United States Court of Appeals
for the Fifth Circuit

No. 19-30297

A True Copy
Certified order issued Aug 25, 2020

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

HAI DUONG,

Petitioner—Appellant,

versus

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

ORDER:

Hai Duong, Louisiana prisoner # 613130, has moved for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application in which he attacked his convictions by a jury of one count of aggravated rape, one count of attempted aggravated rape, two counts of molestation of a juvenile, and one count of aggravated sexual battery. Duong also moves for leave to proceed in forma pauperis (IFP) on appeal.

Duong argues that he improperly was denied a copy of various records and transcripts during the state postconviction proceeding. He also contends that the district court wrongly determined that he failed to exhaust and had procedurally defaulted a claim of a Fifth Amendment violation related to the

APPENDIX
A

1

admission of recorded interviews by the victims. He additionally argues that he should have been granted a new trial based on the references at trial to his post-arrest exercise of his right against self-incrimination. To the extent that Duong raised other claims in his § 2254 application, he has abandoned them by not briefing them. *See Hughes v. Dretke*, 412 F.3d 582, 597 (5th Cir. 2005).

A COA may issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If the district court denies relief on the merits, the petitioner must establish that reasonable jurists would find the district court's assessment of the claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If relief is denied on procedural grounds, a COA should issue if the petitioner demonstrates, at least, that jurists of reason would find it debatable whether the application "states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Duong has not made the necessary showing. Accordingly, his motion for a COA is denied. His motion to proceed IFP likewise is denied.

COA DENIED; IFP MOTION DENIED.

/s/ Carl E. Stewart
CARL E. STEWART
United States Circuit Judge

2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HAI DUONG	CIVIL ACTION
VERSUS	NO. 18-900
DARREL VANNOY	SECTION "R" (4)

ORDER

Before the Court is petitioner Hai Duong's petition for habeus corpus pursuant to 28 U.S.C. § 2254.[1] The Court has reviewed *de novo* the petition, the record, the applicable law, the Magistrate Judge's Report and Recommendation,[2] and the petitioner's objections.[3] The Magistrate Judge correctly determined that petitioner's claims are meritless. Petitioner's objections merely rehash arguments made before the Magistrate Judge and are without merit. The only new argument that petitioner raises in his objections is that he is not required to have exhausted his procedurally defaulted claim because he is a *pro se* litigant. All petitioners, including *pro se* litigants, are subject to the exhaustion requirement. *Saahir v. Collins*, 956 F.2d 115, 118 (5th Cir. 1992) (*pro se* status and ignorance of the law do not

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1 R. Doc. 4.
2 R. Doc. 21.
3 R. Doc. 22.

APPENDIX
B

excuse procedural default). Accordingly, the Court adopts the Magistrate Judge's Report and Recommendation as its opinion therein.

Rule 11 of the Rules Governing Section 2254 Proceedings provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Rules Governing Section 2254 Proceedings, Rule 11(a). A court may issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Rules Governing Section 2254 Proceedings, Rule 11(a) (noting that § 2253(c)(2) supplies the controlling standard). The "controlling standard" for a certificate of appealability requires the petitioner to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented [are] 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. MacDaniel*, 529 U.S. 473, 475 (2000)).

For the reasons stated in the Report and Recommendation, petitioner has not made a substantial showing of the denial of a constitutional right.

4

Accordingly, IT IS ORDERED that the petition is DISMISSED WITH PREJUDICE. The Court will not issue a certificate of appealability.

New Orleans, Louisiana, this 10th day of April, 2019.

Sarah Vance

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HAI DUONG	CIVIL ACTION
VERSUS	NO. 18-900
DARREL VANNOY	SECTION "R" (4)

JUDGMENT

Considering the Court's order[1] on file herein,

IT IS ORDERED, ADJUDGED AND DECREED that Hai Duong's petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 is DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 10th day of April, 2019.

Sarah Vance

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

[1] R. Doc. 23.

6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HAI DUONG	**CIVIL ACTION**
VERSUS	**NO. 18-900**
DARREL VANNOY, WARDEN	**SECTION "R"(4)**

REPORT AND RECOMMENDATION

This matter was referred to a United States Magistrate Judge to conduct hearings, including an evidentiary hearing if necessary, and to submit proposed findings and recommendations pursuant to **28 U.S.C. § 636(b)(1)(B) and** (C), and as applicable, **Rule 8(b) of the Rules Governing Section 2254 Cases**. Upon review of the entire record, the Court has determined that this matter can be disposed of without an evidentiary hearing. *See* 28 U.S.C. § 2254(e)(2) (2006).[1]

I. Factual Background

The petitioner, Hai Duong ("Duong"), is a convicted inmate incarcerated in the Louisiana State Penitentiary, in Angola, Louisiana.[2] On June 21, 2012, Duong was indicted by a Grand Jury in Jefferson Parish for two counts of committing aggravated rape, two counts of committing molestation of a juvenile, and one count of committing aggravated oral sexual battery.[3] Duong entered a plea of not guilty in the case.[4]

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[1]Under 28 U.S.C. § 2254(e)(2), an evidentiary hearing is held only when the petitioner shows that either the claim relies on a new, retroactive rule of constitutional law that was previously unavailable or a factual basis that could not have been previously discovered by the exercise of due diligence and the facts underlying the claim show by clear and convincing evidence that, but for the constitutional error, no reasonable jury would have convicted the petitioner.

[2]Rec. Doc. 4-2, p. 47.

[3]St. Rec. Vol. 1 of 8, Bill of Indictment, 6/21/12.

[4]St. Rec. Vol. 1 of 8, Minute Entry, 7/18/12.

APPENDIX
C

7

The record reflects that the victims, Nicole and Janet,[5] were 13 and 12 at the time of they made the allegations in 1999 and were adults at the time of trial, which occurred 14 years later.[6]

Carl, the victims' father, testified that he and Alice were previously married and had three children, Nicole, Janet, and a son. Duong was married to Mary, Alice's sister. Carl and Alice divorced in 1995. Alice had custody of their daughters, but they would stay with Carl on weekends. In 1996, Duong and Carl began running an automotive repair shop out of Carl's garage. Carl testified that from 1996 until 1999, his daughters spent more time at Duong and Mary's home than with Carl. In 1999, Carl had a girlfriend so he did not spend much time with his daughters. During that time, Carl's daughters had overnight stays at Mary and Duong's home. Carl recalled that Duong had the opportunity to spend time alone with Carl's daughters.

Carl was shocked when he learned of his daughters' allegations in 1999. He testified that he trusted Duong and never saw him touch his daughters inappropriately. Carl admitted that after his daughters alleged that Duong abused them, Duong left without telling Carl where he was going.

Terry Ford, a human resources manager for the successor company of the Input/Output Company, authenticated Duong's employment records. According to the records, Duong began working for Input/Output on January 28, 1982, and ended his employment by resignation on May 14, 1999. The records did not show when Duong gave notice of his intention to resign. The records reflected that on May 19, 1999, Duong completed a "payout request form" requesting a cash distribution from his retirement plan. The form was signed by both Duong and his wife. Duong incurred a tax penalty for taking a cash distribution.

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[5]In accordance with La. Rev. Stat. Ann. § 46:1844(W), the state appellate court used pseudonyms to refer the sex crime victims as Nicole and Janet and their parents as Carl and Alice. This Court will do the same for consistency with the state appellate court's opinion.

[6]The facts were taken from the published opinion of the Louisiana Fifth Circuit on direct appeal. *State v. Duong*, 148 So.3d 623 (La. App. 5th Cir. 2014); St. Rec. Vol. 6 of 8, 5th Cir. Opinion, 13-KA-63, 8/8/14.

Mary Duong, Duong's wife and Alice's sister, testified that she worked at Alice's wig store in the 1990's. During that time, Duong and Mary lived in a house across the street from the Catholic church. Janet and Nicole went to church multiple times a week to attend mass and catechism classes and would visit Duong and Mary's home on those days. The girls would occasionally spend the night at the home. Mary testified that after Carl and Alice's divorce, Nicole began misbehaving. Mary explained that Nicole would not listen, would talk back and left the house without permission to sleep over at a cousin's house.

Mary testified that one day in 1999, while at Alice's wig shop, Janet and Nicole made troubling allegations against Duong. After Alice told Mary about the allegations, Mary had Duong pick her up from the store and they went home. Mary claimed that she questioned Duong about the allegations but that he Duong did not respond to her questions. Mary recalled having a telephone conversation with Alice later that evening, but could not recall what was said during that conversation.

On May 17, 1999, police came to her home looking for Duong. Mary did not recall what she told police. Mary recalled that Duong ended his employment after the allegations. She went with Duong to cash out his retirement plan and he gave her the money to support herself. She testified that Duong left Louisiana because Carl threatened to kill him but he did not tell her where he was going. Months later, Mary flew to another state to be with Duong. They later moved to New Mexico. After his heart attack in 2010, they moved to Wyoming. During his time away from Louisiana, Duong used the alias "Henry Tony" because he was hiding from the government because they wanted him in connection with the victims' allegations.

At some point, Mary attended her father's funeral. She saw the victims at that time and told them she was sorry for them. Mary testified that she never witnessed any of the acts alleged

by the victims. She explained that when she was not present in the home, Duong and his mother watched the girls. She admitted that she could not be certain that her mother-in-law would always see what was going on in the home.

Alice, Nicole and Janet's mother, testified that after her divorce, the girls spent Saturdays at Carl's house and that Duong was always there working on cars. She recalled that sometimes Nicole would complain that she did not want to stay at her Carl's house. Alice testified she would frequently bring her children to Doung and Mary's house.

In 1999, Nicole was rebelling against her mother. During an argument at the wig store, Alice questioned Nicole about her conduct. Nicole told Alice that Duong had been molesting her and raping her at Carl's house since she was young. When Alice questioned Janet about Nicole's allegations, Janet responded that Duong had sexually abused her as well. Alice recalled that both girls cried. Later that evening, when Alice spoke with Mary on the phone, Mary told her that Doung had admitted that the allegations were true. After Alice's parents told her not to report the allegations to the police, Alice encouraged her daughters to tell the school counselor and they did so.

A detective eventually came to Alice's home to ask questions. On May 17, 1999, Alice's daughters gave interviews at the Children's Advocacy Center ("CAC") and underwent medical examinations at Children's Hospital. Alice gave a recorded statement to Detective Broussard on that date. According to Alice, the family did not discuss the abuse thereafter as it was awkward to discuss. She recalled that the victims went to counseling for eight months.

Detective Broussard of the Jefferson Parish Sheriff's Office testified that he first became involved in the investigation of the alleged aggravated rapes of Nicole and Janet on May 10, 1999, when he received a referral from a child protection agency. Broussard set up CAC interviews of

the victims. Immediately prior to the interviews, he met with Alice who related what she had learned from her daughters. Each victim was interviewed separately by Omalee Gordon while Broussard monitored the interviews from a separate room. Broussard watched the interview on a television screen and was able to communicate with Gordon through a microphone in his room and an earpiece that Gordon was wearing. Audio and video recordings of the victims' interviews were made. During the interviews, the victims detailed the allegations made against Duong which they later testified to at trial. Those interviews were played for the jury.

During her interview, Nicole explained that Duong began molesting her when she was six years old and that he touched her all over her body including her chest and vagina. Nicole described the incidents as occurring in the bedroom and the computer room at Mary and Duong's house. Nicole stated that, when she was sleeping, Duong would wake her up and climb on top of her and that he would do the same to Janet. She recalled that the incidents would occur during the holidays and summer and that Duong told her not to tell anyone.

Nicole recalled that Duong raped her when she was eleven years old and that he had raped her more than three times during the period of abuse. Nicole explained that she told her mom about the incidents about a month prior to her CAC interview. About a week after she told her mom, Nicole disclosed the abuse to a school counselor.

During her CAC interview, Janet told Gordon that Duong put his "ding-a-ling" in her private and indicated to her crotch area. She completed a paper diagram marking the areas where Duong touched her. Janet claimed that there was one instance of vaginal sexual intercourse.

After the interviews, the victims were examined at Children's Hospital. In the meantime, Detective Broussard and another officer went to Duong's home to speak with him. Mary told them that she did not know where Duong was and that the victims and Alice were lying. Broussard then

went Duong's workplace and was told by various staff members that Duong had quit his job that day. Broussard was unable to locate Duong and later secured a warrant for his arrest on May 25, 1999. Duong was arrested in Wyoming in February 2012, pursuant to an outstanding warrant, and extradited back to Louisiana. Thereafter, Broussard met with Duong and advised him of his rights. Duong told Broussard that he had retained counsel and had been advised not to talk to him. Several months after his arrest and extradition, Mary solid her belongings and moved back to New Orleans.

Janet was twenty-six years old at the time of the trial. She testified that she and her sister frequently spent time at Duong and Mary's home when they were younger. After her parents' divorce, she spent time at her father's home. She testified that she and Nicole would sometimes stay at their cousins' homes but they always had permission to do so.

Janet explained that Duong began sexually abusing her when she was five or six years of age. The incidents occurred at both Duong and Carl's homes. Initially, the incidents occurred on a bed and Duong touched her chest and genitals. Janet recalled that the incidents usually occurred on Thursdays and Saturdays, the days when she and Janet attended church across the street from Duong's home and that Dung would abuse her when no one else was in the home other than Nicole or when Duong's mother was in a separate room. Janet became afraid to visit Duong's home.

Janet explained that Duong would remove his clothes and make her touch him and that he would insert his fingers inside of her vagina. Janet testified that Duong would sometimes use a back massager on her genitals and showed her pornographic videos. Janet recalled that when she was 11 or 12 years old, Duong had oral and vaginal sex with her on the living room couch at her father's house. She could not recall whether they had sex again after that incident. Duong always gave her money. She did not tell anyone about the incidents because Duong told her she would get in trouble.

Janet recalled that she admitted to her mother that Duong had sexually abused her when mother told her about Nicole's allegations. After Janet and Nicole made their allegations, Mary and Duong fled. Janet testified that she went to counseling a few times. She explained that she did not speak to Nicole about the abuse due to embarrassment. Janet testified that she did not want to remember the abuse but that it still affected her and that she collected sexual offender registration cards so she would know who was around her.

Nicole was 27 years old at the time of trial. She explained that after her parents' divorce, she visited her father on weekends. She recalled the Duong regularly worked on cars at her father's house and that she and her sister frequently went to Duong's home, including on days they attended church. Nicole admitted that she would sometimes leave her father's house to spend the night at her cousin's house but testified that she always had permission to do so.

Nicole recalled giving the CAC interview. Nicole testified that her first memory of sexual abuse by Duong was when she was 7 years old and that he put a back massager on her genitals. She believed that the first time she had vaginal sex with Duong was when she was 7 ½ years old. She explained that the sexual abuse continued for years. Duong would show her pornographic videos. He would expose his penis to her and put his mouth on her vagina. Nicole testified that on one occasion when she was at her father's house, Duong put grapes in her vagina. She admitted that she had not previously told anyone about the incident. She recalled another instance of vaginal sexual intercourse that occurred around the time of Vietnamese New Year. She described another instance of sexual intercourse that occurred at her father's house in the salon room while her father was in the garage.

Nicole explained that Duong told her not to tell anyone about the incidents and gave her money, which she stored in the back of her closet. Nicole testified that she did initially tell anyone

because she was embarrassed. Nicole explained that she told her mom about the sexual abuse in 1999, a few weeks after the last incident occurred at Duong's house while his mother was in the garden. Nicole said she saw a counselor for a time. She admitted that she had a boyfriend during that the time of her allegations but said that she and he only kissed. She denied ever going out with her boyfriend at night without telling her parents.

On May 17, 1999, Dr. Scott Benton, an expert in Pediatric Forensic Medicine and Child Abuse, including Child Sexual Abuse, evaluated Janet and Nicole at the Audrey Hepburn CARE Center at Children's Hospital and created medical reports in connection with those evaluations. Dr. Benton testified at that time Janet told him that her uncle had "raped" her, which she explained meant "the boy puts his thing in the girls' private," and that it had last occurred in April 1999. She also told Dr. Benton that Duong touched her all over. The results of Dr. Benton's physical examination of Janet were normal and her hymen was intact. Dr. Benton testified that normal results were not necessarily inconsistent with sexual abuse as many sexual acts do not cause trauma. He explained that lack of trauma can be due to the gentleness of the perpetrator or use a lubricant. Dr. Benton also explained that the vagina, anus, and mouth are able to rapidly heal and that events that cause scars are not common.

Dr. Benton testified that there was delayed disclosure in Janet's case. He explained that Janet exhibited some of the reasons for delayed disclosure including embarrassment. He stated that she was also possibly conflicted regarding the abuse because Duong gave her money which she spent on junk food. He explained children may disclose different details to different classes of people and often disclose more information to doctors.

Dr. Benton interviewed Nicole prior to examining her. Nicole told Dr. Benton that Duong began molesting her when she was six years old and started having sex with her when she was

eleven years of age. The last incident had occurred two months prior. Dr. Benton's medical examination of Nicole revealed a lack of continuity in her hymen, which indicated that Nicole's hymen had been previously injured and healed in that position. Dr. Benton believed the findings were definitive of blunt penetrating trauma and consistent with rape. Dr. Benton testified that the reasons for delayed disclosure in Nicole's case were that her family did not talk about problems, and Duong bribed and threatened her. He believed that Nicole displayed elements of sequential disclosure in that she testified regarding an incident that she had not previously disclosed to anyone.

Duong testified that he had never been arrested for a crime before his arrest on the charges in this case. Duong recalled that his wife did not appear to believe him when he denied doing anything to the victims and an argument ensued. Duong claimed he packed some clothing and left home without telling his wife, but in hopes that she would ask him to return. Thereafter, he slept in his car for several days and then stayed with his uncle for a few days. He quit his job after deciding to move away with a friend. He later learned that police were looking for him. Duong spoke to others who he told that he could die if he lost his case. He denied consulting a lawyer during that time. Duong claimed that, because he was scared and thought it was better to live longer than to die, he decided to move out of state. Before leaving, he withdrew his money from his retirement account and gave it to his wife.

Duong testified that he lived in Grand Junction, Colorado, for about seven or eight years before moving to Las Cruces, New Mexico. During that time, he spoke to his wife on several occasions. He then moved to Farmington, New Mexico, and his wife came to stay with him after he had a heart attack. They moved to California, but eventually he moved back to New Mexico and then to Wyoming in 2010. He was arrested in February or March 2012.

Duong denied doing any of the acts he was accused of, including having sexual intercourse with Nicole and Janet, touching them inappropriately, and putting grapes in Nicole's vagina. He admitted that he worked on cars at Carl's house nearly every Saturday, but claimed that Carl was always present. Duong further admitted that the victims would come to his house to go to church and that his wife helped out at Alice's wig shop, including on Saturdays. He claimed that he never watched that girls as he was always busy working. He further claimed that he was never alone with the girls from 1991 to 1999. Duong testified that his wife always watched the victims and that she would not go to the wig shop when she had to babysit. While Duong's mother lived with them, Duong claimed that she did not help watch the victims when they came over.

Duong admitted having a pornographic magazine but denied showing it to the victims and also denied having a pornographic video. He admitted that he owned a back massager but denied ever using it on the victims.

Duong claimed that more than a month before the victims made their allegations, Nicole told him that she was on James Street when three boys pulled her into a white van. He testified that Nicole told him that it was alright because she liked one of the boys. Duong testified that he believed the false allegations against him arose because Nicole had a boyfriend, did not want to stay home, and kept staying at other people's houses, which caused Mary to worry.

Duong was tried by a jury on June 10 through June 12, 2013, and Duong was found guilty as charged as to counts one, three, four and five and guilty of the lesser offense of attempted aggravated rape of Janet as to count two[7] The Trial Court denied Duong's motions for new trial.[8]

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[7]St. Rec. Vol. 1 of 8, Trial Minutes, 6/10/13; Trial Minutes, 6/11/13; Trial Minutes, 6/12/13; Verdict, 6/12/13; St. Rec. Vol. 4 of 8, Trial Transcript, 6/10/13; Trial Transcript, 6/11/13; St. Rec. Vol. 5 of 8, Trial Transcript, 6/11/13 (con't); Trial Transcript, 6/12/13; St. Rec. Vol. 6 of 8,Trial Transcript, 6/12/13 (con't); St. Rec. Vol. 7 of 8, Opening Statements Transcript, 6/11/13; Closing and Rebuttal Argument Transcript, 6/12/13.

[8]St. Rec. Vol. 1 of 8, Motion for New Trial, 6/17/13; Memorandum in Support of Motion for New Trial, 6/17/13; Supplemental Motion for a New Trial, 6/18/; Sentencing Minutes, 6/24/13; St. Rec. Vol. 6 of 8, Sentencing

On June 24, 2013, the Trial Court sentenced Duong to life imprisonment as to count one, 50 years as to count two, 15 years each as to counts three and four, and 10 years as to count five, each term to be served at hard labor without the benefit of parole, probation, or suspension of sentence, and each sentence to run concurrently.[9]

On direct appeal, Duong's appellate counsel asserted three errors[10]: (1) the Trial Court erred in admitting the recorded CAC interviews of Nicole and Janet without strict compliance with La. Rev. Stat. § 15:440.1, et seq. and in violation of his right to confrontation; (2) the Trial Court erred in denying his motion for new trial premised upon the prosecutor's reference to his post-arrest exercise of the privilege of self-incrimination; and (3) the Trial Court erred in failing to grant his motion for a mistrial premised upon the prosecutor's reference to "other crimes" evidence in his rebuttal argument. On August 8, 2014, the Louisiana Fifth Circuit affirmed the convictions and sentences finding no merit in the issues raised, but remanded the case to the Trial Court with instructions to provide Duong with written notice of his sex offender notification and registration requirements by using the form set forth in La. Rev. Stat. § 15:543.1 and to correct errors in the Uniform Commitment Order regarding the dates of the offenses.[11]

On September 8, 2014, Duong filed a pro se writ application with the Louisiana Supreme Court.[12] On April 17, 2015, the Louisiana Supreme Court denied Duong's writ application without

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Transcript, 6/24/13.

[9]St. Rec. Vol. 1 of 8, Sentencing Minutes, 6/24/13; St. Rec. Vol. 6 of 8, Sentencing Transcript, 6/24/13.

[10]St. Rec. Vol. 6 of 8, Appeal Brief, 13-KA-763, 1/14/14.

[11]*State v. Duong*, 148 So.3d 623 (La. App. 5th Cir. 2014); St. Rec. Vol. 6 of 8, 5th Cir. Opinion, 13-KA-763, 8/8/14.

[12]St. Rec. Vol. 8 of 8, La. S. Ct. Writ Application, 14 KO 1883, 9/8/14 (dated 9/2/14).

stated reasons.[13] His conviction was final under federal law ninety (90) days later, on July 19, 2015, when he did not file a writ application with the United States Supreme Court. *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) (period for filing for certiorari with the United States Supreme Court is considered in the finality determination under 28 U.S.C. § 2244(d)(1)(A)); U.S. Sup. Ct. Rule 13(1)).

On August 24, 2015, Duong submitted pro se to the Trial Court an application for post-conviction relief and brief in which he raised the following grounds for relief:[14] (1) ineffective assistance of trial counseling in failing to (a) investigate the case; (b) object to voir dire; and (c) raise a defense of false allegations; and (2) prosecutorial misconduct based on (a) the prosecution's systematic exclusion of minorities from jury; (b) knowingly presentation of false testimony, (c) suppression of evidence that one of the victims had run away and that the families did not believe the victims; and (4) threats made to the family members to force them to testify. Duong also filed a motion for production of documents including a free copy of the trial record and specifically claimed he needed the grand jury transcripts, all motions filed in the case, transcripts of all pretrial hearings, the trial transcript, including voir dire examination, opening statements and closing arguments, the Trial Court's rulings on post-trial motions, and the sentencing transcript.[15] He also filed a motion for production of free copies of the District Attorney's files.[16]

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[13]*State v. Duong*, 168 So.3d 395 (La. 2015); St. Rec. Vol. 8 of 8, La. S. Ct. Order, 2014-KO-1883, 4/17/15.

[14]St. Rec. Vol. 2 of 8, Application for Post-Conviction Relief, 8/28/15 (dated 8/24/15).

[15]St. Rec. Vol. 2 of 8, Motion for Production of Documents under Particularized Need, 8/28/15 (dated 8/24/15); Motion for Production of the District Attorney's Files, 8/28/15; Memorandum in Support of Application for Post-Conviction Relief, 8/28/15 (dated 8/24/15).

[16]St. Rec. Vol. 2 of 8, Motion for Production of the District Attorney's Files, 8/28/15.

On September 21, 2015, the Trial Court found that Duong was not entitled to the grand jury transcript and had not made a sufficient showing of particularized need for a free copy of the other transcripts.[17] The Trial Court found that Duong should request the District Attorney's records from the DA and that he should direct his request for trial records to the Clerk of Court for Jefferson Parish.[18]

Duong filed a motion for stay of proceedings and an intent to seek writs and requested a return date.[19] The Trial Court granted Duong's motion for a stay and set a return date for November 30, 2015.[20] Duong filed an application for writs with the Fifth Circuit on October 20, 2015.[21] On December 17, 2015, the Fifth Circuit denied Duong's related writ application finding no error in the Trial Court's rulings.[22] Duong sought a writ of review with the Louisiana Supreme Court.[23] On August 4, 2017, the Louisiana Supreme Court denied relief without stated reasons.[24]

In the interim, after the State filed a response and Duong filed a traverse, the Trial Court denied the post-conviction application on March 2, 2016, finding Duong failed to show any

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[17]St. Rec. Vol. 2 of 8, Trial Court Order, 9/21/15.

[18]*Id.*

[19]St. Rec. Vol. 2 of 8, Motion for Stay of Proceedings, 10/23/15 (dated 10/19/15); Notice of Intent to Seek Writs and Request for Extended Return Date, 10/13/15 (dated 10/19/15).

[20]St. Rec. Vol. 1 of 8, Trial Court Order, 11/24/15; Trial Court Order, 12/7/15.

[21]St. Rec. Vol. 2 of 8, 5th Cir. Writ Application, 15-KH-662, 10/22/15 (dated 10/20/15).

[22] St. Rec. Vol. 2 of 8, 5th Cir. Opinion, 15-KH-662, 12/17/15.

[23]St. Rec. Vol. 14 of 15, La. S. Ct. Writ Application, 2015-KH-2128, 11/13/15.

