entering an order of nolle prosequi, and re-indicting defendant two days later.

Holding. The court noted that this perennial practice of the Orleans Parish District Attorney has been the subject of many writ applications to this Court and that it had expressed concern that the practice might violate the court's inherent power to manage its docket, see La.C.Cr.P. art. 17. The only check on the prosecutor's authority under current jurisprudence is to grant the motion to quash, a drastic remedy the Court had understandably been reluctant to see used.

The trial court in the present case declined to quash the prosecution; instead, in accordance with La.C.Cr.P. art. 701(D)(2), the trial court ordered that defendant be released without bail. That was an empty remedy, though, since the State requested the bond on a pending simple criminal damage to property charge be increased, based on the existence of the reinstituted second degree murder charge, to a sum defendant could not afford. Defendant therefore was re-incarcerated. Nevertheless, the Court found that the defendant got the proper remedy and refused the writ.

HUGHES, J., concurs. JOHNSON, C.J., would grant and assigns reasons. WEIMER, J., dissenting. CRICHTON, J., would grant and assigns reasons. Under certain circumstances, the dismissal and reinstitution of an indictment has the effect of circumventing a trial court's ruling denying the district attorney a continuance. This, in turn, interferes with the trial court's inherent authority to control its docket and renders meaningless a trial court's decision to deny a continuance. The district attorney's authority to dismiss and reinstitute indictments is therefore in tension with the district court's inherent authority over the docket, and I would grant and docket this case to address this tension.

Allotment

State v. Nunez, 2015-1473 (La. 1/27/16) (allotment)

Issue: This writ concerns the allotment system of criminal cases in Orleans Parish Criminal District Court when the date of the offense is uncertain or when there is a multi-count or multi-defendant case. Specifically, are La. Dist. Ct. Rule 14.0 or the defendants' due process rights are violated by the case allotment system of the Orleans Parish Criminal District Court,

which randomly assigns cases to different District Judges based on the first date of the first alleged offense? Defendants assert that the prosecutor has discretion to allege the earliest date of a charged offense and thereby select the judge for the case.

Facts: When the Clerk's office receives a bill of indictment or information, the clerk looks at the date of the offense indicated and refers to the calendar to find out what section of court has been allotted for that date. He uses the "first date of the first offense" to determine the pertinent date where multiple offenses are charged. Use of the first date of the oldest offense is, however, unwritten procedure and not part of the local rule. The current allotment procedure had been adopted after a period of trial and error and upon consultation with the National Center for State Courts.

The Fourth Circuit held that the District Court erred in denying the defendants' motions to quash the allotment, finding Louisiana Supreme Court jurisprudence contains no explicit requirement for a showing of actual manipulation of challenged allotment procedures. It further found the procedure used in Orleans Parish Criminal Court violates the principles of due process as well as La. Dist. Ct. Rule 14.0, because the allotment procedure "gives the District Attorney the ability to manipulate the allotment of cases by alleging certain dates in the indictment."

Holding: The Orleans Parish Criminal District Court's allotment process meets constitutional due process standards because it is sufficiently random and does not vest the District Attorney with the power to choose the Judge to whom a particular case is assigned, instead tethering judicial assignment to the defendant's conduct.

An allotment procedure does not violate due process principles or the requirements of La. Dist. Ct. Rule 14 by merely being susceptible to manipulation. To hold otherwise would have far-reaching consequences, as numerous jurisdictions in this State use date-of-arrest, date-of-offense, or other date-based systems which could conceivably be manipulated by a bad faith actor. Thus we decline to adopt such a burdensome and untenable rule.

WEIMER, J., dissenting.

At issue in this matter is the integrity of the criminal justice system and the justified concern that, when a judge is selected to preside over a case, the justice system is fair to both the state and the accused. It is about the image of the Supreme Court as the guardian of that integrity.

It is undisputed that the district attorney's office knows what judge will hear a case if that office picks a certain date. Counsel for the district attorney's office admitted at oral argument that the system of allotting judges at Criminal District Court for the Parish of Orleans can be manipulated by the district attorney's office. Counsel further submitted that if the ability to manipulate the system is the determining factor under the law, then the district attorney's office should not prevail.

As an example, the DA's practice of going to the first of the month when a range of dates is involved in order to be inclusive is questioned. Here, the victim first indicated the incident occurred in March or maybe the middle of 2012. The state went with July 1st. Why would March–June be excluded as a possible period when crime occurred?

Plea Acceptance

United States v. Batamula, 2016 WL 2342943 (5th Cir. May 3, 2016)(on rehearing en banc)(Dennis & Graves dissenting)(plea acceptance/advising non-citizens of deportation/ineffective assistance of counsel)

Facts: The defendant, a citizen of Tanzania, entered a guilty plea to the offenses of making a false statement to a federal agent and of making a false statement in his application for a passport. The district court, in addition to the other requisites of F.R.Cr.P 11, also asked the defendant if he was 'fully satisfied with the advice and counsel' provided by his lawyer. Defendant answered that he was. The court also advised the defendant that "the offenses that you're pleading guilty to are felonies. That means ... you will likely be deported after you serve your sentence." The court accepted his plea and sentence defendant to time served, with an additional year of supervised release and a fine of \$2000.00.

The defendant subsequently filed a motion to vacate his conviction and sentence contending that his attorney failed to provide effective assistance of counsel under *Padilla* by failing to advise him that pleading guilty to both charges would result in his deportation. He alleged that if he had been advised that his guilty plea would have made him "mandatorily deportable" he would have refused to enter the guilty plea. Defendant attached an affidavit of his retained counsel who stated that counsel "advised [defendant] on immigration consequences solely based on the language (if any) of the plea agreement. I did not advise him that the conviction would make him mandatorily deportable." The plea agreement contained no explanation of the immigration consequences.

The district court denied the motion without a hearing. The district court held that even if counsel's advice was deficient under *Strickland* and *Lafler* the defendant could not establish that such a deficiency prejudiced him *because the court advised defendant of the immigration consequences during the plea colloquy.*

Holding: Defense counsel's deficient performance, in failing to inform defendant that he would be deported if he pled guilty to making false statement to federal agent and in application for United States passport, did not prejudice defendant, and, thus, did not amount to ineffective assistance; defendant did not allege facts or adduce evidence showing the outcome of the plea process would have been different with competent advice, he was deportable before his guilty plea, and remained so afterward.

Speedy Trial

***Betterman v. Montana*, 136 S. Ct. 1609, 1610-11 (May 2016)(unanimous)**

Facts: Petitioner Brandon Betterman pleaded guilty to bail jumping after failing to appear in court on domestic assault charges. He was then jailed for over 14 months awaiting sentence, in large part due to institutional delay. He was eventually sentenced to seven years' imprisonment, with four of the years suspended. Arguing that the 14-month gap between conviction and sentencing violated his speedy trial right, Betterman appealed, but the Montana Supreme Court affirmed the conviction and sentence, ruling that the Sixth Amendment's Speedy Trial Clause does not apply to post-conviction, presentencing delay.

Held: The Sixth Amendment's speedy trial guarantee does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges. However, as at the prearrest stage, due process serves as a backstop against exorbitant delay. Because Betterman advanced no due process claim here, however, the Court expresses no opinion on how he might fare under that more pliable standard.

TRIAL PROCEDURES

Composition of Jury

State v. Dahlem, NO. 2014-KO-1555 (La. 3/15/16)

Issue: Whether trial by a jury composed of fewer jurors than required by law is a non-waivable structural defect which requires that a defendant's conviction be reversed and his sentence vacated.

Facts: The state charged Defendant with DWI, Fourth Offense, which carried a penalty range *with or without hard labor* for "not less than ten years no more than thirty years." La. R.S. 14:98(E)(1)(a)(now La. RS 14:98.4). Considering the bill of information and the related penalty range, the prosecution and defense chose a jury of six people, *without any contemporaneous objection* from either side at any time. More specifically, neither the defendant nor the prosecution requested a twelve-person jury at any time before or during trial. Defendant was sentenced to 25 years at hard labor, with three years to be served without benefit of probation, parole, or suspension of sentence.

The First Circuit held that trial by a six person jury violated the La. Constitution but that the defendant had waived the error by not objecting. Judge Kuhn, in his concurrence determined that the enhancement provisions in La. RS 14:98(E) were just that – enhancement - and didn't create a new crime or affect the composition of the jury. He also determined that, even if the jury composition was erroneous, it was harmless error and that defendant had waived the error.

Twist #1: Shortly thereafter, the State filed a Multiple Offender Bill of Information, alleging the defendant was a third felony offender for offenses unrelated to the DWIs.¹ The trial court, after considering the sentencing guidelines and all other evidence in the case, vacated its original sentence and re-sentenced the defendant under La. R.S. 15:529.1 to serve 25 years imprisonment at hard labor, without the benefit of probation or suspension of sentence.

¹ On May 22, 2007, the defendant was convicted of theft between \$300 and \$500 and was sentenced to two (2) years with the Department of Corrections and three (3) years of probation and was convicted of distribution of marijuana on June 26, 1997 and was sentenced to five (5) years. The pre-sentencing investigation report in this matter showed that, beginning in 1990, defendant had been arrested twenty-seven (27) times prior to the instant offense, for various crimes including theft, criminal trespass, disturbing the peace, simple battery, and simple burglary (among others).

Twist #2: In Defendant's 3rd DWI conviction, he had been sentenced to substance abuse treatment and home incarceration. La. RS 98.4B(1) provides: "If the offender has previously been required to participate in substance abuse treatment or home incarceration pursuant to a sentence imposed on a conviction of a third offense violation of R.S. 14:98, then on a conviction of a fourth or subsequent offense... the offender shall be ... *imprisoned at hard labor* for not less than ten nor more than thirty years, at least three years of which shall be imposed without benefit of parole, probation, or suspension of sentence."

Twist #3: The trial court sentenced defendant to *three* years without benefit of probation or parole. The standard 4th DWI conviction paragraph is *wow* hard labor and *two* years without benefit. The enhanced penalty is only hard labor and *three* years without benefit. Thus, the trial court's sentence doesn't appear to be correct under either provision.

Law: Article I, § 17(A) of the Louisiana Constitution provides that in a case where punishment is necessarily confinement at hard labor, the defendant shall be tried before a jury of twelve persons and that, in a case in which the punishment may be confinement at hard labor or confinement without hard labor, the defendant shall be tried before a jury of six persons.

In *State v. Jones*, 05-0226 (La. 2/22/06), 922 So.2d 508, the Court set forth a bright-line rule that juries composed of *greater* numbers of persons than constitutionally required no longer constitute a non-waivable jurisdictional defect subject to automatic reversal but reserved judgment in cases involving *less* than the number constitutionally required. In *State v. Brown*, 11- 1044 (La. 3/13/12), 85 So.3d 52, the Court held that because the defendant failed to make a contemporaneous objection to the jury error, 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. Both, though, involved twelve person juries.

Holding: The bill of information sets the parameters and dictates the mode of trial. Because the bill of information in this case only set forth the three prior DWI offenses and did not set forth that defendant had participated in substance abuse treatment or home incarceration, the court did not appear to be on notice of facts required to enhance the conviction, and the trial court could have sentenced defendant with or without hard labor. The supreme court specifically declined to create a duty requiring a trial judge to look beyond the face of the bill of information or the indictment. However, evidence of defendant's participation in drug treatment had been offered at trial and with Twist #3, the court couldn't be sure what the trial court had based its ruling on. Thus, it decided not to reach the ultimate issue of jury composition.

However, because the Court had vacated that original possibly improper sentence and sentenced the defendant under La. R.S. 15:529.1, the multiple offender enhancement statute, which required 25 years at hard labor, the court, basically determined there was harmless error.

Unfortunately, the supreme court did not, ultimately, answer the jury composition question nor the waiver issue.

Justice Knoll concurred and agreed with Judge Kuhn that the statute did not call for a 12 person jury and, even if it did, defendant waived any objection. Justice Hughes concurred in the result without rendering an opinion. Justice Weimer dissented finding that where the criminal statute requires a defendant to serve at hard labor, he must be given a jury of twelve. Period.

Waiver of Jury Trial

State v. Spurlock, 2015-1173 (La. 9/25/15), 175 So. 3d 955, 956 (waiver of jury trial)(per curiam)

Holding: It is preferred but not statutorily required for the defendant to waive his right to a jury trial *personally* rather than through counsel. However, it is legal for counsel to appear and waive it on behalf of his client.

