APPELLATE ISSUES AND WRIT PRACTICE

I. DISTINGUISHING APPEALABLE RULINGS AND WRITABLE RULINGS

A. FIRST THINGS FIRST …

When a criminal appeal record is received by the First Circuit, it is reviewed by a central staff attorney or paralegal to determine:

1. Is the case properly presented by appeal?
2. Is the appeal timely?
3. Is (was) the case triable by jury?

B. APPEALABLE?

1. It is important to identify the ruling that is being reviewed. Only a final judgment or ruling is appealable. The most common criminal appeal is the review of a conviction and sentence in a felony case. Of course, there are instances where the State may appeal.

2. Appealable rulings are set out in La. Code Crim. P. art. 912 and 912.1. The list in article 912 is not exclusive.

   a. Here are some **rulings that are appealable:**

   - Conviction and sentence (defendant)
   - Imposition of illegal sentence (defendant) & (State; Arts. 881.2 (B) & 882 (1))
   - A ruling upon a motion by the State declaring the present insanity of the defendant (defendant)
   - A juvenile adjudication and disposition (juvenile; La. Const. art. V, § 10(B)(2); La. Ch. Code art. 330(B))
   - Granting of a motion to quash the indictment or any count in the indictment (State) - **Caveat: If a motion to quash is granted in a misdemeanor case, the State must seek review by writ because the case was not triable by a jury.**

- Granting of a plea of time limitations (where case is dismissed under Articles 571-583; not when a motion for release is granted under Art. 701) (State)
- Granting of plea of double jeopardy (State)
- Granting of motion in arrest of judgment (State)
- Granting of defendant's motion to change venue or denial of the State's motion to change venue (State; Art. 627)
- Granting of a motion to recuse (State; but compare Arts. 912(6) & 684; Art. 684 states "If a judge or a district attorney is recused over the objection of the State, or if an application by the State for recusation of a judge is denied, the State may apply for a review of the ruling by supervisory writs. The defendant may not appeal prior to sentence from a ruling recusing or refusing to recuse the judge or the district attorney.")
- Granting of a motion for postverdict judgment of acquittal (State; Art. 821 (D))

Example of State appeal:

State v. Gillis, 2007-1909 (La. App. 1st Cir. 3/26/08), 985 So.2d 745, writ denied, 2008-0868 (La. 5/14/08), 980 So.2d 698. Defendant, Sean Vincent Gillis, was charged by grand jury indictment with second degree murder. Defendant initially pled not guilty and filed a motion to suppress inculpatory statements and an oral DNA sample taken. The motions were denied. Thereafter, the defendant withdrew his prior plea of not guilty and, at a **Boykin** hearing, entered a plea of guilty pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976), reserving his right to challenge all pretrial rulings. The State objected to the trial court's accepting the **Crosby** plea without agreement to the plea by the State. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The State appealed, designating one assignment of error—that the trial court erred in accepting the defendant's **Crosby** plea without the prosecution's agreement to the plea.

The defendant argued that the State did not have a right to an appeal in the matter, citing La. Code Crim. P. art. 912(B). **Held: A guilty plea not involving capital punishment brings an end to the proceedings, and accordingly, the judgment and sentence are final.** Moreover, by its clear language, Article 912 provides not an exclusive list, but merely an illustrative list of the judgments or rulings from which the State may appeal. Thus, the State had a right to appeal in that case. **State v. Gillis**, 985 So.2d at 746. The First Circuit ultimately concluded that the trial court did not err in accepting the **Crosby** plea without the State's concurrence.

b. Examples of **rulings that are NOT appealable:**

- Verdict of acquittal (found not guilty) (Art. 912(B))
- Refusal to adjudicate child a delinquent (La. Ch. Code art. 331(B))
- Probation revocation
- Denial or granting of a motion to suppress
- Denial or granting of application for postconviction relief (Art. 930.6)
- Denial or granting of habeas (Art. 369)
- Convicted, but not yet sentenced
- Granting of a motion to quash habitual offender adjudication- **State v. Cass**, 44,411 (La. App. 2d Cir. 8/19/09), 17 So.3d 486. Second Circuit held the State has no right of appeal from a ruling quashing a bill of information charging the defendant under the Habitual Offender Law, but nonetheless examined the merits of the State's argument under its supervisory jurisdiction as there was no adequate remedy on appeal.
- Denial of motion for new trial, where no sentence imposed
- Denial of motion for change of venue (defendant, Art. 627)
- Family in need of services

3. Triable by jury?

a. Appellate courts have appellate jurisdiction only in cases triable by a jury. La. Const. art. V, § 10 (A)(3). See La. Code Crim. P. art. 912.1(B)(1). If the case is not triable by jury, the case may

not be handled as an appeal, even if the ruling otherwise would be an appealable ruling. (Example: motion to quash granted in a misdemeanor case - State must seek review by writ because the case was not triable by jury.)

b. To determine if the case was triable by jury, the courts of appeal consider the penalty that is possible under the statute, not the actual sentence imposed. Even if the defendant waived the right to a jury trial, if he had the right, the case is triable by jury for jurisdiction purposes.

c. For the most part, felony offenses are triable by jury. See La. Code Crim. P. art. 782. "Felony" is defined as an offense that may be punished by death or by imprisonment at hard labor. See La. Code Crim P. art. 933(3). Misdemeanor convictions are not appealable. There are some instances ("**Duncan** misdemeanor") where a defendant charged with a misdemeanor is entitled to a jury trial because the possible sentence exceeds 6 months and/or a $1,000 fine.[1] When misdemeanor charges are charged by separate bills of information, and the aggregate penalty of the offenses exceeds 6 months imprisonment or a fine of $1,000, the defendant is entitled to a jury trial. Whenever two or more misdemeanors are joined in the same bill of information, the maximum aggregate penalty shall not exceed imprisonment for more than 6 months, a fine of more than $1,000, or both. See La. Code Crim. P. art. 493.1.