[24]*State ex rel. Duong v. State*, 222 So.3d 720 (La. 2017); St. Rec. Vol. 8 of 8, La. S. Ct. Opinion, 2016-KH-0073, 8/4/17.

deficiency in counsel's performance or any resulting prejudice and failed to provide any evidence demonstrating prosecutorial misconduct.[25]

Duong submitted a writ application with the Louisiana Fifth Circuit seeking review of the Trial Court's March 2, 2016 order denying post-conviction relief.[26] On April 28, 2016, the Fifth Circuit found Duong's challenge to the trial court's denial of his request for production of documents was repetitive, that he failed to demonstrate deficient performance by counsel or resulting prejudice, and that Duong failed to provide any evidence in support of his allegations of prosecutorial misconduct.[27]

On August 4, 2017, the Louisiana Supreme Court denied writs finding that Duong failed to show he received ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).[28]

II. Federal Habeas Petition

On January 29, 2018, Duong filed a petition for federal habeas corpus relief in which he asserts the following grounds for relief[29]: (1) he was denied his rights to equal protection and due process when the state courts denied him discovery thereby preventing him from proving his ineffective assistance of counsel claims; (2) he was denied his rights of equal protection and due

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[25]St. Rec. Vol. 8 of 15, State's Response to Application for Post Conviction Relief, 1/14/16; Traverse to State's Answer and Memorandum to Application for Post-Conviction Relief, 1/27/16 (dated 1/25/16); Trial Court Order, 3/2/16.

[26]St. Rec. Vol. 2 of 8, 5th Cir. Writ Application, 16-KH-187, 4/5/16 (dated 3/28/16).

[27]St. Rec. Vol. 2 of 8, 5th Cir. Order, 16-KH-187, 4/28/16.

[28]*State ex rel. Duong v. State*, 222 So.3d 703 (La. 2017) (per curiam); St. Rec. Vol. 8 of 8, La. S. Ct. Order, 16-KH-1018, 8/4/17.

[29]Rec. Doc. 4.

process when the state courts denied his request for discovery thereby preventing him from proving his claims of prosecutorial misconduct; (3) the Trial Court erred in admitting the CAC videos in violation of his Fifth and Sixth Amendment right of confrontation; (4) the Trial Court erred in denying his motion for new trial; (5) the Trial Court erred in denying his motion for mistrial.

The State filed a response in opposition to the petition asserting that Duong timely filed his federal petition and exhausted his claims with the exception of a portion of claim three in which he alleges a Fifth Amendment violation.[30] The State asserts that the remaining claims can be dismissed as meritless.

Duong filed a reply reiterating his claims.[31] He did not address his failure to exhaust his Fifth Amendment claim.

III. General Standards of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214,[32] applies to this petition, which is deemed filed in this Court on January 29, 2018.[33] The threshold questions on habeas review under the amended statute are whether the

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[30]Rec. Doc. No. 18.

[31]Rec. Doc No. 20.

[32]The AEDPA comprehensively revised federal habeas corpus legislation, including 28 U.S.C. § 2254, and applied to habeas petitions filed after its effective date, April 24, 1996. *Flanagan v. Johnson*, 154 F.3d 196, 198 (5th Cir. 1998) (citing *Lindh v. Murphy*, 521 U.S. 320 (1997)). The AEDPA, signed into law on that date, does not specify an effective date for its non-capital habeas corpus amendments. Absent legislative intent to the contrary, statutes become effective at the moment they are signed into law. *United States v. Sherrod*, 964 F.2d 1501, 1505 n.11 (5th Cir. 1992).

[33]The Fifth Circuit has recognized that a "mailbox rule" applies to pleadings, including habeas corpus petitions filed after the effective date of the AEDPA, submitted to federal courts by prisoners acting pro se. Under this rule, the date when prison officials receive the pleading from the inmate for delivery to the court is considered the time of filing for limitations purposes. *Coleman v. Johnson*, 184 F.3d 398, 401 (5th Cir. 1999); *Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998); *Cooper v. Brookshire*, 70 F.3d 377, 379 (5th Cir. 1995). The clerk of this Court received Duong's original petition on January 30, 2018, and it was eventually filed on February 8, 2018, when it received the filing fee. Duong dated his signature on the original pleadings on January 29, 2018, which is the earliest date appearing in the record on which he could have presented the pleadings to prison officials for filing with a federal court. The fact that he later paid the filing fee does not alter the application of the federal mailbox rule to his pro se petition. *See Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002) (mailbox rule applies even if the filing fee is not paid at time of mailing) (citing *Spotville*, 149 F.3d at 376).

petition is timely and whether the claim raised by the petitioner was adjudicated on the merits in state court; *i.e.*, the petitioner must have exhausted state court remedies and the claims must not be in "procedural default." *Nobles v. Johnson*, 127 F.3d 409, 419-20 (5th Cir. 1997) (citing 28 U.S.C. § 2254(b), (c)).

The State concedes and the record shows that Duong's federal petition was timely filed. The State contends that petitioner did not properly exhaust his claim that the introduction into evidence of the CAC videotapes violated his Fifth Amendment rights.

IV. Exhaustion Doctrine and Procedural Default

"A fundamental prerequisite to federal habeas relief under § 2254 is the exhaustion of all claims in state court prior to requesting federal collateral relief." *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) (citing *Rose v. Lundy*, 455 U.S. 509, 519-20, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)); *Nobles*, 127 F.3d at 419. "A federal habeas petition should be dismissed if state remedies have not been exhausted as to all of the federal court claims." *Whitehead*, 157 F.3d at 387 (citing 28 U.S.C. § 2254(b)(1)(A); *Rose*, 455 U.S. at 519-20, 102 S.Ct. 1198).

The well-established test for exhaustion requires that the substance of the federal habeas claim be fairly presented to the highest state court in a procedurally proper manner. *Whitehead*, 157 F.3d at 387 (citing *Picard v. Connor*, 404 U.S. 270, 275-78, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process," including discretionary review when that review is part of the State's ordinary appellate review procedures. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). "A federal court claim must be the 'substantial equivalent' of one presented to the state

courts if it is to satisfy the 'fairly presented' requirement." *Whitehead*, 157 F.3d at 387 (citing *Picard*, 404 U.S. at 275-78, 92 S.Ct. 509). "This requirement is not satisfied if the petitioner presents new legal theories or new factual claims in his federal application." *Id.*, 157 F.3d at 387 (citing *Nobles*, 127 F.3d at 420); *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001).

For exhaustion purposes, it also is not enough for a petitioner to have raised the claims in the lower state courts if the claims were not specifically presented to the State's highest court, and vice versa. *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004). Furthermore, a petitioner does not fairly present a claim to the State's highest court if that court must read beyond the petition or brief, such as a lower court opinion, to find a claim not otherwise specifically raised. Id., 541 U.S. at 32, 124 S.Ct. 1347.

A review of the record shows that, while petitioner referenced the Fifth Amendment in his Table of Authorities under "Statutory Authority," he did not include any argument regarding the Fifth Amendment in addressing his claim related to the CAC videos.[34] In his brief in support of his writ application to the Louisiana Supreme Court, Duong merely referenced the Fifth Amendment, but once again never presented any argument that the admission of the CAC video violated his Fifth Amendment rights to due process; rather he only addressed the Sixth Amendment Confrontation Clause.[35] As petitioner did not fairly present his Fifth Amendment claim to any state court, he has not exhausted that claim.

Normally, the Court would recommend that Duong's petition be dismissed without prejudice to allow him to pursue exhaustion of his claim in the appropriate state courts. However,

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[34]St. Rec. Vol. 6 of 8, Appellate Brief, 13-KA-0763, pp. 4, 13-19, 1/14/14.

[35]St. Rec. Vol. 8 of 8, La. S. Ct. Writ Application, pp. iii, 1, 8-13, 9/8/14 (dated 9/2/14).

unexhausted claims, those claims which were not "fairly presented" to the state courts, may be considered "technically" exhausted if the habeas petitioner is now prohibited from litigating those claims in the state courts because of some procedural rule. If that is so, then those "technically" exhausted habeas claims might be considered procedurally defaulted.

If a claim has not been adjudicated on the merits in state court, federal review of that claim may be barred by the doctrine of procedural default if the petitioner has failed to meet state procedural requirements for presenting his federal claims, thereby depriving the state courts of an opportunity to address those claims in the first instance. *See Cone v. Bell*, 556 U.S. 449, 465, 129 S.Ct. 1769, 1780 (2009) (noting that, "[w]hen a petitioner fails to properly raise his federal claims in state court, he deprives the State of 'an opportunity to address those claims in the first instance' and frustrates the State's ability to honor his constitutional rights") (quoting *Coleman v. Thompson*, 501 U.S. 722, 732 (1991)). When state court remedies are rendered unavailable by the petitioner's own procedural default, federal courts are normally barred from reviewing those claims. *See Coleman*, 501 U.S. at 722. "[I]f the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, ... [then] there is a procedural default for purposes of federal habeas ..." *Id.*, at 735 n. 1.

A petitioner has "technically exhausted" his claims if he fails to properly and timely present them to each level of the Louisiana courts and thereafter would be barred from seeking relief in those courts. *Magouirk v. Phillips*, 144 F.3d 348, 358 (5th Cir. 1998) (citing *Coleman*, 501 U.S. at 731–33 and *Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995)); *Fuller v. Johnson*, 158 F.3d 903, 905–06 (5th Cir. 1998). In such a case, there is no difference between non-exhaustion and

procedural default. *Magouirk*, 144 F.3d at 358. Accordingly, when a petitioner fails to exhaust state court remedies because he has allowed his federal claims to lapse, those claims are "technically" procedurally defaulted and may be dismissed. *Id.*

In this case, it is reasonable to conclude that Duong is now unable to litigate his claim that admission of the CAC videos violated his Fifth Amendment rights in the Louisiana courts, and that any attempt to litigate this claim would result in dismissal on state procedural grounds. Based on the record, any attempt to litigate this claim now likely would be dismissed as repetitive under La. Code Crim. P. arts. 930.4(D) or (E)[36] or as time-barred by the provisions of La. Code Crim. P. art. 930.8.[37] Therefore, petitioner's claim that admission of the CAC video violated his Fifth Amendment rights is now considered procedurally defaulted. *Sones*, 61 F.3d at 416 (citing *Steele v. Young*, 11 F.3d 1518, 1524 (10th Cir. 1993)). The procedural default doctrine bars federal habeas corpus review if the state courts would now refuse to address a habeas petitioner's unexhausted federal claims because litigation of those claims would be barred by state procedural rules.

Federal habeas review of a "technically" exhausted and now procedurally defaulted claim is barred "... unless the prisoner can demonstrate cause for the default and actual prejudice as result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750–51, 111 S.Ct. 2546.

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[36]Art. 930.4(D) provides that "[a] successive application may be dismissed if it fails to raise a new or different claim." Art. 930.4(E) also provides "[a] successive application may be dismissed if it raises a new or different claim that was inexcusably omitted from a prior application."

[37]Art. 930.8 provides a two-year period of limitations for filing applications for post-conviction relief and that period generally runs from the date that the applicant's judgment of conviction becomes final under Louisiana law, which for Duong was July 19, 2015.

To establish cause for a procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded his efforts to comply with the state's procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). The mere fact that a petitioner or his counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. Id. at 486.

In this case, Duong has not offered any cause for the default which would excuse the procedural bar. The Court's review of the record does not support a finding that any factor external to the defense prevented Duong from raising the claim in a procedurally proper manner. The record also does not reflect any action or inaction on the part of the State which prevented him from doing so.

Should Duong attempt later to argue to a reviewing Court that his appellate counsel was ineffective in failing to raise the issue on direct appeal, such an argument would be unavailing. Duong has not exhausted state court review of any such ineffective assistance of counsel claim and therefore cannot rely on such a claim as cause to excuse the bar. *See Edwards v. Carpenter*, 529 U.S. 446, 452-54 (2000) (requiring exhaustion of a claim of ineffective assistance of counsel as cause for procedural default).

"The failure to show 'cause' is fatal to the invocation of the 'cause and prejudice' exception, without regard to whether 'prejudice' is shown." *Hogue v. Johnson*, 131 F.3d 466, 497 (5th Cir. 1997) (citing *Engle*, 456 U.S. at 134 n.43, 102 S.Ct. 1558). Having failed to show an objective cause for his default, the Court need not determine whether prejudice existed, and

petitioner has not alleged any actual prejudice. *Ratcliff v. Estelle*, 597 F.2d 474, 477-78 (5th Cir. 1979) (citing *Lumpkin v. Ricketts*, 551 F.2d 680, 681-82 (5th Cir. 1977)).

Duong's defaulted claim is therefore procedurally barred from review by this federal habeas corpus court. *See Trest v. Whitley*, 94 F.3d 1005, 1008 (5th Cir. 1996) (habeas review precluded where petitioner neglected to allege actual prejudice and cause of failure to comply with state procedural rule concerning time restriction on filing for state post-conviction relief), *vacated on other grounds*, 522 U.S. 87, 118 S.Ct. 478, 139 L.Ed.2d 444 (1998).[38]

Duong may avoid this procedural bar only when a fundamental miscarriage of justice will occur if the merits of his claim is not reviewed. *Hogue*, 131 F.3d at 497 (citing *Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992)). To establish a fundamental miscarriage of justice, a petitioner must provide the court with evidence that would support a "colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986); *accord Murray*, 477 U.S. at 495-96; *Glover*, 128 F.3d at 902-03. To satisfy the factual innocence standard, petitioner must establish a fair probability that, considering all of the evidence now available, the trier of fact would have entertained a reasonable doubt as to the defendant's guilt. *Campos v. Johnson*, 958 F.Supp. 1180, 1195 (W.D. Tex. 1997) (footnote omitted); *Nobles*, 127 F.3d at 423 & n.33 (actual innocence factor requires a showing by clear and convincing evidence that "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."). When the petitioner has not

[38]The Supreme Court vacated the Fifth Circuit's opinion on grounds that a court of appeals is not required to raise the procedural default argument sua sponte but may do so in its discretion. *Id.*

adequately asserted his actual innocence, the procedural default cannot be excused under the "fundamental miscarriage of justice" exception. *Glover*, 128 F.3d at 903.

Duong does not present any evidentiary support, and the record contains nothing, to suggest or establish his actual innocence on the underlying convictions. In other words, he fails to present any evidence or argument of the kind of actual innocence that would excuse the procedural default. He, therefore, has failed to overcome the procedural bar to his claims, and his claim alleging the admission of the CAC videos violated his Fifth Amendment rights should be dismissed with prejudice.

V. Standards for a Merits Review

The AEDPA standard of review is governed by § 2254(d) and the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000). It provides different standards for questions of fact, questions of law, and mixed questions of fact and law.

A state court's determinations of questions of fact are presumed correct and the Court must give deference to the state court findings unless they were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2) (2006); *see Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). The amended statute also codifies the "presumption of correctness" that attaches to state court findings of fact and the "clear and convincing evidence" burden placed on a petitioner who attempts to overcome that presumption. 28 U.S.C. § 2254(e)(1) (2006).

A state court's determination of questions of law and mixed questions of law and fact are reviewed under § 2254(d)(1), as amended by the AEDPA. The standard provides that deference be given to the state court's decision unless the decision is "contrary to or involves an unreasonable application of clearly established federal law" as determined by the United States Supreme Court. *Hill*, 210 F.3d at 485. The "critical point" in determining the Supreme Court rule to be applied "is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *White v. Woodall*, __ U.S. __, 134 S. Ct. 1697, 1706-07 (2014) (citing *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). "Thus, 'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not

'clearly established at the time of the state-court decision.'" *White*, 134 S. Ct. at 1706 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)).

A state court's decision can be "contrary to" federal law if: (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; or (2) the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405-06, 412-13; *Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Hill*, 210 F.3d at 485. A state court's decision can involve an "unreasonable application" of federal law if it correctly identifies the governing rule but then applies it unreasonably to the facts. *White*, 134 S. Ct. at 1706-07; *Williams*, 529 U.S. at 406-08, 413; *Penry*, 532 U.S. at 792.

The Supreme Court in *Williams* did not specifically define "unreasonable" in the context of decisions involving unreasonable applications of federal law. *See Williams*, 529 U.S. at 410. The Court, however, noted that an unreasonable application of federal law is different from an incorrect application of federal law. *Id.* " '[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [a Supreme Court case] incorrectly.' " *Price v. Vincent*, 538 U.S. 634, 641 (2003) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002)) (brackets in original); *Bell v. Cone*, 535 U.S. 685, 699 (2002)).

Thus, under the "unreasonable application" determination, the Court need not determine whether the state court's reasoning is sound, rather "the only question for a federal habeas court is whether the state court's determination is objectively unreasonable." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002). The burden is on the petitioner to show that the state court applied the precedent to the facts of his case in an objectively unreasonable manner. *Price*, 538 U.S. at 641

(quoting *Woodford*, 537 U.S. at 24-25); *Wright v. Quarterman*, 470 F.3d 581, 585 (5th Cir. 2006). In addition, review under § 2254(d)(1) is limited to the record before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

VI. Denial of Requests for Trial Court Records and Transcripts and District Attorney Files (Claim Nos. 1 and 2)

Duong claims that he was denied equal protection, due process of law and the opportunity to fully present and prove his claims of prosecutorial misconduct and ineffective assistance of counsel presented in his application for post conviction relief when the state courts denied his request for free copies of the trial court record and the District Attorney's files.

In conjunction with his application for post conviction relief, Duong filed several motions seeking free copies of the grand jury transcripts, the complete trial court record, including motions, court rulings, and hearing and trial transcripts, as well as the District Attorney's files.[39] The Trial Court denied his request and the Fifth Circuit found no error in that ruling, finding that Duong's conclusory allegations of inconsistencies between witnesses' grand jury and trial testimonies was not sufficient to meet an exception for disclosure of the grand jury transcripts and that he had not shown a particularized need for the other requested documents.[40] This was the last reasoned opinion on the issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 802, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) (when the last state court judgment does not indicate whether it is based on procedural default or the merits of a federal claim, the federal court will presume that the state court has relied upon the same grounds as the last reasoned state court opinion).

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[39]St. Rec. Vol. 2 of 8, Motion for Production of Documents under Particularized Need, 8/28/15 (dated 8/24/15); Motion for Production of the District Attorney's Files, 8/28/15; Memorandum in Support of Application for Post-Conviction Relief, 8/28/15 (dated 8/24/15).

[40]St. Rec. Vol. 2 of 8, Trial Court Order, 9/21/15; St. Rec. Vol. 2 of 8, 5th Cir. Opinion, 15-KH-662, 12/17/15.

Duong does not present a cognizable issue for federal habeas review based on his perceived rights under state law. It is well settled that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see also*, *Swarthout v. Cooke*, —— U.S. ——, 131 S.Ct. 859, 861 (2011) (federal habeas review does not lie for errors of state law). A federal court does "not sit as [a] 'super' state supreme court in a habeas corpus proceeding to review errors under state law." *Wilkerson v. Whitley*, 16 F.3d 64, 67 (5th Cir. 1994) (citation and quotation omitted).

Under federal law, on direct appeal, an indigent criminal has an absolute right to a trial transcript, or an alternative device that fulfills the same function. *Griffin v. Illinois*, 351 U.S. 12, 18-20 (1956). There is no question that the trial transcript was in fact provided to petitioner's appellate counsel, which Duong does not deny. There is, however, no general due-process right of access to state-court records on collateral review in criminal proceedings. *See, e.g.*, *United States v. MacCollom*, 426 U.S. 317, 323-24 (1976) (no constitutional right to transcripts on collateral review of a conviction; a federal petitioner on collateral review must demonstrate that his claims are not frivolous and that transcripts are needed to prove his claims before he is entitled to a free copy of pertinent transcripts); *Deem v. Devasto*, 140 F. App'x 574, 575 (5th Cir. 2005); *Cook v. Cain*, Civ. Action No. 15-1882, 2015 WL 6702290, at *2 (E.D. La. Nov. 3, 2015).

On collateral review, the burden is on the petitioner to positively demonstrate that there is a particularized need for the requested documents and transcripts and that the request is not frivolous. *MacCollom*, 426 U.S. at 326; *Smith v. Beto*, 472 F.2d 164, 165 (5th Cir. 1973) (affirming the lower court's finding that there was no constitutional violation where the petitioner's attorney had access to the state court record and trial transcripts on direct appeal and where "the petitioner

did not need a transcript in order to establish his contention that he was denied effective counsel at his state trial"). In the absence of a showing of a "particularized need" for such discovery, petitioner is not entitled to habeas corpus relief, especially in the context of a request for grand jury testimony. *See Robinson v. Cain*, Civ. Action No. 05–5478, 2011 WL 890973 at *8 (E.D. La. Feb. 7, 2011) (Chasez, M.J.), *adopted*, 2011 WL 901193 (E.D. La. March 14, 2011)(Zainey, J.)(citing *Pittsburgh Plate Glass Co., v. United States*, 360 U.S. 395, 399–01 (1959)(because defendant failed to meet burden of showing "particularized need", trial court did not err in refusing to disclose grand jury testimony)).

Based on the unsubstantiated nature of Duong's ineffective assistance of counsel and prosecutorial misconduct claims, addressed below, all of which are meritless, vague, and conclusory, Duong has not met his burden of showing particularized need for the records or transcripts.

A. Ineffective Assistance of Counsel

Duong alleges that he was denied effective assistance of counsel. He claims his trial counsel: 1) "failed to object during voir dire examination when the state systematically excluded minorities from the jury [and] [t]he State was not required to give any race neutral reasons for the exclusions;" 2) "failed to investigate the circumstances surrounding Nicole's running away from home to be sexually involved with her boyfriend;" and 3) failed to mount an actual innocence/fabrication defense.[41]

[41]Rec. Doc. No. 4-2, pp. 20-23.

Duong asserted these arguments in his state application for post-conviction relief. The Trial Court denied the ineffective assistance of counsel claims.[42] The Louisiana Fifth Circuit denied the related writ application.[43] The Louisiana Supreme Court denied relief finding that Duong had failed to show he received ineffective assistance of counsel under *Strickland*.[44]

1. Standards of Review under *Strickland*

The issue of ineffective assistance of counsel is a mixed question of law and fact. *Clark v. Thaler*, 673 F.3d 410, 416 (5th Cir. 2012); *Woodfox v. Cain*, 609 F.3d 774, 789 (5th Cir. 2010). The question for this Court is whether the state courts' denial of relief was contrary to, or an unreasonable application of, federal law as determined by the Supreme Court.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court established a two-part test for evaluating claims of ineffective assistance of counsel in which the petitioner must prove deficient performance and prejudice therefrom. *Strickland*, 466 U.S. at 687. The petitioner has the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *Montoya v. Johnson*, 226 F.3d 399, 408 (5th Cir. 2000); *Jernigan v. Collins*, 980 F.2d 292, 296 (1992). In deciding ineffective assistance claims, a court need not address both prongs of the conjunctive *Strickland* standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test. *Amos v. Scott*, 61 F.3d 333, 348 (1995).

To prevail on the deficiency prong, a petitioner must demonstrate that counsel's conduct failed to meet the constitutional minimum guaranteed by the Sixth Amendment. *See Styron v.*

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[42]St. Rec. Vol. 2 of 8, Trial Court Order, 9/21/15.

[43]St. Rec. Vol. 2 of 8, 5th Cir. Order, 16-KH-187, 4/28/16.

[44]*State ex rel. Duong v. State,* 222 So.3d 703 (La. 2017) (per curiam); St. Rec. Vol. 2 of 8, La. S. Ct. Order, 16-KH-1018, 8/4/17.

Johnson, 262 F.3d 438, 450 (5th Cir. 2001). "The defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. The analysis of counsel's performance must take into account the reasonableness of counsel's actions under prevailing professional norms and in light of all of the circumstances. *See Strickland*, 466 U.S. at 689; *Carty v. Thaler*, 583 F.3d 244, 258 (5th Cir. 2009). The reviewing court must "judge . . . counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 690). Petitioner must overcome a strong presumption that the conduct of his counsel falls within a wide range of reasonable representation. *Harrington*, 562 U.S. at 104 (citing *Strickland*, 466 U.S. at 689). "[I]t is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Bell*, 535 U.S. at 702 (citing *Strickland*, 466 U.S. at 689). As a result, federal habeas courts presume that trial strategy is objectively reasonable unless clearly proven otherwise. *Strickland*, 466 U.S. at 689; *Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004) (counsel's " 'conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.' ") (quoting *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002)); *Geiger v. Cain*, 540 F.3d 303, 309 (5th Cir. 2008).

In order to prove prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Williams v. Thaler*, 602 F.3d 291, 310 (5th Cir. 2010). Furthermore, "[t]he petitioner must 'affirmatively prove,' and not just allege, prejudice." *Day v. Quarterman*, 566 F.3d 527, 536 (5th Cir. 2009) (quoting *Strickland*, 466 U.S. at 695). In this context, "a reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Cullen*, 563 U.S. at 189 (quoting *Strickland*, 466 U.S. at. 694). This standard requires a "substantial," not just "conceivable," likelihood of a different result. *Harrington*, 562 U.S. at 112. In making a determination as to whether prejudice occurred, courts must review the record to determine "the relative role that the alleged trial errors played in the total context of [the] trial." *Crockett v. McCotter*, 796 F.2d 787, 793 (5th Cir. 1986). Thus, conclusory allegations of ineffective assistance of counsel, with no showing of effect on the proceedings, do not raise a constitutional issue sufficient to support federal habeas relief. *Miller*, 200 F.3d at 282 (citing *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983)).

On habeas review, the United States Supreme Court has clarified that, in applying *Strickland*, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington*, 562 U.S. at 105 (citing *Strickland*, 466 U.S. at 690). The *Harrington* Court went on to recognize the high level of deference owed to a state court's findings under *Strickland* in light of AEDPA standards of review:

> The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Id. at 105 (citations and quotation marks omitted).

Thus, scrutiny of counsel's performance under § 2254(d) therefore is "doubly deferential." *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 112 (2009)). This Court must therefore apply the "strong presumption" that counsel's strategy and defense tactics fall "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690; *Moore*

v. Johnson, 194 F.3d 586, 591 (5th Cir. 1999).

Federal habeas courts presume that trial strategy is objectively reasonable unless clearly proven otherwise by the petitioner. *Strickland*, 466 U.S. at 689; *Geiger v. Cain*, 540 F.3d 303, 309 (5th Cir. 2008); *Moore*, 194 F.3d at 591. In assessing counsel's performance, a federal habeas court must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time of trial. *Strickland*, 466 U.S. at 689; *Neal*, 286 F.3d at 236–37; *Clark v. Johnson*, 227 F.3d 273, 282–83 (5th Cir. 2000). Tactical decisions when supported by the circumstances are objectively reasonable and do not amount to unconstitutionally deficient performance. *Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir. 1999) (citing *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997) and *Mann v. Scott*, 41 F.3d 968, 983–84 (5th Cir. 1994)).

a. Object to Voir Dire

Duong first claims that his trial counsel was ineffective for failing to object to the prosecution's systematic exclusion of minorities during jury selection.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that purposeful racial discrimination in the use of peremptory strikes of prospective jurors violates the Equal Protection Clause. *Batson*, 476 U.S. at 89. In evaluating whether a petitioner has established a *Batson* violation, a three-step analysis is employed, with the first step requiring a petitioner to make a prima facie showing that a peremptory challenge has been exercised on the basis of race. *Stevens v. Epps*, 618 F.3d 489, 492 (5th Cir. 2010).