Crichton, concurring: I additionally concur with the writ grant and write separately to note that the instant case is but one of many cases questioning the sufficiency of a jury trial waiver effected through counsel. Because this issue continues to appear before this Court, it is important to re-emphasize that, while not absolutely mandated, the preferred method of securing a defendant's waiver of his right to a jury trial is for the trial court (i) to advise the defendant on the record of his constitutional right to a jury trial; (ii) to secure an oral waiver from the defendant himself; and (iii) if warranted, to make a finding that the defendant has intelligently and voluntarily waived his constitutional right to a jury trial. In addition to holding this colloquy on the record, the clerk of court should record a minute entry of the colloquy and the court's ruling. Here, there was no colloquy and no minute entry reflecting a jury waiver determination, which necessitated the appellate court remand for an evidentiary hearing on the issue. Again, this method is not mandated under Louisiana law, but it clarifies for the record—and forevermore—that defendant and his counsel have made a considered and strategic decision in waiving this fundamental constitutional right.

Jury Selection

Foster v. Chatman, 136 S. Ct. 1737 (2016)

Facts: On the morning of August 28, 1986, police found Queen Madge White dead on the floor of her home in Rome, Georgia. White, a 79-year-old widow, had been beaten, sexually assaulted, and strangled to death. Her home had been burglarized. Timothy Foster subsequently confessed to killing White, and White's possessions were recovered from Foster's home and from Foster's two sisters. The State indicted Foster on charges of malice murder and burglary. He faced the death penalty.

Petitioner Timothy Foster was convicted of capital murder and sentenced to death in a Georgia court. During jury selection at his trial, the State used peremptory challenges to *strike all four black prospective jurors*. Foster argued that the State's use of those strikes was racially motivated, in violation of *Batson v. Kentucky*. The trial court rejected that claim, and the

Georgia Supreme Court affirmed. Foster then renewed his *Batson* claim in a state habeas proceeding.

While that proceeding was pending, Foster, through the Georgia Open Records Act, obtained copies of the file used by the prosecution during his trial. Among other documents, the file contained

- (1) copies of the jury venire list on which the names of each black prospective juror were highlighted in bright green, with a legend indicating that the highlighting “represents Blacks”;
- (2) a draft affidavit from an investigator comparing black prospective jurors and concluding, “If it comes down to having to pick one of the black jurors, [this one] might be okay”;
- (3) notes identifying black prospective jurors as “B# 1,” “B# 2,” and “B# 3”;
- (4) notes with “N” (for “no”) appearing next to the names of all black prospective jurors;
- (5) a list titled “[D]efinite NO's” containing six names, including the names of all of the qualified black prospective jurors;
- (6) a document with notes on the Church of Christ that was annotated “NO. No *Black* Church”;
- and
- (7) the questionnaires filled out by five prospective black jurors, on which each juror's response indicating his or her race had been circled.

The state habeas court denied relief. It noted that Foster's *Batson* claim had been adjudicated on direct appeal. Because Foster's renewed *Batson* claim “fail[ed] to demonstrate purposeful discrimination,” the court concluded that he had failed to show “any change in the facts sufficient to overcome” the state law doctrine of res judicata. The Georgia Supreme Court denied Foster the Certificate of Probable Cause necessary to file an appeal.

Holding: (1) The Court had jurisdiction to review the judgment of the Georgia Supreme Court denying Foster a Certificate of Probable Cause on his *Batson* claim. Although the Court could not ascertain the grounds for the unelaborated state court judgment, there was no indication that it rested on a state law ground that is both “independent of the merits” of Foster's *Batson* claim and an “adequate basis” for that decision, so as to preclude jurisdiction. (2) The decision that Foster failed to show purposeful discrimination was clearly erroneous. Only *Batson* 's third step was at issue. Though the trial court accepted the prosecution's justifications for both strikes, the record belies much of the prosecution's reasoning. Evidence that a prosecutor's reasons for striking a black prospective juror apply equally to an otherwise similar nonblack prospective juror who is allowed to serve tends to suggest purposeful discrimination.

***White v. Wheeler*, 136 S. Ct. 456, 193 L. Ed. 2d 384 (12/14/2015)(Unanimous Per Curiam)**

Facts: Following affirmance of state prisoner's capital conviction and death sentence and affirmance of denial of state post-conviction relief, prisoner sought federal habeas relief. The United States District Court for the Western District of Kentucky denied relief. Prisoner

appealed. The United States Court of Appeals for the Sixth Circuit affirmed the conviction but reversed the death sentence and remanded.

During *voir dire*, Juror 638 gave equivocal and inconsistent answers when questioned about whether he could consider voting to impose the death penalty. In response to the judge's questions about his personal beliefs on the death penalty, Juror 638 said, *"I'm not sure that I have formed an opinion one way or the other. I believe there are arguments on both sides of the—of it."* When asked by the prosecution about his ability to consider all available penalties, Juror 638 noted *he had "never been confronted with that situation in a, in a real-life sense of having to make that kind of determination."* *"So it's difficult for me," he explained, "to judge how I would I guess act, uh."* The prosecution sought to clarify Juror 638's answer, asking if the juror meant he was *"not absolutely certain whether [he] could realistically consider" the death penalty.* Juror 638 replied, *"I think that would be the most accurate way I could answer your question."* During defense counsel's examination, Juror 638 described himself as *"a bit more contemplative on the issue of taking a life and, uh, whether or not we have the right to take that life."* Later, however, he expressed his belief that *he could consider all the penalty options.* The prosecution moved to strike Juror 638 for cause based on his inconsistent replies, as illustrated by his statement that he was not absolutely certain he could realistically consider the death penalty.

Holding: A state court's determination to excuse for cause a prospective juror on grounds of substantial impairment of ability to impose death penalty is entitled to deference on federal habeas review.

In *Witherspoon*, this Court set forth the rule for juror disqualification in capital cases. *Witherspoon* recognized that the Sixth Amendment's guarantee of an impartial jury confers on capital defendants the right to a jury not "uncommonly willing to condemn a man to die." But the Court with equal clarity has acknowledged the State's "strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." To ensure the proper balance between these two interests, only "a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause." As the Court explained in *Witt*, a juror may be excused for cause "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law."

Reviewing courts owe deference to a trial court's ruling on whether to strike a particular juror "regardless of whether the trial court engages in explicit analysis regarding substantial impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias." A trial court's "finding may be upheld even in the absence of clear statements from the juror that he or she is impaired...." And where, as here, the federal courts review a state-court ruling under the constraints imposed by AEDPA, the federal court must accord an additional and "independent, high standard" of deference. As a result, federal habeas review of a *Witherspoon–Witt* claim—much like federal habeas review of an ineffective-assistance-of-counsel claim—must be " ' "doubly deferential." ' ' "

The test is “Was the Kentucky Supreme Court's decision to affirm the excusal of Juror 638 for cause “ ‘so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement’ ”?”

Jury Conduct

***United States v. Mix*, 791 F.3d 603 (5th Cir. 6/2015)(extrinsic information in jury deliberation)**

Facts: The defendant, an engineer for British Petroleum, was prosecuted for obstruction of justice for “deleting text messages and emails related to his calculations of the amount of oil spilling out of the Macondo well, the site for the Deepwater Horizon accident.” The jury initially reported a deadlock and rendered a verdict only after the district court issued an “Allen charge”.

Following the verdict of guilty, defense counsel contacted jurors to “obtain feedback about the defense’s failed trial strategy.” The contact was made without first obtaining leave of court. Defense counsel found, and established at a hearing, that one of the jurors, the jury foreperson, overheard a comment in the courthouse elevator that other BP employees were also being prosecuted in connection with the matter. The jury foreperson reported only that she overheard information and that “this information gave her comfort in voting guilty”. She did not report the information which she overheard.

Holding: The court of appeal set aside a jury verdict convicting the defendant because ‘extrinsic information’ overheard by one of the jurors was brought to the attention of the other jurors during deliberations.

The court of appeal found that the district court’s order granting a new trial was not an abuse of discretion because the defendant showed that the extrinsic information “likely caused prejudice” and the government failed to show that there was no reasonable possibility that the jury’s verdict was influenced by the extrinsic evidence.”

Prosecutorial Misconduct

Wearry v. Cain, No. 14-10008, 2016 WL 854158, at *1 (U.S. Mar. 7, 2016)(Brady violation)(per curium)(not briefed or argued)

Facts:

Scott testimony. Sometime between 8:20 and 9:30 on the evening of April 4, 1998, Eric Walber was brutally murdered. Nearly two years after the murder, Sam Scott, at the time incarcerated, contacted authorities and implicated Defendant. Scott initially reported that he had been friends with the victim; that he was at work the night of the murder; that the victim had come

looking for him but had instead run into Defendant and four others, including Randy Hutchinson; and that Defendant and the others had later confessed to shooting and driving over the victim before leaving his body on Blahut Road. In fact, the victim had not been shot, and his body had been found on Crisp Road.

Scott changed his account of the crime over the course of four later statements, each of which differed from the others in material ways, before finally testifying that he had been playing dice with Defendant and others when the victim drove past. Defendant, who had been losing, decided to rob the victim. According to Scott, on the night of the murder, Hutchinson had run into the street to flag down the victim, pulled the victim out of his car, shoved him into the cargo space, and crawled into the cargo space himself. Five men, including Scott, Hutchinson, and Defendant, proceeded to drive around, at one point encountering Eric Brown—the State's other main witness—and pausing intermittently to assault the victim. Finally, Scott related, Defendant and two others killed the victim by running him over.

Brown Testimony: Consistent with Scott's testimony, Brown testified that on the night of the murder he had seen Defendant and others with a man who looked like the victim. Incarcerated on unrelated charges at the time of Defendant's trial, Brown acknowledged that he had made a prior inconsistent statement to the police, but had recanted and agreed to testify against Defendant, not for any prosecutorial favor, but solely because his sister knew the victim's sister. The State commented during its opening argument that Brown "is doing 15 years on a drug charge right now, [but] hasn't asked for a thing."

Defense. Defendant's defense at trial rested on an alibi. He claimed that, at the time of the murder, he had been at a wedding reception in Baton Rouge, 40 miles away. His girlfriend, her sister, and her aunt corroborated his account.

Brady Violations.

1) Undisclosed police records showed that two of Scott's fellow inmates had made statements that cast doubt on Scott's credibility. One inmate had reported hearing Scott say that he wanted to "make sure [Wearry] gets the needle cause he jacked over me." The other inmate told investigators—at a meeting Scott orchestrated—that he had witnessed the murder, but this inmate recanted the next day. "Scott had told him what to say," he explained, and had suggested that lying about having witnessed the murder "would help him get out of jail."

2) The State had failed to disclose that, contrary to the prosecution's assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against Defendant. The police had told Brown that they would "talk to the D.A. if he told the truth."

3) The prosecution failed to turn over medical records on Randy Hutchinson. Hutchinson's medical records revealed that, nine days before the murder, Hutchinson had undergone knee surgery to repair a ruptured patellar tendon. An expert witness testified at the state collateral-

review hearing that Hutchinson's surgically repaired knee could not have withstood running, bending, or lifting substantial weight.

Based on this new evidence, Defendant alleged violations of his due process rights under *Brady v. Maryland*, 83 S.Ct. 1194 (1963).

Louisiana court holdings: Acknowledging that the State “probably ought to have” disclosed the withheld evidence and that Defendant’s counsel provided “perhaps not the best defense that could have been rendered,” the post-conviction court denied relief. Even if Defendant’s constitutional rights were violated, the court concluded, he had not shown prejudice. In turn, the Louisiana Supreme Court also denied relief. Chief Justice Johnson would have granted Defendant’s petition on the ground that he received ineffective assistance of counsel.

Holding: In a per curium opinion, with Alito and Thomas dissenting solely because they felt the case should have been briefed and argued, the Court concluded that the Louisiana courts’ denial of Defendant’s *Brady* claim ran up against settled constitutional principles (they did not consider the merits of his ineffective-assistance-of-counsel claim).

Citing *Brady*, the Court held that “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *See also Giglio v. United States*, 92 S.Ct. 763 (1972) (clarifying that the rule stated in *Brady* applies to evidence undermining witness credibility). Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury. To prevail on his *Brady* claim, Defendant did not need to show that he “more likely than not” would have been acquitted had the new evidence been admitted. He must show only that the new evidence is sufficient to “undermine confidence” in the verdict. *Beyond doubt*, the Court held, the newly revealed evidence sufficed to undermine confidence in Defendant’s conviction. The State’s trial evidence resembled “a house of cards,” built on the jury crediting Scott’s account rather than Defendant’s alibi.