d. The First Circuit Court of Appeal would notice, ex propio motu, that a non-appealable judgment is being appealed. Often, the First Circuit will invite the parties to show cause by brief why the appeal should not be dismissed. The Third Circuit also notices, ex propio motu, that a non-appealable judgment is being appealed by issuing a rule to show cause why the appeal should not be dismissed. The First Circuit has a long-standing policy of not converting appeals to writ applications. See **State v. Clause**,

[1] La. Code Crim. P. art. 779 provides that a defendant charged with a misdemeanor in which the punishment may be a fine in excess of $1,000 or imprisonment for more than 6 months shall be tried by a jury of six jurors, and a defendant charged with any other misdemeanor shall be tried by the court without a jury.

486 So.2d 1206 (La. App. 1st Cir. 1986).[2] This also appears to be the practice for the Fifth Circuit Court of Appeal. See **State v. Fleming,** 01-1370 (La. App. 5th Cir. 5/29/02), 820 So.2d 1112, 1113. The Third Circuit no longer converts appeals to writs. However, the order dismissing the appeal can provide the defendant a 30-day delay in which to file a writ application. The Third Circuit, in the opinion dismissing the appeal, allows the defendant 30 days to file a writ (15 days if the judgment is a misdemeanor conviction).

4. Examples of dismissed appeals

   a. **State v. Hudson,** 2013KA0189 (La. App. 1st Cir. 5/8/13). Defendant was charged with two counts of unlawful distribution of criminal records, a violation of La. R.S. 15:596, and one count of distribution of a driver's license photograph, also in violation of La. R.S. 15:596. At the time of the offenses, the defendant was an officer with the Greensburg Police. It appears she obtained information from the criminal databases about her boyfriend's ex-wife's boyfriend, then gave the information to her boyfriend (now husband), and he texted or e-mailed the information to his ex-wife while they were fighting over child support.

      La. R.S. 15:596(B) provides as follows:

      > B. Any individual who shall acquire or distribute any criminal history record, pursuant to this Chapter and except as authorized by law and in accordance with applicable rules and regulations of the bureau, shall be fined not less than five hundred nor more than one thousand dollars, and may be imprisoned for not more than three months for each offense, or both.

      The distribution of criminal records charges is clearly covered by this section. It is not as clear *which* section of La. R.S. 15:596 prohibits the improper distribution of a driver's license photograph, but since La. R.S. 15:596(A) only applies to agency

[2] This policy is not absolute as the First Circuit has, on occasion, converted an appeal to a writ.

heads, La. R.S. 15:596(C) prohibits the transmission of false information and withholding information, and La. R.S. 15:596(D) allows for administrative sanctions against agencies, presumably a driver's license photograph is a criminal history record under La. R.S. 15:596(B). Since the penalty for a violation of La. R.S. 15:596(B) is a fine of not more than $1,000 or imprisonment for not more than 3 months, or both, the charges of distribution of criminal history records were not triable by jury, and the First Circuit did not have appellate jurisdiction. The proper method for obtaining review of these convictions is by application for supervisory writs. See La. Code Crim. P. art. 912.1(C). (In this case, defendant moved to convert her appeal to a writ, and the First Circuit permitted that.)

b. **State v. Owens**, 2012KA0400 (La. 1st Cir. 4/23/12). The defendant was charged with failing to wear a safety belt, in violation of La. R.S. 32:295.1. After a bench trial, he was convicted as charged and sentenced to pay a fine of $25. After informing the court that he refused to pay the fine, the court held the defendant in contempt of court and sentenced him to serve 5 days in the parish jail. The defendant filed a timely motion for appeal, even though the court told him that he did not have the right to appeal the conviction, but could file a writ application. The penalty for driving without a safety belt is a fine of $25 for a first offense, $50 for a second offense, or $50, plus court costs, for a third or higher offense. See La. R.S. 32:295.1(G)(1). Since the offense of driving without a safety belt is not triable by jury, the First Circuit held it did not have appellate jurisdiction, noting the proper method for obtaining review of the conviction and sentence is by application for supervisory writs. (The appeal was dismissed, but the defendant was permitted 30 days to file a writ).

c. **State v. Ruple,** 2011KA1534 (La. App. 1st Cir. 9/26/11). The defendant was separately charged with two counts of violations of the West Baton Rouge Parish leash law, and he was convicted as charged after a bench trial. The defendant represented himself during the trial, but retained counsel for the appeal. According to the trial transcript, the defendant was charged after his neighbor complained that the defendant's livestock was in his wheat field. The transcript reflects that this problem had been going on for at

least ten to twelve years, and there is apparently a fence dispute between them, as well. The bill recites that the defendant was charged with two violations of "WBR Parish Ordinance 5-5 LEASH LAW, by unlawfully allowing any dog or cat to run at large at all times." Testimony adduced during the trial established that the animals at large were cows. This case is actually pretty interesting, since the bills charge the defendant with violations of the leash law when the actual offense was presumably allowing animals to run at large - Ordinance 5-1, according to a summons filed with one of the bills. Moreover, the court convicted the defendant on both counts, even though there was no testimony at all about one of the offenses. Since neither of these offenses is triable by jury, the First Circuit determined it did not have appellate jurisdiction. (Defendant was allowed 30 days in which to file a writ).