In the instant matter, Duong has not demonstrated a prima facie case of racial discrimination. The minutes reflect that the prosecution exercised only five peremptory

challenges.[45] While he claims that the State "systematically excluded minorities from the jury," he provides no evidence to support his unsupported allegation that the State misused its peremptory strikes. Nor does he offer any evidence of the racial composition of the venire or the racial composition of the final trial jury. He offers no reasons for his failure to do so here or in the state courts. While there is no transcript of the voir dire from his trial, given there was no *Batson* objection made during jury selection, the transcript simply would not assist in analyzing Duong's claim as it would not have revealed the race of the prospective jurors.

Duong has failed to provide even minimal evidence in support of his claim, either here or in the state courts. Accordingly, Duong has clearly failed to satisfy his burden of proof to show that his counsel failed to make what would have been a meritorious objection which would entitle him to relief under *Strickland*. *See Turner v. Epps*, No. 07-77, 2010 WL 653880, at *7 (N.D. Miss. Feb 19, 2010) ("As Petitioner cannot establish that any minority venire person was struck by the State, much less that they were struck with a discriminatory intent, he cannot establish ineffective assistance of counsel on this conclusory argument"); *Bell v. Director, TDCJ-CID*, No. 03-36, 2005 WL 977771, at *6 (E.D. Tex. Nov. 2, 2005)(citations omitted) (Petitioner's claim that a juror was improperly struck "is a conclusory allegation ... insufficient to support a petition for a writ of habeas corpus."); *Eastridge v. United States*, 372 F.Supp.2d 26, 61 (D.D.C. May 26, 2005) ("Petitioners cannot establish improper application of peremptory challenges because they present no evidence of selective exclusion and cannot produce evidence of the racial composition of the

[45]St. Rec. Vol. 1 of 8, Trial Minutes, 3/10/13.

venire."). Therefore, the state courts' denial of relief on this claim was not contrary to, or an unreasonable application of *Strickland*. Duong is not entitled to relief on this claim.

b. Investigate and Prepare a Falsification/Actual Innocence Defense

Duong claims his counsel was ineffective when he failed to investigate the case. He specifically claims that had counsel investigated, he would have learned that Nicole had a boyfriend with whom she was sexually involved and that she had a history of running away from home. He also claims his counsel failed to present a fabrication defense.

When a habeas petitioner alleges a failure of his counsel to investigate, he "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.' " *Moawad v. Anderson*, 143 F.3d 942, 948 (5th Cir. 1998) (citation omitted). In other words, a petitioner cannot show prejudice with respect to a claim that counsel failed to investigate without adducing what the investigation would have shown. *Diaz v. Quarterman*, 239 F. App'x 886, 890 (5th Cir. 2007) (citing *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052, in recognizing that some evidence is required to show that "the decision reached would reasonably likely have been different."). Instead, to prevail on such a claim, the petitioner must provide factual support as to what exculpatory evidence further investigation would have revealed. *See Moawad*, 143 F.3d at 948; *see also Brown v. Dretke*, 419 F.3d 365, 375 (5th Cir. 2005); *Davis v. Cain*, No. 07-6389, 2008 WL 5191912, at *10 (E.D. La. Dec. 11, 2008) (order adopting Report and Recommendation). Duong has failed to establish that any further investigation was needed or that the investigation would have uncovered exculpatory evidence as he contends.

Duong does not offer any evidence to support his claim that Nicole had a history of running away or that she was sexually active. Further, any evidence of the victim's sexual history would

not have been admissible under the circumstances of the case, and defense counsel had no legal basis to present evidence of Nicole's prior sexual conduct with other persons. *See* La. Code Evid. Art. 412 (prohibiting evidence regarding the past sexual behavior of the victim in sexual assault cases, except (1) when there is an issue of whether the accused was the source of semen or injury, "provided that such evidence is limited to a period not to exceed seventy-two hours prior to the time of the offense," and (2) when the past sexual behavior is with the accused and there is an issue of whether the victim consented to the charged sexually assaultive behavior.) Thus, Duong cannot establish that counsel was deficient in any way nor that counsel's failure to investigate the victim's history, including her past sexual history, prejudiced him at trial.

Duong also claims that his counsel erred in failing to put forth a fabrication defense in light of the fact that he is actually innocent. A review of the record could not be farther from the truth. The transcript is replete with efforts by Duong's counsel to attempt to establish that the victims' allegations were fabricated. It is clear from the record that counsel attempted to discredit the allegations and testimony of the victims through cross-examinations in an effort to raise doubt about the reliability of their testimony and in support of Duong's claim of actual innocence. Duong's counsel utilized the testimony of each of the State's witnesses on cross-examination, along with the victims' CAC interviews, to challenge the veracity of the accusations against Duong. Duong's counsel took great strides to point out the inconsistencies in the victims' allegations. Further, Duong testified on his own behalf and vehemently denied the allegations. Short of perhaps using the word "fabricated" or the phrase "actual innocence," Duong's counsel did in fact present a fabrication/actual innocence defense. The testimony was presented to the jury, who as the trier of fact, weighed and considered the testimony. The fact that the jury did not

believe the defense does not render counsel's performance constitutionally deficient or prejudicial. *See Martinez v. Dretke*, 99 F. App'x 538, 543 (5th Cir. 2004) ("Again, an unsuccessful strategy does not necessarily indicate constitutionally deficient counsel."). "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689 (citations omitted). Duong has provided no basis to undermine the deference due his counsel's trial tactics and strategy.

The state courts' denial of relief on these issues was not contrary to or an unreasonable application of *Strickland.* Duong is not entitled to relief on these claims.

B. Prosecutorial Misconduct

Duong claims that the State used its peremptory challenges to systematically eliminate minorities from his jury. He also claims that the prosecution failed to disclose evidence that proved Nicole ran away to be with her boyfriend as well as evidence that the family members did not believe the victims' allegations against Duong and that their grand jury testimony was exculpatory in nature. Duong also claims that the prosecutor threatened and coerced the witnesses to testify against him at trial and knowingly presented false testimony.

1. Striking Minorities During Jury Selection

Duong claims that the prosecution utilized its peremptory challenges to eliminate minorities from the jury. As outlined above in this Court's review of Duong's claim of ineffective assistance of counsel for failing to object to the State's use of peremptory challenges during jury selection, Duong failed to demonstrate that the State struck *any* minority venire person let alone that the State had any discriminatory intent in utilizing its peremptory challenges.

The state courts' denial of relief on this issue was not contrary to or an unreasonable application of United States Supreme Court precedent. Duong is not entitled to relief on this claim.

2. Suppression of Exculpatory Evidence

Duong claims that the prosecution suppressed exculpatory evidence that proved that Nicole ran away to be with her boyfriend. Duong also claims that evidence was suppressed showing that the victims' family members did not believe the victims' allegations against Duong and that the grand jury testimony by the family was exculpatory in nature.

The Fifth Circuit found that Duong failed to provide evidence is support of his allegations of prosecutorial misconduct, including any evidence that there were inconsistencies between the grand jury and trial testimonies of the witnesses.[46] It further found that Duong failed to demonstrate that the State suppressed any evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).[47] This was the last reasoned opinion on the issue.

The United States Fifth Circuit Court of Appeals has applied the standards set in *Brady v. Maryland*, 373 U.S. 83 (1963), to address a habeas petitioner's claim that the State failed to disclose potentially exculpatory or impeachment evidence of false or inconsistent statements by refusing to produce grand jury transcripts. *Castillo v. Johnson*, 141 F.3d 218, 222 (5th Cir. 1998). The *Brady* materiality determination is a mixed question of law and fact. *Cobb v. Thaler*, 682 F.3d 364, 377 (5th Cir. 2012). Thus, the question before this court is whether the state courts' denial of relief was contrary to or an unreasonable application of United States Supreme Court precedent.

[46]St. Rec. Vol. 2 of 8, 5th Cir. Order, 16-KH-187, p. 2, 4/28/16.

[47]*Id.*

In *Brady*, the United States Supreme Court held "that the 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." *Brady*, 373 U.S. at 87. The duty to disclose this kind of evidence exists even though there has been no request by the defendant. *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)). The prosecution's duty to disclose includes both exculpatory and impeachment evidence. *Strickler*, 527 U.S. at 280 (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

Brady claims involve "the discovery after trial of information which had been known to the prosecution but unknown to the defense." *Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994) (quoting *Agurs*, 427 U.S. at 103). Thus, "when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim." *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980); *see Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002) (holding that *Brady* does not require prosecutors to furnish a defendant with exculpatory evidence if that evidence is fully available to the defendant through an exercise of reasonable diligence); *Rector v. Johnson*, 120 F.3d 551, 558–59 (5th Cir. 1997) (holding that the State has no duty to lead the defense toward potentially exculpatory evidence if the defendant possesses the evidence or can discover it through due diligence). *Brady* also does not place any burden upon the prosecution to conduct a defendant's investigation or assist in the presentation of the defense's case. *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir. 1990) (citations omitted).

To prove a *Brady* violation, a defendant must establish that the evidence is favorable to the accused because it is exculpatory or impeachment, that the evidence was suppressed by the State,

and that prejudice resulted from the non-disclosure. *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (citing *Strickler*, 527 U.S. at 281–82). However, "[t]he prosecution is not obliged to disclose impeachment evidence unless the evidence is 'favorable to the accused.' " *East v. Scott*, 55 F.3d 996, 1005 (5th Cir. 1995).

Duong has not demonstrated that the State withheld exculpatory or impeachment evidence in violation of his constitutional rights. He has not presented any proof from the record, by affidavit or by other means, that the State had or withheld information about either victim's history. While he claims that "the grand jury testimonies of the State's witnesses are drastically different from their trial testimonies" and that "[t]he family told Duong that their personal testimonies were exculpatory in nature"[48], his allegations are not supported by any affidavits from the family members. Rather, his allegations appear to be based upon his assumptions of what transpired during of the grand jury proceedings.

Where, as here, a petitioner presents no evidence, whatsoever, in support of a contention that *Brady* material was in fact withheld from the defense, his claim fails at the initial prong of the *Brady* inquiry. *Williams v. Cain*, Nos. 06–0224 and 06–0344, 2009 WL 1269282, at *5 (E.D. La. May 7, 2009), *aff'd*, 359 F. App'x 462 (5th Cir. 2009); *Watson v. Cain*, Civ. Action No. 06–613, 2007 WL 1455978, at *7 (E.D. La. May 17, 2007); *Abron v. Cain*, Civ. Action No. 05–876, 2006 WL 2849773, at * 10 (E.D. La. Oct. 3, 2006); *Harris v. United States*, 9 F.Supp.2d 246, 275 (S.D.N.Y. 1998) ("[T]he government does not bear the burden of establishing that documents were not withheld; it is [petitioner's] burden to prove that the government failed to disclose evidence favorable to [him]."), *aff'd*, 216 F.3d 1072 (2nd Cir. 2000); *see also United States v. Avellino*, 136

[48]Rec. Doc. No. 4-2, p. 25.

F.3d 249, 261 (2nd Cir. 1998); *Cruz v. Artuz*, 97–CV–2508, 2002 WL 1359386, at * 14 (E.D.N.Y. June 24, 2002).

Duong's claim that the prosecution withheld favorable evidence is entirely lacking in factual support. He has not demonstrated a violation of *Brady* or any constitutional provision arising from the failure to provide him with a grand jury transcript. The state courts' denial of relief was not contrary to or an unreasonable application of Supreme Court law. Duong is not entitled to relief on this claim.

3. Threatening Witnesses/Presentation of False Testimony

Duong claims that the prosecutor threatened the witnesses to testify against him.[49] He further claims the prosecution knowingly presented false testimony. In the last reasoned opinion on the matter, the Fifth Circuit found that Duong failed to provide any evidence to support his allegations.[50]

A state denies a defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Giglio v. United Sta*tes, 405 U.S. 150, 766, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illin*ois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). In order to obtain relief, the defendant must show that: (1) the testimony was actually false, (2) the State knew the testimony was false, and (3) the testimony was material. *Duncan v. Cockrell*, 2003 WL 21545926, at *3, 70 F. App'x 741 (5th Cir. July 3, 2003); *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993). False testimony is "material" only if there is any reasonable likelihood that it could have affected

[49]Rec. Doc. No. 4-2, p. 25.

[50] St. Rec. Vol. 2 of 8, 5th Cir. Order, 16-KH-187, p. 2, 4/28/16.

the jury's verdict. *Duncan*, 2003 WL 21545926, at *3, 70 F. App'x 741 (citing *Nobles*, 127 F.3d at 415).

Here, it is clear Duong has not met his burden of proving these elements. He has failed to establish that any of the witnesses' testimony was actually false. At most, there is evidence that portions of the victims' testimony differed from the statements they made at the time of the allegations 14 years earlier. However, courts have held that conflicting or inconsistent testimony is insufficient to establish perjury. *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001) (citing *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990)). Thus, merely because the victims' testimony at trial differed from their previous statements, does not establish that the testimony was actually false. Furthermore, Duong's counsel had the opportunity to question the victims at trial to determine the veracity of their testimony.

As for his claim that the prosecutor coerced the witnesses to testify against him, Duong does not explain which witnesses were allegedly threatened. Nor does Duong make any specific allegations as to what the prosecutor allegedly said to the witnesses to coerce them to testify against. Duong has not provided any support whatsoever for his allegations that the prosecution actually threatened or coerced any witnesses. None of the witnesses testified at trial that they had been coerced or threatened to testify against Duong. Duong has not provided affidavits from any of the witnesses supporting a claim that they were threatened. Further, while the State presented the testimony of Carl, Alice and Mary in its case-in-chief, none of the witnesses gave an opinion regarding the truthfulness of the victims' allegations. Duong simply has not established that any threats were ever made and therefore fails to satisfy his burden of proof. *Brooks v. Cain*, Civ. Action No. 05–3004, 2007 WL 2900291, at *7 (E.D. La. Sept. 27, 2007). .

The state courts' denial of relief on these issues was not contrary to or an unreasonable application of Supreme Court precedent. Duong is not entitled to relief on these issues.

VII. CAC Videos Violated Sixth Amendment Right of Confrontation (Claim No. 3)

Doung claims his Sixth Amendment right to confrontation was denied when the Trial Court admitted into evidence the CAC videos of Nicole and Janet without requiring strict compliance with La. Rev. Stat. § 15:440 et seq. Duong claims that the State did not produce the interviewer as a witness and that Detective Broussard did not "supervise" the interviews and therefore the CAC videos were not admissible under state law.

The Fifth Circuit addressed the issue on direct appeal and found that the evidence was sufficient to demonstrate that Detective Broussard was the supervisor of the CAC interviews within the meaning of Louisiana law.[51] Finding no violation of state law, the Fifth Circuit concluded that there was no violation of the right to confrontation.[52] The Louisiana Supreme Court denied writs without opinion.[53]

As the Court has already discussed, federal habeas corpus review is limited to questions of federal constitutional dimension, and federal courts do not review alleged errors in the application of state law. *See Swarthout*, 131 S.Ct. at 861. Any alleged impropriety based on state law does not warrant federal habeas review or relief.

Duong's federal law claim does not entitle him to relief as the admission of the CAC videos did not violate Duong's Sixth Amendment right to confrontation. In *Crawford v. Washington*, 541

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[51] *Duong*, 148 So.3d at 639-41; St. Rec. Vol. 6 of 8, 5th Cir. Opinion, 13-KA-763, 8/8/14.

[52] *Id.* at 641; St. Rec. Vol. 6 of 8, 5th Cir. Opinion, 13-KA-763, 8/8/14.

[53] *Duong*, 168 So.3d at 395; St. Rec. Vol. 8 of 8, La. S. Ct. Order, 2014-KO-1883, 4/17/15

U.S. 36 (2004), the Supreme Court reiterated that the Sixth Amendment's Confrontation Clause gives the accused "[I]n all criminal prosecutions, ... the right ... to be confronted with the witnesses against him." *Crawford*, 541 U.S. at 59. The Supreme Court held that the Confrontation Clause permits admission of "[t]estimonial statements of witnesses absent from trial ... only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.*, at 53–54. Testimonial statements include "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.*, at 51; *see Bullcoming v. New Mexico*, 564 U.S. 647, 657-58, 131 S.Ct. 2705, 2713 (2011) (defendant has the right to cross-examine the person who actually performed testing or examination of evidence); *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009) (expert report is "functionally identical" to testimonial statement).

Whether a defendant's confrontation right was violated is a mixed question of law and fact. *Fratta v. Quarterman*, 536 F.3d 485, 499 (5th Cir. 2008); *Horn v. Quarterman*, 508 F.3d 306, 312 (5th Cir. 2007). Because Duong's Confrontation Clause claim was adjudicated on the merits by the state court, this federal court is "prohibited from granting habeas relief unless the state court's decision (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,' or (2) 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' " *Buckenberger v. Cain*, 471 F. App'x 405, 406 (5th Cir. 2012) (quoting 28 U.S.C. § 2254(d)(1)) (citing *Fratta*, 536 F.3d at 499).

Crawford is premised on a defendant's right to cross-examine. 541 U.S. at 53–54. No violation of the Confrontation Clause occurs where the declarant testifies at trial and is subject to cross-examination. *United States v. Owens*, 484 U.S. 554, 560 (1988); *California v. Green*, 399 U.S. 149 (1970); *Carson v. Collins*, 993 F.2d 461, 464 (5th Cir. 1993), *cert. denied*, 510 U .S. 897 (1993). Duong had a full opportunity to cross-examine Nicole and Janet about the allegations of sexual abuse and the assertions made to Gordon, the CAC forensic interviewer, in the videotaped statements. As the Fifth Circuit has held, under these circumstances, "[t]he confrontation clause requires no more." *Carson*, 993 F.2d at 464.

Duong's claim that his inability to cross-examine Gordon violated his right to confrontation fares no better. Gordon simply questioned the victims during the interviews. Duong does not now, and did not before the state courts, claim that Gordon made any testimonial statements during the interviews. As there is no claim that Gordon's questions were testimonial in nature, the introduction into evidence of the videos of the interviews did not violate the confrontation clause. *United States v. Wolford*, 386 F. App'x 479, 483 (5th Cir. 2010) (admission of portions of interview transcript did not violate Sixth Amendment right to confrontation where reporter's questions did not speak the truth of any matter but rather gave context to defendant's statements); *Stoll v. Key*, Case No. 3:17-cv-05158-BHS-JRC, 2017 WL 4803909, at *13-14 (W.D. Wash. Aug. 31, 2017) (where videotape of interview of victim was admitted into evidence, unavailability of detective who interviewed victim did not violate confrontation clause where defendant did not claim detective's questions were testimonial), *report and recommendation adopted by*, 2017 WL 4777012 (W.D. Wash. Oct. 23, 2017).

The denial of relief by the state courts was not contrary to or an unreasonable application of federal constitutional precedent. Duong is not entitled to relief on this claim.

VIII. Failure to Grant a New Trial (Claim No. 4)

Duong claims the Trial Court erred in denying his motion for new trial based on the references to his post-arrest exercise of his right to remain silent made during the trial.

During trial, and over defense counsel's objection, the prosecutor questioned Detective Broussard about his meeting with Duong following his extradition back to Jefferson Parish. The following exchange occurred:

> Q. When you met with Mr. Duong, Detective, was he informed of his rights?
>
> A. He was advised of his rights, yes.
>
> Q. Did you do that?
>
> A. Yes, I did.
>
> Q. Did he indicate to you that he understood his rights?
>
> A. He understood his rights, yes.
>
> Q. Okay. Did he agree to give you a statement?
>
> A. No. After I told him that I wanted to talk – after I advised him of his rights, I wanted to talk to him about the charges, he immediately told me that he and his family had secured an attorney, Bruce Netterville. And he told me that his attorney told – advised not to talk to me. I then stopped whatever I – I didn't interview. I didn't ask him any more questions. And I left.[54]

During closing argument, the prosecutor referenced Detective Broussard's interview of Duong. The prosecutor stated:

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[54]St. Rec. Vol. 5 of 8, Trial Transcript (con't), pp. 283-285, 6/11/13.

> What else did he do when he was on the run? Henry Tony; that's his alias, one of the aliases he sued. If he was so innocent, why use an alias? He didn't talk to a Lawyer. However, when he was arrested in Wyoming, when the police went to go interview him at the jail here, he had a lawyer before they even got there. So at some point, over the 13 years that he was gone, he did learn about the legal system. Did he call anybody down here? Did he turn himself in? No. He stayed on the run until he was caught. That's what he did because he is guilty. That's why he fled.[55]

Defense counsel raised the issue of the references to Duong's post-arrest exercise of his right to remain silent in his supplemental motion for new trial, which the Trial Court denied.[56] The issue was again raised on appeal and the Fifth Circuit found that the Trial Court clearly erred in allowing the state to question Detective Broussard regarding Duong's exercise of his right to remain silent and that the error was compounded when the prosecution referenced it in closings.[57] The Fifth Circuit, however, relying on *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 91 (1976), found harmless error due to the "extraordinary strong" and "particularly overwhelming" evidence.[58] The Louisiana Supreme Court denied writs without stated reasons.[59]

In general, the prosecution is prohibited from using a defendant's post-arrest silence as incriminating evidence or for impeachment purposes. *Doyle*, 426 U.S. at 610. In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court established the standard for determining whether a *Doyle* error merits relief on collateral review. The Supreme Court held that a *Doyle* error must be assessed in terms of its potential impact on the jury and that a *Doyle* error can be

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[55]St. Rec. Vol. 7 of 8, Closing and Rebuttal Argument Transcript, pp. 10-11, 6/12/13.

[56]St. Rec. Vol. 1 of 8, Supplemental Motion for a New Trial, 6/18/13; Sentencing Minutes, 6/24/13.

[57]*Duong*, 148 So.3d at 626; St. Rec. Vol. 6 of 8, 5th Cir. Opinion, 13-KA-763, p. 32, 35-36, 8/8/14.

[58]*Id.*, at 643-44; St. Rec. Vol. 6 of 8, 5th Cir. Opinion, 13-KA-763, pp. 33-36, 8/8/14.

[59]*Duong*, 168 So.3d at 395; St. Rec. Vol. 8 of 8, La. S. Ct. Order, 2014-KO-1883, 4/17/15.

considered harmless. *Id.* at 638. An error is harmless when the evidence of the defendant's guilt is overwhelming. *Taylor v. Cain*, 545 F.3d 327, 336 (5th Cir. 2008).

In *Brecht*, because the prosecution had referred to the defendant's silence only infrequently, and because the other evidence of guilt was substantial, the Court concluded that the *Doyle* error did not substantially influence the jury's verdict and that federal habeas corpus relief was not warranted. *Id.* at 639.

In *United States v. Carter*, 953 F.2d 1449 (5th Cir. 1992), the Fifth Circuit considered the effect of comments by a prosecutor and arresting officer that the defendant would not make any statements. The court held that although such remarks constituted a *Doyle* error, the error was harmless. The court reasoned that the potential for prejudice was insufficient to warrant reversal because "the prosecutor did not focus or follow up on the response. Indeed, since [the defendant] had not at that point of the trial offered any exculpatory story, the evidence could have had only a minor effect as slight substantive evidence or remote impeachment-in-advance." *Id.* at 1463. Even though the error was compounded by the prosecutor's later impeachment of the defendant with his silence and by a comment on the defendant's silence during closing argument, the court nonetheless held that the error was harmless. *Id.* at 1465-67.

Insofar that Detective Broussard's challenge testimony and the prosecutor's comment made during closing argument regarding Duong's post-arrest silence violated *Doyle*, the errors were harmless. There was overwhelming evidence of Duong's guilt including (1) the detailed recorded statements of the victims taken at the time of the initial allegations; (2) the testimony of Janet and Nicole who both identified Duong as the perpetrator and recalled the incidences; (3) the medical evidence relating to the examination of Nicole which was consistent with blunt force

trauma to her hymen; (4) Dr. Benton's testimony that Nicole's injury was consistent with rape; (5) the testimony of a representative from Duong's former employer that Duong resigned his position and cashed out his retirement savings around the time of the allegations; and (6) family members' testimony corroborating the circumstances surrounding the victims' disclosure of the sexual abuse and Duong's actions taken thereafter, including that Duong fled the state and lived in a number of states under an alias. Based on the evidence presented at trial, it cannot be said that the reference to Duong's exercise of his right to remain silent had a substantial and injurious effect or influence in determining the jury's verdict.

The denial of relief by the state courts was not contrary to or an unreasonable application of federal constitutional precedent. Duong is not entitled to relief on his claims that the Trial Court erred in denying his motions for new trial.

IX. Denial of Motion for Mistrial

Duong's final claim is that the Trial Court erred in denying his motion for mistrial based on the prosecutor's improper reference to "other crimes" his during rebuttal argument.

The record reflects that during rebuttal, the prosecutor, in referring to Mary Duong's testimony, stated:

> She couldn't even – "Him, him," is what she said because he's had many victims in his life, more than just two girls.[60]

Defense counsel objected and the following bench conference was held:

> MR. NETTERVILLE:
>
> Now, he's intimating that there are other victims in this case.

[60]St. Rec. Vol. 7 of 8, Closing and Rebuttal Argument Transcript, p. 31, 6/12/13.

MR. HUFF:

There are.

MR. NETTERVILLE:

There are no – Wait.

MR. HUFF:

No, I'm going to explain it.

MR. NETTERVILLE:

Come on. No. That's –

THE COURT:

Well, I'll have him verify.

MR. HUFF:

Okay.

MR. NETTERVILLE:

That's – I want some sort of limited instruction. This –[61]

The bench conference ended and the prosecutor resumed with his argument:

MR. HUFF:

There are multiple victims in this case. And no, Mr. Netterville, I'm not talking about physical victims; I'm talking about victims of suffering, victims of emotional abuse. There are only two women in this room that we know of that he has physically abused.[62]

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[61] *Id.*, at pp. 31-32.

[62] *Id.*, at p. 32.