***State v. Brown*, 2015-2001 (La. 2/19/16), 184 So. 3d 1265, 1267-68**

Facts: David Brown, one of the “Angola 5,” was charged and convicted of the first degree murder of prison guard Captain David Knapps. A jury sentenced him to death for this crime. About four months after receiving this death sentence, Brown learned that, *prior to his trial*, the State had interviewed inmate Richard Domingue who was friendly with Brown’s co-defendant, Barry Edge, while Edge and Domingue lived on the same tier at Angola following the Angola 5’s attempted escape and the murder of Captain Knapps.

According to Brown, Domingue relayed to the State the following details concerning Captain Knapps’ murder which Domingue allegedly learned in conversations with Brown’s co-defendant, Barry Edge (Edge’s alleged words are in bold):

*... I said how did everything turn out so bad to where y'all had to kill Captain [Kn]apps. Because I just can't see, you had Foot [David Brown], who is huge. That's the black guy that was involved and all the rest of y'all. Y'all telling me y'all couldn't overpower little Captain [Kn]apps, you know, to where you don't have to kill him. And he said **oh no**, he said **we didn't have to kill him**. He said **we could have let him live**. He said **we did it**. **We made a decision to kill him to help our self**. It's bigger than you know. It's really bigger than you think. ...*

*... And he was like **you don't, you don't really understand you know, I'm saying there was more involved. He's like there's more involved. But we could have let him live. But me and Jeff [rey Clark] made the decision at that time because all of these other mother fuckers that was involved they couldn't seem to get their head together when they were, you know, everything went down**. He said **me and Jeff decided we're going to kill him**. I mean it was just like shhh. It was like [Edge] flipped a switch and they killed him. ... I'm telling you specifically what Barry said.*

Investigators then went on to question Domingue further as to who made the decision to kill Captain Knapp:

Tommy Block: And Barry Edge told you **we could have allowed him to live**?

Domingue: Yeah. Barry Edge said **we could have let him live. We could have let him live**.

Tommy Block: But he had to die.

Domingue: No, he said **it was going to help us. It was going to help us** so yeah, he had to die.

Tommy Block: And he and, he and Jeffrey made the decision.

Domingue: He said **him and Jeffrey did, were the only ones that were thinking rationally during this highly charged situation. And they made a decision to help their self to kill Captain [Kn]apps. But they could have let him live**. And he bluntly said **he didn't have to die**.

Brown argues that this statement supports the defense theory that he was less culpable because he was not present at the time of Captain Knapp's death. Brown's full statement, presented to the jury, was that he reassured Captain Knapp that he would not be harmed, that he offered Captain Knapp water, and that Captain Knapp was alive when he left the bathroom. Brown filed a Motion for New Trial.

Holding: The District Court granted Brown's motion in part, finding it was reasonably probable the jury may have reached a different decision. By a two to one majority, the First Circuit reversed this ruling, holding that the defendant had not made this showing.

In a per curiam opinion, the Court held that, consistent with *Strickler v. Greene* and *State v. Bright*, the State's failure to disclose Domingue's statement to Brown did not constitute a "true *Brady* violation" because (1) the statement was not favorable to Brown and (2) the failure

to disclose the statement was not prejudicial to him (i.e., the statement was not “material” for *Brady* purposes).

According to the Court, “Domingue's statement simply does not exculpate Brown. Certainly, it *inculcates Edge and Clark* as the individuals who *made the decision* to kill Captain Knapp. However, assuming this conversation between Edge and Domingue actually occurred, Edge never implies who actually killed Captain Knapp. It is just as likely Brown carried out orders to kill Brown just as he carried out the order to move Captain Knapp into the bathroom. It is highly implausible that, faced with Domingue's statement which *provides no additional evidence as to who actually killed Captain Knapp*, the jury would have imposed a different sentence.”

Chief Justice Johnson dissented and filed an opinion. Justices Weimer and Hughes also dissented.

Inconsistent Prosecutorial Positions

State v. Coleman, 2014-0402 (La. 2/26/16)

Facts: See above.

Holding: The Court found that the inconsistent positions taken by the state also violated defendant's due process rights. Due process forbids the state from employing inconsistent and irreconcilable theories to secure convictions against individuals for the same offenses arising from the same event. *See State v. Holmes*, 5 So.3d 42 (La. 2008)(upholding conviction of Brandy, the girlfriend); *State v. Scott*, 921 So.2d 904, 957 (La. 2006). The state contended its theory had been consistent—that defendant and Brandy committed these crimes together—and the expert’s testimony at the penalty phase did not change that theory. The Court disagreed *citing State v. Lavalais*, 95–320 (La.11/25/96), 685 So.2d 1048 (penalty phase inconsistent theory). Contrary to *Lavalais*, the Court determined that the state's actions in this case went beyond the product of the state's argument as to *degree* of culpability. Here, the state actually presented inconsistent *evidence* in the form of Rogers' changed testimony regarding the identity of the Blaze shooter based on the forensic evidence. The Court found that the inconsistencies in the state's position rose to the level of fundamental unfairness and thus infringed upon defendant's right to due process.

Not Guilty By Reason of Insanity

State v. Holder, 50,171 (La. App. 2 Cir. 12/9/15)(NGRI)

Defendant killed his mother. It was undisputed that he had bipolar disorder with psychotic features, and schizoaffective disorder. His symptoms included suicidal thoughts, anxiety, depression, auditory hallucinations, delusions, paranoia, homicidal ideations, and violence. He had been treated with numerous antipsychotic and anti-anxiety medications. Numerous physicians and healthcare providers testified that he needed to be on medications

for his condition and that his condition became severe when not medicated. However, defendant resisted taking these medications and had stopped treatment at least a month prior to the offense.

In the weeks before her murder, his mother had expressed concern for her son and admitted that she was afraid of him. She intended to have Christopher committed for treatment and then placed in a group home, which he vehemently opposed.

On the day after the offense, psychologists at Bossier Max reported that Christopher showed very little emotion, but did not appear to be experiencing hallucinations. Within weeks, his condition deteriorated and he began to have auditory hallucinations and suicidal ideations.

Two physicians were appointed to a sanity commission and evaluated the defendant. Dr. Mark Vigen interviewed the defendant on at least five occasions. He testified that, on one occasion, approximately one year after the offense, Christopher reported that he saw through Jesus' eyes and that Jesus killed Dr. Holder. This case was the fourth time in Dr. Vigen's 37-year career that he rendered an opinion that a defendant was not guilty by reason of insanity.

In contrast, Dr. Seiden testified that, although a defendant may suffer from schizoaffective disorder and be psychotic at the time of the offense, he may also know that what he is doing is wrong. Dr. Seiden noted that defendant called 911 and initially reported that an intruder committed the offense, and that he had threatened violence against his mother prior to the offense. He opined that, despite the psychotic disorder, Christopher was capable of distinguishing right from wrong at the time of the offense.

The jury also heard defendant's confession made the night of the murder. In that confession, Defendant noted being "upset" at the prospect of killing his mother. Notably, he articulated a motive: he was "mad" at his mother, because she was going to medicate him and have him hospitalized.

Holding: In the case of such conflicting evidence, the trial court must accord great weight to the jury's resolution of the evidence. The jury's decision should not be overturned unless no rational trier of fact could have found that the defendant failed to meet his burden of proof. Though the evidence leaves no doubt that Christopher suffered from severe mental illness, he failed to meet his burden of proving that he was incapable of distinguishing between right and wrong at the time of the offense.

A defendant's conduct and action after a crime may properly be considered in determining whether a defendant has met his burden of proof on an insanity defense. Here, considering that evidence along with Dr. Seiden's testimony, the jury reasonably rejected the defendant's defense of not guilty by reason of insanity.

Double Jeopardy

***State v. Fairman*, 15-67 (La. App. 5 Cir. 9/23/15), 173 So. 3d 1278, 1286
(Double Jeopardy)**

Facts: Defendant was originally charged on count two with attempted disarming of a peace officer but was convicted of the responsive verdict of battery of a police officer (Deputy Lowe). Battery of a police officer has three elements: the intentional use of force upon a police officer, without the consent of the officer, when the offender knows or should reasonably know that the victim is a police officer acting within the performance of his duty. La. R.S. 14:34.2.

Defendant was also convicted on count five of battery of a police officer (Deputy Lowe) producing injury requiring medical attention. In order to convict a defendant of this crime, the State must prove all of the same elements as battery of a police officer, in addition to proving that the use of force or violence produced an injury which required medical attention. La. R.S. 14:34.2(B)(3).

Defendant argued that convictions for both of these crimes violates the double jeopardy clause because there is no distinct fact and the convictions are based on the same evidence.

Holding: Louisiana courts utilize two tests in examining violations of double jeopardy. The “distinct fact” or Blockburger test and the “same evidence test.”

The testimony of Deputies Smith and Lowe indicated that separate incidents occurred, which support defendant's convictions for both offenses. Once Deputy Lowe tackled defendant to the ground, a violent struggle ensued during which Deputy Smith observed defendant put his hand on Deputy Lowe's holster and tug on the grip of his gun. Defendant complied with Deputy/ Smith's order to release Deputy Lowe's gun; however, defendant continued to punch and kick the officers. It was at this time that the elements for the responsive verdict of battery of a police officer were fulfilled. Up to this point, there was no evidence to indicate that a battery upon Deputy Lowe producing injury requiring medical attention had transpired.

After the initial battery of Deputy Lowe had occurred, Deputy Lowe was able to put defendant into a “sleeper hold” in an attempt to gain control over him. While attempting to handcuff defendant, defendant “either woke up or he pushed up on the ground” and reached over his shoulder and punched Deputy Lowe in the face. Deputy Lowe testified that it was at this time that his lip was “busted open” by defendant. The laceration Deputy Lowe sustained to his lip required medical treatment.

These were two separate and distinct offenses committed during the same criminal episode, and supported by corresponding separate and distinct facts; thus, application of both the “distinct facts” and the “same evidence” tests demonstrates that no double jeopardy violation existed.

***Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016)**

Puerto Rico and the United States are not separate sovereigns for double jeopardy purposes.

Sufficiency of Evidence

***Musacchio v. United States*, 136 S. Ct. 709, 711 (2016)(sufficiency of evidence)**

Facts: Petitioner Musacchio resigned as president of Exel Transportation Services (ETS) in 2004, but with help from the former head of ETS's information-technology department, he accessed ETS's computer system without ETS's authorization through early 2006. In November 2010, Musacchio was indicted under 18 U.S.C. § 1030(a)(2)(C), which makes it a crime if a person “intentionally accesses a computer without authorization or exceeds authorized access” and thereby “obtains ... information from any protected computer.”

At trial, the Government did not object when the District Court instructed the jury that §1030(a)(2)(C) “makes it a crime ... to intentionally access a computer without authorization *and* exceed authorized access” (emphasis added), even though the conjunction “and” added an additional element.

Holding: A sufficiency challenge should be assessed against the elements of the *charged* crime, not against the elements set forth in an *erroneous* jury instruction. Sufficiency review essentially addresses whether the Government's case was strong enough to reach the jury and not on how the jury was instructed.

***State v. Mire*, 2014-2295 (La. 1/27/16) (sufficiency of evidence/motive)**

Facts: Defendant shot and killed the victim while hunting deer in the Little Prairie marsh in Vermillion Parish. He shot the victim three times with a semi-automatic shotgun, striking him in the head, neck, and torso from a distance of approximately 40 to 70 feet. He then collected the spent shotgun shells and left without trying to render aid and did not seek help. Defendant then discarded the shotgun shells in a canal. The victim was reported missing the next day. His body was found 3 days later, after a search by state and parish agencies and members of the community. Defendant stood by while others diligently searched and even took steps to divert attention from himself and cast suspicion on others. Defendant finally admitted to detectives that he shot and killed the victim. He claimed it was a hunting accident. He said the victim was driving deer toward him and he mistook the victim for a deer. He was charged with second degree murder. At trial, the state's witnesses described the tumultuous relationship between the defendant and the victim over the years and their various business disputes.