5. Timely?

   a. Was the motion to appeal timely filed? If the defendant is appealing, staff checks the minutes to find out when the defendant was sentenced. The defendant has 30 days from that date in which to file a motion to appeal. See La. Code Crim. P. art. 914(B)(1). (We start counting on the day after sentencing. The deadline is the 30th day. If the 30th day is on a weekend or lower court holiday, go to the next day).

   b. A defendant in a felony case has 30 days after sentencing, or within such longer period as the court may set at sentence, in which to file a motion to reconsider sentence. If a motion to reconsider sentence is filed, the time delays for appeal start with the ruling on that motion. (Start counting on the day after the ruling). See La. Code Crim. P. art. 914(B)(2).

   c. If a case is remanded by a court of appeal for some purpose, and it is clear from the opinion that the defendant will have the right to appeal again (example: **Crosby** plea), and there is no ruling on motion to suppress, and case is remanded for ruling, the time delays will start the day after the ruling that is rendered after the remand.

C. JURISDICTIONAL ISSUES

1. If the trial court has declared a statute or ordinance unconstitutional, the courts of appeal do not have jurisdiction to handle the appeal. If the defendant has been convicted of a capital offense, and the penalty of death has been imposed, the courts of appeal do not have jurisdiction to handle the appeal. In both of these instances, the Louisiana Supreme Court has exclusive appellate jurisdiction. See La. Const. art. I, § 5.

2. Defendant **may** appeal to the Louisiana Supreme Court from a judgment in any capital case in which a sentence of death actually has been imposed. See La. Code Crim. P. art. 912.1(A)(1). A defendant "may" appeal to the supreme court from a judgment in a capital case in which a sentence of death is actually imposed, but he is not required to do so. See **State v. Bordelon**, 2007-0525 (La. 10/16/09), 33 S0.3d 342.

3. Interestingly, in a capital case, the defendant was convicted and sentenced to death. He filed a motion for new trial and issued subpoenas. The State sought review of the district court's ruling granting defendant's request to issue subpoenas to the district attorney and two assistant district attorneys to testify at a hearing on defendant's motion to recuse the assistant district attorneys from representing the State on defendant's motion for new trial. Because the defendant was convicted of first degree murder and sentenced to death, the First Circuit elected to transfer this matter to the Louisiana Supreme Court pursuant to La. Const. art. V, § 5(D). The State filed a supervisory writ with the Louisiana Supreme Court. The supreme court granted the State's writ, in part. Noting that the district court suspended action on defendant's notice of appeal pending consideration of defendant's motion for new trial, the supreme court found that its appellate jurisdiction had not yet attached and found that the State properly invoked the supervisory jurisdiction of the court of appeal "over cases which arise within its circuit." The supreme court granted the application for the sole purpose of transferring it for consideration of the merits to the First Circuit. See **State v. Brown**, 12-2006 (La. 9/14/12), 98 So.3d 288 (per curiam).

4. Other jurisdictional provisions

a. Louisiana Code of Criminal Procedure Article 912.1(B)(2) provides that an appeal from a judgment in a criminal case triable by jury from a city court located in the Nineteenth Judicial District shall be taken to the Nineteenth Judicial District in the parish of East Baton Rouge.

b. Review or appeal of a judgment in any criminal case tried under a **State statute in city, parish, or municipal courts** shall be provided in article 912.1 of the Louisiana Code of Criminal Procedure (which is by appeal if triable by jury, and by writ if not). Review of a judgment in any other criminal case (**ordinance violation**) tried in a city, parish, or municipal court shall be by appeal to the district court of the parish in which the court of original jurisdiction is located, except in those cases which are appealable to the supreme court under the provisions of the Louisiana Constitution. La. R.S. 13:1896(B). See also La. Const. art. V, § 16(B). For those cases that are appealable to the district court, the next step is a writ application to the court of appeal. (La. R.S. 13:1896(A) has special provisions for mayor's courts and justice of the peace courts.)

D. JUVENILE APPEALS

1. When a juvenile is adjudicated a delinquent under Title VIII of the Children's Code, review is by appeal (at least in the First and Third Circuits). Even if the adjudication as a delinquent is based on a misdemeanor offense, the courts of appeal have jurisdiction over the appeal. See La. Const. art. V, § 10(A)(2). An appeal may be taken only after a judgment of disposition. The State may not appeal from a judgment refusing to adjudicate a child to be delinquent or from a judgment of acquittal. La. Ch. Code art. 331(B). If the ruling is that the family is in need of services (FINS), or that the child is in need of care, there is a right of appeal, but the appeal is civil. See La. Ch. Code art. 330(B).

2. Juvenile appeals shall be taken within 15 days from the mailing of the notice of judgment. If a timely application for new trial is made, the delay for appeal commences to run from the date of the mailing of notice of denial of the new trial motion (the delay for filing a motion

for new trial is 3 days, exclusive of holidays, and shall commence to run from the mailing of the notice of judgment). A motion for new trial shall be decided expeditiously and within 7 days from the date of submission for decision. See La. Ch. Code art. 332(A) & (C).

3. Juvenile appeals shall be accorded preference and shall be determined at the earliest practicable time. See La. Ch. Code art. 337 & Uniform Rules of Louisiana Courts of Appeal-Rule 5-1.

E. SCOPE AND STANDARD OF REVIEW

1. Types of review

a. Sufficiency of the evidence to uphold a conviction - (Jackson[3] standard of review) Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime beyond a reasonable doubt.

When reviewing sufficiency, we must be mindful that the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Where there is conflicting testimony regarding factual matters, the resolution of which depends upon the determination of the credibility of witnesses, the matter is one of the weight of the evidence, not its sufficiency. On appeal, the reviewing court will not assess the credibility of the witnesses or re-weigh the evidence to overturn a fact finder's determination of guilt. **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660.