54

Defense counsel again objected, the Trial Court sustained the objection, and a bench conference was held during which defense counsel argued that the prosecution's comments left the impression that there were other potential victims and moved for a mistrial based on the prosecution's reference.[63] The Trial Court denied the motion and advised that it would instruct the jury that there was no evidence of other victims and to disregard the prosecutor's comment.[64] The Trial Court then instructed the jury:

> Ladies and gentlemen, let me just say this. The Prosecutor said that there are no other victims that we know of. You are to disregard that remark. Do you understand? Okay.[65]

The prosecutor then proceeded to clarify to the jury that Doung's wife and the Nicole and Janet's parents were the other victims he was speaking of and that they were left with the guilt of knowing they left Nicole and Janet in harm's way.[66]

When the issue was raised on direct appeal, the Fifth Circuit, relying on Louisiana law, found that the prosecutor's comment was not a reference to "other crimes" but rather "misspoken words regarding defendant's emotional victimization of the family that were corrected."[67] The Fifth Circuit further found that the comments did not contribute to the verdict and that the denial

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[63] *Id.*, at pp. 32-36.

[64] *Id.*, at p. 37.

[65] *Id.*, at p. 38.

[66] *Id.*, at p. 39.

[67] *Duong*, 148 So.3d at 646; St. Rec. Vol. 6 of 8, 5th Cir. Opinion, 13-KA-763, pp. 36-33, 8/8/14.

55

of the motion for new trial was not an abuse of discretion under Louisiana law.[68] The Louisiana Supreme Court also denied relief without added reasons.[69]

As an initial matter, Duong's arguments that the Trial Court erred in failing to grant a mistrial under state law do not involve consideration of any questions of federal or constitutional law, and review of such claims is not proper on habeas review. *See Lavernia v. Lynaugh*, 845 F.2d 493, 496 (5th Cir. 1988) (the failure to grant a mistrial is a matter of state law and not one of a constitutional dimension); *Haygood v. Quarterman*, 239 F. App'x 39, 42 (5th Cir. Jun.14, 2007) (state court's denial of a motion for a new trial does not necessarily constitute a violation of a federal constitutional right) (citing *Dickerson v. Guste*, 932 F.2d 1142, 1145 (5th Cir. 1991). Thus, even the misapplication of state law in denying the motion for mistrial would not entitled Duong to relief. *Thomas v. Ieyoub*, No. 93-3757, 1994 WL 286198, at *2 (5th Cir. June 22, 1994) ("[E]rrors of state law, such as a denial of a mistrial, must rise to a constitutional dimension in order to merit habeas relief."); *Smith v. Whitley*, No. 93-03208, 1994 WL 83777, at *1 (5th Cir. Mar. 3, 1994) ("Even if the court's refusal to declare a mistrial was a violation of Louisiana law, we, as a federal habeas court, are without authority to correct a simple misapplication of state law; we may intervene only to correct errors of constitutional significance."); *Dickerson v. Guste*, 932 F.2d 1142, 1145 (5th Cir. 1991) (petitioner's claim that the state courts violated state law in denying his motion for new trial provided no basis for federal habeas relief absent the showing of

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[68]*Id.*, at 644-47; St. Rec. Vol. Vol. 6 of 8, 5th Cir. Opinion, 13-KA-763, pp. 38-40, 8/8/14.

[69]*Duong*, 168 So.3d at 395; St. Rec. Vol. 8 of 8, La. S. Ct. Opinion, 2014-KO-1883, 4/17/15.

56

an independent violation of a federal constitutional right). Any alleged impropriety based on state law does not warrant federal habeas review or relief.

A state court's denial of a motion for mistrial will trigger federal habeas corpus relief only if it was " 'error ... so extreme that it constitutes a denial of fundamental fairness under the Due Process Clause.' " *Hernandez v. Dretke*, 125 F. App'x 528, 529 (5th Cir. 2005) (quoting *Bridge v. Lynaugh*, 838 F.2d 770, 772 (5th Cir. 1988)). In order to receive federal habeas relief, Duong must show that "the trial court's error had a 'substantial and injurious effect or influence in determining the jury's verdict.' " *Hernandez*, 125 F. App'x at 529 (citing *Brecht*, 507 U.S. at 623). Duong must show that "there is more than a mere reasonable possibility that [the ruling] contributed to the verdict. It must have had a substantial effect or influence in determining the verdict." *Woods v. Johnson*, 75 F.3d 1017, 1026 (5th Cir. 1996).

The question of fundamental fairness at trial under the Due Process Clause presents a mixed question of law and fact. *Wilkerson v. Cain*, 233 F.3d 886, 890 (5th Cir. 2000); *see Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir. 1997) (whether evidence is admitted or excluded contrary to the Due Process Clause also is a mixed question of law and fact). The court must determine whether the denial of relief by the state courts was contrary to or an unreasonable application of federal law.

The record demonstrates that the state courts' denial of Duong's motion did not constitute a denial of his due process rights, and that the denial had neither a substantial nor an injurious effect in determining the jury's verdict. Under federal law, "it 'is not enough that the prosecutor['s] remarks were undesirable or even universally condemned.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *Darden v. Wainwright*, 669 F.2d 1031, 1036

(8th Cir. 1983)). Instead, a petitioner must establish that the prosecutor's argument or comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Bell v. Lynaugh*, 828 F.2d 1085, 1095 (5th Cir. 1987). The prosecutor's remarks must be evaluated in the context of the entire trial. *Greer v. Miller*, 483 U.S. 756, 765–66 (1987) (citing *Darden*, 477 U.S. at 179); *Kirkpatrick v. Blackburn*, 777 F.2d 272, 281 (5th Cir. 1985). To obtain federal habeas relief based on allegations of improper prosecutorial comment or argument, a petitioner "must demonstrate that the misconduct [was] persistent and pronounced or that the evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper remarks." *Jones v. Butler*, 864 F.2d 48, 356 (5th Cir. 1988); *Hogue v. Scott*, 874 F.Supp. 1486, 1533 (N.D.Tex.1994).

The Trial Court admonished the jury to ignore the comment by prosecutor that there were are no other victims "that we know of." The Trial Court also instructed the jury that the statements of the attorneys was not evidence.[70] The prosecutor clarified that his argument that there were "other victims" related to the emotional suffering of the victims' parents and aunt as a result of Duong's sexual abuse of Nicole and Janet. Even if the comments at issue were improper, they were brief and were not egregious. Further, there is no evidence that they were made in bad faith in a deliberate attempt to taint the proceedings or prejudice the jury. Additionally, when the comments are considered in context of the entire trial, it cannot be reasonably said that they played a significant factor in the jury's verdict, especially considering the jury instructions and the overwhelming evidence of guilt admitted at trial.

[70]St. Rec. Vol. 1 of 8, Closing Jury Instructions, p. 5, 6/12/13.

58

Duong has not established a due process violation resulting from the denial of the motion for mistrial based on the prosecutor's comments during rebuttal argument. The denial of relief on this issue by the state courts was not contrary to or an unreasonable application of Supreme Court law. He is not entitled to federal habeas corpus relief.

X. Recommendation

For the foregoing reasons, it is **RECOMMENDED** that Duong's petition for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 be **DISMISSED WITH PREJUDICE**.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation **within fourteen (14) days** after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996).[71]

New Orleans, Louisiana, this 21st day of September, 2018.

KAREN WELLS ROBY
CHIEF UNITED STATES MAGISTRATE JUDGE

[71] *Douglass* referenced the previously applicable ten-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. § 636(b)(1) was amended to extend the period to fourteen days.

59

The Supreme Court of the State of Louisiana

STATE EX REL. HAI A. DUONG

NO. 2016-KH-1018

VS.

STATE OF LOUISIANA

- - - - - -

IN RE: Hai A. Duong; - Plaintiff; Applying For Supervisory and/or Remedial Writs, Parish of Jefferson, 24th Judicial District Court Div. K, No. 12-1285; to the Court of Appeal, Fifth Circuit, No. 16-KH-187;

- - - - - -

August 4, 2017

Denied. See per curiam.

MRC

JLW

GGG

JDH

SJC

JTG

Supreme Court of Louisiana
August 4,2017

Robin A. Burras
Deputy Clerk of Court
For the Court

APPENDIX
D

SUPREME COURT OF LOUISIANA

No. 16-KH-1018

STATE EX REL. HAI A. DUONG

AUG 04 2017

v.

STATE OF LOUISIANA

ON SUPERVISORY WRITS TO THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON

MRC PER CURIAM:

Denied. Relator fails to show he received ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Relator has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, *see* 28 U.S.C. § 2244, 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. The district court is ordered to record a minute entry consistent with this per curiam.

BJJ. n.s.

61

Application For Writs

No. 15-KH-662

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

OCTOBER 26, 2015

Deputy Clerk

HAI A DUONG
VERSUS
N. BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY

IN RE HAI A DUONG

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE ELLEN SHIRER KOVACH, DIVISION "K", NUMBER 12-1285

Attorneys for Relator:

Hai A Duong #613130
Louisiana State Penitentiary
Angola, LA 70712

Attorneys for Respondent:

Terry M. Boudreaux
Assistant District Attorney
200 Derbigny Street
Gretna, LA 70053
(504) 368-1020

WRIT DENIED

(SEE ATTACHED DISPOSITION)

Gretna, Louisiana, this 11th day of December, 2015.

APPENDIX
E

62

HAI A DUONG

VERSUS

N. BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY

NO. 15-KH-662

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

WRIT DENIED

Relator, Hai A Duong, seeks this Court's supervisory review of the trial court's September 21, 2015 ruling that denied his motion for documents in support of his application for post-conviction relief, motion for appointment of counsel, and motion for evidentiary hearing. Relator filed these motions in conjunction with his application for post-conviction relief. The trial court's ruling ordered the State to respond to relator's application with procedural objections, but denied the accompanying motions as stated above.

In this writ application, relator argues that these denials have deprived him of his rights to due process and equal protection. The trial court found that relator's application for post-conviction relief failed to show particularized need for the documents such that they should be furnished to him free of charge. The ruling directs relator to seek the various documents from their custodians. Relator's request for the grand jury transcripts was denied. Relator's motions for appointment of counsel and evidentiary hearing were denied "at this time."

On the showing made, we see no error in the trial court's rulings. Relator fails to show that he has been denied due process or equal protection. We find no error in the trial court's conclusion that relator is not entitled to the grand jury transcripts. Relator's application only makes conclusory allegations regarding alleged inconsistencies in the grand jury testimony with trial testimonies and thus fails to provide any factual support that he has met an exception for the disclosure of the grand jury transcripts under La. C.Cr.P. art. 434, *et seq.* Further, relator has failed to show particularized need for the other requested documents such that they should be furnished free of charge. Accordingly, this writ application is denied.

Gretna, Louisiana, this 17th day of December, 2015.

JGG

JUDGE JUDE G. GRAVOIS

MEJ

JUDGE MARC E. JOHNSON

RAC

JUDGE ROBERT A. CHAISSON

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DEC 17 2015
DEPUTY CLERK
COURT OF APPEAL, FIFTH CIRCUIT

63

HAI A. DUONG

VERSUS

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY

NO. 16-KH-187

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

April 28, 2016

Susan Buchholz
First Deputy Clerk

****CONFIDENTIAL****
LSA-RS 46:1844(W)
ATTORNEYS OF RECORD ONLY

IN RE HAI A. DUONG

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE ELLEN SHIRER KOVACH, DIVISION "K", NUMBER 12-1285

Panel composed of Judges Stephen J. Windhorst, Jude G. Gravois, and Hans J. Liljeberg

WRIT DENIED

Relator, Hai A. Duong, seeks review of the trial court's denial of his application for post-conviction relief (APCR) and request for documentation and discovery.

Relator contends that the trial court erred in summarily denying his APCR. La. C.Cr.P. art. 929 provides that if the trial court determines that the factual and legal issues can be resolved based on the APCR, answer, and supporting documents, the court may grant or deny relief without further proceedings. Relator failed to show that the trial court erred in summarily denying his APCR based on his APCR, the State's response, and exhibits.

Claim one:

Relator contends that trial counsel was ineffective. He argues that the charges were false and counsel failed to investigate the nature of the allegations, failed to present a plausible defense, failed to object during *voir dire* when the State systematically excluded minorities from the jury without race neutral reasons, and failed to investigate circumstances surrounding the alleged incidents. Relator also requested copies of the transcripts and documents, including minute entries to support his APCR.

To the extent relator is seeking to challenge the trial court's denial of his request for production of documents, relator's request is repetitive. This Court previously considered and denied relator's challenge to the trial court's denial of his motion for production of documents and for D.A. files. See Duong v. Cain, 15-662 (La. App. 5 Cir. 12/17/15) (unpublished writ disposition).

64

To prove ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Relator failed to demonstrate how the trial court erred in finding that his allegations were conclusory and without merit. Relator provided only speculative and conclusory allegations to support his claim. Relator failed to provide specific facts and evidence to show that counsel was ineffective. Thus, on the showing made, relator did not show that counsel's performance was deficient or that he was prejudiced by counsel's performance.

Claim two:

Relator contends that his trial was fundamentally unfair because of prosecutorial misconduct. Relator argues that the State systematically excluded minorities from the jury without race neutral reasons, the State suppressed information revealing that one of the victims ran away from home with her boyfriend, the State infringed on his right to present a "fabrication defense," the State suppressed that fact that the family of the alleged victims did not believe the victims, the State threatened the family of the victims to testify against relator, the State suppressed information about one of the victim's truancy, and the grand jury testimonies of the State's witnesses were different from their testimonies at trial. Relator further contends that he was not granted any of his documents to support his "factual and meritorious claims." He specifically requested the grand jury transcript of every witness, pretrial hearing transcripts with any and all motions filed by defense counsel and the State, transcripts of *voir dire* examination, the trial court's rulings on the post-trial motions, the entire trial transcript, and the sentencing transcript. Relator claims he was denied equal protection and due process when the trial court denied his request for documentation and discovery which prevented him from proving his claim of prosecutorial misconduct.

To the extent relator is again challenging the trial court's denial of his request for production of documents and discovery, this claim is repetitive. The trial court did not err in denying this request. See Duong, supra.

Relator failed to provide specific facts or evidence that there were inconsistencies between the grand jury and trial testimonies of the witnesses, as well as the alleged suppressed evidence concerning one of the victims. Relator also failed to demonstrate that the State suppressed information concerning the victim's prior history in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We further find that the trial court did not err in finding that, as the State pointed out in response, the appellate record reveals that the *voir dire* was not transcribed. Relator failed to provide any evidence to support this allegation. Therefore, on the showing made, relator failed to provide evidence in support of his allegation of prosecutorial misconduct.

Accordingly, this writ application is denied.

Gretna, Louisiana, this 28th day of April, 2016.

SJW
JGG
HJL

45

W. Jeff.

SERVICE

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 12-1285

DIVISION "K"

RECEIVED
SEP 28 2015
W.F.P.S.O.

RECEIVED
SEP 28 2015
Legal Programs Department

STATE OF LOUISIANA

VERSUS

HAI DUONG

FILED: Sept. 21, 2015

K Newby
DEPUTY CLERK

ORDER

This matter comes before the court on Petitioner's APPLICATION FOR POST-CONVICTION RELIEF, MOTION FOR APPOINTMENT OF COUNSEL, MOTION TO COMPEL ANSWER, MOTION FOR EVIDENTIARY HEARING, MOTION FOR PRODUCTION OF DOCUMENTS, MOTION FOR THE PRODUCTION OF THE DISTRICT ATTORNEY'S FILES, ALL STAMPED AS FILED AUGUST 28, 2015.

On June 12. 2012, Petitioner was convicted of the following:

- Count #1 – LSA-R.S. 14:42, aggravated rape, and was sentenced to life imprisonment at hard labor.
- Count #2 – LSA-R.S. 14:(27)42, attempted aggravated rape, and was sentenced to 50 years imprisonment at hard labor.
- Count #3 – LSA-R.S. 14:81.2, molestation of a juvenile, and was sentenced to 15 years imprisonment at hard labor.
- Count #4 - LSA-R.S. 14:81.2, molestation of a juvenile, and was sentenced to 15 years imprisonment at hard labor.
- Count #5 – LSA-R.S. 14:43.4, aggravated oral sexual battery, and was sentenced to 10 years imprisonment at hard labor.

All sentences were ordered to run concurrently. His convictions were affirmed on appeal. *State v.Duong*, 13-KA-763 (La. App. 5 Cir. 8/8/14) 148 So.3d 623, writ denied, 2014-KO-1883 (La. 4/17/15), 168 So. 3d 395.

Petitioner now files an application for post-conviction relief, alleging the following claims:

1. Ineffective assistance of counsel.
2. Prosecutorial misconduct.

Post-conviction relief law requires that if an application alleges a claim which, if proven, would entitle petitioner to relief, the court shall order the district attorney to file any procedural objections, or an answer on the merits if there are no procedural objections, within 30 days. LSA-C.Cr.P. art. 927. A district court may grant a summary disposition on an application for post conviction relief only after the required answer by the state has been filed. LSA-C.Cr.P. art. 929.

For these reasons, it is the order of this court that the State file a response raising what ever procedural objections it may have, or if no procedural objections, an answer on the merits to petitioner's allegations.

As to Petitioner's request for trial records, this request should be directed to the Clerk of Court for Jefferson Parish (200 Derbigny St., Gretna, LA 70053). As the custodian of the court record, the Clerk of Court is the only office able to produce true and certified copies of the above requested information.

Petitioner requests a transcript of the grand jury testimony. Unlike other transcripts, that of the grand jury is statutorily secret, and is not to be made available for review. Members of the grand jury, all other persons present at a grand jury meeting, and all persons having confidential access to information concerning grand jury proceedings, shall keep secret the testimony of witnesses and all other matters occurring at, or directly connected with, a meeting of the grand jury. LSA-C.Cr.P. Art. 434. He is not entitled to this transcript.

Petitioner also requests various pre-trial and trial transcripts. Petitioner is not entitled to free transcripts. Requests for all transcripts which are not *Boykin* transcripts require that the prisoner show a "particularized need." Particularized need is more than a mere statement of a wish to comb the record for errors or a general statement that a right has been violated. The

APPENDIX
F

defendant must be able to point to a particular interchange recorded in the transcript and allege the interchange is the grounds for his challenge and the challenge must not be mere harmless error, but must be an error of constitutional proportions. *State ex rel. Payton v. Thiel.* 315 So.2d 40 (La. 1975).

In *State ex rel. Bernard v. Criminal Dist. Court Section J.,* 653 So.2d 1174, 94-2247 (La. 4/28/95), the Supreme Court of Louisiana held that an indigent inmate cannot make a showing of particularized need absent a properly filed application for post-conviction relief which sets forth the specific claims of constitutional errors which required the requested documentation for support. The Petitioner has in fact filed an application for post-conviction relief in this case. However, the Petitioner has made not made a sufficient showing of particular need, and the court finds that he is not entitled to relief.

Petitioner seeks review of records from the District Attorney. If the Petitioner wishes to obtain documents from the District Attorney, the defendant should direct his requests to the custodian of these records, pursuant to the Public Records Act. (LSA-R.S. 44:1 et seq.). He should write a letter, containing his specific document requests, to District Attorney, 200 Derbigny St., Gretna, LA 70053.

It should be noted that the District Attorney is not required to provide defendant with free copies of its public records. *Foster v. Kemp*, 657 So.2d 681 (La. App. 1st Cir., 1995). Instead, these records are available to the defendant at a cost of per page. Additionally, the District Attorney's office is not required to bear the cost of mailing document. Defendant should send a friend or family member to the District Attorney's office to pay for and obtain the records for him.

If a request for public records is denied by the custodian, the defendant may institute civil proceedings for a writ of mandamus at the trial court level. *State ex rel. McKnight,* 742 So.2d 894 (La. App. 1 Cir. 12/3/98). See La.R.S. 44:35(A).

The court notes that Petitioner has requested appointment of counsel and an evidentiary hearing. The court finds that Petitioner is not entitled to appointed counsel or an evidentiary hearing at this time.

Accordingly,

IT IS ORDERED BY THE COURT that the State file a response within 30 days raising whatever procedural objections it may have, or if no procedural objections, an answer within 30 days on the merits.

IT IS FURTHER ORDERED BY THE COURT that Petitioner's *Motion for Appointment of Counsel* is hereby **DENIED.**

IT IS FURTHER ORDERED BY THE COURT that Petitioner's *Motion for Evidentiary Hearing* is hereby **DENIED.**

IT IS FURTHER ORDERED BY THE COURT that Petitioner's *Motion for Production of Documents* is hereby **DENIED.**

IT IS FURTHER ORDERED BY THE COURT that Petitioner's *Motion for Production of D.A. Files* is hereby **DENIED.**

Gretna, Louisiana this 21st day of September, 2015.

JUDGE

PLEASE SERVE:

Defendant: Hai Duong, DOC # 613130, Louisiana State Penitentiary, Angola, LA 70712

Terry Boudreux, District Attorney's Office, 200 Derbigny St., Gretna, LA 70053

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE
DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON

67

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

NO. 2014-KO-1883

VS.

HAI A. DUONG

- - - - - -

IN RE: Duong, Hai A.; - Defendant; Applying For Writ of Certiorari and/or Review, Parish of Jefferson, 24th Judicial District Court Div. K, No. 12-1285; to the Court of Appeal, Fifth Circuit, No. 13-KA-763;

- - - - - -

April 17, 2015

Denied.

GGG

BJJ

JTK

JLW

MRC

JDH

SJC

Supreme Court of Louisiana
April 17, 2015

Deputy Clerk of Court
For the Court

APPENDIX
G

STATE OF LOUISIANA

VERSUS

HAI A. DUONG

NO. 13-KA-763

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 12-1285, DIVISION "K"
HONORABLE ELLEN S. KOVACH, JUDGE PRESIDING

August 8, 2014

FREDERICKA HOMBERG WICKER
JUDGE

Panel composed of Judges Fredericka Homberg Wicker, Marc E. Johnson, and Robert A. Chaisson

PAUL D. CONNICK, JR.
DISTRICT ATTORNEY
Twenty-Fourth Judicial District
Parish of Jefferson
TERRY M. BOUDREAUX
JULIET L. CLARK
ASSISTANT DISTRICT ATTORNEYS
200 Derbigny Street
Gretna, Louisiana 70053
COUNSEL FOR PLAINTIFF/APPELLEE

BRUCE G. WHITTAKER
ATTORNEY AT LAW
Louisiana Appellate Project
P. O. Box 791984
New Orleans, Louisiana 70179-1984
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED; REMANDED WITH INSTRUCTIONS

APPENDIX
H

69

Defendant, Hai A. Duong, appeals his convictions for aggravated rape against N.T., attempted aggravated rape against J.T., molestation of a juvenile against both N.T. and J.T., and aggravated oral sexual battery against J.T. Defendant raises three assignments of error, two of which we find lack merit. Defendant, however, in his second assignment of error claims that the trial judge erred in denying his motion for a new trial on the ground that the prosecuting attorney improperly questioned a state witness regarding defendant's post-arrest silence during trial in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). For the reasons which follow, we find that the prosecutor's reference to defendant's post-arrest silence was clearly improper and that the trial court clearly erred in ruling that the prosecutor could query the investigating officer regarding defendant's post-arrest silence. Furthermore, we find that the prosecutor compounded this clear violation by referring to defendant's silence in his rebuttal closing argument. However, in the context of this particular trial, these errors do not warrant reversal. Accordingly, we affirm defendant's convictions and sentences. We remand this matter with instructions for the trial court to notify

70

defendant of his sex-offender notification requirements and correct defendant's uniform commitment order.

PROCEDURAL HISTORY

On June 21, 2012, a grand jury indicted defendant on five counts: counts one and two charged defendant with committing aggravated rape in violation of La. R.S. 14:42; counts three and four charged defendant with committing molestation of a juvenile in violation of La. R.S. 14:81.2; and count five charged defendant with committing aggravated oral sexual battery in violation of La. R.S. 14:43.4.[1]

At his arraignment on July 18, 2012, defendant pled not guilty. On August 16, 2012, the trial court granted defendant's motion for a copy of the video recordings of the victim interviews at the Children's Advocacy Center ("CAC"). This grant was subject to a protective order. On June 10, 2013, a jury was selected. Trial continued through June 11 and 12, 2013, concluding on June 12, 2013, when the jury returned a verdict finding defendant guilty as charged on counts one, three, four and five. On count two, the jury found defendant guilty of a lesser charge, attempted aggravated rape. On the first day of trial, the trial court granted the state's motion for a second interpreter during instances in which a witness, in addition to defendant, did not speak English fluently. On the second day of trial, the trial court overruled defendant's objection to the admission of the victims' CAC video interviews.

On June 17, 2013, defendant filed a motion for new trial, supplementing the motion on June 18, 2013. On June 24, 2013, the motion for new trial was heard, then denied. After defendant waived sentencing delays, the trial court sentenced defendant to imprisonment terms of: life in prison on count one; 50 years on count

[1] Before this indictment, on March 27, 2012, a preliminary hearing was held and the trial court determined that probable cause existed to hold defendant.

two; 15 years each counts three and four; and 10 years on count five. These sentences were to be served at hard labor and concurrently, without the benefit of parole, probation, or suspension of sentence. On the same date as sentencing, defendant made an oral motion for appeal and filed a *pro se* written motion for appeal, which was granted on June 25, 2013.

FACTS

Preliminarily, for the ease of reading, we have given the victims and their parents fictitious names in the remainder of this opinion.[2] The victims, J.T. and N.T., will be called Janet and Nicole. The victims' parents, C.T. and A.T., will be called Carl and Alice.

This is defendant's appeal from his original trial on five counts charging him with the molestation, oral sexual battery, and rape of two victims, Janet and Nicole. Defendant's crimes against Janet and Nicole occurred in the 1990s when they were children under the age of twelve. However, this case was not brought to trial until 2013 due to defendant's flight from Louisiana after Janet and Nicole made their allegations against defendant. At trial, the jury heard Janet and Nicole, now both adults, testify. The jury also viewed the CAC interviews of Janet and Nicole which were recorded on May 17, 1999. At trial, the jury also heard testimony from: Terry Ford, a human resources manager at defendant's former employer; Detective Richard Broussard, a detective who investigated the case and supervised the 1999 victim interviews; Carl and Alice, the victims' parents; as well as Mary Doung, a relative of Alice and the wife of defendant. In addition, defendant testified in his own defense.

Carl testified that he married Alice and had three children: Nicole; Janet; and a son. Mary married defendant in 1984. Carl testified that during the time period

[2] See La. Rev. Stat. Ann. § 46:1844(W)(3)

from 1991 through 1995, he lived with his wife and children in Avondale. From this address, Carl ran his after-work mechanic shop. Carl testified that during this time period, he did not hear any complaints from his children that defendant had touched them inappropriately. In 1995, Carl and Alice divorced.