The Third Circuit vacated defendant's conviction for second degree murder, entered a judgment of guilty of negligent homicide, and remanded for sentencing because it found the evidence insufficient to establish defendant's specific intent. *State v. Mire*, 14–0435, p. 18 (La.App. 3 Cir. 10/8/14), 149 So.3d 981, 991 (“We find that the State did not exclude every reasonable doubt that Defendant had the specific intent to kill the victim. Accordingly, the evidence was insufficient to support Defendant's conviction for second degree murder.”). The lynchpin of the court of appeal's analysis was its determination that the state failed to establish a clear motive for the killing.

Holding. The Supreme Court found that the court of appeal had erred in two aspects. First, the state, in fact, presented abundant evidence of motive in the form of witnesses who described the various disagreements and, at times, acrimonious relationship between defendant and victim over the years. Second, the court of appeal erred in its apprehension of *State v. Mart*, 352 So.2d 678, 681 (La.1977). *Mart*, notably, did not involve a question of the sufficiency of the evidence. Dicta in *Mart* notwithstanding, motive is not an essential element of the offense and a jury need not find it proved beyond a reasonable doubt. Although fairness may require that—once a jury receives a general instruction that the state need not prove motive, and affirmative evidence discloses a lack of motive—then, at defendant's request, the jury must be instructed that lack of motive may properly be considered as mitigating against a finding of specific intent, that principle was overextended by the court of appeal here, particularly considering that the jury in the present case was not instructed regarding motive.

Responsive Verdicts

***State v. Graham*, 2014-1801 (La. 10/14/15), 180 So. 3d 271, 272-73, reh'g denied (Dec. 7, 2015)(responsive verdict to aggravated incest)(Per curiam)**

Facts: Defendant was indicted with one count of aggravated incest. After defendant rested his case at trial and it became apparent that the State had failed to carry its burden of proof on this charge since the defendant was not within the relational categories, the District Court permitted the State to add molestation of a juvenile as a responsive verdict. Molestation of a juvenile had not been the focus of trial and it contained an element not necessarily required by the original charge. Although neither the State nor the defendant presented any evidence concerning this new element, the jury found the defendant guilty of one count of molestation of a juvenile, and the trial court sentenced him to serve 50 years imprisonment at hard labor. The court of appeal affirmed the conviction and sentence.

Holding: Molestation of a juvenile is not a lesser included offense of the charge of aggravated incest; therefore, defendant's trial was rendered fundamentally unfair when the District Court permitted the State to add “guilty of molestation of a juvenile” as a responsive verdict even though defendant had no opportunity to mount a defense concerning an additional essential element of this offense.

Critically, molestation of a juvenile requires proof of the additional element that the act was accomplished “by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile.” The State, with the Court’s approval, affirmatively limited its theory of the case to proof of “the use of influence by virtue of a position of control or supervision over the juvenile.”

The Court of Appeal erred in the present case in finding that because molestation of a juvenile is enumerated as one of many means by which aggravated incest can be committed it is necessarily a lesser and included grade of the offense. Because aggravated incest can be committed in numerous ways, only one of which is molestation of a juvenile, the evidence

sufficient to support conviction of aggravated incest may not necessarily support conviction for molestation of a juvenile. It might instead, depending on the circumstances of the case, support a conviction for sexual battery, carnal knowledge, indecent behavior, and so on. Stated another way, many reasonable scenarios can be imagined wherein the greater offense is committed without perpetration of the lesser offense. Accordingly, molestation of a juvenile is not a lesser and included grade of aggravated incest and the trial court erred in including “guilty of molestation of a juvenile” among the responsive verdicts.

JUVENILE LAW

***Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)(juvenile life sentence)**

Miller held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on cruel and unusual punishments. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, mandatory life without parole poses too great a risk of disproportionate punishment. *Miller* required that sentencing courts consider a child's "diminished culpability and heightened capacity for change" before condemning him or her to die in prison. Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes *reflect irreparable corruption*.

Miller requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," *Miller* made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."

"Our decision does not categorically bar a penalty for a class of offenders or type of crime – as, for example, we did in *Roper* or *Graham*. Instead, it *mandates only that a sentencer follow a certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty*. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments."

"*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury *must have the opportunity to consider mitigating circumstances* before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment."

Basically, the rule of Miller was that a state has to “draw a line between children whose crimes reflect transient immaturity (no life sentence) and those rare children whose crimes reflect irreparable corruption (life sentence is appropriate).” See *Montgomery v. Louisiana*, 136 S. Ct. 718, 734, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016).

Statutes enacted in response to *Miller*:

La. Code Crim. Proc. Ann. art. 878.1

A. In any case where an offender is to be sentenced to life imprisonment for a conviction of first degree murder (R.S. 14:30) or second degree murder (R.S. 14:30.1) where the offender was under the age of eighteen years at the time of the commission of the offense, a hearing shall be conducted prior to sentencing to determine whether the sentence shall be imposed with or without parole eligibility pursuant to the provisions of R.S. 15:574.4(E).

B. At the hearing, the prosecution and defense shall be allowed to introduce any aggravating and mitigating evidence that is relevant to the charged offense or the character of the offender, including but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, and such other factors as the court may deem relevant. Sentences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases.

La. Rev. Stat. § 15:574.4

E. (1) Notwithstanding any provision of law to the contrary, any person serving a sentence of life imprisonment for a conviction of first degree murder (R.S. 14:30) or second degree murder (R.S. 14:30.1) who was under the age of eighteen years at the time of the commission of the offense shall be eligible for parole consideration pursuant to the provisions of this Subsection *if a judicial determination has been made* that the person is entitled to parole eligibility pursuant to Code of Criminal Procedure Article 878.1 and all of the following conditions have been met:

- (a) The offender has served 35 years of the sentence imposed.
- (b) The offender has not committed any major disciplinary offenses in the twelve consecutive months prior to the parole hearing date. A major disciplinary offense is an offense identified as a Schedule B offense by the Department of Public Safety and Corrections in the Disciplinary Rules and Procedures for Adult Offenders.
- (c) The offender has completed the mandatory minimum of one hundred hours of prerelease programming in accordance with R.S. 15:827.1.
- (d) The offender has completed substance abuse treatment as applicable.
- (e) The offender has obtained a GED certification, unless the offender has previously obtained a high school diploma or is deemed by a certified educator as being incapable of obtaining a GED certification due to a learning disability. If the offender is deemed incapable of obtaining a GED certification, the offender shall complete at least one of the following:
 - (i) A literacy program.
 - (ii) An adult basic education program.

- (iii) A job skills training program.
- (f) The offender has obtained a low-risk level designation determined by a validated risk assessment instrument approved by the secretary of the Department of Public Safety and Corrections.
- (g) The offender has completed a reentry program to be determined by the Department of Public Safety and Corrections.
- (2) For each offender eligible for parole consideration pursuant to the provisions of this Subsection, the board shall meet in a three-member panel, and each member of the panel shall be provided with and shall consider a written evaluation of the offender by a person who has expertise in adolescent brain development and behavior and any other relevant evidence pertaining to the offender.
- (3) The panel shall render specific findings of fact in support of its decision.

***Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) as revised (Jan. 27, 2016)
(juvenile life hearing retroactive)(last dissent authored by Justice Scalia)**

Facts: Montgomery was 17 years old in 1963, when he killed a deputy sheriff in Louisiana. The jury returned a verdict of “guilty without capital punishment,” which carried an automatic sentence of life without parole. Nearly 50 years after Montgomery was taken into custody, the Supreme Court decided that mandatory life without parole for juvenile homicide offenders violated the Eighth Amendment’s prohibition on cruel and unusual punishments. *See Miller v. Alabama* (below). Montgomery sought state collateral relief, arguing that *Miller* rendered his mandatory life-without-parole sentence illegal. The trial court denied his motion, and his application for a supervisory writ was denied by the Louisiana Supreme Court, which had previously held that *Miller* does not have retroactive effect in cases on state collateral review. *State v. Tate*, 2012-2763 (La. 11/5/13), 130 So. 3d 829

Holdings:

Retroactive effect: A court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced. Substantive rules include “rules forbidding criminal punishment of certain primary conduct,” as well as “rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.” *Miller’s* prohibition on mandatory life without parole for juvenile offenders announced a new *substantive* rule that, under the Constitution, is retroactive in cases on state collateral review. The “foundation stone” for *Miller’s* analysis was the line of precedent holding certain punishments disproportionate when applied to juveniles. Relying on *Roper v. Simmons*, and *Graham v. Florida*, *Miller* recognized that children differ from adults in their “diminished culpability and greater prospects for reform,” and that these distinctions “diminish the penological justifications” for imposing life without parole on juvenile offenders. Because *Miller* determined that sentencing a child to life without parole is excessive for “all but the rare juvenile offender whose crime reflects irreparable corruption,” it rendered life without parole an unconstitutional penalty for “a class of defendants because of their status”—i.e., juvenile offenders whose

crimes *reflect the transient immaturity of youth*. *Miller* therefore announced a *substantive* rule of constitutional law, which, like other substantive rules, is retroactive because it necessarily carries a significant risk that a defendant—here, the *vast majority* of juvenile offenders—faces a punishment that the law cannot impose upon him.

What is required of Louisiana: The Court specifically stated that a State need not *relitigate* sentences or convictions but may remedy a *Miller* violation by extending *parole eligibility* to juvenile offenders. “Giving *Miller* retroactive effect, moreover, does not require States to re-litigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation *by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them*. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment. Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller’s* central intuition—that children who commit even heinous crimes are capable of change.”

Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, dissenting.

The Court has no jurisdiction to decide this case, and the decision it arrives at is wrong.

Statutes *proposed* in response to *Montgomery*:

HB 264 (made it through Conference Committee/House accepted/no Senate vote):

SB 127 (died in House Committee)

SB 367 (died in House Committee)

Added a paragraph to La. RS 15:574.4 to allow the Parole Board to consider parole for convicted for 1st or 2nd degree murder committed while under the age of 18 and whose conviction was *before 2012*. It required *no judicial determination*. It provided the same conditions as above.

HB 554 (failed on House floor)

Amended La. RS 15:574.4 to remove necessity for a judicial determination and reduce the years to 25, among other things.

SB 278 (never heard in Committee)

Would have amended La. RS 15:574.4 to eliminate the requirement of a court determination and provide:

- (4) The provisions of this Subsection shall apply to all offenders and alleged offenders, retrospectively and prospectively, regardless of the date of the alleged offense or of the conviction.

***State v. Montgomery*, 2016 WL 3533068 (June 28, 2016)**

After waiting for the legislature to do something in response to the Supreme Court ruling, the Louisiana Supreme Court remanded this case to the 19th JDC for re-sentencing pursuant to previously enacted statutes noting, however, that “the legislature is free within constitutional contours to enact further laws governing these resentencing hearings.” “[T]he Legislature ultimately failed to take further action in the last few moments of the legislative session regarding sentences of life without parole for juvenile homicide offenders. See HB 264 of the 2016 Regular Session. Therefore, in the absence of further legislative action, the previously enacted provisions should be used for the resentencing hearings that must now be conducted....”

By inference, the Court noted that in the absence of legislation it should act or, otherwise, the federal courts would step in as it already had in *Gillam v. Cain*, No. 14–2129 (E.D.La.5/31/16) (slip op.) (“the state trial court is ordered to resentence Petitioner ... within ninety (90) days or, in the alternative, to release him from confinement”); *Palmer v. Cain*, No. 03–2983 (E.D.La.5/5/16) (slip op.) (“the state trial court is ordered to resentence him ... within one-hundred twenty (120) days from entry of judgment or release him from confinement.”); *Tate v. Cain*, No. 14–2145 (E.D.La.4/21/16) (slip op.) (“The petitioner shall be released if no such hearing is held within 90 days of this Order.”); *Trevathan v. Cain*, No. 15–1009 (E.D.La.4/11/16) (slip op.) (“the state court is ORDERED to resentence him ... within ninety (90) days or, in the alternative, to release him from confinement”).

The Court held that pursuant to La. CCrP art. 878.1, the trial court should determine whether relator was “the rare juvenile offender whose crime reflects irreparable corruption,” as required by *Miller*, or whether he should be eligible for parole under the conditions established in La.R.S. 15:574.4(E).

CCrP art. 878.1 directs a court to consider any aggravating and mitigating evidence that is relevant to the charged offense or the character of the offender, including but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, and such other factors as the court may deem relevant. The Court further suggested that some of those other factors might include:

- (a) The nature and circumstances of the offense committed by the defendant.
- (b) The effect of the crime on the victim's family and on the community.
- (c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
- (d) The defendant's background, including his or her family, home, and community environment.