When circumstantial evidence forms the basis of a conviction, La. R.S. 15:438 requires that the elements of the offense be proven so that every reasonable hypothesis of innocence is excluded. **State v. Schnyder,** 06–29 (La. App. 5th Cir. 6/28/06), 937 So.2d 396, 400. "... [T]he pertinent question on review [is] not whether the appellate court found that defendant's hypothesis of innocence offered a reasonable explanation for the evidence at trial but whether jurors acted reasonably in rejecting it as a basis

[3] See **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 La.Ed.2d 560 (1979).

for acquittal." **State v. Pigford**, 05–0477 (La. 2/22/06), 922 So.2d 517, 520 (per curiam). All of the evidence, both direct and circumstantial, must be sufficient to satisfy a rational trier of fact that the defendant is guilty beyond a reasonable doubt. **State v. Schnyder**, supra.

b. Abuse of discretion

The trier of fact is presumed to have acted rationally until it appears otherwise. **State v. Mussall**, 523 So.2d 1305 (La. 1988). Only irrational decisions to convict by the trier of fact will be overturned, 523 So.2d at 1309.

c. Harmless error (La. Code Crim. P. art. 921)

Once an appellate court has determined that the trial court erred (abused its discretion), the harmless error analysis is utilized in certain situations. The proper analysis for determining harmless error is not whether in a trial that occurred without the error, a guilty verdict surely would have been rendered, but whether the guilty verdict actually rendered in the trial was surely unattributable to the error. **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

The United States Supreme Court distinguished between "trial errors," which may be reviewed for harmless error, and "structural errors," which defy analysis by harmless error standards. **Arizona v. Fulimante**, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Trial error is error which occurred during presentation of the case to the jury and may, therefore, be quantitatively assessed in context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. "Structural error" is one that affects the framework within which trial court proceeds; structural defects include complete denial of counsel, adjudication by biased judge, exclusion of members of defendant's race from grand jury, right to self-representation at trial, right to public trial, and right to jury verdict of guilt beyond a reasonable doubt. See **State v. Johnson**, 664 So.2d 94 (La. 1995).

d. Juvenile delinquency appeals

When the State charges a child with a delinquent act, it has the burden of proving each element of the offense beyond a reasonable doubt. On appeal, the applicable standard of review is whether or not, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This standard of review applies to juvenile proceedings in which a child is adjudicated a delinquent. See La. Ch. Code art. 883; **State in the Interest of Giangrosso**, 395 So.2d 709, 714 (La. 1981). However, in juvenile proceedings, the scope of review of the court of appeal extends both to law and facts. La. Const. art V, § 10B; See **State in the Interest of D.M.**, 11-2588 (La. 6/29/12), 91 So.3d 296, 298 (per curiam).

2. Procedural examples

a. Confession

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, *i.e.*, unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 09-1589 (La. 12/1/09), 25 So.3d 746, 751.

Unless the evidence does not support the trial court's finding, an appellate court will defer to the trial court's determination as to whether a confession was made knowingly and voluntarily.

b. Searches and seizures

The Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. La. Code Crim. P. art. 703(A). A

trial court's ruling on a motion to suppress the evidence is entitled to great weight because the district court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 01-0908 (La. App. 1st Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 02-2989 (La. 4/21/03), 841 So.2d 791.

c. Identification of the defendant

A trial court's determination of the admissibility of identification evidence is entitled to great weight and will not be disturbed on appeal in the absence of an abuse of discretion. **State v. Reed**, 97-0812 (La. App. 1st Cir. 4/8/98), 712 So.2d 572, 576, writ denied, 98-1266 (La. 11/25/98), 729 So.2d 572.

d. Competency to stand trial

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense. La. Code Crim. P. art. 641. The law presumes the defendant's sanity. La. R.S. 15:432. The defendant bears the burden of proving by a preponderance of the evidence that, as a result of his mental infirmity, he is incompetent to stand trial. **State v. Rogers**, 419 So.2d 840, 843 (La. 1982). While a court is permitted to receive the aid of expert medical testimony on the issue of a defendant's mental capacity to proceed, the ultimate decision of competency is the court's alone. La. Code Crim. P. art. 647; **State v. Pravata**, 522 So.2d 606, 610 (La. App. 1st Cir.), writ denied, 531 So.2d 261 (La. 1988). The ruling of the district court on a defendant's mental capacity to proceed is entitled to great weight on appellate review and will not be overturned absent an abuse of discretion.

e. Ordering a sanity commission

La. Code Crim. P. Art. 643, which provides for a mental examination of a defendant to determine his mental capacity to stand trial, states that the court shall order a mental examination when it has “reasonable ground to doubt the defendant's mental

capacity to proceed." The ordering of the examination rests in the sound discretion of the court, and there must be sufficient evidence to raise a reasonable doubt of the defendant's capacity. **State v. Charles**, 450 So.2d 1287 (La. 1984).

f. Continuance

The granting or denial of a motion for continuance rests within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a showing of a clear abuse of discretion. **State v. Albert**, 96-1991 (La. App 1st Cir. 6/20/97), 697 So.2d 1355, 1360.

F. REHEARINGS

1. Applications for rehearing are addressed by Uniform Rules of Louisiana Courts of Appeal, Rules 2-18.1 through 2-18.7 & 4-9 (2-18.1 through 2-18.7 apply to requests for rehearings related to writ applications).

2. Rule 2-18.7 provides that an application for rehearing will be considered where the court has:

   a. Granted a writ application on the merits.

   b. Dismissed an appeal; or

   c. Ruled on the merits of an appeal.