After the divorce, the girls' mother, Alice, moved out of the house. The children primarily lived with Alice and visited their father, Carl, on the weekends. Also after the divorce, Carl worked with defendant repairing cars on weekends, and after their primary jobs ended for the day, on weekdays. Nicole and Janet spent time with Carl and defendant when they visited Carl. In 1999, Carl had a new girlfriend and therefore did not spend much time with his daughters. Carl testified that around this time, his daughters spent time and had overnight stays with Mary and defendant. Carl clarified that defendant had the opportunity to be alone with his daughters. Nicole and Janet did not report abuse to their father prior to 1999. Carl testified that after Nicole and Janet alleged that defendant abused them, defendant left without telling Carl where he was going.

Terry Ford, a human resources manager for the successor company of the Input/Output Company where defendant worked in 1999, authenticated defendant's employment records with Input/Output. These records showed that defendant began working for Input/Output on January 28, 1982, and ended his employment by resignation on May 14, 1999. Mr. Ford clarified that these documents do not show when defendant gave notice of his intention to resign. On May 19, 1999, defendant filled out a "payout request form", requesting a cash distribution from his company's "401K" plan. Both defendant and his wife signed this form. Defendant incurred a tax penalty for taking this cash distribution.

Mary Duong, defendant's wife, testified that she worked at Alice's wig store in the 1990's. Mary explained that during this time, she lived with defendant at a

house across the street from the Catholic church which Janet and Nicole attended. The two children went to this church multiple times each week to attend mass and catechism classes. Janet and Nicole went to defendant's house when they attended this church. On Mondays through Saturdays, the days she worked at her wig shop, Alice regularly dropped off her children at Mary and defendant's house.

Mary testified that during the time before Alice's divorce, the majority of the time that the victims spent at her house, defendant was outside working with Carl on cars. Mary further testified that the victims rarely spent the night at her house during this time period. According to Mary, at some point in the 1990s, Alice, Carl, and their children lived in the house owned by Alice's mother. Alice's family eventually moved out of Alice's mother's house and into another house. At this new residence, Alice began suffering marital trouble when her husband had an affair and used a credit card for gambling. Alice and her husband eventually divorced.

Mary testified that after Alice divorced her husband, Nicole began to talk back to Mary during Nicole's Saturday visits to Mary's house. According to Mary, Nicole would leave the house, without permission, and sleep over at a cousin's house.

Mary testified that one day in 1999, at Alice's shop, Alice's daughters, Janet and Nicole, made serious allegations against defendant. After learning of these allegations, Mary called defendant to come pick her up from the store and go home. Mary questioned her husband, defendant, about the allegations which the victims had made. According to Mary, defendant did not respond to these questions. Mary admitted to having a follow-up conversation with Alice that night, but could not recall what was said during that conversation. On May 17,

1999, police officers came to Mary's house; Mary did not give a detailed description of the conversation she had with these officers.

Mary testified that after Janet and Nicole made these allegations, defendant left their family home, unaccompanied by her and without telling her where he went. Mary testified that defendant left because the victims' father threatened to kill him. Mary testified that not long after the victims made their allegations against defendant, defendant ended his employment, and she and defendant signed a form to cash out his 401K.

A few months after defendant fled, Mary came back into occasional contact with defendant by telephone. Mary admitted that after a period of time, she flew to meet and live with defendant in another state. Mary stayed in this other state for about a month before returning to the New Orleans area. According to Mary, defendant came back to the New Orleans area to pick Mary up. They then again left the state, this time by car. According to Mary, she and defendant traveled by car to New Mexico, where they continued to live together. The couple then traveled to Cheyenne, Wyoming, where they lived for a short while before returning to New Mexico. In 2010, while in New Mexico, defendant suffered a heart attack. After this, Mary testified that she and defendant traveled back to Cheyenne, Wyoming, together.

Mary testified that while she and her husband were on the run, her husband would use an alias, "Henry Tony." Mary testified her husband used this alias because he was hiding from the government because the government wanted her husband in connection with the victims' accusations.

At some point after Mary initially left the New Orleans area, she returned to attend her father's funeral. Mary admitted when she saw the victims at that funeral she cried and told them she was sorry for them. Mary however expressed no

opinion as to whether she believed the victims had suffered any abuse by defendant.

After their final move to Cheyenne in 2012, defendant was pulled over for an alleged traffic violation. When the officer effecting this traffic stop found that defendant had an outstanding warrant in Jefferson Parish, defendant was taken into custody and eventually extradited back to Jefferson Parish. Mary stayed in Cheyenne for several months before selling her belongings and returning home to the New Orleans area.

Mary testified that she never witnessed defendant commit any of the acts of which he was accused. Mary testified that defendant and defendant's mother were present at their house during the times when Janet and Nicole were there, and Mary was absent. Mary admitted that she could not be sure that defendant's mother would always see what was going on in the house. Mary testified that she feels sad for Janet and Nicole because of what happened to them. When asked by the prosecution "who caused all this pain to all the women in this family," Mary indicated that it was her husband.

Alice testified, identifying herself as the victims' mother. During the time period in the 1990s when she was still married to Carl, Alice would bring the children over to defendant's house for social visits, and babysitting when she needed to go to work. This occurred both on the weekends and weekdays. Janet and Nicole were ten and twelve years old, respectively, when Alice separated from Carl. Alice also testified that Janet and Nicole were around the ages of eleven and twelve by the time she actually became divorced.

After the divorce, Alice usually dropped off the children with their father, Carl, at his house on Saturdays. Alice testified that when she did this, defendant was usually there working on cars. Alice testified that she usually stayed for a

short period of time, but would leave and then pick the children up on Sunday after church. Alice testified that Nicole would occasionally tell her that she did not want to go to her father's house. Alice testified that her children's former catechism classes took place at the church on Saturday and Sunday after mass. Alice also testified that she often dropped her children off at defendant's house because she was close with Mary and defendant.

According to Alice, Nicole first told her that defendant had abused her and Janet during an argument at Alice's wig shop. According to Alice, this argument happened because Nicole had become a rebellious child and had been skipping school. According to Alice, during this argument, "[Nicole] just told me that – [s]he just come out and said, 'Well, my problem is, you know, [defendant], Hai . . . he molested me since I was little.' And I went – 'And raped.'" Nicole told Alice that her abuse happened only at Carl's house. Alice testified, "[Nicole] told me that it happened since they were, like, four or five. I just - - I said only a monster could do something to children, you know."

After this conversation, Alice confronted Mary who was also at the wig shop. According to Alice, Mary responded that she did not know whether the allegations were true, and then called defendant to be picked up. Alice then questioned Janet about Nicole's allegation. Janet responded, "It happened to me, Mom." According to Alice, during a follow-up call, Mary told her that her husband had told her "about everything, what happened to the children."

After her daughters made these allegations, Alice sought advice from her parents; they claimed that it was best to keep the matter in the family. Alice did not follow that advice, but rather encouraged her children to report the abuse to a school counselor. The victims did this, and a detective eventually came to their house to ask questions. As a result of this questioning, on Saturday, May 17, 1999,

the detective took the victims for an interview at the CAC and a medical examination at Children's Hospital. Alice also confirmed that on this date she gave a recorded statement to Det. Broussard.

Alice testified that other than the day at her shop, when her daughters alleged their abuse, she never really pushed them to talk about it. She described the abuse as hard on the family and awkward to talk about. According to Alice, her daughters subsequently received eight months of counseling to help them cope with this abuse.

Det. Broussard of the Jefferson Parish Sheriff's Office testified that he participated in the investigation of the alleged aggravated rapes of Nicole and Janet, which ultimately led to defendant's arrest. Det. Broussard first became involved in this investigation because of referral by the child protection agency on May 10, 1999. This referral informed Det. Broussard that two children had complained of sexual abuse, with the most recent incident having occurred two months before the referral. Pursuant to normal procedure, the children were interviewed at the CAC.

On May 17, 1999, Det. Broussard met privately with Alice at the CAC before Nicole and Janet were interviewed there. He explained the interview procedure to Alice and heard Alice's description of the allegations. CAC interviewer Omalee Gordon also met privately at the CAC with Alice in order to explain the interview procedure. The children were not in the room for this discussion.

After Det. Broussard explained the procedure to Alice, Nicole was interviewed at the CAC by Omalee Gordon. During the interview, Nicole and Ms. Gordon were the only individuals in the interview room. Det. Broussard monitored that interview in a separate room as it was happening. Det. Broussard

watched the interview occur on a television screen and was able to talk to Ms. Gordon through a microphone in his room and an earpiece that Ms. Gordon was wearing. An audio and video VHS recording of this interview was made. Janet was also individually interviewed by Ms. Gordon, using the same procedures. During that interview, Det. Broussard monitored the interview in the separate room in the same manner as he had done during Nicole's interview. After these interviews were complete, Det. Broussard received two VHS tape recordings of the interviews. One of those VHS tapes became State's Exhibit 14. This VHS tape, containing Nicole and Janet's recorded interviews, was played for the jury. When played, this video showed that it was recorded on May 17, 1999. Before Ms. Gordon asked any questions, Ms. Gordon can be heard declaring that Det. Broussard was "monitoring the equipment." Ms. Gordon then proceeded with her interviews of Nicole and Janet. In each of their interviews, Nicole and Janet detailed substantially the same allegations against defendant which they later testified to at trial.

In her CAC videotaped interview, Nicole stated that she was thirteen years old at the time of the interview and that her date of birth was December 13, 1985. Nicole also stated that defendant began molesting her when she was six years old. Nicole stated that defendant raped her, which she explained as having intercourse with her. Defendant also touched her all over her body including her chest. This occurred at Mary's house when Mary was supervising her while her mother worked. Nicole stated that while she and Janet were sleeping in Mary's room, defendant would wake up Nicole, climb on top of her, and touch her all over her

body. Defendant would also do the same to Janet.[3] When Mary would walk into the room, defendant would get off of Nicole and go into the bathroom to get ready to go outside and work.

Nicole further stated that when she was six years old, defendant touched her chest and vagina with his hands under her clothes. When defendant was on top of Nicole and touching her, he told her not to tell. Defendant would unbutton Nicole's clothes. The incidents occurred in the morning, when defendant was at the house. The incidents occurred in defendant's room and also in the computer room. When Nicole would do research in the computer room, defendant would touch her chest. She would lock the door when she entered the computer room but defendant would somehow open it. The incidents occurred during the holidays and the summer because Nicole did not visit defendant's house on school days.

One week before Nicole turned eleven years old, defendant raped her. Nicole stated defendant raped her more than three times throughout the period of abuse. Nicole detailed the instances where defendant repeatedly raped and sexually molested her in her testimony at trial. Her trial testimony on these repeated rapes and instances of abuse was substantially similar to her statements in her 1999 CAC interview.

At the end of her CAC interview, Nicole told Ms. Gordon that she first disclosed these incidents to her mother one month before the interview, telling her mother exactly what she had just stated in the current interview. A week after Nicole disclosed to her mom, she also disclosed to the school counselor, Ms. Gorman.

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[3] Nicole did not indicate that she saw defendant touch Janet. Nicole did not explain how she knew that defendant had also touched Janet. It is further noted that Janet stated in her own CAC interview that the first person she disclosed the incidents to was Nicole.

Det. Broussard took a recorded statement from Alice. After taking this statement, Det. Broussard continued his investigation in the Avondale area with the intent of interrogating defendant. When he arrived at defendant's home in Avondale, defendant's wife, Mary, answered the door. Det. Broussard testified that when he asked her about his investigation, she became hostile. Mary claimed she did not know where her husband was located, and she accused Alice, Nicole, and Janet of lying. Det. Broussard learned the location of defendant's employer, Input/Output, from Mary and then proceeded to that location. At Input/Output, Det. Broussard spoke to various staff members and discovered that defendant had quit his job there that day. After Det. Broussard was unable to locate defendant, he sought an arrest warrant for him.[5] On May 25, 1999, an arrest warrant was issued and Det. Broussard subsequently registered that warrant with the National Crime Information Center, a nationwide arrest warrant database. With Det. Broussard unable to locate defendant, the case went unresolved from 1999 until 2012.

In February 2012, an officer stopped defendant in Cheyenne, Wyoming, for a suspected traffic violation. That officer subsequently found defendant's outstanding warrant from Jefferson Parish and began the procedure to have him extradited back to Louisiana. On March 12, 2012, Det. Broussard met defendant at the Jefferson Parish Correctional Center. Defendant did not give a statement.

Janet and Nicole testified in person at the trial. Their testimony at trial, years after their abuse ended, was substantially similar to their videotaped interviews taken at the time they first informed their mother of the abuse. Janet testified she was 26 years old and her birthday was November 20, 1986. Janet

[5] Det. Broussard also testified that at the time of this initial investigation in 1999, he did not take any clothing or DNA samples from the victims because he did not believe he would have found any useful evidence given the two-month period between the last reported incident and the date Det. Broussard came to learn of the incidents.

confirmed that Alice was her mother, that Carl was her father, and that she was related to Mary, defendant's wife. In the late 1990s when she and her family were living in Avondale, her parents divorced and her mother moved out of the family home. Janet testified that at this time, she and her sister regularly attended a Catholic church across the street from the house where Mary and defendant lived. Janet confirmed that when she was a child, her mother worked full-time at her wig shop and her father worked repairing cars. Janet testified that she and her sister would go over to defendant's house so that defendant and Mary could babysit them and they could attend catechism at the church on Saturday and Sunday. Janet confirmed that defendant's mother also lived at this house. Janet testified that her brother did not regularly go over to defendant's house with her and her sister. When Janet's parents divorced, her mother moved to Metairie. Janet's father remained in Avondale and continued his friendship with defendant.

Janet testified that defendant sexually abused her when she was younger at both his home and her father's home. The first incident of sexual abuse occurred at defendant's house in his bedroom, on his bed. Janet described defendant's bedroom as being across from the bathroom, with a bed inside it on the left side of the room. Janet testified that defendant first abused her in this bed by touching her both above and under her clothing. According to Janet, defendant touched her breasts, crotch, and genitals. During this incident, defendant told Janet, "[d]on't say anything; you'll get in trouble for it."

Janet testified that after this first time, defendant repeatedly sexually abused her throughout her childhood. Janet testified that the molestation by defendant mainly occurred on Thursdays and Saturdays, the days Janet and Nicole attended the church across from defendant's house. Janet explained that defendant would abuse her when no one else was at the home. Defendant would remove his clothes

and make Janet touch him. Janet specifically testified that during these instances of abuse, defendant would insert his fingers inside of her vagina. After defendant committed these acts, he would offer Janet money in the amount of five, ten, or twenty dollars, and instruct Janet not to say anything about the incident.

Janet described her molestation as having occurred over the period between when she was five or six years old and continuing until she was ten or eleven years old. Janet testified that when Mary was home, defendant would neither molest her nor show her pornography. Janet contrasted this from when she was home alone with defendant; she testified that, at those times, "I knew it was coming right away." This made her afraid to go over to defendant's house, but she did not tell anyone of her fear because she thought she would get in trouble. Janet testified that Nicole was at the house during the instances of her sexual abuse, but that she did not remember whether Nicole was in the room during the incidents. Janet and Nicole typically traveled together. Defendant's mother was in the house during these instances of sexual abuse, but she was never in the room.

Describing other instances of sexual abuse, Janet testified that defendant would occasionally place a large back massager on her "privates." Defendant was naked and touching himself while he did this. Janet testified that reflecting back on this incident, she believed that defendant, when he was placing this back massager on her privates, was "enjoying the show." Janet accused defendant of showing her pornographic videos. As an adult testifying at trial, Janet described these videos as showing "[n]aked men and girls."

Janet testified that this sexual abuse escalated at the time that she was ten or eleven years old, when defendant inserted his penis inside of her. Janet testified that this first occurred at her father's house when she was alone with defendant. The first incident of intercourse occurred in the living room on the couch. Janet

also described this as the first time defendant put his mouth on her vagina. Janet explained that this first instance of sex with defendant hurt and felt like it lasted a long time. Janet testified that after this instance of sex occurred, defendant gave her money for "junk food" and left the house. She went to church without telling anyone of what had just occurred.[6]

Janet testified that after this first incident of sexual intercourse with defendant, she did not remember whether defendant molested her or had sex with her again. Janet testified that a few weeks after this instance of sexual intercourse, her sister, Nicole, "came out to my mom." Janet testified that this instance of molestation occurred at her father's house, probably on a Saturday.

Janet confirmed that after Nicole told their mother that defendant had been "molesting and raping" them, their mother came to her and asked her whether Nicole's allegations were true. Janet testified that she told her mother that Nicole's allegations were true. Janet testified that she did not talk with Nicole about the abuse since it happened because "it's embarrassing." Janet testified that after her first conversation with her mother about her sexual abuse, she never talked about that abuse with her mother again.

Janet testified that she remembered giving an interview about defendant at the CAC, and that her answers at that interview were truthful. However, she could not recall many of the details from her CAC interview. Janet confirmed that after she and Nicole made their allegations against defendant, he and Mary fled. Janet did not know of their location after they fled. Janet was angry after defendant fled and went to two or three counseling sessions. Janet testified that it was a relief to disclose what defendant had done to her.

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[6] Janet testified that defendant's mother was always at defendant's house, including during the incidents when defendant sexually molested and raped her.

Janet described herself as feeling "disgusted" and just not wanting to remember her abuse. Janet testified that the abuse still affects her today and confirmed that she collects sex-offender registration cards which are sent to her house. She testified that she collects these cards because "you know what those people are capable of."

Nicole also testified at trial. At the time of trial Nicole was 27 years old. Nicole testified that after her parents divorced, she spent the majority of her time with her mother, visiting her father primarily on weekends. Nicole described her father's relationship with defendant during this post-divorce period as "friendly." Nicole admitted that after her parents divorced, there were times when she would leave her father's house to spend the night at her cousin's house. Nicole explained that this cousin's house was a block away from her father's house, and that she always had her father's permission to leave to spend the night there. Nicole denied ever leaving at night with a boyfriend without permission.

Nicole confirmed that defendant and Mary lived in a house across the street from a church which she and Janet attended and that her parents would entrust defendant and Mary with the responsibility of babysitting her and her sister. Nicole confirmed that defendant regularly came over to her father's house in order to help him work on cars. Nicole testified that in addition to going to defendant's house to be babysat, she and Janet would go to defendant's house on Thursdays and Saturdays to attend catechism classes at the church. Nicole confirmed that defendant had a job and that on the Thursdays she went over to defendant's house, she would only see defendant in the evenings.

Nicole testified defendant first sexually abused her by placing a back massager on her vagina when she was seven years old. In addition to using the back massager, defendant took off his clothes and touched Nicole's "bottom" and

vagina. Nicole testified that over the span of several years, defendant committed additional acts of sexual abuse that progressed in severity. Describing one incident, Nicole testified she was sitting on a couch in the salon room on the day of a school fair when defendant came into the room with a bag of grapes and sat next to her. Defendant then proceeded to push Nicole's underwear to the side and insert the grapes into Nicole's vagina. Defendant then left without saying anything. This incident occurred while Nicole's father was in the garage. Nicole testified that she has never before told anyone of this grape incident. Nicole also testified that defendant showed her a pornographic movie which depicted men and women having sex. Nicole claimed defendant would expose his penis to her and that defendant had put his mouth on her vagina.

Nicole testified that the first instance of sexual intercourse with defendant occurred at his home in his bedroom. Nicole's sister and defendant's mother were at the home at the time it occurred, but they were not in the bedroom. Nicole could not remember the exact date that the defendant first raped her, but she estimated that she was about seven years old at the time it happened. Nicole could not recall whether defendant had used a condom, but did believe that defendant had ejaculated.

Nicole also testified regarding an instance of rape by vaginal sexual intercourse that occurred around the time of the Vietnamese New Year. Nicole testified:

> He pulled down his - - When he pulled down my panties, he was pulling down his pants. He started - - he tried to push his penis inside of me. I told him to stop because it hurt. And he said the pain would go away. And it never did.

Nicole went on to specifically testify that during this incident defendant eventually inserted his penis into her vagina.

Nicole testified that another instance of defendant raping her had occurred at her father's house in the salon room.[7] Testifying regarding that instance of sexual intercourse, Nicole stated, "All I remember is him pulling my panties down and his pants while we were sitting on the couch." Nicole testified that during this incident, her sister was with her mother and not at the house. Nicole testified that her father was in the garage at the time this happened. Nicole described the garage as not connected to the house, but rather is a separate structure built just a few feet away from the house. Nicole testified that the instance of rape at her father's house occurred on a Saturday afternoon.

Nicole testified that defendant raped her again after this, but she could not recall many details of these incidents. According to Nicole, after defendant raped her, he told her not to tell anyone and gave her money in the amounts of five, ten, twenty, or more dollars. Nicole claimed that she put this money back in his closet because she knew what happened was wrong. Nicole testified that she did not tell anyone about this abuse initially because she was embarrassed.

Nicole testified that defendant continued molesting and raping her over a period of time, with the last incident of intercourse occurring a few weeks before Nicole disclosed the abuse to her mother. This last incident occurred at defendant's house. At the time it occurred, defendant's mother was on the property, in the garden. Nicole testified that her sister, Janet, may have been with their mother at a location other than defendant's house.

Nicole admitted that she disclosed defendant's abuse of her to her mother during an argument the two of them were having. Nicole confirmed that she had not talked to her sister, Janet, about this abuse since the initial disclosure to their

[7] Nicole claimed that there were a "few times" when defendant molested her and one instance when defendant had sexual intercourse with her at her father's house.

mother. Nicole remembered giving her recorded CAC interview, but she did not remember many of the things she had said during that interview. Nicole testified that she had undergone a "very short" period of counseling following her reporting of these incidents.

Dr. Scott Benton, an expert in Pediatric Forensic Medicine and Child Abuse, including Child Sexual Abuse, was employed at Children's Hospital in 1999. Dr. Benton testified on behalf of the State that he treated Janet and Nicole at the Audrey Hepburn CARE Center at Children's Hospital on May 17, 1999. Dr. Benton created medical reports in connection with his evaluations of Janet and Nicole.[8] These medical reports contained the results of Dr. Benton's examination of Janet and Nicole, as well as the statements by Janet and Nicole which Dr. Benton recorded.[9] The victims' statements to Dr. Benton did not differ from their statements in their CAC interview or from their trial testimony. These statements further corroborate the victims' explanation of their abuse.

Dr. Benton conducted a physical examination of Janet and the results were normal. He also stated that Janet's hymen was intact. Dr. Benton explained that it is possible for a child to have been sexually abused by penile intercourse and still have normal results. According to Dr. Benton, there are many sexual acts that can be performed that do not cause trauma. Dr. Benton further explained that when the activities progress over time, the perpetrator can progressively dilate the vagina until he is able to actually penetrate the vagina. According to Dr. Benton, one reason there is no injury is because of the gentleness of the perpetrator. He explained that these are not forced acts but are seduction acts, and also the

[8] The child abuse program forensic medicine referrals and reports for Janet and Nicole were admitted as State's Exhibits 18 and 19.

[9] On cross-examination, Dr. Benton admitted that he had no independent recollection of his examination of Janet and Nicole. Dr. Benton's trial testimony was based on his medical reports on Janet and Nicole which he believed were accurate.

perpetrator could use a lubricant, including saliva. Another reason for a lack of trauma is that the body is designed to repair itself from injury, especially in areas such as the vagina, anus and mouth, which are able to rapidly heal. Dr. Benton explained that events that are beyond the ability to heal, which cause scars, are not common.

Dr. Benton also stated that there was delayed disclosure in this case. He explained that the reasons for delayed disclosure include that the child is naïve to what happened to her, external factors such as being threatened or bribed, and internal factors such as the belief that if she tells, bad things are going to happen, embarrassment over discussing something intimate, mental health issues, and self-blame, especially if the child takes bribes. Dr. Benton explained that Janet exhibited some of these reasons, including embarrassment. Dr. Benton believed that Janet may have been conflicted regarding her abuse because defendant gave her money and she spent it on junk food.

Dr. Benton also explained that children are selective about what they disclose to certain people, and they may disclose different details to different classes of people. According to Dr. Benton, people will tell doctors things they will not tell other people.

Regarding Nicole and her statements to him, Dr. Benton explained the reasons for delayed disclosure that she exhibited were that her family did not talk about problems, and that defendant offered bribes, although she refused them. Dr. Benton further explained that demeanor of the child is not indicative as to whether there was abuse because people react differently. According to Dr. Benton, there appears to be elements of sequential disclosure, in that Nicole subsequently disclosed an incident that she had not previously disclosed to anyone else. Dr.

Benton explained that it is important to focus on what was omitted on the various occasions, whether it had significance, and the reason for not mentioning it.

After Nicole provided a history, Dr. Benton performed a medical examination. During the examination, Dr. Benton found a lack of continuity in Nicole's hymen, which indicated that Nicole's hymen had been previously injured and healed in that position. Dr. Benton believed his findings were consistent with rape and was definitive of blunt penetrating trauma.

After the state rested, defendant testified on his own behalf. He testified that before this case, he had never been arrested for a crime. According to defendant, his wife asked him whether he did something with the victims and he responded in the negative. His wife appeared to not believe him and an argument ensued. In the morning, his wife refused to speak to him. Defendant decided that it was stressful and packed two or three articles of clothing and left home without telling his wife. He went to work but did not go home afterward and slept in the car for about two days. Then, he stayed with his uncle in New Orleans East for a few days until he found out that the police were looking for him.

Defendant explained that at first he was staying away from home in the hopes that his wife would miss him and ask him to return. However, when he realized that the police were looking for him, he became "scared." Defendant explained that he did not understand why the police were involved in a family situation because in Vietnam it was something that was settled inside the family. Defendant spoke to many people and was told that if he lost his case that he could die; and therefore, he was really "scared." He had already quit his job because he had decided to move away and stay with a friend in the woods in order to show his wife that nothing happened with him and the victims. According to defendant, he quit his job before discovering that the police were looking for him. When shown

his employee records indicating that he quit on May 14, defendant testified that those records were "very close to right." When defendant discovered that the police were looking for him, he decided to run away and move out of town because it was better to live a little longer than to die. Defendant explained that he withdrew money from his IRA and gave everything to his wife to survive.

Defendant drove to Grand Junction, Colorado, to visit a friend, where he lived for about seven or eight years. He next moved to Las Cruces, New Mexico, and then to Farmington, New Mexico. Defendant admitted to calling and speaking to his wife several times while in Colorado and New Mexico.

While defendant was in Farmington, he bought an RV, and his wife came to stay with him because he had a heart attack. He and his wife then moved to California for a time, and then he moved back to New Mexico. Defendant then moved to Wyoming in 2010, and remained there until he was arrested in February or March of 2012.