- (e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
 - (f) The extent of the defendant's participation in the offense.
 - (g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
 - (h) The nature and extent of the defendant's prior criminal history.
 - (i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
 - (j) The possibility of rehabilitating the defendant.
- See Fla. Stat. § 921.1401(2) (2014).

Finally, the Court directed the District Court to be mindful of the US Supreme Court's directive in *Miller* “to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” In making its ultimate determination regarding parole eligibility, the District Court was further directed to issue reasons indicating the factors it considered to aid in appellate review of the sentence imposed after resentencing.

As of 2009, *Louisiana has 335 juveniles serving a life without parole sentence.*² For the next year, until the 2017 session, a court will need to resentence the defendant under La. CCRP art. 878.1. If the defendant is found to be entitled to parole, then, if the defendant has served 35 years of his/her sentence, the Parole Board will hold a parole hearing and, again, determine if the defendant meets the requirements of La. RS 15:574.4.

State v. Roberson, 2014-1996 (La. 10/14/15), 179 So. 3d 573, 574 (juvenile procedure/dismiss & refile in adult court)

Synopsis: The Juvenile Court dismissed a juvenile case *with prejudice* due to expiration of the time period for adjudication provided in the Children's Code. The District Attorney later obtained a grand jury indictment against the juvenile and brought the case to District Court. The District Court then quashed the defendant's indictment on the basis of the Juvenile Court's prior dismissal of the juvenile petition with prejudice. The Supreme Court held that the district attorney is allowed to do this finding exclusive jurisdiction vested in the district court by operation of law when the indictment was returned.

Facts: Defendant Roberson was charged with armed robbery and attempted second-degree murder for offenses which allegedly occurred when the defendant was 16 years old. On July 9, 2012, the State filed a petition in Juvenile Court. The juvenile appeared and entered a denial on July 13, 2012, and the matter was assigned for adjudication on September 11, 2012. However, the State was granted a thirty-day continuance, and the juvenile was released from custody. On October 12, 2012, the new date set for the adjudicatory hearing, the State again moved to

² <http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/etc/map.html>. Louisiana is 3rd; Pennsylvania had 444, Michigan had 346. Florida (266), California (250), Missouri (116), Illinois (103), Arkansas (73).

continue. The Juvenile Court denied the State's motion "*with prejudice* [d]ue to the state being unable to show good cause."

On November 8, 2012, a grand jury indicted the defendant with three counts of armed robbery and two counts of attempted second-degree murder. The defendant moved to quash the indictment filed in District Court based on the previous dismissal of the Juvenile Court petition "*with prejudice*." The District Court granted the motion to quash, finding it did not have authority to review the Juvenile Court's dismissal of the matter with prejudice. The Court of Appeal reversed, finding exclusive jurisdiction vested in the District Court by operation of law when the indictment was returned

The defendant alleged the State may not circumvent the Juvenile Court's ruling, which was based on the expiration of the time period provided for defendant's juvenile adjudicatory hearing in La. Ch.C. 877, by later filing an indictment in District Court containing charges stemming from the same allegations previously dismissed with prejudice. In support, the defendant relied on *State in Interest of R.D.C., Jr.*, 632 So.2d 745 (La.2/28/94). In *R.D.C.*, the Supreme Court held that the State may not refile its petition where a good cause extension is not granted before the expiration of the time period for commencement of adjudication provided by La. Ch.C. art. 877.

However, this holding is not applicable to the present case, as the provisions of La. Ch.C. art. 877 pertain exclusively to proceedings in Juvenile Court. Here, the applicable time period for adjudication in Juvenile Court had clearly expired when the State was denied a continuance on October 12, 2012; thus, the State is not allowed to re-file a petition in Juvenile Court. However, La. Ch.C. art. 877 does not authorize the Juvenile Court to limit the State's authority to later bring an indictment in District Court.

La. Ch.C. art. 305 gives the District Attorney discretion to obtain an indictment or file a bill of information in District Court, when, as is the case here, the child is 15 years of age or older at the time of commission of certain serious crimes, including armed robbery and attempted second-degree murder. Although the defendant was originally subject to the exclusive jurisdiction of the Juvenile Court, La. Ch.C. art. 305(B)(4) clearly provides: "If an indictment is returned or a bill of information is filed, the child is subject to the *exclusive* jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures ... and the district court may order that the child be transferred to the appropriate adult facility for detention prior to his trial as an adult."

While it is true the mandatory time limitations provided in La. Ch.C. art. 877 were set forth to ensure expedited adjudication of children, the Legislature has provided that, when juveniles have reached a certain age and are alleged to have committed certain serious crimes, the District Attorney may elect to bring the case in District Court.

JOHNSON, Chief Justice, dissents and assigns reasons. WEIMER, Justice, additionally concurs and assigns reasons. CRICHTON, Justice, additionally concurs and assigns reasons.

Where is the protection for defendants in this chess game, when the prosecution can do an end run around the court's attempt to control progress of the trial, and the time limitations start anew.

SENTENCING

State v. Kelly, 2015-0484 (La. 6/29/16)(illegally lenient sentence/

After review, we conclude the sentence imposed in this case, even if illegally lenient, does not constitute error discoverable from an inspection of the pleadings and proceedings under the jurisprudential construction of La.C.Cr. P. art. 920(2). The victim's age stated in the indictment is simply an allegation made by the state. It cannot be equated to a definitive finding by the district court relative to defendant's guilt. Additionally, as the state acknowledges, the evidence of D.V.'s age was provided through the testimony of D.V. and her mother. Examination of this evidence to find proof of D.V.'s age far exceeds the allowable scope of errors patent review. Moreover, although the indictment charged defendant with aggravated rape of a child under thirteen, the trial court did not find defendant guilty as charged in the indictment, but rather found defendant guilty of molestation of a juvenile, a permissible responsive verdict under La.C.Cr. P. art. 814(A)(8.1).³ The guilty verdict of molestation of a juvenile is not dependent on the victim being under the age of thirteen. Although the district court stated D.V.'s date of birth during the extensive course of explaining its decision, it was not stated as a factual or legal finding for the purpose of applying a particular subsection of La. R.S. 14:81.2. The district court's statement of D.V.'s date of birth is not part of the verdict, which we hold is limited to the finding of guilt—molestation of a juvenile.

State v. Jones, 2015-1723 (La. 12/4/15)(per curiam)(sentencing – reasons)

Facts: The trial court provided reasons why it found defendant guilty of this crime, but provided no reasons for imposing the maximum sentence of six months in jail.

Holding: The trial court's decision not to articulate its reasons for the maximum sentence was inconsistent with the very clear directives set forth in La.C.Cr.P. art. 894.1.

State v. Mosby, 2014-2704 (La. 11/20/15), 180 So. 3d 1274 (excessive sentence) (Weimer, Clark, Guidry dissent)

Facts: 72 year old woman who suffered from severe infirmities was sentenced to 30 years of imprisonment for possession of a small amount of cocaine.

However, she was also a 4th offender felon with an extensive criminal history. She had been charged with ten and convicted of five other offenses over the course of her life. Her “criminal activity began late in life with a first conviction for any offense occurring at age 52. In 1971 she was charged with attempted murder; those charges were eventually refused. She was then accused of committing two crimes related to her ownership of the “Sorrento” bar in the

uptown neighborhood of New Orleans in 1976 and 1977. No disposition was found as to those cases, however. In 1995, 1996 and 1997, she was charged with and convicted of possession of Schedule II controlled dangerous substances. In 1997 she was also charged with and convicted of possession of LSD. In 2006, Ms. Mosby was charged with theft of goods and unauthorized entry of a place of business. The theft charges were eventually dismissed, but Ms. Mosby was convicted of unauthorized entry. Finally, in 2011, fourteen days prior to being arrested for this charge, Ms. Mosby was arrested for possession with the intent to distribute cocaine. Those charges were still pending.

Holding: The Court found that the sentence for this particular defendant was “grossly out of proportion to the severity” of the offense, amounted to nothing more than the “purposeful imposition of pain and suffering,” and was “unconscionable” - all of which rendered it unconstitutional. See La. Const. art. I, § 20. The sentence was vacated and the case remanded for resentencing.

Dissents: In La.R.S. 15:529.1(A)(4)(a), the legislature determined that a fourth-felony offender's sentence for the distribution of a small quantity of cocaine should be not less than the maximum sentence for a first offense, which is 30 years imprisonment. The legislature has sole authority under the Louisiana Constitution to define conduct as criminal and provide penalties for such conduct. Given the legislature's plenary authority, departures from mandatory minimum sentences by their nature must be exceedingly rare and the class of exceptional offenders defined by *Johnson* exceedingly narrow, as *Johnson* itself emphasizes.

***Lynch v. Arizona*, 136 S. Ct. 1818 (May 2016)(6-2)(Thomas & Alito, dissenting)**

Facts: Petitioner Shawn Patrick Lynch and his co-conspirator, Michael Sehwani, met their victim, James Panzarella, at a Scottsdale bar on March 24, 2001. The three went back to Panzarella's house early the next morning. Around 5 a.m., Sehwani called an escort service. The escort and her bodyguard arrived soon after. Sehwani paid her \$300 with two checks from Panzarella's checkbook after spending an hour with her in the bedroom. Lynch and Sehwani then left the house with Panzarella's credit and debit cards and embarked on a spending spree. The afternoon of March 25, someone found Panzarella's body bound to a metal chair in his kitchen. His throat was slit. Blood surrounded him on the tile floor. The house was in disarray. Police discovered a hunting knife in the bedroom. A knife was also missing from the kitchen's knifeblock. And there were some receipts from Lynch and Sehwani's spending spree. Police found Lynch and Sehwani at a motel two days after the killing. They had spent the days with Panzarella's credit and debit cards buying cigarettes, matches, gas, clothing, and Everlast shoes, renting movies at one of the motels where they spent an afternoon, and making cash withdrawals. When police found the pair, Sehwani wore the Everlast shoes, and Lynch's shoes were stained with Panzarella's blood. A sweater, also stained with his blood, was in the back seat of their truck, as were Panzarella's car keys.

Defendant was convicted of first-degree murder, kidnapping, armed robbery, and burglary, and, after the first jury could not reach unanimous verdict at the penalty phase, a second jury determined that defendant should be sentenced to death. Defendant appealed. The Supreme Court of Arizona reversed the penalty for improper jury instruction and remanded. On remand, a third penalty phase jury returned a death verdict. Prior to the penalty phase, the trial court refused to permit defense counsel to tell the jury that the only alternative sentence to death was life without parole. It determined that, under state law, Lynch could have received a life sentence that would have made him eligible for “release” under executive clemency after 25 years. On automatic appeal, the Supreme Court of Arizona affirmed.

Holding: Without full briefing or oral argument, the Supreme Court reversed. Under *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), and its progeny, “where a capital defendant’s future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole,” the Due Process Clause “entitles the defendant ‘to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.’ ” *Shafer v. South Carolina*, 121 S.Ct. 1263 (2001)(plurality opinion). Furthermore, *Simmons* expressly rejected the argument that the possibility of clemency diminishes a capital defendant’s right to inform a jury of his parole ineligibility. In *Simmons*, South Carolina had argued that the defendant need not be allowed to present this information to the jury “because future exigencies,” including “commutation [and] clemency,” could one day “allow [him] to be released into society.” The Court disagreed: “To the extent that the State opposes even a simple parole-ineligibility instruction because of hypothetical future developments, the argument has little force.”

See La. Code Crim. Proc. Ann. art. 905.2

“Notwithstanding any provision to the contrary, the court *shall instruct* the jury that under the provisions of the state constitution, the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime, and the governor may, in exercising such authority, commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence including the possibility of parole, and may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole. The court shall also instruct the jury that under this authority the governor may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon. *The defense may argue or present evidence to the jury on the frequency and extent of use by the governor of his authority.*

DEATH PENALTY

Wearry v. Cain, No. 14-10008, 2016 WL 854158, at *1 (U.S. Mar. 7, 2016)(Brady violation)(per curium)(not briefed or argued)

See Facts and Holding above (See above under Prosecutorial Misconduct)

Defendant alleged violations of his due process rights under *Brady v. Maryland*, 83 S.Ct. 1194 (1963). In a per curium opinion that was neither briefed or argued to the Court, the Court reversed the conviction and held that the Louisiana courts' denial of Defendant's *Brady* claim ran up against settled constitutional principles on exculpatory evidence.

