

May 18, 2006.

No. 40,866-KA

**DISSENT FROM THE DENIAL OF REHEARING  
RENDERED ON MAY 18, 2006**

COURT OF APPEAL  
SECOND CIRCUIT  
STATE OF LOUISIANA

\* \* \* \* \*

STATE OF LOUISIANA

Appellee

versus

NATHAN WILLIAMS

Appellant

\* \* \* \* \*

Originally appealed from the  
First Judicial District Court for the  
Parish of Caddo, Louisiana  
Trial Court No. 230,576

Honorable Michael A. Pitman, Judge

\* \* \* \* \*

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\* \* \* \* \*

Before BROWN, WILLIAMS, DREW, MOORE, and LOLLEY, JJ.

BROWN, C.J., dissents from the denial of application for rehearing and assigns reasons.

**BROWN, CHIEF JUDGE, dissents from the denial of application for rehearing and assigns reasons.**

I would grant the state's request for a rehearing for the following reasons.

This court's opinion states that "the three previous convictions arising from guilty pleas entered on the same day should count as only one conviction under the applicable *jurisprudence on the date of the commission of the instant offense.*" (Emphasis added). The date of commission of the offense was August 9, 2003; however, both the trial and sentencing were in 2005. In 2004, the *Johnson* case was rendered (*State v. Johnson*, 03-2993 (La. 10/19/04), 884 So. 2d 568). The majority opinion applies the rule of *State ex rel. Mims v. Butler, supra*, which was expressly overturned by *Johnson*.

In *State v. Dorsey*, 04-1358 (La. App. 1<sup>st</sup> Cir. 03/24/05), 907 So. 2d 154, the defendant's crime was also committed in 2003, and his sentencing as a habitual offender also occurred after the *Johnson* decision. The *Dorsey* court stated:

Although defendant pled guilty to three of the aforementioned predicates on the same date, the offenses occurred on different dates and do not appear to be based on related conduct. According to *Johnson*, these predicate convictions can be counted separately for sentence enhancement as there is no specific sequence requirement.

*Id.* at 157.

Trial courts and courts of appeal are bound to follow the last expression of law of the Louisiana Supreme Court. *Pelican State Associates, Inc. v. Winder*, 219 So. 2d 500 (La. 1969); *Cloman v. Monroe City School Board*, 557 So. 2d 1100 (La. App. 2d Cir. 1990); *Lucky v.*

*Fricks*, 511 So. 2d 1315 (La. App. 2d Cir. 1987), *writ denied*, 514 So. 2d 455 (La. 1987); *D'Antoni v. D'Antoni*, 432 So. 2d 926 (La. App. 4<sup>th</sup> Cir. 1983); *Moss v. Guarisco*, 409 So. 2d 323 (La. App. 1<sup>st</sup> Cir. 1981), *writ denied*, 412 So. 2d 540 (La. 1982).

As noted by the Fifth Circuit in *Abadie v. Metropolitan Life Insurance Co.*, 00-344 (La. App. 5<sup>th</sup> Cir. 03/28/01), 784 So. 2d 46, 78, a products liability case,

[T]he Louisiana Supreme Court did not create new substantive law in *Halphen*. The court in *Halphen* merely compiled and interpreted the law with regards to products liability in Louisiana at that time. Justice Dennis, the author of *Halphen*, held in *Hulin v. Fibrebond Corporation*, 178 F. 3d 316 (5<sup>th</sup> Cir. 1999), that *Halphen* applies retroactively. We find his language persuasive. The decisions of a court of last resort are not the law, but only the evidence of what the court thinks is the law.<sup>16</sup> The Supreme Court has held that unless a judicial decision specifies otherwise it is given both retrospective and prospective effect.<sup>17</sup> A prospective - only application of judicial decisions is, in effect, legislating. Under Louisiana's Constitution, the power to make substantive laws is vested in the legislature. La. Const. Art. III, Sect. 1, Art. II, Sect. 2.

The majority opinion confuses jurisprudence with statutory provisions. Statutory laws, such as the amendment to La. R.S. 15:529.1B, do apply prospectively. I would grant the state's application for rehearing to further examine this issue.

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<sup>16</sup>*Construction materials, Inc. v. American Fidelity Fire Insurance Co.*, 388 So. 2d 365, 367 (La. 1980), citing *Norton v. Crescent City Ice Manufacturing Co.*, 178 La. 135, 145 150 So. 855, 858 (1933).

<sup>17</sup>*Succession of Clivens*, 426 So. 2d 585, 587 (La. 1982).