According to defendant, he never had sexual intercourse with Nicole. He acknowledged that he used to work on cars at Carl's house almost every weekend, usually on Saturdays. He explained that he worked when Carl was home because he was the only one with a key to the garage. According to defendant, he did not have sex with Nicole or Janet while their father was outside working on cars. Defendant also explained that it was not true that he touched them throughout a long period of time. According to defendant, he did not place grapes in Nicole's vagina. Defendant also denied using his mouth on Nicole or Janet. Defendant explained that according to Vietnamese customs, kissing is a terrible and dirty thing. Defendant testified that more than a month before the disclosure, Nicole told him that she was on James Street and three boys jumped down from a white van and pulled her into the van. According to defendant, he looked at her sadly,

and Nicole smiled and told him that it was alright because she liked one of the boys. Defendant denied doing any of the acts of which he was accused.

Defendant acknowledged that the girls would come to his house to go to church, which was located across from defendant's house. He also acknowledged that his wife helped out at Alice's wig shop, including on Saturdays. However, defendant testified that his wife took care of the girls, and he was always working on the automobiles. Therefore, he did not know when they came and left from his house. Defendant testified that he never watched the girls because he was busy, and from 1991 to 1999, he was never alone with them. Defendant did not know why Nicole said what she said. Defendant explained that when the girls were at defendant's house, his wife would not go to the wig shop because she had to babysit. Defendant's mother lived with him and she spent time on the couch and outside gardening. He explained that his mother did not help watch the girls when they came over.

Defendant admitted to having a pornographic magazine that was only for his use, but denied having a pornographic video. Defendant acknowledged owning a back massager that was big and heavy, but denied ever using it on the victims. According to defendant, he never slept with the girls. Defendant also stated that he did not consult a lawyer during the time he was still in the New Orleans area. Defendant explained that he believed the problem arose when Nicole had a boyfriend, did not want to stay home, and kept staying at other people's houses, which caused defendant's wife to worry. According to defendant, the girls were never alone at his house without his wife. Defendant did not offer a reason to explain why his wife testified that he had spent time alone with the girls. Defendant did, however, testify that he believed that his wife would do whatever

she could to protect him. Defendant stated that he never showed any pornographic magazines to the victims, and he denied raping or molesting them.

DISCUSSION

In this appeal, defendant assigns three errors. First, defendant argues that his constitutional right to confront witnesses against him was violated by the admission of video-recorded interviews of Janet and Nicole without proof of strict compliance with the requirements of La. R.S. 15:440.1, *et seq*. Second, defendant argues the trial court erred by denying his motion for a new trial based on the prosecutor's reference to defendant's post-arrest exercise, upon the advice of counsel, of his right to remain silent. Third, defendant argues the trial court erred in denying his motion for a mistrial after the prosecutor made an improper reference to other crimes in the prosecutor's rebuttal argument. For the following reasons, we find that defendant's first and third assignments of error are without merit. While defendant's second assignment of error has serious merit, we do not find that the trial court abused its discretion in the context of this case in denying defendant's motion for new trial.

Assignment One

In his first assignment of error, defendant argues the trial court erred in admitting the recorded CAC interviews of Janet and Nicole without strict compliance with La. R.S. 15:440.1, *et seq*. Specifically, defendant argues that the state failed to meet the requirement of La. R.S. 15:440.5(6) that the "person conducting or supervising the interview of the protected person in the recording is present at the proceeding and available to testify or be cross-examined by either party." The parties do not dispute that the "person conducting" Janet and Nicole's CAC interviews, Ms. Gordon, was not "present at the proceeding" and not "available." Defendant asserts that this requirement is not met because Det.

Broussard, who did testify at trial and who was subject to cross examination, was not a supervisor of the interviews. Defendant contends that this failure to adhere to the strict requirements of La. R.S. 15:440.1, *et seq.*, violated his rights under the Sixth Amendment confrontation clause of the U.S. Constitution.

Under the relevant Louisiana law, certain audio and visual recordings of interviews of protected persons, such as the victims in this case, are admissible provided that certain requirements are met.[10] The requirements relevant to this appeal are as follows:

> A. A videotape of a protected person may be offered in evidence either for or against a defendant. To render such a videotape competent evidence, it must be satisfactorily proved:
>
> * * *
>
> (5) That the taking of the protected person's statement was supervised by a physician, a social worker, a law enforcement officer, a licensed psychologist, a medical psychologist, a licensed professional counselor, or an authorized representative of the Department of Children and Family Services.
>
> B. The department shall develop and promulgate regulations on or before September 12, 1984, regarding training requirements and certification for department personnel designated in Paragraph (A)(5) of this Section who supervise the taking of the protected person's statement.

La. R.S. 15:440.4

> A. The videotape of an oral statement of the protected person made before the proceeding begins may be admissible into evidence if:
>
> * * *
>
> (6) The person conducting or supervising the interview of the protected person in the recording is present at the proceeding and available to testify or be cross-examined by either party; . . .

La. R.S. 15:440.5

At the outset, it is clear that Det. Broussard is a law enforcement officer and is thus within a class of individuals which La. R.S. 15:440.4 permits to supervise a

[10] For purposes of this analysis "'protected person' means any person who is a victim of a crime or a witness in a criminal proceeding and who is either of the following: (1) Under the age of seventeen years. (2) Has a developmental disability as defined in R.S. 28:451.2(12)." La. R.S. 15:440.2(C).

recording of an interview of a protected person. *State v. Guidroz*, 498 So.2d 108, 110 (La. App. 5th Cir. 1986) (stating "La. R.S. 15:440.4 B does not require that law enforcement officials be certified if they are to supervise the taking of the victim's statement"). The statute requires that:

> [E]ither the interviewer or the person supervising the interview be available to testify or to be cross-examined by either party. La. R.S. 15:440.5(A)(6). This statutory requirement serves the purpose of having a witness who can authenticate the video tape, and it serves the purpose of having a witness to testify in regard to whether the process of recording and conducting the interview complied with the statutory requirements.

State v. Roberts, 42,417 (La. App. 2 Cir. 9/19/07), 966 So.2d 111, 123.

Furthermore, Louisiana courts have routinely found that officers who acted similarly to Det. Broussard were supervisors of protected-person interviews within the meaning of La. R.S. 15:440.5. See *Id.*, and *State v. Hawkins*, 11-193 (La. App. 4 Cir. 11/16/11), 78 So.3d 293.

In *Roberts*, the defendant argued that the court erred in admitting a videotaped interview conducted pursuant to La. R.S. 15:440.1, *et seq.*, because the state had not produced the interviewer as a witness and because the state did not prove that the detective who watched the interview was the supervisor of that interview. *Roberts,* 966 So.2d at 122. Similar to the current case, in *Roberts*, the supervising detective watched and listened to the interview via closed-circuit television in another room. "The interviewer was wearing an 'ear bug'" which allowed the detective to communicate with the interviewer "to suggest questions or to let her know they could not hear what was being said." *Id.* at 116. The state did not call the interviewer at trial; however, it called the detective who had listened to the interview.[11] While the Second Circuit did not reach the merits of this

[11] The state also called the child-victim interviewee as a witness. *Roberts,* 966 So.2d at 115.

assignment because they found that the issue had not been preserved for appeal, that court nevertheless stated that it found "no merit to [the] Defendant's contention that [the detective listening in the other room] did not actually supervise the interview or that she was not properly qualified to do so in accordance with the statute." *State v. Roberts*, 42,417 (La. App. 2 Cir. 9/19/07), 966 So. 2d 111, 122-23.

In *State v. Hawkins*, *supra*, the Fourth Circuit faced the same challenge to a similar interview of a child victim. In *Hawkins,* the detective was not in the interview room, but was fitted with an earpiece and a microphone that allowed her to directly communicate with the interviewer. The Fourth Circuit held that, even without the testimony of the interviewer, the testimony of the supervising detective was sufficient to satisfy La. R.S. 15:440.4(A)(5) and La. R.S. 15:440.5(A)(6). The court reasoned that the detective's testimony as to whether the recorded interview adhered to the legal requirements served the purpose of the statutory requirement. The *Hawkins* court also found that the defendant's right to confront the witnesses against him had not been violated.

Similar to the detectives in *Roberts* and *Hawkins*, in the present case, Det. Broussard testified that he observed and viewed the interviews of Janet and Nicole from a separate room as those interviews occurred. Detective Broussard had a microphone through which he communicated to Ms. Gordon via an "earpiece" at least twice. The first instance of this communication is observed at the time marked "10:02" on the recording. At that time, when a muffled and inaudible voice is heard on the recording, Ms. Gordon pauses. The second instance is observed at the time of "10:05" on the recording, when Ms. Gordon again pauses in her questioning. After both of these pauses, Ms. Gordon asks questions

intended to clarify the victims' prior answers.[12] In light of this evidence, and applying the law and jurisprudence of this state, we find that Det. Broussard was the supervisor of the CAC interviews of Janet and Nicole within the meaning of La. R.S. 15:440.5(A)(6). In light of our finding that this provision was not violated, defendant's argument that the violation of this law violated his rights under the confrontation clause of the U.S. Constitution also fails. Accordingly, we find this assignment of error to be without merit.[13]

Assignment Two

In his second assignment of error, defendant argues the trial court erred when it denied his motion for a new trial premised upon the prosecutor's calculated reference to defendant's post-arrest exercise of his privilege against self-incrimination. During Det. Broussard's direct examination by the state, the following took place:

> [In response to the state's questioning of Det. Broussard regarding defendant's actions after he had been extradited back to Jefferson Parish from Wyoming, defense counsel objected and asked for a bench conference where the following exchange took place:]
>
> [Defense Counsel]: This [testimony] is going that he went down and talked to him, and he said, I have an attorney who's advised me not to talk to you okay?
>
> [Court]: Uh-huh.
>
> [Defense Counsel]: And I don't think that's admissible. It was against his constitutional right. And it's within his privilege not to - - to remain silent. And I don't think it can be used as evidence. They're presenting it as evidence. Since they don't have a statement, they should stop.

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[12] Presumably, this was done at the instruction of Det. Broussard.

[13] In *Guidroz, supra*, this Court held that the trial court did not err in admitting a recorded interview of a protected person. This Court also found that where the defendant viewed the videotape prior to trial, the victim was called to testify after showing of the videotape, and the defendant was able to conduct a meaningful cross-examination, then the admission of the recorded interview into evidence did not violate the defendant's constitutional rights under the Sixth Amendment's Confrontation Clause.

[Court]: You want him to testify as to what his attorney advised him?

[Prosecution]: No. I was just going to ask him if he was informed of his rights and if he was willing to give a statement.

[Defense Counsel]: And that - - Right. And I don't think you can do that. I don't think that - - He's under no obligation to give that statement.

[Prosecution]: He's informed of his rights, and he is cognizant of his rights, and he is taking advantage of the constitutional rights that he understands.

[Court]: I'm going to overrule the objection.

[Defense Counsel]: Note our objection.

(End of bench conference.) [The prosecution resumes examination of Det. Broussard]

[Prosecution] Q. When you met with [defendant . . .], was he informed of his rights?

[Det. Broussard] A. He was advised of his rights, yes.

[Prosecution] Q. Did you do that?

[Det. Broussard] A. Yes, I did.

[Prosecution] Q. Did you need an interpreter?

[Det. Broussard] No, no.

[Prosecution] Q. Did he indicate to you that he understood his rights?

[Det. Broussard] A. He understood his rights, yes.

[Prosecution] Q. Okay. Did he agree to give you a statement?

[Det. Broussard] A. No. After I told him that I wanted to talk - - after I advised him of his rights, I wanted to talk to him of his rights, I wanted to talk to him about the charges, he immediately told me that he and his family had secured an attorney, Bruce Netterville. And he told me that his attorney told - - advised not to talk to me. I then stopped whatever I - - I didn't interview. I didn't ask him anymore questions. And I left.

In his closing argument, the prosecutor returned to the matter of defendant's retention of an attorney and post-arrest exercise of his right to remain silent, stating:

> Really? You know why he left; because he knew he was guilty. He didn't want to be punished.
>
> What else did he do when he was on the run? Henry Tony; that's his alias, one of aliases he used. If he was so innocent, why use an alias? He didn't talk to a lawyer. However, when he was arrested in Wyoming, when the police went to go interview him at the jail here, he had a lawyer before they even got there. So at some point, over the 13 years that he was gone, he did learn about the legal system. Did he call anybody down here? Did he turn himself in? No. He stayed on the run until he was caught. That's what he did because he is guilty. That's why he fled.

Defense counsel entered a timely objection to the above state questioning of Det. Broussard and filed a motion for new trial on June 17, 2013. Defense counsel supplemented his motion for a new trial on June 18, 2013. In this supplemental motion for a new trial, defense counsel argued "[t]he court erred when it allowed the state to elicit testimony that the defendant refused to make a statement on advice of counsel." First, we find this assignment of error is properly preserved for appeal. Second, we find that the trial court clearly erred in allowing the state to question Det. Broussard regarding the defendant's exercise of his right to remain silent. The state compounded this error when they referenced defendant's exercise of his Fifth Amendment Constitutional rights during closing arguments.

Standard of Review

Under La. C.Cr.P. art. 851(2), the trial court shall grant a new trial whenever "[t]he court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error." According to La. C.Cr.P. art 851, a new trial motion "is based on the supposition that injustice has been done the defendant,

and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded."

The denial of a motion for a new trial is not subject to appellate review except for an error of law. La. C.Cr.P. art. 858. Further, the ruling on a motion for a new trial is committed to the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of abuse of that discretion. *State v. Bibbins*, 13-875 (La. App. 5 Cir. 4/9/14); *State v. Gerard,* 96-366 (La. App. 5 Cir. 11/14/96), 685 So.2d 253, 260. The merits of a motion for a new trial must be viewed with extreme caution in the interest of preserving the finality of judgments. *Id*; see also *State v. Rodriguez,* 02-334 (La. App. 5 Cir. 1/14/03), 839 So.2d 106, 133, *writ denied,* 03-00482 (La. 5/30/03), 845 So.2d 1061, *cert. denied,* 540 U.S. 972, 124 S.Ct. 444, 157 L.Ed.2d 321 (2003).

Analysis

In *Doyle v. Ohio*[14], the United States Supreme Court held that reference to a defendant's silence at the time of his arrest for impeachment purposes violates his due process rights.[15] Even in cases where a defendant does not testify in his own defense, it is improper to reference the fact that an accused exercised his right to remain silent to ascribe a guilty meaning to his silence or to undermine, by inference, an exculpatory version of events related by the accused. *State v. Pierce*, 11-320 (La. App. 5 Cir. 12/29/11), 80 So.3d 1267, 1272; *State v. Montoya*, 340 So.2d 557 (La. 1976).

In *State v. George*, the Louisiana Supreme Court explained:

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[14] 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

[15] The Supreme Court explained, "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.... it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle v. Ohio,* 426 U.S. at 617-18, 96 S.Ct. at 2244-45.

> This court has expressed its disapproval of placing before the jury evidence that the police advised the defendant of his *Miranda* rights at the time of his arrest when the testimony does not establish a predicate for admitting a subsequent oral or written inculpatory statement and thereby invites jurors to consider the defendant's post-arrest silence as an impeachment of an exculpatory account later offered at trial. *State v. Mosley,* 390 So.2d 1302 (La.1980); *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

State v. George, 95-0110 (La.10/16/95), 661 So.2d 975, 979.

Harmless Error

Doyle violations are characterized as trial errors, and are subject to harmless error analysis. See *State v. Alas*, 622 So.2d 836, 837 (La. App. 5 Cir. 1993) *writ denied*, 629 So.2d 397 (La. 1993); *State v. Olivieri,* 03-563 (La. App. 5 Cir. 10/28/03), 860 So.2d 207, 215; *State v. Longo*, 08-405 (La. App. 5 Cir. 1/27/09), 8 So.3d 666, 674.

Here, where there was an objection to the testimony of Det. Broussard on this point at a bench conference before Det. Broussard testified on this point, we cannot say that the prosecutor unwittingly fell into pursuing an unconstitutional line of questioning. Furthermore, the fact that the prosecutor referred to defendant's silence again in closing argument indicates a clear intent to pursue the line of questioning. While a brief reference to a defendant's post-arrest silence does not in every case require reversal, it is not permissible for the prosecutor to intentionally thread the needle by impermissibly laying before the jury a defendant's post-arrest silence and then carefully moving away to another line of questioning.

While this Court has consistently held that "a brief reference to post-*Miranda* silence does not mandate a mistrial or reversal where the trial as a whole was fairly conducted, the proof of guilt is strong, and the state made no use of the silence for impeachment purposes, this analysis does not apply where the

prosecutor stresses or emphasizes the defendant's silence at trial. *Pierce, supra, State v. Campbell, supra*; See also *State v. Smith,* 336 So.2d 867 (La.1976). (Compare to cases in which post-arrest silence was stressed or emphasized at trial: *State v. Grant*, 99-1065 (La. App. 5 Cir. 1/25/00), 761 So.2d 10, 12-14 (wherein the defendant was repeatedly asked at trial why he didn't "talk to anybody else...when you [the defendant] first got arrested"), and *State v. Montoya*, 340 So.2d at 562 (wherein the prosecutor implicitly referenced the defendant's failure to testify at trial, argued at trial that the defendant had to "explain his possession [of stolen property]," and where additional errors further compounded a state witness' reference to the defendant's post-arrest silence)).

However, the evidence of the defendant's guilt in this case is particularly overwhelming. Both victims knew their attacker personally and gave clear and detailed recorded statements during the time period in which their attacks occurred. As adults, both victims testified to the past abuse in question. The jury was able to compare their adult testimony with their video statements as children. Furthermore, several family members and the defendant's employer were able to corroborate the circumstances surrounding the abuse. The evidence in this case is extraordinarily strong. Therefore, in the context of this particular case, we cannot say that the trial court erred in denying the motion for mistrial.

In this case, the prosecutor's questions to Det. Broussard regarding defendant's exercise of his Fifth Amendment privilege against self-incrimination on the advice of counsel were improper and impermissible. Likewise, the trial court's ruling overruling defense counsel's objection to this impermissible line of questions was also clearly in error. See *State v. Kersey*, 406 So.2d 555, 560 (La. 1981); *State v. Smith*, 336 So.2d 867, 868 (La. 1976); *State v. Montoya*, 340 So.2d at 560. As stated above, the prosecutor compounded this error in closing

argument. Defendant's conviction stands only because we find defendant's post-arrest silence was not stressed or emphasized throughout the entirety of the trial, and the trial as a whole was fairly conducted and there was patently overwhelming proof of guilt. See *State v. Pierce*, 80 So.3d at 1272; *State v. Campbell*, 97-369 (La. App. 5 Cir. 11/25/97), 703 So.2d 1358, 1361; *State v. Smith*, 336 So.2d at 869.

Although Det. Broussard testified regarding his further investigation after defendant invoked his right to be silent, there was no necessity for Det. Broussard to testify to this invocation of silence to explain the next steps in his investigation. While we clearly disapprove this improper line of questioning designed to elicit inadmissible evidence, we do not find the error warrants reversal nor a new trial under the unusually strong evidence presented in this particular case. See *State v. Pierce*, 80 So.3d at 1272; *State v. Campbell*, 97-369 (La. App. 5 Cir. 11/25/97), 703 So.2d 1358, 1361; *State v. Smith*, 336 So.2d at 869. Accordingly, we find that this clear error did not, in this particular case, mandate that the trial court grant a new trial.

Assignment Three

In his third assignment of error, defendant argues the trial court erred in failing to grant his June 17, 2013 motion for a mistrial premised upon the prosecutor's improper reference to other crimes evidence in his rebuttal argument. Specifically, defendant argues the prosecutor impermissibly asked the jury to consider the evidence of other crimes when, in his rebuttal to defendant's closing argument, he made two statements. First, the prosecutor stated:

> You know, this trial, we're in day three of this trial, and there's been a lot of tears from this witness stand, a lot of tears in a lot of unexpected places; because there's more victims in this case. There's Mary, his wife. I don't know about you. Mary's a victim.
> . . .
> [The love between defendant and his wife, Mary,] is strong [. . . .] But you know what breaks love? You know what's stronger than that

> love? The truth, the truth about what happens to innocent little girls. They both said that she looked at these girls almost as if she was their own mother. . . . And that's why she got on the stand and she told you the truth.
> ...
> She told you the pain that it has caused her, the pain that it has caused her entire family. And she -- I said in the last question I asked her as she was crying, she was sobbing here in front of you, saying "I wish," you know, 'I'm sorry, I wish.' I said, 'It's not your fault.' I said, 'You didn't cause this pain. The girls didn't cause this pain. [Alice] didn't cause this pain.' I said, 'Whose fault is all of this?' She couldn't even 'Him, him,' is what she said; because he's had many victims in his life, more than just the two girls.

At this point, defense counsel objected to what he perceived as the prosecution's reference to other crimes. The prosecutor argued to the court that he was simply making reference to other "emotional" victims of defendant's actions. The trial court allowed the prosecutor to clarify this point to the jury, at which point, the prosecutor then stated to the jury:

> There are multiple victims in this case. And no, Mr. Netterville, I'm not talking about physical victims; I'm talking about victims of suffering, victims of emotional abuse. There are only two women in this room that we know of that he has physically abused.

Defense counsel again objected on the grounds that the prosecutor was implying to the jury that defendant had physically abused other victims. The trial court sustained defense counsel's objection. At a bench conference which immediately followed, defense counsel argued that the prosecutor's reference to other crimes was impermissible and moved for a mistrial. The trial court denied defense counsel's motion for mistrial, stating:

> I don't think that the statement that 'there are no other victims that we know of' says that there are other victims out there. In fact, it says we don't know. And I'm going to make -- I will do an instruction to the jury that there is no evidence of other victims and they are not to consider that. And I think that his argument was, if I understood it correctly, that there are other victims in the family. . . . Any emotional victims. . . . Not victims of sexual abuse. So I'll ask that [the prosecutor] clarify that.

The trial court then instructed the jury that it was to disregard the prosecutor's statement "that there are other victims that we know of" and allowed the prosecutor to continue his rebuttal argument. In the portion of his rebuttal argument that followed, the prosecutor explained to the jury, "there are victims that we do know of. . . . there's Mary . . . . There's [Carl], a hard working father, [and . . . Alice, who is] also another victim in this case."[16]

La. C.Cr.P. art. 775 provides for a mistrial if prejudicial conduct inside or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized under La. C.Cr.P. arts. 770 or 771.[17] A mistrial under La. C.Cr.P. art. 775 is discretionary and is warranted only when trial error results in substantial prejudice to the defendant depriving him of a reasonable expectation of a fair trial. *State v. Davis,* 07-544 (La. App. 5 Cir. 12/27/07), 975 So.2d 60, 68, *writ denied,* 08-380 (La. 9/19/08), 992 So.2d 952.

La. C.Cr.P. art. 770 provides in pertinent part that:

> Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during trial or in argument, refers directly or indirectly to:
>
> ...
>
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible.
>
> ...
>
> An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish

---

[16] In the omitted portion of this quote, the prosecutor explained how each of these individuals was victimized by defendant's actions against Janet and Nicole.

[17] Under La. C.Cr.P. art. 771, a mistrial is discretionary when a comment is made by, *inter alia,* a district attorney that might prejudice the defendant when that comment is outside of the scope of La. C.Cr.P. art. 770. Article 771 gives the trial court the option to either admonish the jury, upon motion of the defendant, or, if an admonition does not appear sufficient, to declare a mistrial. *State v. Johnson,* 10–209 (La. App. 5 Cir. 10/12/10), 52 So.3d 110, 124, *writ denied,* 10–2546 (La. 4/1/11), 60 So.3d 1248. A mistrial should be granted under Article 771 only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. *State v. Thomas,* 08-390 (La. App. 5 Cir. 1/27/09), 8 So.3d 80, 86-87, *writ denied,* 09-626 (La. 11/25/09), 22 So.3d 170; *State v. Pierce,* 11-320 (La. App. 5 Cir. 12/29/11), 80 So.3d 1267, 1271-72.

the jury to disregard the remark or comment but shall not declare a mistrial.

A mistrial is a drastic remedy and is warranted only when trial error results in substantial prejudice to a defendant that deprives him of a reasonable expectation of a fair trial. Whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed absent an abuse of discretion. *State v. Lagarde,* 07-123 (La. App. 5 Cir. 5/29/07), 960 So.2d 1105, 1113-14, *writ denied,* 07–1650 (La. 5/9/08), 980 So.2d 684.

Louisiana Code of Criminal Procedure article 770, subsection 2, is not applicable unless the inference clearly constitutes a comment on other crimes committed or alleged to have been committed by the defendant. *State v. Rhodes*, 95-54, p. 4 (La. App. 5 Cir. 6/28/95), 657 So.2d 1373, 1376-77, *writ denied*, 95-2265 (La. 3/14/97), 690 So.2d 28. Here, there was no distinct or recognizable reference to any other crime. After examining the prosecutor's remarks in context, it is clear that he referenced the emotional victims in the family and not other sexual abuse victims. See *Rhodes*, 657 So.2d at 1377; and *State v. Blueford*, 48,823, 2014WL880367, at 6-7 (La. App. 2 Cir. 3/5/14). The prosecutor's comment was not a reference to other crimes but merely misspoken words regarding defendant's emotional victimization of the family that were corrected. The prosecutor's comment was explained and corrected, and did not contribute to the jury finding defendant guilty. *State v. Daniels*, 01-545 (La. App. 5 Cir. 11/27/01), 803 So.2d 157, 166, *writ denied, sub. nom State ex rel. Daniels v. State*, 02-215 (La. App. 5 Cir. 11/27/02), 831 So.2d 272. We find that the trial court did not abuse its discretion in denying defendant's motion for a mistrial on this ground. *See State v. Chairs,* 12-363 (La. App. 5 Cir. 12/27/12), 106 So.3d 1232, 1244 *writ*

denied sub nom. State ex rel. Chairs v. State, 2013-0306 (La. 6/21/13), 118 So.3d 413. Accordingly, we find this assignment of error to be without merit.

ERRORS PATENT

We have reviewed the record for errors patent in conformity with La. C.Cr.P. art. 920; *State v. Oliveaux*, 312 So.2d 337 (La. 1975); and *State v. Weiland*, 566 So.2d 175 (La. App. 5 Cir. 1990). The record reflects two errors patent which require corrective action.

First, the record does not reflect that defendant was notified of Louisiana's sex offender registration requirements in accordance with La. R.S. 15:540, *et seq.* Defendant was convicted of aggravated rape upon Nicole, committed between December 13, 1991, and December 12, 1997; attempted aggravated rape upon Janet, committed between November 20, 1992, and November 19, 1998; molestation of a juvenile upon Nicole committed between December 13, 1991, and May 17, 1999; molestation of a juvenile upon Janet, committed between November 20, 1992, and May 17, 1999; and aggravated oral sexual battery upon Janet, committed between November 20, 1992, and November 19, 1998. See La. R.S. 15:542(E).