***Hurst v. Florida*, 136 S. Ct. 616 (1/12/2016)(death penalty/judge makes findings)**

Facts: Under Florida law, the maximum sentence a capital felon may receive on the basis of a conviction alone is life imprisonment. He may be sentenced to death, but only if an additional sentencing proceeding “results in findings by the court that such person shall be punished by death.” Fla. Stat. § 775.082(1). In that proceeding, the sentencing judge first conducts an evidentiary hearing before a jury. Next, the jury, by majority vote, renders an “advisory sentence.” Notwithstanding that recommendation, the court must independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death. The jury convicted Hurst of first-degree murder for killing a co-worker and recommended the death penalty. The court sentenced Hurst to death, but he was granted a new sentencing hearing on appeal. At resentencing, the jury again recommended death, and the judge again found the facts necessary to sentence Hurst to death.

Holding: The Supreme Court held that Florida's capital sentencing scheme, under which an advisory jury makes a recommendation to a judge, and the judge makes the critical findings needed for imposition of a death sentence, violates the Sixth Amendment right to jury trial.

Any fact that “expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict” is an “element” that must be submitted to a jury. *Apprendi v. New Jersey*, 120 S.Ct. 2348. Applying *Apprendi* to the capital punishment context, the *Ring* Court had little difficulty concluding that an Arizona judge's independent fact-finding exposed Ring to a punishment greater than the jury's guilty verdict authorized. *Ring* 's analysis applies equally here. Florida requires not the jury but a judge to make the critical findings necessary to impose the death penalty. That Florida provides an advisory jury is immaterial. As with *Ring*, Hurst had the maximum authorized punishment he could receive increased by a judge's own fact-finding.

Justice ALITO, dissenting.

As the Court acknowledges, “this Court ‘repeatedly has reviewed and upheld Florida’s capital sentencing statute over the past quarter of a century.’ ” And as the Court also concedes, our precedents hold that “ ‘the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.’ ” (quoting *Hildwin v. Florida*, 109 S.Ct. 2055 (1989) (per curiam); see also *Spaziano v. Florida*, 104 S.Ct. 3154 (1984)). The Court now reverses course, striking down Florida’s capital sentencing system, overruling our decisions in *Hildwin* and *Spaziano*, and holding that the Sixth Amendment does require that the specific findings authorizing a sentence of death be made by a jury. I disagree.

There are strong reasons to question whether this principle is consistent with the original understanding of the jury trial right. See *Alleyne v. United States*, 133 S.Ct. 2151, 2172–2173 (2013) (ALITO, J., dissenting). Before overruling *Hildwin* and *Spaziano*, I would reconsider the cases, including most prominently *Ring v. Arizona*, 122 S.Ct. 2428 (2002), on which the Court now relies.

Second, even if *Ring* is assumed to be correct, I would not extend it. Although the Court suggests that today’s holding follows ineluctably from *Ring*, the Arizona sentencing scheme at issue in that case was much different from the Florida procedure now before us. In *Ring*, the jury found the defendant guilty of felony murder and did no more. It did not make the findings required by the Eighth Amendment before the death penalty may be imposed in a felony-murder case. Nor did the jury find the presence of any aggravating factor, as required for death eligibility under Arizona law. Nor did it consider mitigating factors. And it did not determine whether a capital or noncapital sentence was appropriate. Under that system, the jury played *no role* in the capital sentencing process.

***Brooks v. Alabama*, 136 S. Ct. 708 (1/21/2016)(death penalty)**

Facts: Christopher Eugene Brooks was sentenced to death in accordance with Alabama’s procedures, which allow a jury to render an “advisory verdict” that “is not binding on the court.” Ala.Code § 13A–5–47(e) (2006). The jury returned a recommendation of death by a vote of eleven to one. On November 10, 1993, the trial judge accepted the jury’s recommendation and sentenced the Petitioner to death. Executed 1/21/16.

Holding: In this denial of certiorari, Justices Sotomayor and Ginsburg noted that the Court’s opinion upholding Alabama’s capital sentencing scheme was based on *Hildwin v. Florida* and *Spaziano v. Florida*, two decisions overruled in *Hurst v. Florida*. They nonetheless voted to deny certiorari because they believed there were procedural obstacles that would have prevented the Court from granting relief. Justice Breyer dissented from the denial because Alabama’s sentencing scheme is “much like” and “based on Florida’s sentencing scheme” and Florida’s scheme is unconstitutional. According to Justice Breyer, “The unfairness inherent in treating this case differently from others which used similarly unconstitutional procedures only underscores the need to reconsider the validity of capital punishment under the Eighth Amendment.”

***Kansas v. Carr*, 136 S. Ct. 633, 635-36 (2016)(8-1; Sotomayor dissent)(mitigating circumstances jury instruction)(last majority decision written by Justice Scalia)**

Facts: A Kansas jury sentenced Gleason to death for kidnapping, raping and killing a co-conspirator and killing her boyfriend to cover up the robbery and beating of an elderly man. Another Kansas jury sentenced Reginald and Jonathan Carr, brothers, to death after a joint sentencing proceeding. Respondents were convicted of various charges stemming from a notorious crime spree that culminated in the brutal repeated rapes, robbery, kidnapping, and execution-style shooting of five young men and women. No execution date set.

Holding: The Court's capital-sentencing case law does not require a court to instruct a jury that mitigating circumstances need not be proved beyond a reasonable doubt. Nor was such an instruction constitutionally necessary in these particular cases to avoid confusion. Ambiguity in capital-sentencing instructions gives rise to constitutional error only if “there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence,” a bar not cleared here.

The Court (Scalia) said, “Approaching the question in the abstract, and without reference to our capital-sentencing case law, we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called “selection phase” of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called “eligibility phase”), because that is a purely factual determination. ... Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. It *would* be possible, of course, to instruct the jury that *the facts establishing* mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof. If we were to hold that the Constitution requires the mitigating-factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt whether that would produce anything but jury confusion. In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

***Kansas v. Carr*, 136 S. Ct. 633, 635-36 (2016)(8-1; Sotomayor dissent)(severance of joint defendants *at the capital sentencing phase*)**

Facts: See above. The brother defendants argued that, because of the joint sentencing proceeding, one defendant's mitigating evidence put a thumb on death's scale for the other, in violation of the other's Eighth Amendment rights. Reginald's contended that he was prejudiced by his brother's portrayal of him as the corrupting older brother and that he was prejudiced by his brother's cross-examination of their sister, who equivocated about whether Reginald admitted to her that he was the shooter. Jonathan asserted that he was prejudiced by evidence associating him with his dangerous older brother, which caused the jury to perceive him as an incurable sociopath. No execution date set.

Holding. The Constitution did not require severance of the Carrs' joint sentencing proceedings. It is not the role of the Eighth Amendment to establish a special "federal code of evidence" governing "the admissibility of evidence at capital sentencing proceedings." Rather, it is the Due Process Clause that wards off the introduction of "unduly prejudicial" evidence that would render the trial fundamentally unfair. The question is whether the allegedly improper evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process."

In light of all the evidence presented at the guilt and penalty phases relevant to the jury's sentencing determination, the contention that the admission of mitigating evidence by one Carr brother could have "so infected" the jury's consideration of the other's sentence as to amount to a denial of due process is beyond the pale. The Court presumes that the jury followed its instructions to "give separate consideration to each defendant." Joint proceedings are permissible and often preferable when the joined defendants' criminal conduct arises out of a single chain of events. Limiting instructions, like those given in the Carrs' proceeding, often will suffice to cure any risk of prejudice that might arise from codefendants' "antagonistic" mitigation theories. Only the most extravagant speculation would lead to the conclusion that any supposedly prejudicial evidence rendered the Carr brothers' joint sentencing proceeding fundamentally unfair when their acts of almost inconceivable cruelty and depravity were described in excruciating detail by the sole survivor, who, for two days, relived the Wichita Massacre with the jury.

***Maryland v. Kulbicki*, 136 S. Ct. 2 (10/2015)(death penalty/ineffective assistance)**

Facts: In 1993, Kulbicki shot his 22-year-old mistress in the head at pointblank range. At Kulbicki's trial, commencing in 1995, Agent Ernest Peele of the FBI testified as the State's expert on Comparative Bullet Lead Analysis, or CBLA. In testimony of the sort CBLA experts had provided for decades, Peele testified that the composition of elements in the molten lead of a bullet fragment found in Kulbicki's truck matched the composition of lead in a bullet fragment removed from the victim's brain; a similarity of the sort one would " 'expect' " if " 'examining two pieces of the same bullet.' " The jury convicted Kulbicki of first-degree murder.

Kulbicki then filed a petition for postconviction relief, which lingered in state court until 2006 when Kulbicki added a claim that his defense attorneys were ineffective for failing to question the legitimacy of CBLA. By then, 11 years after his conviction, CBLA had fallen out of favor.

Indeed, Kulbicki supplemented his petition once more in 2006 after the Court of Appeals of Maryland held for the first time that CBLA evidence was not generally accepted by the scientific community and was therefore inadmissible.

The Maryland high court vacated Kulbicki's conviction on that ground alone. Kulbicki's counsel, according to the court, should have found a report coauthored by Agent Peele in 1991 that "presaged the flaws in CBLA evidence." One of the many findings of the report was that the composition of lead in some bullets was the same as that of lead in other bullets packaged many months later in a separate box. Rather than conduct "further research to explain the existence of overlapping compositions," the authors "speculated" that coincidence (or, in one case, the likelihood that separately packaged bullets originated from the same source of lead) caused the overlap. The Court of Appeals opined that this lone finding should have caused the report's authors to doubt "that bullets produced from different sources of lead would have a unique chemical composition," the faulty assumption that ultimately led the court to reject CBLA evidence 15 years later.

Holding: Counsel did not perform deficiently in failing to anticipate that CBLA, which at time of trial was widely accepted as a valid forensic tool to match suspect to victim, would become discredited; counsel could not be expected to unearth a report that apparently was available only in public libraries in an era of card catalogues rather than the world wide web.

The Court of Appeals offered no support for its conclusion that Kulbicki's defense attorneys were constitutionally required to *predict* the demise of CBLA. Instead, the court indulged in the "natural tendency to speculate as to whether a *different trial strategy* might have been more successful." To combat this tendency, we have "adopted the rule of *contemporary* assessment of counsel's conduct." Had the Court of Appeals heeded this rule, it would have "judge[d] the reasonableness of counsel's challenged conduct ... viewed *as of the time* of counsel's conduct." Reversed.

***Glossip v. Gross*, 135 S. Ct. 2726, 192 L. Ed. 2d 761 reh'g denied, 136 S. Ct. 20, 192 L. Ed. 2d 990 (6/29/2015)(use of midazolam)**

Facts: State death-row inmates brought § 1983 action alleging that Oklahoma's three-drug lethal injection protocol – now using 500 mg of midazolam instead of sodium thiopental – created an unacceptable risk of severe pain in violation of Eighth Amendment.

After Oklahoma adopted lethal injection as its method of execution, it settled on a three-drug protocol of (1) sodium thiopental (a barbiturate) to induce a state of unconsciousness, (2) a paralytic agent to inhibit all muscular-skeletal movements, and (3) potassium chloride to induce cardiac arrest. In *Baze v. Rees*, 128 S.Ct. 1520, the Court held that this protocol does not violate the Eighth Amendment's prohibition against cruel and unusual punishments. Anti-death-penalty advocates then pressured pharmaceutical companies to prevent sodium thiopental (and, later, another barbiturate called pentobarbital) from being used in executions. Unable to obtain either sodium thiopental or pentobarbital, Oklahoma decided to use a 500–milligram dose of midazolam, a sedative, as the first drug in its three-drug protocol.

The inmates argued that a 500–milligram dose of midazolam will not render them unable to feel pain associated with administration of the second and third drugs. After a three-day evidentiary hearing, the District Court denied the motion. It held that the prisoners failed to identify a known and available alternative method of execution that presented a substantially less severe risk of pain. It also held that the prisoners failed to establish a likelihood of showing that the use of midazolam created a demonstrated risk of severe pain.

Holding: Because capital punishment is constitutional, there must be a constitutional means of carrying it out. Further, Petitioners have failed to establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment.

To succeed on an Eighth Amendment method-of-execution claim, a prisoner must establish that the method creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives.