3. As a general rule, the First Circuit will not consider an application for rehearing where the appellate court has denied a writ application, and a rehearing is not allowed. See Uniform Rules of Louisiana Courts of Appeal, Rule 2-18.7 & 4-9. When a writ application has been denied, the Third Circuit will file an application for rehearing, but it will be denied based on Rule 2-18-7. If relator files a rehearing application anyway, the delay for filing a writ with the Louisiana Supreme Court runs from the court of appeal's original writ denial, not from its denial of rehearing. See **Morris v. Stueben**, 01-0137 (La. 1/26/01), 781 So.2d 1220. See also **State v. LeBlanc**, 01-0502 (La. 4/20/01), 790 So.2d 12.

4. The Louisiana Supreme Court has a similar rule. Louisiana Supreme Court Rule IX, Section 6 provides:

> An application for rehearing will not be considered when the court merely granted or denied an application for a writ of certiorari or a remedial or supervisory writ, or when the judgment of this court is merely overruling a motion to dismiss an appeal or a motion to recall or rescind a rule nisi, or when, for any reason, the judgment has not finally disposed of the case in this court ….

The application of Louisiana Supreme Court Rule IX, Section 6 has caused some consternation of late. This is because the supreme court has not invariably barred motions for rehearing where the appellate court has merely granted or denied a writ application.[4] This issue has come up recently before the First Circuit in the context of an application for postconviction relief. An application for postconviction relief shall not be considered if it is filed more than two years after the judgment of conviction and sentence has become final. Relator in the case argued that he had 2 years plus 14 days to file his application for postconviction relief on the basis of the additional 14 days allowed by La. Code Crim. P. art. 922(A) to file for rehearing to the Louisiana Supreme Court. The State refuted this contention stating that an application for rehearing will not be considered when the Louisiana Supreme Court has merely denied an application for writ of certiorari, as was the action in that case, citing the Louisiana Supreme Court rule, and, therefore, relator did not get the benefit of the extra 14 days. The trial court dismissed defendant's application for postconviction relief filed exactly 2 years and 14 days

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[4] See *e.g.*, Recently, the Louisiana Supreme Court issued the following action in **State ex rel. Alo v. State,** 2012-0697 (La. 10/8/12), 98 So.3d 866:

> **Writ granted; case remanded.** Because relator's "judgment of conviction and sentence" did not become final under La. C. Cr. P. art. 922 until January 30, 2009 (14 days) after this Court denied writs on January 16, 2009, cf. **State v. Brown,** 08–0311 (La. 3/13/09), 5 So.3d 107; **State ex rel. Frazier v. State,** 03–0242 (La.2/6/04), 868 So.2d 9, his application filed November 24, 2010 arrived timely. La. C. Cr. P. art 930.8. The district court is accordingly ordered to give the application merits consideration.

after the supreme court denied writs. The First Circuit denied writs. It will be interesting to see what the supreme court does with this one.

G. FINALITY OF JUDGMENTS OF THE APPELLATE COURTS

1. Louisiana Code of Criminal Procedure Article 922, Finality of Judgment on Appeal

   a. Within 14 days of rendition of the judgment of the supreme court or any appellate court, in term time or out, a party may apply to the appropriate court for a rehearing. The court may act upon the application at any time.

   b. A judgment rendered by the Louisiana Supreme Court or other appellate court becomes final when the delay for applying for a rehearing has expired and no application thereof has been made.

   c. If an application for a rehearing has been made timely, a judgment of the appellate court becomes final when the application is denied.

   d. If an application for a writ of review is timely filed with the supreme court, the judgment of the appellate court from which the writ of review is sought becomes final when the supreme court denies the writ.

2. Defendant's conviction and sentence become final when the Louisiana Supreme Court denies defendant's writ seeking review of the court of appeal's opinion. See La. Code Crim. P. art. 922(D). If a defendant does not seek review of an appellate court's opinion, then the judgment becomes final when the delay for applying for a rehearing has expired, and no application thereof has been made.

II. PRACTICAL ASPECTS AND COMMON PROBLEMS WITH FILING OF APPEALS AND WRITS

Most problems that arise from the filing of appeals and supervisory writs can be prevented by perfecting the record at the trial court level and knowing and complying with the appellate court's uniform and local rules. Ensuring that all exhibits have been introduced into evidence at the hearing and/or trial, that all motions are in the record and that all the appropriate transcripts have been designated for inclusion in the appellate record will assist in the timely review of the issues presented on appeal.

Most importantly, knowledge of, and compliance with, the appellate counsel's uniform and local rules are essential to avoiding problems with your appeals and/or supervisory. Some appellate courts have appellate and appellee brief checklists on their websites which provide useful information. Reviewing these checklists can help insure that you have included all necessary information that is needed for the appellate court to consider the merits of your arguments.

Rules 2.1 et seq., Uniform Rules, Courts of Appeal provide for the preparation of the appeal record. Most relevant is Rule 2-1.17, which provides for the designation of the record. Local rules should also be reviewed in the preparation of the record. For example, Local Rule17 for the Fourth Circuit Court of Appeal provides additional requirements for the processing of criminal appeals. Section B of the rule allows appellate counsel to seek supplementation of the record, if necessary. Also relevant is Local Rule 24, which sets forth the technical requirements for all electronic audio and video evidence submitted to the court.

Rule 2-11.4, Request for Oral Argument, was recently amended. Effective January 1, 2014, a request for oral argument must be in the form of a motion or letter, and must be filed within thirty days from filing of appellate record in the appellate court. Failure to timely request oral argument may result in the denial of the request by the court. Rules 2-8.2, 2-14.1 and 12-14.2, which provide for service of pleadings on opposing counsel, have also been amended to allow service in accordance with the provisions of La. C.C.P. article 1313. Rule 2-12.2, which concerns the preparation of briefs submitted in appeals, motions, applications for supervisory writs and applications for rehearing, Rule 2-12.4, which provides for the content of appellants' briefs, and Rule 2-12.5, which sets forth the requirements of appellees' briefs, were also amended. The amendments extend the page limitations of the briefs and set forth the specific items to be included the briefs.