La. R.S. 15:540, *et seq.,* requires registration of sex offenders and La. R.S. 15:543(A) requires the trial judge to provide written notification of the registration requirements of La. R.S. 15:542 and La. R.S. 15:542.1 to defendant. The trial court's failure to provide this notification constitutes an error patent and warrants a remand for written notification. *State v. Lampkin,* 12-391 (La. App. 5 Cir. 5/16/13), 119 So.3d 158, 168 *writ denied sub nom. State ex rel. Lampkin v. State*, 2013-2303 (La. 5/23/14), 140 So.3d 717 (citing *State* v. *Pierce,* 11-320 (La. App. 5 Cir. 12/29/11), 80 So.3d 1267, 1279-80). This is the case even where a life sentence has been imposed. *State v. Videau,* 13-520 (La. App. 5 Cir. 12/27/13),

131 So.3d 1070, 1089, (citing *State v. Williams*, 09-48 (La. App. 5 Cir. 10/27/09), 28 So.3d 357, 368-69, *writ denied,* 09-2565 (La. 5/7/10), 34 So.3d 860).

Accordingly, we remand the matter to the trial court for purposes of providing defendant with appropriate written notice of his sex offender notification and registration requirements, using the form contained in La. R.S. 15:543.1.

Second, the "State of Louisiana Uniform Commitment Order," incorrectly reflects the date of defendant's offenses as March 7, 2012. However, the record reflects that there were multiple offense dates between 1991 and 1999. The practice of this Court is to remand a case for correction of the Uniform Commitment Order in its error patent review when the Uniform Commitment Order is inconsistent with the minute entry and transcript. *See State v. Long*, 12-184 (La. App. 5 Cir. 12/11/12), 106 So.3d 1136, 1142. Accordingly, we remand this matter for correction of the Uniform Commitment Order error regarding the offense dates and further direct the Clerk of Court to transmit the original of the Uniform Commitment Order to the officer in charge of the institution to which defendant has been sentenced and the Department of Correction's Legal Department. *See Id.* (citing La. C.Cr.P. art. 892(B)(2); and *State ex rel. Roland v. State*, 06-224 (La. 9/15/06), 937 So.2d 846 (per curiam)).

CONCLUSION

For the reasons assigned, defendant's convictions and sentences are affirmed. The matter is remanded to the trial court for compliance with the instructions set forth in our errors patent review.

AFFIRMED; REMANDED WITH INSTRUCTIONS

Current with amendments received through January 1, 2014

UNIFORM APPLICATION FOR POST-CONVICTION RELIEF

Hai A. Duong
NAME OF PETITIONER

No. _____
(To be filled in by the clerk)

613130
PRISON NUMBER

TWENTY-FOURTH JUDICIAL DISTRICT

Louisiana State Penitentiary
PLACE OF CONFINEMENT

IN THE PARISH OF JEFFERSON
STATE OF LOUISIANA

VS.

N. BURL CAIN, Warden
Louisiana State Penitentiary

Please Serve CUSTODIAN and Paul D. Connick, Jr., DISTRICT ATTORNEY, TWENTY-FOURTH JUDICIAL DISTRICT, STATE OF LOUISIANA.

INSTRUCTIONS — READ CAREFULLY

(1) This application must be legibly written or typed, signed by the applicant and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for a criminal prosecution. All questions must be answered concisely in the proper space on the form. Additional pages are not permitted except with respect to the facts which you rely upon to support your claims for relief. No citation of authorities or legal arguments are necessary.

(2) Only one judgment may be challenged in a single application except that convictions on multiple counts of a single indictment or information may be challenged in one application.

(3) YOU MUST INCLUDE ALL CLAIMS FOR RELIEF AND ALL FACTS SUPPORTING SUCH CLAIMS IN THE APPLICATION.

(4) When the application is completed, the original must be mailed to the clerk of the district court in the parish where you were convicted and sentenced.

(5) You must attach a copy of the court order sentencing you to custody. You may obtain a copy of that order from the clerk of the district court of the parish where you were sentenced or from the institution where you are confined. If a copy of the court order is not attached, you must allege what steps were taken in an effort to obtain the order.

(6) Applications which do not conform to these instructions will be returned with a notation as to the deficiency.

APPENDIX
I

APPLICATION

1. Name and location of court which entered the judgment of conviction challenged: **Twenty-Fourth Judicial District Court, Government Building, 200 Derbigny Street, Gretna, LA 70434-1090.**

2. Date of judgment of conviction: **June 12, 2013.**

3. Length of sentence: **Count one life; count two 50 years; counts three and four 15 years; and count five ten years, all without the benefits of parole, probation or suspension of sentence.**

4. Nature of offense involved (all counts) **aggravated rape, attempted aggravated rape, two counts of molestation of a juvenile, and aggravated oral sexual battery.**

5. What was your plea? (check one)
   (A) Not guilty (X)
   (B) Guilty ( )
   (C) Not guilty and not guilty by reason of insanity ( )
   If you entered a guilty plea to one or more counts and not guilty to other counts, give details: **N/A.**

   (D) Name and address of the lawyer representing you at your plea (if you had no lawyer please indicate): **Bruce Netterville 929 4th Street Gretna LA 70053.**

   (E) Was the lawyer appointed ( ) or hired (X)? (check one)

6. Kind of trial: (check one)
   (A) Jury (X)
   (B) Judge only ( )

7. (A) Name and address of lawyer representing you at trial: **Bruce Netterville 929 4th Street Gretna LA 70053.**

   (B) Was the lawyer appointed ( ) or hired (X)? (check one)

8. Did you testify at trial? Yes ( ) No (X)

9. (A) Give the name and address of the lawyer who represented you at sentencing for the conviction being attacked herein: **Bruce Netterville 929 4th Street Gretna LA 70053.**

   (B) Was the lawyer appointed ( ) or hired (X)? (check one)

10. Did you appeal from the judgment of conviction? Yes (X) No ( )

11. If you did appeal, give the following information:
    (A) Citation, docket number, and date of written opinion by the Supreme Court or Court of Appeal (if known) **LA. Supreme Court Docket No. 2014-KO-1883. Ruling date April 17, 2015; Fifth Circuit Court of Appeal, #13-KA-0763, State v. Duong, 13-763, (La.App. 5 Cir. 8/8/14), 148 So.3d 623.**

    (B) Name and address of lawyer representing you on appeal: **Bruce Whittaker Attorney at Law 3801 Canal Street Suite 325 New Orleans LA 70119.**

    (C) Was the lawyer appointed (X) or hired ( )? (check one)

12. Other than direct appeal from the judgment of conviction and sentence, have you previously filed any application for post-conviction relief with respect to this judgment in any state or federal court? Yes ( ) No (X).

13. If your answer to 12 is "yes", give the following information:
    (A) (1) Name of court _____
    (2) Nature of proceeding _____
    (3) Claims raised: _____
    (4) Did you receive an evidentiary hearing on your application? Yes ( ) No ( )
    (5) Was relief Granted or denied? _____
    (6) Date of disposition: _____

///

(7) Citation of opinion (if known) _____
(8) Name and address of lawyer representing you: (if none, so state)
(9) Was the lawyer appointed ( ) or hired ( )? (check one)

(B) As to any second application give the same information:
(1) Name of court _____
(2) Nature of proceeding _____
(3) Claims raised: _____
(4) Did you receive an evidentiary hearing on your application? Yes ( ) No ( )
(5) Was relief Granted or denied? _____
(6) Date of disposition: _____
(7) Citation of opinion (if known) _____
(8) Name and address of lawyer representing you: (if none, so state)
_____
(9) Was the lawyer appointed ( ) or hired ( )? (check one)

(C) Have you filed any other applications for post-conviction relief with respect to challenged conviction? Yes ( ) No ( )

(D) Did you appeal or seek writs of review from the denial of any post-conviction application?
(1) First petition, etc. Yes ( ) No ( ).
(2) Second Petition, etc. Yes ( ) No ( ).

(E) If you did not appeal or seek writs from the denial of any post-conviction application, explain briefly why you did not: _____

(F) Name of the lawyer who represented you on appeal from the denial of any post-conviction application (if none, so state): _____
(1) First petition _____
(2) Second petition _____

CLAIMS FOR RELIEF

State concisely facts supporting your claim that you are being held unlawfully. If necessary, you may attach extra pages stating additional claims and supporting facts. Do not argue points of law.

For your information, the following is a list of the most frequently raised claims for relief in post-conviction applications. You may raise any claim which you may have other than those listed. However, YOU MUST RAISE IN THIS APPLICATION ALL AVAILABLE CLAIMS RELATING TO THIS CONVICTION.

(A) Denial of right of appeal.

(B) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(C) Conviction obtained by use of coerced confession.

(D) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(E) Conviction obtained by use of evidence pursuant to an unlawful arrest.

(F) Conviction obtained by a violation of the privilege against self-incrimination.

(G) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(H) Conviction obtained by a violation of the protection against double jeopardy.

(I) Conviction obtained by action of grand or petit jury which was unconstitutionally selected and impaneled.

(J) Denial of effective assistance of counsel.

A REMINDER: YOU MUST SET FORTH ALL OF YOUR COMPLAINTS ABOUT YOUR CONVICTION IN THIS APPLICATION. YOU MAY BE BARRED FROM PRESENTING ADDITIONAL CLAIMS AT A LATER DATE. Remember that you must state the FACTS upon which your complaints about your conviction are based. DO NOT JUST SET OUT CONCLUSIONS.

CLAIM I

Claim: **Hai's trial was rendered fundamentally unfair because he was denied the effective assistance of counsel, in violation of Article I, §§ 1, 2, 13, 16, and 22 of the Louisiana Constitution of 1974 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.**

(A) Supporting FACTS (tell your story briefly without citing cases or law): **Trial counsel failed to investigate the nature of the false allegations against Hai and also failed to mount a fabrication defense. Trial counsel also failed to impeach the state's witnesses. See original memorandum in support.**

(B) List names and addresses of witnesses who could testify in support of your claim. If you cannot do so, explain why: **Because of the nature of the charges, Hai will not list the names and addresses of the alleged victims and the family. But they are the witnesses who can testify to support this claim; Bruce Netterville 929 4th Street Gretna LA 70053.**

(C) If you failed to raise this ground in the trial court prior to conviction, on appeal, or in a prior application, explain why: **A claim of ineffective assistance is a claim best raised on an application for post-conviction relief.**

CLAIM II

Claim: **Hai's trial was rendered fundamentally unfair as a result of prosecutorial misconduct, in violation of Article I, §§ 1, 2, 3, 13, 16, and 22 of the Louisiana Constitution of 1974 and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.**

(A) Supporting FACTS (tell your story briefly without citing cases or law): **The state systematically excluded minorities from the jury without assigning any race neutral reasons as to why. The state also suppressed information revealing that Nicole ran away from home to be with her boyfriend. The state also suppressed the fact that the family of the allege victims did not believe the stories told by Nicole and Janet. The prosecutor threatened the family of Nicole and Janet to testify against Hai in this matter. The family told the state that they did not want to have anything to do this matter because they did not believe the lies told by the alleged victims. The state knew about Nicole's truancy, and chose to suppress this information. The state also suppressed the grand jury testimonies witnesses who testified differently at trial. See original memorandum in support.**

(B) List names and addresses of witnesses who could testify in support of your claim. If you cannot do so, explain why: **Because of the nature of the charges, Hai will not list the names and addresses of the alleged victims and the family. But they are the witnesses who can testify to support this claim; Bruce Netterville 929 4th Street Gretna LA 70053.**

(C) If you failed to raise this ground in the trial court prior to conviction, on appeal, or in a prior application, explain why: **This claim is best raised on an application for post-conviction relief because the full record is not available without an evidentiary hearing.**

A. Do you have in a state or federal court any petition or appeal now pending as to the judgment challenged? Yes ( ) No (X). If "yes", name the court. _____

B. Do you have any future sentence to serve after you complete the sentence imposed by the judgment challenged? Yes ( ) No (X).

(1) If so, give name and location of court which imposed sentence to be served in

the future: _____

(2) Give date and length of sentence to be served in the future: _____

(3) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No ( ).

C. If a copy of the court order sentencing you to custody is not attached, explain why. **Hai never received a copy of any of the record. He does not even have the court minutes.**

WHEREFORE, applicant prays that the Court grant applicant relief to which he may be entitled.

_____
Signature of Applicant

August 2015
Day / Month / Year

APPLICATION FOR APPOINTMENT OF COUNSEL

I am unable to employ counsel to represent me in this matter because I have no assets or funds except: **NONE.**
(Write "None" above if you have nothing; otherwise, list your assets including funds in prison accounts.)

_____
Signature of Applicant

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF **WEST FELICIANA**

Hai A. Duong, being first duly sworn says that he has
(Name of Applicant)
read the foregoing application for post-conviction relief and swears or affirms that all of the information therein is true and correct. He further swears or affirms that he is unable to employ counsel because he has no assets or funds which could be used to hire an attorney except as listed above.

_____
Signature of Applicant

SWORN TO AND SUBSCRIBED before me this ____ day of **August**, 2015 at Angola, Louisiana.

_____
Ex Officio Notary

115

IN THE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

NUMBER 12-1285, Div. "K"

HAI A. DUONG
Petitioner

Vs.

N. BURL CAIN, Warden
Louisiana State Penitentiary
Respondent

ORIGINAL MEMORANDUM IN SUPPORT OF APPLICATION FOR POST-CONVICTION RELIEF AND REQUEST FOR SUPPORTING DOCUMENTATION AND DISCOVERY

PREPARED BY AN OFFENDER COUNSEL SUBSTITUTE AT THE LOUISIANA STATE PENITENTIARY ON BEHALF OF HAI A DUONG PRO SE PETITIONER

TITLE XXXI-A
OF THE
LOUISIANA CODE OF CRIMINAL PROCEDURE

PETITIONER REQUESTS AN EVIDENTIARY HEARING

Respectfully submitted:

Hai A Duong
#613130, Cypress – 4
Louisiana State Penitentiary
Angola, LA 70712

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

State Cases

MAY IT PLEASE THE COURT:

NOW INTO COURT comes Petitioner, Hai A. Duong (hereinafter "Hai"), pro se, respectfully submitting the following in support of his Application for Post Conviction Relief, pursuant to Title XXX-1A, relative to Post-Conviction Relief Procedures,[1] requesting supporting documentation and discovery to demonstrate violations of Rights guaranteed by Article 1, § 2, 3, 13, 16, and 22, of the Louisiana Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by respectfully showing the following.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part that no person "shall be compelled in any criminal case to be a witness against himself."

The Sixth Amendment to the United States Constitution provides in pertinent that a criminal defendant cannot be deprived of his right "to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part, "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

In this memorandum in support of his application for post-conviction relief, Hai respectfully asserts that the Court shall grant relief when "[t]he conviction was obtained in violation of the Constitutions of the State of Louisiana and/or the United States."[2]

Because there are questions of fact that cannot be resolved on this record, an evidentiary hearing is warranted for the taking of testimony or other evidence.[3]

JURISDICTIONAL AND STATUTORY PROVISIONS

Jurisdiction is vested in this Honorable Court by virtue of Article V, § 16 of the Louisiana Constitution of 1974, as amended, which provides that the District Courts shall have original jurisdiction over all civil and criminal cases.

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[1] La. C.Cr.P. Art. 924 et. seq.
[2] La. C.Cr.P. Art. 930.3(1).
[3] La. C.Cr.P. Art. 930(A).

120

"An application for post conviction relief shall be by written petition addressed to the district court for the parish in which the petitioner was convicted."[4]

STATEMENT OF THE CASE

On June 21, 2012, Hai was formally charged by a five count indictment. On counts one and two, he was charged with aggravated rape. On counts three and four he was charged with molestation of a juvenile in violation. And on count five Hai was charged with aggravated oral sexual battery, all in violation of Louisiana law.[5]

On July 18, 2012, Hai entered a plea of not guilty at arraignment. A twelve-member jury was selected on June 10, 2013. The trial on the merits began on June 11, 2013, and continued until June 12, 2013, with the jury returning a verdict of guilty as charged on counts one, three, four and five. On count two, the jury found Hai guilty of the lesser charge of attempted aggravated rape.

Hai filed a motion for new trial on June 17, 2013. On June 18, 2013, Hai filed a motion to supplement the motion for new trial. The Court denied Hai's motion on June 24, 2013. After waiving sentencing delays, Hai was sentenced by the Court to imprisonment terms of: life on count one; 50 years on count two; 15 years each on counts three and four; and ten years on count five. These sentences were to be served at hard labor and concurrently without the benefit of probation, parole, or suspension of sentence.

Hai then made an oral motion for appeal, and filed a pro se written motion for appeal. The Court granted Hai's motion on June 25, 2013. Hai's conviction and sentenced was affirmed by the Fifth Circuit Court of Appeal on August 8, 2014.[6]

On September 4, 2014, Hai timely filed an application for writ of certiorari to the Louisiana Supreme Court, that was denied April 17, 2015. This original application for post-conviction relief with memorandum and request for supporting documentation and discovery timely follows.

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[4]La. C.Cr.P. Art. 925.
[5]See La. R.S. 14:42; La. R.S. 14:81.2; La. R.S. 14:34.4.
[6]State v. Duong, 13-763, (La.App. 5 Cir. 8/8/14) 148 So.3d 623.

121

STATEMENT OF THE FACTS

Hai adopts the Fifth Circuit Court of Appeal's statement:

> Preliminarily, for the ease of reading, we have given the victims and their parents fictitious names in the remainder of this opinion.[7] The victims, J.T. and N.T. will be called Janet and Nicole. The victims' parents, C.T. and A.T. will be called Carl and Alice.[8]

For further ease of reading, Hai's wife "M" will be called "Monica."

Carl testified that he was previously married to Alice.[9] Monica – Alice's sister – lived with the couple for a time.[10] Carl and Alice have three children together – Nicole, Janet, and a son.[11] Carl told the jury he is acquainted with Hai from his (Hai's) relationship with Monica, Carl's ex-wife's sister.[12] Carl and Alice divorced in 1995.[13] Their daughters, Nicole and Janet, stayed with their mother Alice, and visited Carl on the weekends.[14] When the girls were with Carl, the group would sometimes visit at Hai's house.[15] Sometimes, Hai would visit Carl's home when the girls were there.[16]

Carl trusted Hai around his children, and never saw him abuse his children in anyway. Janet or Nicole never told him about any alleged abuse – sexual or otherwise.[17] Even so, around 1999 Alice told Carl that Hai had sexually abused the girls.[18] After the allegations of abuse were made, Hai "disappeared."[19]

Monica testified that Hai is her husband.[20] They had been married twenty-three years as of the day of trial.[21] Monica identified Alice as her older sister.[22] Monica identified Carl as Alice's ex-husband.[23] In the late 1990's Monica worked part-time with

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[7]See La.Rev.Stat. Ann. § 46:1844(W)(3).
[8]State v. Duong, 13-763, (La.App. 5 Cir. 8/8/14) 148 So.3d 623, 626; La. R.S. 46:1844(W)(3).
[9]R. p. 191.
[10]R. p. 192.
[11]R. p. 192.
[12]R. p. 193.
[13]R. p. 196.
[14]R. p. 196.
[15]R. p. 196.
[16]R. p. 197.
[17]R. p. 199.
[18]R. p. 199.
[19]R. p. 199.
[20]R. pp. 255-257.
[21]R. p. 258.
[22]R. p. 258.
[23]R. p. 259.

122

her sister Alice at Alice's wig shop.[24] Carl worked by fixing cars.[25] Alice would drop her children off at Monica's house on Saturday mornings. Monica would babysit while Alice worked at her place of business.[26] At the time, Hai worked for an electrical company mostly Monday through Friday.[27]

Monica was questioned about a particular "day at the wig shop where [her] niece told [her] sister [Alice] some troubling information concerning [her] husband"[28] That "news" upset her.[29] As a result, Monica telephoned Hai, who drove to the wig shop where he was confronted by Alice.[30] Monica could not remember the specifics of what was said by the daughter that upset Alice so.[31]

The state was nonetheless able to ask Monica leading questions: "Do you remember telling your sister [Alice] on the phone that night that you spoke with your husband Hai and that he'd admitted to you that it was true what he did to those girls?"[32] Monica replied, "Okay. That time, at that time I don't know. I just kind of say that to my sister, just something - -"[33] Later, the state got Monica to say that Hai told her "[h]e had to leave because his brother - - my brother-in-law is threatening to kill him whenever he see him and that he was afraid that they're going to electrocute him."[34] Monica had no idea where Hai relocated to until ten years later.[35] At some point after leaving, Hai returned to draw out his retirement money.[36] Monica accompanied him to draw out his retirement money at work, and was told by Hai that he had been fired by his boss.[37]

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[24]R. pp. 259-260.
[25]R. p. 260.
[26]R. pp. 263-264.
[27]R. pp. 267-268.
[28]R. p. 272.
[29]R. p. 272.
[30]R. p. 272.
[31]R. p. 273.
[32]R. p. 278.
[33]R. p. 278.
[34]R. p. 287.
[35]R. pp. 289-290.
[36]R. p. 299.
[37]R. p. 291.

When Monica next learned of Hai's whereabouts, he was in New Mexico where he had suffered a heart attack.[38] Monica joined Hai in New Mexico, and traveled with him to Wyoming.[39] She later received a call from Hai after he was arrested, and learned he was wanted by law enforcement in Louisiana.[40] Monica testified that at no time did she observe anything wrong or inappropriate in Hai's behavior around Nicole and Janet.[41]

On re-direct, Monica told the jury that when she and Hai were out of state, he told her he wanted to go by the name "Henry Tony."[42] He told her it was to help him hide from the government who wished to speak to him about his nieces.[43]

Alice testified that Hai was formerly her brother-in-law.[44] She identified her three children by Carl as Nicole, Janet, and A.[45] Her sister Monica married Hai when she was about 19 years old.[46] Alice told the jury she used to bring her young children to Monica and Hai's home on Saturdays so she could be free to run her wig shop.[47] Alice said she left the children at Monica and Hai's home "pretty often."[48]

Alice said her daughter Nicole was rebellious, prompting her into a discussion with Nicole one day wherein Nicole exclaimed, "[w]ell, my problem is, you know, your brother-in-law, Hai, she - - he molested me since I was little....[a]nd raped."[49] Upon hearing Nicole's words, Alice "froze."[50] Nicole started crying and proceeded to tell Alice "everything."[51]

Nicole told her " it happened since they were four or five."[52] Alice later confronted her daughter Janet, who cried and told her, "[i]t happened to me, mom."[53]

[38]R. p. 296.
[39]R. p. 308.
[40]R. pp. 310-311.
[41]R. p. 322.
[42]R. p. 353.
[43]R. p. 354.
[44]R. p. 375.
[45]R. p. 376.
[46]R. p. 377.
[47]R. pp. 381-382.
[48]R. p. 383.
[49]R. p. 384.
[50]R. p. 384.
[51]R. p. 385.
[52]R. p. 386.
[53]R. p. 387.

Alice spoke to Monica on the phone and learned from her that she had spoken to Hai, and he allegedly told her "about everything, what happened to the children."[54] Alice consulted with her parents who instructed her to "keep it in the family."[55] However, the children spoke of the alleged abuse to the school authorities, the police, and medical staff at Children's Hospital.[56] From the date of the disclosure, Alice never saw Hai again until she took the stand to testify against him in trial.[57]

Detective Richard Broussard testified that in May of 1999, he participated in the investigation of the aggravated rapes of Nicole and Janet, resulting in Hai's arrest.[58] The girls were 12, and 13 years old at the time, and stated that over a seven or eight year period they had been "sexually molested by an uncle, both digital and penile."[59] Broussard met with the girls, as well as their mother.[60] Omalee Gordan conducted separate video-taped interviews with the two girls. The interviews were monitored by Broussard from a location separate of the girls.[61] Broussard explained, "[w]ell, Omalee puts on a earpiece. And I can talk into a mike, and she can hear me. And I can - - I can hear the interview. I can see the interview on the monitor."[62]

A videotape of the interviews were played for the jury in open court over trial counsel's objection.[63] Following the interviews, the girls were taken to Children's Hospital for medical examinations.[64] Broussard noted the last incident of alleged abuse occurred two months prior to disclosure.[65] As a result, he took no steps to secure the girls clothing, or other physical evidence from the alleged crime scenes.[66]

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[54]R. p. 387.
[55]R. p. 388.
[56]R. pp. 389-390.
[57]R. pp. 392-393.
[58]R. p. 422.
[59]R. p. 423.
[60]R. pp. 425-426.
[61]R. pp. 426-427.
[62]R. p. 426.
[63]R. pp. 361-371; R. pp 428-431.
[64]R. p. 431.
[65]R. p. 438.
[66]R. p. 438.

Broussard obtained an arrest warrant for Hai.[67] Hai was arrested on the warrant, and formally charged on March 12, 2012.[68]

Janet told the jury she was born November 20, 1986. She testified that she was 26 years old at the time of trial.[69] She knew Hai as the husband of her aunt Monica.[70] As a child, she was often left at Monica and Hai's home on Saturdays while her parents worked.[71] Janet nodded her head affirmatively in response to the state's leading questions indicating that Hai sexually abused her.[72] She then verbalized that Hai would "touch" her "above and under" her clothing, on her "chest and around my genitals."[73] According to Janet's testimony, the activity happened "multiple times."[74]

According to Janet, it specifically included Hai inserting his finger into her vagina.[75] At around the age of eleven, she stated that Hai put his penis inside her.[76] She also said that Hai put his mouth on her vagina at that age.[77] She further testified that Hai used a massager on her and showed her pornographic videos.[78] Janet stated that the activity, in one form or the other, started when she was five or six and persisted until she was eleven.[79] On cross-examination, Janet adamantly claimed that penile/vaginal intercourse occurred only once.[80]

Nicole told the jury that she was born December 13, 1985, and was twenty-seven years old at the time of trial.[81] Nicole testified that she remembered a time when she was seven years old, when her uncle Hai used a back massager on her "private part."[82] Nicole said the abuse progressed to Hai putting his penis in her vagina.[83] According to

[67]R. p. 434.
[68]R. p. 435.
[69]R. p. 474.
[70]R. p. 475.
[71]R. pp. 476-477.
[72]R. pp. 480-481.
[73]R. pp. 481-482.
[74]R. p. 482.
[75]R. p. 483.
[76]R. p. 484.
[77]R. p. 484.
[78]R. pp. 487-489.
[79]R. p. 489.
[80]R. p. 501.
[81]R. p. 520.
[82]R. pp. 521-522.
[83]R. p. 522.