***State v. Tucker*, 181 So.3d 590 (La. 9/1/15), reh'g denied (Oct. 30, 2015) cert. denied 136 S.Ct. 1801 (2016)(with dissent by Breyer/Ginsburg)(Death penalty at 18 w/ 74 IQ).**

Facts: In September 2008, Tavia Sills was nearly five months pregnant. A few weeks earlier, she had informed 18–year–old, but still in high school, Lamondre Tucker that she believed he was the father of her unborn child (it turned out he was not). On September 9, 2008, Tucker picked Tavia up at the home of her mother. Tucker claimed that his sister had asked to meet Tavia after learning of the pregnancy. Before leaving, Tavia demonstrated some trepidation; she asked her mother to pray with her and then gave her defendant's phone number. A few hours later Tucker returned without Tavia. A few days later, her body washed up near a pond with three bullet holes to her neck, arm, and back. Defendant confessed to the killing with changing stories, all of which culminated in him being involved in the planning of her death and either being the shooter or a part of the shooting or a part of her being pushed into the pond after the shooting. He was convicted and given the death penalty.

On appeal, Tucker contended that his immaturity in conjunction with his diminished capacity rendered him ineligible for the death penalty because he was just five months past his eighteenth birthday at the time of the crime and he has a full scale IQ of 74.

Holding: According to the Louisiana Supreme Court, the US Supreme Court in *Roper v. Simmons* drew the line at age 18 well aware of the “objections always raised against categorical rules,” driven by two rationales: there was “objective indicia of consensus” against sentencing juvenile offenders to death in that, for example, most States had already rejected that possibility; and the death penalty “is a disproportionate punishment” because juvenile offenders as a class are less culpable than adult offenders. No similar consensus exists against executing adult offenders and defendant had the opportunity to present his immaturity to the jury in the penalty phase as a mitigating circumstance.

The defendant also argued that he was mentally retarded and could not be executed. He did not, however, attempt to prove that he should have the benefit of that categorical prohibition by following the procedure provided by La.C.Cr.P. art. 905.5.1, which was enacted to effectuate the mandate of *Atkins*. He simply submitted Dr. Vigen's expert opinion that he has a full scale IQ of 74 in conjunction with a post-verdict motion, not at the penalty phase. Defendant, in essence, argued that his two near misses at qualifying for the categorical prohibitions established in *Roper* and *Atkins*, when viewed together, should qualify him for a new categorical prohibition under the Eighth Amendment, as yet unestablished by the U.S. Supreme Court, against executing those who are less culpable because of their immaturity in conjunction with their below average intelligence. The court was unwilling to create such a new category.

Dissent by Breyer/Ginsburg: “Tucker may well have received the death penalty not because of the comparative egregiousness of his crime, but because of an arbitrary feature of his case, namely, geography. One could reasonably believe that if Tucker had committed the same crime but been tried and sentenced just across the Red River in, say, Bossier Parish, he would not now be on death row.” *Citing* Robertson, “The Man Who Says Louisiana Should ‘Kill More,’ *N.Y. Times*, July 8, 2015, p. A1 (“From 2010 to 2014, more people were sentenced to death per capita [in Caddo Parish] than in any other county in the United States, among counties with four or more death sentences in that time period”).

APPEAL

***Williams v. Pennsylvania*, 136 S. Ct. 1899, 1901 (2016)(5-3)(Roberts, Alito, Thomas dissenting)**

Facts: Petitioner Williams was convicted of the 1984 murder of Amos Norwood and sentenced to death. During the trial, the then-district attorney of Philadelphia, Ronald Castille, approved the trial prosecutor's request to seek the death penalty against Williams. Over the next 26 years, Williams's conviction and sentence were upheld on direct appeal, state post-conviction review, and federal habeas review. *In 2012*, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), arguing that the prosecutor had obtained false testimony from his codefendant and suppressed material, exculpatory evidence in violation of *Brady*. Finding that the trial prosecutor had committed *Brady* violations, the PCRA court stayed Williams's execution and ordered a new sentencing hearing. The Commonwealth asked the Pennsylvania Supreme Court, *whose chief justice was former District Attorney Castille*, to vacate the stay. Williams filed a response, along with a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the motion to the full court for decision. Without explanation, the chief justice denied Williams's motion for recusal and the request for its referral. He then joined the State Supreme Court opinion vacating the PCRA court's grant of penalty-phase relief and reinstating Williams's death sentence. Two weeks later, Chief Justice Castille retired from the bench.

Holding: Chief Justice Castille's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment. An unconstitutional failure to recuse constitutes structural error that is “not amenable” to harmless-error review, regardless of whether the judge's vote was dispositive. Because an appellate panel's deliberations are generally confidential, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process.

POST CONVICTION

***Brumfield v. Cain*, 135 S. Ct. 2269, 192 L. Ed. 2d 356 (June 2015)(AEDPA post-conviction relief re: post *Atkins* mental disability in death penalty case)**

Facts: After *Atkins* was decided, Kevan Brumfield (who was convicted of the murder of Betty Smothers, the mother of football player Warrick Dunn) requested an opportunity to prove he was intellectually disabled in state court. Without affording him with an evidentiary hearing or granting him funding to secure expert assistance, the state court rejected his claims.

When the state district court denied Brumfield's request for funding of an expert or for an evidentiary hearing, and the Louisiana Supreme Court denied the writ, Brumfield filed an application for post- conviction relief in the federal district court. The court held a hearing and heard extensive evidence regarding Brumfield's mental condition. The federal district court found that Brumfield established his intellectual disability and granted relief from the death penalty.

The Fifth Circuit Court of Appeals reversed and the Supreme Court granted writs, reversed and remanded.

Holding: The state court decision was based on an unreasonable determination of facts in light of the evidence presented in the state court proceedings. Brumfield was therefore entitled to have his *Atkins* claim considered on the merits in federal court.

The Court agreed with the federal district court's determination that the state court's rejection of Brumfield's request for an *Atkins* hearing was "premised on an unreasonable determination of the facts. Thus, the AEDPA bar did not preclude the federal court from conducting its evidentiary hearing on the issue of intellectual disability – and concluding that Brumfield suffered from an intellectual disability which precluded the State from executing him.

"The question here is whether Brumfield cleared AEDPA procedural hurdles, and was thus entitled to a hearing to show that he so lacked the capacity of self-determination that it would violate the Eighth Amendment to permit the State to impose the law's most severe sentence and take his life as well. That question and that question alone, we answer in the affirmative."

The Court noted that "we need not address whether [the state court's] refusal to grant [Brumfield] expert funding or at least the opportunity to seek pro bono expert assistance to further his threshold showing...

***Brumfield v. Cain*, 808 F.3d 1041, 1043 (5th Cir. Dec. 2015)(AEDPA/mental disability/death penalty)**

On remand, the Fifth Circuit reviewed the district court ruling for clear error and found that the district court's determination that Brumfield is, in fact, intellectually disabled was plausible in light of the record as a whole and its determination is not clearly erroneous. Accordingly, it affirmed the ruling of the district court. Brumfield may not be executed.

Fully litigated claims

The Supreme Court has begun to put the following language in relevant post-conviction cases:

“Relator has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the Legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he 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.”

All of the below cases, for example, contained that language.

***State v. Lee*, 2014-2374 (La. 9/18/15), 181 So. 3d 631, 634**

We find relator has not carried his post-conviction burden of proof and thus, the District Court did not err when it dismissed his claims for the reasons it assigned in denying relief. La.C.Cr.P. art. 930.2. It is well-established that the District Court may dispose of an application for post-conviction relief without conducting an evidentiary hearing, even if the application states a claim on which relief could be granted, if the issues raised can be resolved on the application, answer, and supporting documents, including relevant transcripts, depositions, and other reliable documents submitted by either party or that are available to the court.

***State ex rel. Williams v. State*, 2015-1073 (La. 4/22/16)**

Relator fails to show he received ineffective assistance of counsel. ...

***State ex rel. Nicholas v. State*, 2015-1060 (La. 4/22/16)**

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. Relator's sentencing claim is not cognizable on collateral review.

***State ex rel. Guidry v. State*, 2015-0840 (La. 2/19/16), 186 So. 3d 635**

The application was not timely filed in the district court, and relator fails to carry his burden to show that an exception applies.

CRIMINAL LAW

***Caetano v. Massachusetts*, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (2016)(Unanimous per curiam)(Alito/Thomas concurrence)**

Held: Lack of common use of stun guns at time of Second Amendment's enactment, unusual nature of stun guns as a modern invention, and lack of ready adaptability of stun guns for use in the military did not preclude stun guns from being protected by Second Amendment right to bear arms.

Facts (from concurrence): After a “bad altercation” with an abusive boyfriend put her in the hospital, Jaime Caetano found herself homeless and “in fear for [her] life.” She obtained multiple restraining orders against her abuser, but they proved futile. So when a friend offered her a stun gun “for self-defense against [her] former boy friend,” Caetano accepted the weapon. It is a good thing she did. One night after leaving work, Caetano found her ex-boyfriend “waiting for [her] outside.” He “started screaming” that she was “not gonna [expletive deleted] work at this place” anymore because she “should be home with the kids” they had together. Caetano's abuser towered over her by nearly a foot and outweighed her by close to 100 pounds. But she didn't need physical strength to protect herself. She stood her ground, displayed the stun gun, and announced: “I'm not gonna take this anymore.... I don't wanna have to [use the stun gun on] you, but if you don't leave me alone, I'm gonna have to.” The gambit worked. The ex-boyfriend “got scared and he left [her] alone.”

The events leading to Caetano's prosecution occurred sometime after the confrontation between her and her ex-boyfriend. In September 2011, police officers responded to a reported shoplifting at an Ashland, Massachusetts, supermarket. The store's manager had detained a suspect, but he identified Caetano and another person in the parking lot as potential accomplices. Police approached the two and obtained Caetano's consent to search her purse. They found no evidence of shoplifting, but saw Caetano's stun gun. Caetano explained to the officers that she had acquired the weapon to defend herself against a violent ex-boyfriend. The officers believed Caetano, but they arrested her for violating Mass. Gen. Laws, ch. 140, § 131J, “which bans entirely the possession of an electrical weapon.”

The Supreme Judicial Court rejected Caetano's Second Amendment claim, holding that “a stun gun is not the type of weapon that is eligible for Second Amendment protection.” Citing *Heller*, the court reasoned that stun guns are unprotected because they were “not ‘in common use at the time’ of enactment of the Second Amendment,” and because they fall within the “traditional prohibition against carrying dangerous and unusual weapons.”

Discussion: The Court has held that “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,” *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), and that this “Second Amendment right is fully applicable to the States,” *McDonald v. Chicago*, 130 S.Ct. 3020 (2010).

All of the bases of the Massachusetts court’s opinion are directly inconsistent with *Heller*. “The reasoning defies our decision in *Heller*, which rejected as “bordering on the frivolous” the argument “that only those arms in existence in the 18th century are protected by the Second Amendment.” The decision below also does a grave disservice to vulnerable individuals like Caetano who must defend themselves because the State will not.

A State's most basic responsibility is to keep its people safe. The Commonwealth of Massachusetts was either unable or unwilling to do what was necessary to protect Jaime Caetano, so she was forced to protect herself. To make matters worse, the Commonwealth chose to deploy its prosecutorial resources to prosecute and convict her of a criminal offense for arming herself with a nonlethal weapon that may well have saved her life.

If the fundamental right of self-defense does not protect Caetano, then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe.

State v. Sims, No. 2015-KA-2163 (6/29/16)

Issue: Is R.S. 14:46.3, a statute which makes illegal the trafficking of children for sexual purposes and which provides that a defendant’s lack of knowledge of a victim’s age shall not be a defense to charges, unconstitutionally contradictory, vague, ambiguous, and indefinite, as the 19th JDC had held?

Facts: La. RS 14:46.3, entitled “Trafficking of children for sexual purposes,” specifically provides:

A. It shall be unlawful:

(1) For any person to *knowingly* recruit, harbor, transport, provide, sell, purchase, receive, isolate, entice, obtain, or maintain the use of a person under the age of eighteen years for the purpose of engaging in commercial sexual activity....

C. . . . (2) *Lack of knowledge* of the victim's age *shall not be a defense* to a prosecution pursuant to the provisions of this Section.

Defendant argued that it criminalizes the *knowing* trafficking of juveniles for sexual purposes while *simultaneously precluding* a defendant from *asserting lack of knowledge* of the victim’s age as a defense.

The trial court granted the motion to quash and declared R.S. 14:46.3 unconstitutional, stating, in pertinent part: “[T]he court finds [] subpart C(2) to be unconstitutional. It is clear that these

two sections are contradictory. How can the State prohibit a defendant from knowingly committing a criminal act and, at the same time, not be required to prove defendant's knowledge of an essential element of the crime – that being the age of the victim? These two sections are logically antagonistic and irreconcilable.” The trial court, however, only struck subsection C(2) as unconstitutional.