Supervisory writs are governed by Uniform Rules 4-1 et seq. Knowledge of these rules is essential to insure review of your application for supervisory writs. One of the most common problems is the failure to comply with all the requirement of Rule 4-5. This rule sets forth, in detail, the contents of the writ

application. The failure to include any one of these items could result in the denial of the writ application. It is important to include any hearing transcripts upon which the ruling, from which the writ is being sought, is based, be included in the writ application. Failure to include the hearing transcripts may either result in the denial of the writ application or a delay in the review of the writ application.

Likewise, knowledge of the appellate court's local rules is important to ensure proper review of the writ application. Local Rule 18, Fourth Circuit Court of Appeals, requires the filing of a verifying affidavit that opposing counsel and the trial court have been served with the writ application. The rule states that "[f]ailure to make contemporaneous service in accordance with the affidavit shall result in dismissal of the application unless good cause is shown." The court's Local Rule 24, mentioned above, is also applicable to applications for supervisory writs.

Each appellate court has its own manner for determining whether an application for supervisory writs is considered as an emergency or expedited writ. Rules 4-4 and 4-5, Uniform Rules, Courts of Appeal, require that if a relator is seeking expedited review and/or a stay of the proceedings, the writ application shall include a separate page, "entitled 'REQUEST FOR EXPEDITED CONSIDERATION', setting forth justification for the request and a specific time within which actions by the appellate court is sought." If the designation is not included in the writ application, the writ application may not receive expedited consideration. In addition, the appellate court also considers the manner in which the issue became expedited. Rule 4-4 (C) also requires that the relator provide an affidavit verifying that opposing counsel, all unrepresented parties and the trial court have been informed that the writ application is being filing and a stay sought.

Juvenile matters which require expedited hearing are covered in Rule 5.1, Uniform Rules, Courts of Appeal. These matters include delinquency matters as well as children in need of care, FINS, termination and/or surrender of parental rights, adoption and protection of terminally ill children. Rule 5.3 sets forth the specific requirements for handling such cases. These cases have shortened briefing schedules and are given priority in placement on the docket.

III. EFFECTS OF DEFICIENCIES IN THE APPELLATE RECORD ON THE MERITS REVIEW OF APPEALS

A. The record should reflect all amendments of the bill.

B. Formally offer, file, and introduce all of the evidence into the record. Courts of appeal cannot review evidence that is not a part of the record. *State v. Jacobs*, 08-1068 (La.App. 3 Cir. 3/4/09), 6 So.3d 315, *writ denied*, 09-755 (La. 12/18/09), 23 So.3d 931. It is not unusual in reading a trial transcript to find frequent references to a document or exhibit that was ultimately not introduced into evidence.

C. The record should reflect disposition of post-trial motions, such as a motion for new trial, post verdict judgment of acquittal, and motion to reconsider sentence. Third Circuit – when a motion to reconsider sentence is not ruled upon, we remand the case, via order, immediately after lodging. With the other post-trial motions, we address the lack of ruling in the opinion in the errors patent section.

D. Jury selection – record should clearly indicate which party challenged a prospective juror, whether the challenge was a peremptory or cause challenge, the trial court's rulings on the challenges, and the jurors selected. Uniform Rules—Courts of Appeal, Rule 2-1.5 requires that the minute entries in the record shall list the challenges for cause, the peremptory challenges, and the jurors selected. **In-chambers discussions** – *State v. Hamilton*, 12-204 (La.App. 3 Cir. 11/7/12), 103 So.3d 705 – there were in-chambers discussions regarding the exercise of peremptory and cause challenges; however, those discussions were not part of the record. Minute entries did not indicate which side excused prospective jurors and why. Third circuit reversed the convictions and sentences because the Defendant was denied, based on an incomplete record, the right to full review of the jury selection process. The supreme court reversed and remanded the case. *State v. Hamilton*, 13-104 (La. 6/28/13), 117 So.3d 95 – the jury strike sheet was maintained by the trial judge in his trial binder and therefore "available"; supreme court ordered us to supplement the record with the strike sheet.

E. Reasons for sentencing insufficient – To avoid remand, the sentencing records should reflect compliance with La.Code Crim.P. art. 894.1 and should be susceptible to a *State v. Whatley*, 03-1275 (La.App. 3 Cir. 3/3/04), 867 So.2d 955/*State v. Lisotta*, 98-648 (La.App. 5 Cir. 12/16/98), 726 So.2d 57, *writ denied*, 99-433 (La. 6/25/99), 745 So.2d 1183 analysis. Bear in mind, the third circuit does not receive the PSI with each appeal; however, if we need it, we will request it from the trial court, so make sure it gets filed in the record.

F. There are very few instances in which we are allowed to consider errors which were not objected to at trial. La.Code Crim.P. art. 841. Further, we will generally consider only the ground for the objection which was raised at trial.

G. The bases for trial objections and rulings on the objections should be clearly reflected in the record.

H. Appellate Judges are not present at trial and cannot view what is being demonstrated in the courtroom. Adequately describe on the record what is happening in the courtroom. If a diagram is used and the witness identifies locations on the diagram, have the witness mark the identification with some specific identifying mark. If a witness identifies a person in the courtroom, spell out on the record who the witness identified. If a witness describes a distance, such as from here to the jury box), attempt to make the record clear as to the exact distance.