Nicole, the penile/vaginal activity started when she was about eight and went on for "years."[84] She said that he also used his hands on her naked vagina.[85] Nicole testified that one particular incident of intercourse she recalled happened around the time of the Vietnamese New Year, a week before she turned eleven.[86] She said that Hai would show her pornographic videos of men and women engaging in sexual activity.[87]

Dr. Scott Benton testified as an expert in pediatric forensic medicine and child abuse. He told jury he examined Janet and Nicole on May 17, 1999.[88] Dr. Benton said Janet told him, her uncle "Hai Duong" "raped" her. He stated she meant, "[l]ike, the boy puts his thing in girl's private."[89] He also said Janet told him the last incident occurred in April of 1999.[90] Janet's physical exam was unremarkable.[91]

Dr. Benton also examined Nicole.[92] According to Dr. Benton, she also identified her uncle by "Hai Duong," and told him she "was molested when I was six; but when I turned 11, he started raping me."[93] By rape she meant "he put his private inside of me, inside of mine."[94] When pressed, Nicole specified his "penis" into her "vagina."[95] The last incident was two months prior to the examination by D. Benton.[96] The physical exam on Nicole revealed findings that were "consistent with rape."[97]

Hai testified on his own behalf. He told the jury he was 53 years of old at the time of trial.[98] His wife asked him if he "did something with his niece," and a short time later, he discovered that the police were looking for him. Hai said he was told if he lost his case he would die[99]. Hai said that fear got the best of him and caused him to leave

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[84]R. pp. 521-522.
[85]R. p. 523.
[86]R. p. 524.
[87]R. p. 526.
[88]R. pp. 549-551.
[89]R. p. 554.
[90]R. p. 555.
[91]R. pp. 558-559.
[92]R. p. 577.
[93]R. p. 578.
[94]R. p. 578.
[95]R. p. 578.
[96]R. p. 579.
[97]R. pp. 583-585.
[98]R. p. 599.
[99]R. pp. 602-604.

the area.[100] He told the jury he decided to quit his job, and move away for a while. Hai testified that he wanted to be in a better position to return and prove his innocence to his wife concerning his nieces.[101] Eventually, Hai was arrested in Wyoming, and extradited to face charges in Louisiana.[102] Hai emphatically denied any sexual activity with Nicole, and Janet, and insisted that the allegations were "absolutely" false.[103] This original memorandum in support of Hai's application for post-conviction relief with request for supporting documentation and discovery timely follows.

UNAVAILABILITY OF TRIAL RECORDS

Hai is not in possession of the trial record in this matter and is attempting to perfect his memorandum in support of his application for post-conviction relief from memory. After due consideration, Hai prays that this Honorable Court will grant him a copy of the record, or in the alternative, loan him a copy for 30 days for the purpose of further perfecting his memorandum in support of his application in order to protect his rights, and to fully and fairly present all of his constitutional claims before the Court so that it may make a just ruling in this matter.

In order to demonstrate that the errors set forth herein are not harmless requires addressing all the testimony presented at the hearings in the trial court. It is necessary for Hai to have the record to make the required showing in support of his claims. Otherwise he would be deprived of an adequate opportunity to present his claims fairly.

Under the particularized need doctrine,[104] Hai needs the grand jury transcript of every witness whose testimony contains exculpatory information. Hai needs these transcripts to adequately argue his ineffective assistance of counsel claim based on trial counsel's failure to impeach the state's witnesses, and his failure to investigate. Hai also needs these transcripts to adequately argue his prosecutorial misconduct claim based on the prosecutor allowing knowingly false testimony to be presented to the jury uncorrected.

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[100]R. pp. 602-604.
[101]R. p. 604.
[102]R. p. 613.
[103]R. pp. 613; 615-616; 638-639.
[104]See United States v. MacCollom, 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976).

Hai also needs the pretrial hearings associated with any and all motions filed by trial counsel and the state. Hai was severely prejudiced by the state being allowed to circumvent justice in order to obtain a tainted conviction.

Hai also needs the transcripts of voir dire examination where the state backstruck and/or excluded several minorities from the jury and trial counsel failed to object. The state eliminated several minorities from Hai's jury and did not give any race neutral reason as to why.

Finally, Hai needs the Court's ruling on post trial motions, and the sentencing transcript to assist him in seeking a non-frivolous collateral review in post-conviction relief proceedings. Hai asserts that only a "colorable need" be shown, and therefore he should be given the requested documents. Hai respectfully requests that this Honorable Court, after reviewing his show of particularized need, would grant the same and direct the Office of the Clerk and/or the Court Reporter to furnish him with the specific documentation requested so that he may fairly and adequately present his constitutional claims for review.

The Louisiana Supreme Court articulated a standard for indigent inmates to obtain free copies of documents of their criminal proceedings, provided they show a particularized need. A particularized need is defined as a showing that the suit for which the transcript is desired is not frivolous, and that the transcript is necessary to decide the issues presented.[105]

The Court held:

> In this case, relator has identified with factual specificity three constitutional claims he argues will entitle him to post conviction relief. Relator may therefore file an application which lacks any supporting documentation without fear of summary dismissal under La. C.Cr.P. art. 926(E). He may renew his request for documents in that application, and it will remain for the district court to determine in the first instance, subject to review, whether the documents are necessary to resolve relator's claims fairly under either (1) the provisions of La. C.Cr.P. art. 929, which allow the court to grant or deny relief summarily on the pleadings and/or relevant transcripts or other documents submitted by the parties or "available to the court," or (2) the provisions of La. C.Cr.P. art. 930,

[105]See State ex rel. Nash v. State, 604 So.2d 1054 (La. App. 1 Cir. 1992); U.S. v. MacCollom, 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976).

which allow for an evidentiary hearing at which the court may receive duly authenticated records, documents, or transcripts in addition to live testimony before ruling on the merits of the claims.[106]

In applying these principles to this case, Hai is alleging several factually meritorious claims that, if established, would entitle him to post-conviction relief. Specifically, Hai alleges that his trial was rendered fundamentally unfair through **ineffective assistance of counsel, prosecutorial misconduct.**

Hai has demonstrated a particularized need for supporting documentation and discovery by establishing – to the best of his ability – that his fact-allegations are not frivolous. He has presented a genuine and material factual dispute that cannot be resolved on the record. Accordingly, the specific records are needed to fairly present his fact-allegations for review, consideration, and resolution.

Hai is requesting the following documents to support his factual, and meritorious claims; the grand jury transcript of all testimonies that contain exculpatory information; a transcript of all pre-trial hearings; the jury voir dire; a complete copy of the trial transcript; and opening statements, and closing arguments of trial counsel and the prosecution.

Hai was never granted any of his records. He was represented by retained counsel during trial, and the Louisiana Appellate Project on direct review. Hai did not file a motion to supplement and therefore did not receive a free copy of the record in this matter. This also presents a challenge for Hai to go into specific details the lay out his claims before this Court properly.

LEGAL PRECEDENT

The State and Federal Constitutions mandate equal protection of law.[107] The equal protection of our State's Constitution was intended as a restatement of the federal Equal Protection Clause.[108]

In criminal trials, a State can no more discriminate on account of religion, race, creed or color. The U.S. Supreme Court opened the door to equal protection attacks on

[106]State ex rel. Bernard v. Criminal District Court, 653 So.2d 1174 (La. 1995).
[107]La. Const. Art. 1, § 3 (1974); United States Const. Amend. XIV.
[108]State v. Barton, 315 So.2d 289 (La. 1975); Pavel v. Pattison, 24 F.Supp. 915 (W.D.La. 1938).

procedures that are non-discriminatory on their face, but in effect confront the indigent with the illusion of a 'choice' in paying a fee he cannot afford or forfeiting an opportunity available to those who can pay.[109] The U.S. Supreme Court held that a state with an appellate system that makes trial transcripts available to those who could afford them was constitutionally required to provide a means of affording adequate and effective appellate review to indigent defendants.[110] The Court extended this principle to apply to indigents seeking state collateral proceedings.[111] The Court also said that "in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty."[112]

This principle is no less applicable when the state has afforded an indigent access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase at the state collateral review level solely because of his poverty.[113] The Court made it clear that these principles were not to be limited to direct appeals from criminal convictions, but as in Lane v. Brown, extended to state post-conviction proceedings.[114] Respecting the state's grant of a right to test their detention, the Court said that "it extends as far to each."[115] These decisions applies to Hai's case.

The Fourteenth Amendment guarantees Hai the constitutional right of access to state courts, and assures the indigent defendant an adequate opportunity to present his claims fairly.[116] Hai has demonstrated a colorable need for the above-referenced documents, and is entitled to them so that he may adequately present his claims to the Court in an orderly fashion with the assistance of a trained Offender Counsel Substitute. Hai's poverty is the only obstacle preventing him from acquiring the requested records, and his right to access should insure his non-frivolous, constitutional claims can be properly "tested on the same basis by the reviewing court" as is available for the rich.[117]

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[109]See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956).
[110]See Griffin, supra, 351 U.S., at 20.
[111]See Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963).
[112]See Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959).
[113]La. C.Cr.P. Art. 92; Burns, supra, 365 U.S., at 257.
[114]Smith v. Bennett, 365 U.S. 708, 89 S.Ct. 895, 6 L.Ed.2d 39 (1969).
[115]Smith v. Bennett, supra, 365 U.S., at 714.
[116]See Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).
[117]See Draper v. Washington, 372 U.S. 487, 499, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963).

However, if this Court find that Hai has failed to show a sufficient need, then he respectfully ask that the Court allow him to review the requested documents through Mrs. Trish Foster, Supervisor of the Legal Programs Department, Louisiana State Penitentiary, Angola, Louisiana 70712. She will assume responsibility for return of the records. In State ex rel. Lee v. Whitaker, the Louisiana Supreme Court granted a mandamus and ordered the District Court to furnish Lee with the Record to be reviewed through the Legal Programs Supervisor at the prison.[118]

ARGUMENT

Claim No. 1

Hai's trial was rendered fundamentally unfair because he was denied the effective assistance of counsel, in violation of Article I, §§ 1, 2, 13, 16, and 22 of the Louisiana Constitution of 1974 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

A criminal defendant's right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments "is indispensable to the fair administration of our adversarial system of criminal justice."[119]

The standard of review for a claim of ineffective assistance of counsel requires a reviewing court to reverse a conviction if the defendant establishes: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different.[120] This reasonable probability standard does not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome in the case.[121] While a reviewing court must examine the "totality of circumstances and the entire record" to assess counsel's performance, "[s]ometimes a single error is so substantial that it alone causes the attorney's performance to fall below the Sixth Amendment standard."[122]

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[118]See State ex rel. Lee v. Whitaker, 521 So.2d 1141 (La. 1988).
[119]Maine v. Moulton, 474 U.S. 159, 168, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985).
[120]Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
[121]Strickland v. Washington, 466 U.S., at 693, 104 S.Ct., at 2068.
[122]Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979).

Nicole's false allegations began after she told Hai about her getting into a vehicle with three unknown males. Hai asked Nicole about her well-being. He then questioned her about her behavior. After Nicole's open rebellion and pattern of sneaking away from her father's house was noticed, Nicole began telling lies about Hai molesting her, and her sister Janet, to take attention away from what she was doing.

The truth of the matter is, the charges that Hai are convicted of are false. Trial counsel failed to investigate the nature of these false allegations and thereby failed to mount a plausible defense. This claim, if established, would entitle Hai to post-conviction relief.

Hai's trial counsel failed to object during voir dire examination when the state systematically excluded minorities from the jury. The state did not give any race neutral reasons for the exclusions. Hai's trial counsel had a duty to object to the state's racial profiling of the jury.

Hai's trial counsel failed to investigate the circumstances surrounding Nicole's running away from home to be sexually involved with her boyfriend. Trial counsel also failed to mention that Nicole also had a history of running away from home. Hai told trial counsel that Nicole had asked him (Hai) was it okay for her to "have a boyfriend." Hai became concerned and asked Nicole why would she be interested in a boyfriend. Nicole told Hai that one night when she was walking to her cousins home, a van with three males stopped her. Nicole told Hai that although she was at first afraid, she got in the vehicle with them. Nicole told Hai that one of the three males eventually became her "boyfriend." After relating this story to Hai, Nicole began telling the lies that has caused an innocent man to lose his freedom.

On April 19, 1999, Nicole was arrested as a local runaway. Nicole had been running away since about March of the same year – this is at least the time when her absence began to be noticed by adults. When her actions caught up to her, Nicole began telling her "uncle Hai" stories, and recruited Janet for to the same. Nicole created lies about her uncle to cover up the fact that she was already sexually active, and she feared

that she would get in trouble. Hai's trial counsel failed to investigate this situation. Trial counsel should have mounted a fabrication defense because Hai is **actually innocent** of the crimes he has been convicted of.

Hai respectfully asserts that the transcripts and documents requested herein, and the complete court minutes for his case are vital to assist him in seeking a non-frivolous collateral review in post-conviction relief proceedings.

Claim No. 2

Hai's trial was rendered fundamentally unfair as a result of prosecutorial misconduct, in violation of Article I, §§ 1, 2, 3, 13, 16, and 22 of the Louisiana Constitution of 1974 and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The United States Supreme Court has several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials."[123] Unfortunately, from the moment Hai's trial began, the Assistant District Attorney revealed that his interest in the prosecution of this case was not that justice should be done, but that Hai be convicted at any cost – even if costs an innocent man his freedom.

Louisiana Code of Criminal Procedure Art. 776 provides that the state's opening statement "shall explain the nature of the charge, and set forth, in general terms, the nature of the **evidence** by which the state expects to prove the charge." Louisiana Code of Criminal Procedure Art. 774 "specifically commands that the argument 'shall not appeal to prejudice.'"[124]

"A district attorney should not harbor any personal feelings toward an accused that might, consciously or unconsciously, impair his ability to conduct the accused's trial fairly and impartially,"[125] because "[i]n our system of justice, we intrust vast discretion to the prosecutor in deciding which cases to pursue, whether to dismiss the charges, whether to offer a plea bargain, what any plea bargain will entail, and how the trial will be conducted."[126]

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[123] Banks v. Dretke, 540 U.S. 668, 696, 124 S.Ct. 1256, 1275, 157 L.Ed.2d 1166 (2004).
[124] State v. Stovall, 363 So.2d 658, 660 (La.1978).
[125] State v. King, 06-2383, (La. 4/27/07), 956 So.2d 562, 570.
[126] State v. King, 956 So.2d at 570; quoting In re Toups, 00-0634 (La. 11/28/00), 773 So.2d 709, 715.

It is also well established that "a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."[127] The rule forbidding the state's use of "false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."[128] This is because the "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life may depend.[129]

It does not matter if "'the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."'[130] Even if the "'district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing as it did, a trial that could in any real sense be termed fair."'[131] Consequently, Hai is entitled to a new trial "'if the false testimony could, in any reasonable likelihood have affected the judgment of the jury."'[132]

The state systematically excluded minorities from the jury without assigning any race neutral reasons as to why. The state also suppressed information revealing that Nicole ran away from home to be with her boyfriend.[133] This calls Hai's conviction into question. The state infringed on Hai's right to present a fabrication defense. The state also suppressed the fact that the family of the allege victims did not believe the stories

[127]Napue v. People of State of Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959).
[128]Napue, 360 U.S., at 269, 79 S.Ct., at 1177.
[129]Napue, 360 U.S., at 269, 79 S.Ct., at 1177.
[130]Napue, 360 U.S., at 269-270, 79 S.Ct. 1177; quoting People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y. S.2d 885, 887, 136 N.E.2d 853, 854- -855.
[131]Napue, 360 U.S., at 269-270, 79 S.Ct. 1177; quoting People v. Savvides, supra.
[132]Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); citing Napue v. People of State of Illinois, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (U.S. Ill. 1959).
[133]See Exhibit – A.

told by Nicole and Janet. The prosecutor threatened the family of Nicole and Janet to testify against Hai in this matter. The family told the state that they did not want to have anything to do this matter because they did not believe the lies told by the alleged victims. The state knew about Nicole's truancy, and chose to suppress this information. This claim, if established, would entitle Hai to post-conviction relief.

The grand jury testimonies of the state's witnesses is drastically different from their testimonies at trial. The family expressed to Hai that their personal testimonies were exculpatory in nature. However, the state suppressed this information as well.

LIBERAL CONSTRUCTION

As a pro se litigant, Hai's application for post-conviction relief should be liberally construed in the interest of justice.[134]

CONCLUSION

Hai has a made a colorable showing of the denial of several constitutional rights, however, there are questions of facts that cannot be properly resolved based upon the pleadings.[135] Due process requires that an evidentiary hearing be held so that the facts may be more fully developed.

Additionally, because Hai is the petitioner and the burden of proof is on him, Hai expressly reserves the right to traverse the state's Answer. This will ensure full and fair development of the issues presented herein and a just resolution of this case.

Respectfully submitted,

Hai A Duong
#613130, Cypress – 4
Louisiana State Penitentiary
Angola, LA 70712

[134]See State ex rel. Egana v. State, 00-2351, 771 So.2d 638 (La. 2000).
[135]See La. C.Cr.P. Art. 930.2; La. C.Cr.P. Art 930.

AFFIDAVIT/CERTIFICATE OF SERVICE

I, Hai A. Duong, do hereby affirm and certify that the foregoing is true and correct to the best of my knowledge and belief, and has been served upon:

Opposing Counsel:

Paul D. Connick, Jr.
District Attorney
200 Derbigny Street, 5th Floor
Gretna, LA 70053-5850

by placing a copy of same in a properly addressed envelope into the hands of the Classification Officer assigned to my unit along with a Withdrawal form made out to the General Fund, LSP, Angola, LA 70712 for the cost of postage and a properly filled out Inmate's Request for Indigent/Legal Mail form, receiving receipt for same in accordance with the institution's rules and procedures for the sending of legal mail.

Done this _____ day of _____, 2015.

_____
Hai A Duong

HAI A. DUONG

VERSUS

N. BURL CAIN, Warden
Louisiana State Penitentiary

24TH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

DOCKET NO.: 12-1285, DIV. "K"

FILED: _____ DEPUTY CLERK _____

MOTION FOR PRODUCTION OF DOCUMENTS UNDER PARTICULARIZED NEED

Because of his incarceration, Duong is indigent and without means to purchase the documents requested in his Memorandum in Support of his Application for Post-Conviction Relief.[1] These records are necessary so that Duong may further substantiate and develop his claims before this Court, as Duong has met the requisite showing of particularized need via the claims outlined in his Application for Post Conviction Relief and Memorandum in Support.

In State ex rel. Bernard v. Orleans Criminal District Court J,[2] the Louisiana Supreme Court held that an indigent inmate has a constitutional right to free copies of documents to which the inmate is not entitled to as of right only in those instances where the inmate shows that the denial of the request will deprive the inmate of an adequate opportunity to present his claims fairly. Meeting that constitutional threshold requires a showing of what has been called "particularized need."[3]

Access to courts for prison inmates entails not only freedom to file pleadings, but also freedom to employ those accessories without which legal claims cannot be effectively asserted.

In this instance, Duong is relying on a prison system that experiments with a law library and trained Offender Counsel Substitutes. However, because the prison's Offender

[1]See Memorandum in Support, pp. .
[2]State ex rel. Bernard v. Orleans Criminal District Court J, 94-2247, (La.4/28/95), 653 So.2d 1174
[3]See, United States v. MacCollom, 426 U.S. 317, 324, 96 S.Ct. 2086, 2091, 48 L.Ed.2d 666 (1976) (quoting Ross v. Moffin, 417 U.S. 600, 616, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974).

APPENDIX
J

Counsel Substitutes were not at Duong's trial, their impediment of an unavailable trial record and Duong's reliability on his memory severely disadvantages them to help Duong prepare an Application for Post Conviction Relief. In this case, it is more likely than not, Duong will not have an adequate collateral review unless, this Court will aid him.

The Louisiana Supreme Court has judiciously determined that, "One of the goals of Louisiana's system of justice is to provide both the accused and the state fair and prompt trials, appeals, **and further proceedings to correct error.**"[4]

WHEREFORE, Duong prays that after a thorough review of his Application for Post Conviction Relief and Memorandum in Support that this Honorable Court will order that he be provided a free copy of the trial record so that he may more fully develop and present his claims before the Court.

Respectfully submitted this _____ day of August, 2015.

Hai A Duong
#613130, Cypress – 4
Louisiana State Penitentiary
Angola, LA 70712

[4]State ex rel. Glover v. State, 93-2330, (La.9/5/95), 660 So.2d 1189.

HAI A. DUONG

VERSUS

N. BURL CAIN, Warden
Louisiana State Penitentiary

24TH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

DOCKET NO.: 12-1285, DIV. "K"

FILED: _____ DEPUTY CLERK _____

ORDER

THE ABOVE AND FOREGOING MOTION CONSIDERED:

IT IS HEREBY ORDERED that, the Clerk of Court and/or Court Reporter furnish Hai A. Duong a free copy of the grand jury transcripts of the testimonies of individuals whose testimony contains exculpatory information and/or contradicts their trial testimonies; transcripts of all pretrial hearings and discovery including police reports; the voir dire examination transcripts; the Court's rulings on post-trial motions; and the sentencing transcript by forwarding the same to Hai A. Duong, 613130, Cypress – 4, Louisiana State Penitentiary, Angola, LA 70712.

IT IS HEREBY ORDERED that Petitioner's Application for Post Conviction Relief and Memorandum in Support is due _____ days after receipt of the trial record in this matter, or no later than allowed by equitable tolling.

Gretna, Louisiana this _____ day of _____, 2015.

_____

JUDGE – TWENTY-FOURTH JUDICIAL DISTRICT COURT

140

HAI A. DUONG

VERSUS

N. BURL CAIN, Warden
Louisiana State Penitentiary

24TH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

DOCKET NO.: 12-1285, DIV. "K"

FILED: _____ DEPUTY CLERK _____

MOTION FOR PRODUCTION OF THE DISTRICT ATTORNEY'S FILES

MAY IT PLEASE THE COURT:

NOW INTO COURT comes Hai A. Duong, (hereinafter "Duong"), respectfully requesting this Honorable Court to issue an **order** directing the Jefferson Parish District Attorney's Office to provide him with **free copies** of the **public records** in his possession and custody surrounding Duong's **arrest**, **prosecution**, and **conviction**. This will allow Duong to **fairly** and **adequately** litigate his factually meritorious claims presented in his application for post-conviction relief with memorandum in support.[1] Duong respectfully shows the following:

Duong is serving concurrent imprisonment terms of life without benefits; 50 years; 15 years; and ten years.[2] Duong's conviction and sentence became **final** on July 16, 2015, after the Louisiana Supreme Court denied certiorari.

Duong's **first** application for post-conviction relief with memorandum in support is currently pending before this Honorable Court. In it he alleges **several** factually meritorious claims that set forth **contested facts** with real credibility issues that, if resolved in Duong's favor, would entitle him to relief.

Specifically, Duong alleged that his trial was rendered fundamentally unfair as a result of prosecutorial misconduct when the prosecutor appealed to the sympathy, passion, and prejudice of the jury in his opening statement. The prosecutor also went

[1]See La. R.S. 44:31.1.

[2]Duong was convicted for violations of La. R.S. 14:42; La. R.S. 14:81.2; La. R.S. 14:34.4. The 50 year sentence is modified for attempted aggravated rape.

141

beyond the scope of an opening statement by giving commentary and his personal opinion. The prosecutor mischaracterized and misstated the law, facts, and the evidence to the jury throughout the trial. The prosecutor also allowed knowingly false testimony go to the jury without correcting it. [3]

With respect to the factual and meritorious allegations contained herein, and also briefed in the memorandum in support of Duong's application for post-conviction relief – there is good cause for requesting free copies of the public records from the District Attorney's Office to resolve these factual disputes. Duong has the right to request and obtain **free** copies of the **public records** surrounding the **investigation**, **arrest**, and **prosecution** in this case in order to ***fairly*** and ***adequately*** litigate his claims.[4]

Duong maintains that a **full disclosure** of the requested **public records** would provide him with a meaningful opportunity to ***resolve*** his genuine, material, and factual disputes that will ultimately lead to a just determination of his claims.

CONCLUSION

Duong has made a sufficient showing of a **particularized need** for the requested **public records** by demonstrating that a genuine and material factual dispute exists on the constitutional claims outlined herein, and briefed in his original application for post-conviction relief with memorandum in support.

Finally, Duong respectfully requests that this Honorable Court direct the Jefferson Parish District Attorney's Office to provide him with **free** copies of **public records** of the **investigation**, **arrest**, and **prosecution** associated with this case.

Respectfully submitted

Hai A Duong
#613130, Cypress – 4
Louisiana State Penitentiary
Angola, LA 70712

[3]See Memorandum in Support, pp. .
[4]See La. R.S. 44:31.1; Landis v. Moreau, 779 So.2d 691 (La. 2001); State ex rel. Leonard v. State, 695 So.2d 1325 (La. 1997); State ex rel. Bernard v. Criminal District Court, 653 So.2d 1174 (La. 1995); State ex rel. Tassin v. Whitley, 602 So.2d 721 (La. 1992); State v. Jean, 847 So.2d 780 (La. App. 3 Cir. 2003).

142

HAI A. DUONG	24TH JUDICIAL DISTRICT COURT
VERSUS	PARISH OF JEFFERSON
N. BURL CAIN, Warden Louisiana State Penitentiary	STATE OF LOUISIANA
	DOCKET NO.: 12-1285, DIV. "K"
_____	_____
FILED:	DEPUTY CLERK

ORDER/SHOW CAUSE

Based on the foregoing **"Motion for Production of the District Attorney's Files:"**

IT IS HEREBY ORDERED that the Office of the District Attorney in and for the Parish of Jefferson provide Hai A. Duong copies of the public records of the **investigation**, **arrest**, and **prosecution** in this case within thirty (30) days, or show cause on the ___ day of _____, 2015, at ___ o'clock __.m., and show cause why your office should **not** provide copies.

IT IS HEREBY ORDERED that if the Office of the District Attorney in and for the Parish of Jefferson **does not** comply with this order within thirty (30), or appear before this Honorable Court on the ___ day of _____, 2015, at ___ o'clock __.m., and show cause why the District Attorney's Office did not comply with this order.

IT IS FURTHER ORDERED that N. Burl Cain, Warden, Louisiana State Penitentiary, Angola, Louisiana produce the body of Hai A Duong, 613130, before this Honorable Court on the ___ day of _____, 2015, at ___ o'clock __.m.

Done and signed in chambers this ___ day of _____, 2015.

_____

JUDGE – TWENTY-FOURTH JUDICIAL DISTRICT COURT