Holding: It is clear and unambiguous and, therefore, constitutional. The “knowing” requirement only relates to the ACT of recruiting, harboring, transporting, providing, selling, purchasing, receiving, isolating, enticing, obtaining or maintaining and not to knowledge of the age of the individual. The statute clearly provides that knowledge of the AGE doesn't matter and is not a defense.

***State v. Tucker*, 181 So.3d 590 (La. 9/1/15), reh'g denied (Oct. 30, 2015) cert den. 136 S.Ct. 1801 (2016) (see elsewhere for other issues)**

Issue: Can a prospective juror, that is, a member of the jury venire who had not been selected and seated, be the object of the offense of Jury Tampering?

Facts: See further discussion above. After a prospective juror changed her views on the death penalty overnight, defense counsel informed the court they believed someone had spoken with this prospective juror and persuaded her to change her answers. The juror was examined and admitted that she had received a three-way telephone call the night before in which The defendant had urged her to change her answers to questions about the death penalty. The prospective juror eventually revealed the contact and was excused from service on that jury.

Holding: The court could find no case law from Louisiana deciding the issue. Relying on cases from other jurisdictions, it held that the term ‘juror’ in La. R.S. 14:129 includes a person summoned as a prospective juror. The statute does not exclude venire members summoned to jury duty, nor does it strictly limit the reach of the statute only to impaneled jurors, including grand and petit jurors. The statute proscribes any verbal or written communication made to any juror for the purpose of influencing his verdict or indictment ‘in any cause that is *pending* or about to be brought before him’Because any threat or attempt to influence a person summoned for jury duty (i.e., a prospective juror) in a pending trial impairs the administration of justice in exactly the same way that justice is impaired by a threat or influence of an empaneled juror, the court concluded that the term ‘juror’ in the statute included a prospective juror.

***State v. Broyard*, 183 So.3d 796 (La. App. 4 Cir. 12/23/15)(La. RS 14:110.1, jumping bail, requires charges to be filed)**

Facts: Broyard was charged with bail jumping, a felony offense pursuant to La. R.S. 14:110.1. Mr. Broyard filed a motion to quash the bill of information, alleging that the State failed to charge him with a crime punishable under a valid statute. In granting Mr. Broyard's motion, the

trial court concluded that a case is not pending until formal charges are instituted by the prosecution.

The statute in question, which was amended in 2008, provides in pertinent part: “Jumping bail is the intentional failure to appear at the date, time, and place as ordered by the court *before which the defendant's case is pending.* ...”

Prior to the 2008 amendment, La. R.S. 14:110.1(A) provided that “[j]umping bail is the intentional failure to appear at such time and place as designated by the judge or committing magistrate who has fixed the amount of the bail bond”

The trial court found that the instant matter was not “pending until it is properly instituted via a bill of information, a bill of indictment, or an affidavit.” It further determined that prior to act constituting the alleged “jumping,” the State failed to file formal charges against Mr. Broyard and that he was merely arrested for violation of La. R.S. 14:69(A). Thus, because there was no prosecution instituted prior to the date of the act, Mr. Broyard had no pending case as required by La. R.S. 14:110.1.

Holding: The Fourth Circuit found that the fact that the legislature chose to amend the bail jumping statute suggests its intent to limit its application to only those cases that are “pending.” Furthermore, the Court found that the statutory language of La. R.S. 14:110.1 is at best ambiguous and the meaning of a “case [that] is pending” cannot be discerned with certainty. Thus, “[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them” and, thus, in Mr. Broyard's favor.

***State v. Tucker*, 181 So.3d 590 (La. 9/1/15), reh'g denied (Oct. 30, 2015)(death penalty)(killing of pregnant woman as first degree murder)(appeal to Supreme Court pending with numerous motions from amici)**

Facts: See above. Defendant shot and killed the 5 month pregnant young woman who claimed he was the father of her unborn child (turns out he was not).

He contended he was the first person convicted of first degree murder under La. R.S. 14:30(A)(3) (intent to kill or harm more than one person) for killing a pregnant woman and her unborn child.

Holding: The Court found no constitutional impediment to including offenders who intentionally kill women they know are pregnant in that narrow category. In fact, of the 32 states that at present authorize capital punishment, seven provide that the intentional killing of a pregnant woman is an aggravating factor that may justify a death sentence. Thus, it's a matter of statutory interpretation.

The Court adopted the reasoning from *State v. Keller*, 592 So.2d 1365 (La.App. 1 Cir.1991). In *Keller*, Gregory Keller was indicted for the first degree murder of Andrea Simmons, who was pregnant, based on the specific intent to kill or to inflict great bodily harm upon more than one

person. Keller sought to quash the prosecution on the basis that a fetus cannot be considered a person for purposes the multiple-person aggravating element of La. R.S. 14:30(A)(3). The court found that, although a fetus is not considered a human being whose unlawful killing constitutes homicide, a fetus is nonetheless defined as a person in the criminal code. Louisiana R.S. 14:30(A)(3) provides that first degree murder is the killing of a human being “[w]hen the offender has a specific intent to kill or inflict great bodily harm upon more than one person.” Louisiana R.S. 14:2(7) defines “person” in the criminal law to include “a human being from the moment of fertilization and implantation.” Thus, pursuant to these two statutory provisions, first degree murder does include the killing of a human being (the pregnant woman) when the offender has the specific intent to kill or inflict great bodily harm upon more than one person (the pregnant woman and the implanted conceptus).

***Voisine v. United States*, 2016 WL 3461559 (U.S. June 27, 2016)**

Facts: In an effort to “close [a] dangerous loophole” in the gun control laws, *United States v. Castleman*, 134 S.Ct. 1405, 1409 (2014), Congress extended the federal prohibition on firearms possession by convicted felons to persons convicted of a “misdemeanor crime of domestic violence,” 18 U.S.C. § 922(g)(9). Section 921(a)(33)(A) defines that phrase to include a misdemeanor under federal, state, or tribal law, committed against a domestic relation that necessarily involves the “use ... of physical force.” In *Castleman*, this Court held that a knowing or intentional assault qualifies as such a crime, but left open whether the same was true of a reckless assault.

Petitioner Stephen Voisine [and Petitioner Armstrong] pleaded guilty to assaulting his girlfriend in violation of §207 of the Maine Criminal Code, which makes it a misdemeanor to “intentionally, knowingly *or recklessly* cause[] bodily injury” to another. Petitioners argued that they were not subject to §922(g)(9)’s prohibition because their prior convictions could have been based on reckless, rather than knowing or intentional, conduct and thus did not qualify as misdemeanor crimes of domestic violence.

Holding: A reckless domestic assault qualifies as a “misdemeanor crime of domestic violence” under § 922(g)(9).

MISCELLANEOUS

***Burrell v. State*, 50,157 (La. App. 2 Cir. 1/13/16)(compensation for wrongful conviction)**

Facts: Albert Ronnie Burrell and Michael Ray Graham each spent more than 13 years on death row after having been convicted of the 1986 double murder of William and Callie Frost (“the Frost murders”). No physical evidence of any nature was ever obtained which implicated or exonerated Burrell, Graham, or any other persons for these murders. Burrell and Graham were convicted on circumstantial evidence alone. The investigation that led to the arrests was full of mistakes, and most of the testimony that led to the convictions was later recanted or discredited. The facts of this matter have been considered by both state and federal courts.

After new trials were granted, the Louisiana Department of Justice conducted a thorough investigation of all known possible independent sources of credible information. Based on the results of that investigation, the Louisiana Attorney General's Office filed a dismissal of all charges against Graham and Burrell. At the request of the trial court, reasons for this dismissal were also filed by the attorney general, citing the complete lack of credible evidence in this matter. Shortly thereafter, Burrell and Graham were released. Charges against Burrell and Graham have never been reinstated. No one else has ever been charged with the Frost murders.

These actions for compensation for wrongful conviction and imprisonment were filed on August 28, 2008. On August 6, 2014, after a four-day trial, a judgment and written reasons were issued denying Burrell and Graham compensation.

Burrell and Graham allege the trial court failed to follow the statutory requirements of La. R.S. 15:572.8 regarding procedure, misapplied the burden of proof, and erred in not finding they met the burden.

45 day requirement. Burrell and Graham contend the trial court failed to follow the statutory requirements by not setting the matter for trial within 45 days after the filing of the answer by the state (the hearing was nearly 3 years later and two witnesses, allegedly, died in the interim). The issue here is whether the statute requires the court to set the trial date on its own initiative or if a request must be made by a party.

Holding: No specific procedure is provided by the statute. Louisiana R.S. 15:572.8(E) clearly states that the court shall set a hearing within 45 days of the attorney general's response, but provides no remedy for instances when a failure to set the court date occurs. The benefit of an expeditious determination of claims for compensation for wrongful conviction and

imprisonment falls to the petitioner in these matters. At any time after the 45 days had passed, Burrell and Graham could have requested this benefit by filing a motion to set the matter for trial, but did not do so until almost three years later. Considering the overwhelming size of this record, it was prudent for the trial court to wait until the parties indicated readiness to proceed in this matter. While it is true the matter was not set for trial until more than two years after the filing of the answer, this was not due to any error by the trial court.

Standard of Proof. Burrell and Graham allege the trial court erred in its application of the standard of proof under La. R.S. 15:572.8, which states, in pertinent part:

“A petitioner is entitled to compensation in accordance with this Section if he has served in whole or in part a sentence of imprisonment under the laws of this state for a crime for which he was convicted and (1) The conviction of the petitioner has been reversed or vacated; and (2) The petitioner has proven by clear and convincing scientific or non-scientific evidence that he is factually innocent of the crime for which he was convicted.”

The intermediate standard “clear and convincing” means more than a “preponderance” but less than “beyond a reasonable doubt.” To receive compensation, Burrell and Graham must prove it is highly probable that they are factually innocent of the murders for which they were convicted.

Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt. A bona fide claim of actual innocence, as basis for post-conviction relief, must involve new, material, noncumulative, and conclusive evidence, which meets an extraordinarily high standard and undermines the prosecution's entire case. A credible claim nevertheless requires new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.

Burrell and Graham offer no new positive evidence of their factual innocence, and instead they argue that because the state conceded to the “complete lack of credible evidence” this admission, in and of itself, entitles them to compensation. Merely showing there is lack of credible evidence to support a conviction is insufficient to meet the burden of La. R.S. 15:572.8.

Here, the trial court allowed a relaxed evidentiary standard to enable a full and thorough examination of all the facts involved in this matter. The trial court reviewed over 6000 pages of evidence, and heard testimony of witnesses over a four-day bench trial. Ultimately, the trial court was unable to conclude Burrell and Graham demonstrated factual innocence by clear and convincing evidence.

Burrell and Graham essentially requested the trial court to find them factually innocent and entitled to compensation for wrongful conviction based on the same evidence and facts upon which the judgment for new trial was granted. The legislature did not intend for the burden under La. R.S. 15:572.8 to be the same as the burden under La. C. Cr. P. 851. If this had been the intention, the result would ultimately be that nearly every defendant who was granted a new

trial would also be awarded compensation. It is clear that the burden to prove factual innocence for the purposes of compensation under La. R.S. 15:572.8 is more onerous than the burden to prove entitlement to a new trial.

END OF A CRIME STORY

State v. Lee, 2014-2374 (La. 9/18/15)(Crichton, J. concurring)

In my view, nothing Lee has offered post-conviction would have outweighed the atrocious nature of his crimes. ... Even if all the omitted evidence had been presented, there would not have existed a reasonable probability of a different sentence in a case with such horrendous crimes and in which substantial evidence of Lee's adaptive impairments was presented in furtherance of his mental retardation claim. ...

As made clear in the Court's unanimous per curiam opinion, Lee has been afforded the assistance of appointed counsel and several years of access to Louisiana's courts for litigation of his post-conviction claims. Much like an inmate's singular opportunity to seek relief in federal habeas proceedings, after the delays for rehearing have run pursuant to La. Supreme Court Rule IX, this writ denial marks the end of Lee's state court proceedings, *finally bringing some measure of closure to the families of the multiple victims that have been irreparably affected by his hideous crimes.*

Afterword: Serial killer Derrick Todd Lee died January 21, 2016 of heart disease.

2016 Legislation