I. Be sure you ask all the questions needed to establish the elements of the offense. We cannot draw your conclusions for you. Nail down the details.

J. If a trial judge starts to make a mistake (for ex. as to sentencing range, failure to address a *Boykin* right, etc.), "help" the judge by reminding/politely correcting him/her.

K. Example case – this case is pending before the court now so no identifying information will be provided. The case involves numerous sexual offenses. Two victims testified at trial. However, as to numerous counts of aggravated incest, the bill did not list/identify the victim. Testimony regarding the age at which the acts occurred was very vague (for example, "maybe about ten," "around ten). One victim testified differently as to her age for the same incident, and this discrepancy was never clarified. With respect to some incidents, the age testimony did not match up with the dates in the indictment. Age was crucial for sentencing with some of the offenses. In the opening or closing, the State never identified the victim of the aggravated incest charges or the acts of the defendant which satisfied the elements of each offense. Each victim testified to acts that would satisfy the elements of the aggravated incest charges. On top of all of that, there was an amendment to the sexual battery statute during the range of dates in the indictment. There was also an obstruction of justice charge, but the record was not clear as to which criminal proceeding that charge applied, which affected the sentence.

IV. ERRORS PATENT REVIEW ON APPEALS

1. This varies with each appellate court.

2. The record should reflect a sufficient waiver of jury trial. *State v. Bazile*, 12-2243 (La. 5/7/13), ___ So.3d ___ (2013 WL 1880395) – reference to trial date in La.Const. art. I, § 17(a) refers to initial trial setting. La.Code Crim.P. art. 780 was amended this year (eff. June, 2013) to allow the defendant to waive jury trial within 45 days prior to commencement of trial, with the consent of the D.A., and to require a written motion.

3. The record should reflect a disposition of all charges.

4. A sentence should be imposed on each count.

5. Habitual offender (HO) proceedings – The record should be clear as to which count(s) is(are) being enhanced and that an enhanced sentence is imposed on each enhanced count. The record should reflect whether the defendant is being found to be a second, third, etc. HO.

6. Use of sentencing enhancements is not always clear from the record, which will require remand (for ex., armed robbery with a dangerous weapon). *State v. Billingsley*, 11-1425 (La.App. 3 Cir. 3/14/12), 86 So.3d 872.

7. The record needs to include the signed verdict(s) of the jury.

8. To determine the legality of a sentence, it is helpful if the bill contains sufficient information for the court to determine which penalty provision applies (ex., molestation of a juvenile or obstruction of justice (identifying the criminal proceeding involved)).

9. **Generally**, the third circuit will not recognize an illegally lenient sentence unless the issue is raised. *State v. Celestine*, 11-1403 (La.App. 3 Cir. 5/30/12), 91 So.3d 573.

10. We routinely see failure to advise or incorrect advice regarding the time limitation provided in La.Code Crim.P. art. 930.8.

11. Juvenile appeals – some examples of errors which are usually not harmless: timeliness of adjudication and/or disposition hearings, waiver of right to counsel, written disposition not contained in the record, and the failure of record to reflect a disposition as to each adjudication.

V. NOTABLE RULINGS ON SUPERVISORY WRIT APPLICATIONS

1. The third circuit enforces the thirty day time limit of Uniform Rules—Courts of Appeal, Rule 4-3 to all writ applications (pro se and attorney-filed) **EXCEPT** pro se writs involving post-conviction relief. The untimeliness of a writ is always brought to the attention of the panel, but of course, a panel may choose not to dispose of a writ on the basis of untimeliness.

2. *State v. Davenport*, 13-39 (La.App. 3 Cir. 7/3/13), 116 So.3d 1038 – In a jury trial, the trial judge granted a judgment of acquittal under La.Code Crim.P. art. 778 (which applies to bench trials). A few days later, the judge realized the error and ordered a mistrial. The third circuit said the trial court's grant of a mistrial subjected the Defendant to double jeopardy because the judgment of acquittal was based on its assessment of the sufficiency of the evidence.

3. *State v. Kyle*, 13-647 (La. 6/14/13), 117 So.3d 498, was one of several cases before the third circuit involving requests for stays due to lack of IDB funding. In *Kyle*, the supreme court said if counsel makes a **particularized showing** that funds are needed for investigators or experts and funding does not appear to be forthcoming, the trial court may consider other appropriate alternatives, including a stay.

4. Language in writ rulings in the third circuit – no error means the trial court's ruling and reasoning were correct. On the other hand, "the trial court did not err in denying . . ." means the result is correct but not necessarily the reasoning behind the ruling or the factual determinations.

5. Third circuit had a recent writ by a juvenile seeking review of a judgment regarding restitution imposed as a condition of probation. We said the claims regarding that judgment were not reviewable on writs, but we construed counsel's oral notice of intent to appeal as an oral motion for appeal and remanded the case for compliance with the remaining articles on appeal. (Note: counsel gave oral notice of intent to appeal or seek writs, whichever was appropriate.)

VI. WHAT JUDGES LIKE TO SEE IN BRIEFS AND HEAR IN ORAL ARGUMENTS

1. Parts of the record need not be attached to appellate briefs, and attachments that are not part of the record will not be considered by the court.

2. As to the contents of the brief, remember that attorneys have a duty of candor to the tribunal. The court knows the difference between persuasive writing and twisting the facts. Lack of candor works to the detriment of the attorney not only in that case but in future cases. Next time the court sees the name, it will associate the name with misstatements and start from a position of mistrust.

3. Provide a clear factual background of your case unless it has been provided by the opposing party.

4. Make sure to address the arguments presented in the defendant's brief. If the defendant's brief is deficient in any way, point this out to the court.

5. When you write your brief, educate the court as simply and directly as possible as to the facts and the law. Research the law, find the best cases, and make your best arguments. In an amazing number of appeals, winning theories and arguments are missed or ignored.

Example of a bad argument in brief:

> The undersigned files this brief in support of his motion to withdraw as counsel for the Appellant in accordance with *Anders v California,* 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) and *State v Jyles*, 704 So. 2d 241 (La. 1997). After a conscientious and thorough review of the trial court record, counsel for the **Appellant can find no ruling of the trial court or evidentiary issue which arguably supports the appeal**.
>
> As plainly shown in the appellate record, **there were improper rulings by the trial judge**.

6. Simple and direct are key words with regard to style. You cannot hide a bad case behind grandiose language and complicated phraseology, and you can obscure a good one.

7. Cite to record pages and exhibits in your brief. If you fail to do so, your assignment of error may be disregarded. Uniform Rules—Courts of Appeal, Rule 2-12.4.

8. Make sure statutory and case citations are accurate and up to date.

9. Do not cite cases that have been overruled on the point of law for which you are citing them.

10. Proofread your briefs.

Errors found in **ONE** brief:

"**This an** original appeal on behalf of" the defendant.

The victim "describes a scuffle he had with her assailant during which he struck her in the head, twisted her arm and caused her to fall and strike her head." (discrepancies regarding gender)

The victim's statement included "a description of the jacket the assailant **work.**"

"After the tracking team arrived on scene, the dogs were taken into the store then they **preceded** to go outside the store and begin the tracking processing."

"At some point **sample so the shoes** were submitted for DNA analysis."

First assignment of error read: "Kendrick's fundamental right to a fair trial was violated **by because** the victim, the only eyewitness, stated she recognized her assailant by his voice, but no voice identification was made either in court **our** out of court or **tat** the trial."

"In, viewing the evidence in a light most favorable to the State counsel avers accordingly; Berryman was subject to an armed robbery and second-degree battery by a man she could not visually identify." (grammar)

"DNA analysis conducted regarding the **shoes discovered on Kendrick's mother's property**."

"Individual's **whom** live in Payne subdivision testified."

"In this instance, a **reasonable hypotheses Kendrick** did not have a dark colored hooded jacket with fur around the collar and Berryman's assailant did."

"Based on the foregoing**, this court should be reverse the trial court** and remand the case for retrial."

"Based on foregoing, this court **should vacate jury's verdict** and Kendrick should be released from custody."

11. During oral argument, update research with opinions rendered since the brief was filed and provide the court with citations to those cases.

12. If a party has nothing to say other than what is contained in his/her brief, he/she is wasting his/her time orally arguing, as appellate court judges can and do read the briefs. Always inquire as to whether the judges have any questions.

13. Do not interrupt questions, and do not avoid answers.

14. Cite to pages of the record and exhibit numbers during oral argument.

15. Do not cite facts outside the record.

16. Do not attack your opponent during oral argument, and do not make faces while sitting at counsel's table.

17. Speak clearly, and make sure you can be heard.

VII. LEGISLATION AND RECENT SUPREME COURT DECISIONS

1. 2013 La.Acts No. 251 § 1 - Louisiana Code of Criminal Procedure Article 930.4, which pertains to repetitive and successive applications for post-conviction relief, has been amended to replace may with shall. Louisiana Code of Criminal Procedure Article 930.8 has been amended to add a due diligence requirement to the new facts exception to the time limit for filing post-conviction relief.

2. Louisiana Code of Criminal Procedure Article 890.1 was amended, effective May 17, 2012, to allow for a plea agreement or post-conviction agreement, between the defendant, the prosecution, and the court, which specifies the sentence shall be served with benefits (when the statute specifies without benefits) or for a reduced fine or confinement. The article does not apply to crimes of violence or sex offenses.

3. *State v. Sarrabea*, 13-1271 (La. 10/15/13), ___ So.3d ___ (2013 WL 5788888), stated, "Because La. R.S. 14:100.13 operates in the field of alien registration as interpreted by the Supreme Court in **Arizona** *[v. United States,* 576 U.S. ___, 132 S.Ct. 2492 (2012)], by regulating the circumstances under which non-citizens carry documentation establishing proof of lawful status, the statute is preempted under the Supremacy Clause of the U.S. Constitution, as interpreted by controlling federal jurisprudence."

4. *State v. Tate*, 12-2763 (La. 11/5/13), ___ So.3d ___, the supreme court "granted writs to address the retroactivity of *Miller* [*v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012)] to those juvenile homicide convictions final at the time *Miller* was rendered. *Miller* held mandatory life imprisonment without parole for juvenile homicide offenders violates the Eight Amendment's prohibition of cruel and unusual punishment. The supreme court stated, "we find, under the *Teague* analysis, *Miller* sets forth a new rule of criminal constitutional procedure, which is neither substantive nor implicative of the fundamental fairness and accuracy of criminal proceedings. Accordingly, we find the *Miller* rule is not subject to retroactive application on collateral review. We likewise find, under its plan and unambiguous language, 2013 La. Acts 239 applies prospectively only."

VIII. E-FILING

1. The first, second, third, and fourth circuits do NOT currently have e-filing.

2. The second circuit permits e-mailing in emergencies.

3. E-filing is coming soon to the fifth circuit. The fifth circuit has eCourt. It is available to members of the Louisiana Bar Association who are in good standing. The attorney has to register, and once the registration process is complete, the attorney will receive e-mail notification of court issued notices, orders, decisions, opinions, and dockets. Counsel will have the ability to view through a web portal, in a case management-like environment, their filings and all e-notified documents. Those who enroll agree to receive notification by electronic means only. On-line tutorial is available. For more information, call the fifth circuit at 504-376-1400.