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App.1a

APPENDIX A
UNITED STATES COURT OF APPEALS, FIFTH
CIRCUIT ORDER NO. 04-30950, CERTIFICATE OF
APPEALABILITY (COA), DENIED,
DATED: MARCH 17, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RONNIE M. LYLES,

Petitioner-Appellant,

v.

JAMES D. MILLER, Warden,

Respondent-Appellee.

No. 04-30950
USDC No. 2:03-CV-2948-K

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

Before: W. Eugene DAVIS, United States Circuit Judge

Ronnie M. Lyles, Louisiana prisoner #102175, was convicted by a jury of two counts of indecent behavior with a juvenile and, because he was a fourth felony offender, he was sentenced to a total of 20 years in prison. Lyles filed an application under 28 U.S.C. § 2254 challenging the 2003 state court conviction. Lyles moves this court for a certificate of appealability

(COA) to appeal the district court's dismissal, without prejudice, of his 28 U.S.C. § 2254 application for failure to exhaust his state remedies.

A COA may be issued only if the movant makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). When, as here, a district court dismisses a 28 U.S.C. § 2254 application on procedural grounds, a COA may not issue unless the prisoner shows that "jurists of reason would find it debatable whether the petition 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." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Lyles has not shown that jurists of reason would debate the district court's dismissal, without prejudice, of his application for failure to exhaust his state remedies. *See id.* Accordingly, his motion for a COA is DENIED. Lyles's motion for appointment of counsel is also DENIED.

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX B
UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA REPORT
AND RECOMMENDATION NO. 03-2948, 28 U.S.C.
§ 2254 WRIT OF HABEAS CORPUS, DENIED,
DATED: MARCH 16, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE M. LYLES,

v.

JAMES D. MILLER, Warden,

Civil Action No. 03-2948
Section "K" (6)

Before: Louis MOORE, JR.,
United States Magistrate Judge

This matter was referred to the United States Magistrate Judge for the purpose of conducting hearings, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition 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. For the reasons set forth below, it is recommended that the instant petition be DISMISSED

WITHOUT PREJUDICE for failure to exhaust state court remedies.

In this petition, RONNIE M. LYLES, seeks relief from his March 15, 2000 state court conviction for two counts of indecent behavior with a juvenile, in violation of LSA-R.S. 14:81. (State Rec. Vol. 2 at p. 15). Lyles was sentenced as a fourth felony offender to a term of twenty years on count one and to a term of 6 years on count two, each sentence to run concurrent. (State Rec. Vol. 2 at p. 104 and State Rec. Vol. 3 at 304.) In his federal petition for a writ of *habeas corpus*, Lyles raises eight claims for relief: 1) malicious prosecution and abuse of process, 2) denial of the right to compulsory process, 3) denial of the right to testify in his own defense, 4) denial of due process and/or equal protection as a result of the withholding of exculpatory/impeaching evidence, 5) ineffective assistance of trial counsel, 6) ineffective assistance of appellate counsel, 7) denial of due process when the state appellate court denied petitioner relief based upon an incomplete court record, and, 8) double jeopardy.¹

The Court does not reach the merits of petitioner's *habeas* application since the petitioner has failed to exhaust his available state court remedies. 28 U.S.C. § 2254; *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982); *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); *Serio v. Members of the Louisiana Board of Pardons*, 821 F.2d

¹ The court has attempted to summarize the claims raised by Lyles. However, petitioner's claims are somewhat intertwined and/or confused. Reference should be made to pages 6-22 of Lyles' brief attached to his form habeas petition.

1112, 1117 (5th Cir. 1987). Generally, the exhaustion requirement is satisfied only when the grounds urged in a federal petition were previously presented to the state's highest court in a procedurally proper manner. *Dupuy v. Butler*, 837 F.2d 699, 702 (5th Cir. 1988). Petitioner must show that each of his federal claims have been fully exhausted in the state courts in that the state courts have had an "opportunity to pass upon and correct" alleged violations of its prisoner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971) (citation omitted)).

A review of the state court record in petitioner's case reveals that Lyles took a direct appeal of his conviction and sentence, raising ten assignments of error.² After the state appellate court affirmed Lyles' conviction and sentence on direct appeal on September 16, 2003, however, Lyles failed to file a request for writ of certiorari with the Louisiana Supreme Court. His only filing with the highest state court was filed on September 10, 2003, and was a request for that court to review the lower appellate court's ruling on a complaint of an ethical violation by his attorney.³

² See State Rec. Vol. 1, Tab 1 for a copy of the decision of the Louisiana Fifth Circuit relative to petitioner's direct appeal. See also, Original Brief on Behalf of Appellant Ronnie M. Lyles at State Rec. Vol. 3 at p. 347-372, and Pro Se Supplemental Memorandum on Behalf of Appellant Ronnie M. Lyles, State Rec. Vol. 3 at 340-343.

³ See Louisiana Supreme Court Docket No. 2003-KH-2523. A staff member of this Magistrate Judge contacted the Louisiana Supreme Court and confirmed that the only writ application filed with that court relative to Lyles' 2000 conviction was Writ No. 2003-KH-2523.

Having failed to raise the claims which he seeks to adjudicate in this court before the highest state court, petitioner has failed to exhaust his state court remedies as required by *Rose*, 455 U.S. at 510, 102 S.Ct. at 1199 and 28 U.S.C. § 2254 (b)(1)(A). This Court must therefore dismiss the petition of Ronnie M. Lyles for failure to exhaust state court remedies.⁴

Recommendation

It is therefore RECOMMENDED that the petition of Ronnie M. Lyles for issuance of a writ of *habeas corpus* under 28 U.S.C. § 2254 be DISMISSED WITHOUT PREJUDICE for failure to exhaust state court remedies.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 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 Services Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996).

New Orleans, Louisiana, this 16th day of March, 2004.

/s/ Louis Moore, Jr.
United States Magistrate Judge

⁴ Since Lyles' petition became final 30 days after the Louisiana Fifth Circuit Court of Appeal's ruling on direct appeal, or on October 16, 2003, Lyles' one year federal limitations period had not yet expired. *See* 28 U.S.C. 2244(d)(1) and (2).

APPENDIX B1
UNITED STATES DISTRICT COURT, EASTERN
DISTRICT OF LOUISIANA ORDER NO. 03-2948,
MOTION FOR TERMINATION OF
PROSECUTION, DENIED,
MARCH 16, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE M. LYLES,

v.

JAMES D. MILLER, Warden,

Civil Action No. 03-2948
Section "K" (6)

Before: Louis MOORE, JR.,
United States Magistrate Judge

Before the court is petitioner, Ronnie M. Lyles' "Motion for Termination of Prosecution In Support of Petitioner's Objection In Opposition to the State's Response In Opposition to Granting Writ of Habeas Corpus" (Rec. Doc. 8).

The court this date recommended that Lyles' federal habeas petition be DISMISSED for failure to exhaust state court remedies. Accordingly, his motion is DENIED.

/s/ Louis Moore, Jr.
United States Magistrate Judge

APPENDIX B2
UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
ORDER NO. 03-2948, APPROVAL AND ADOPTION
OF THE U.S. MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION, DENIED,
DATED: JULY 20, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE M. LYLES,

v.

JAMES D. MILLER, Warden,

Civil Action No. 03-2948
Section "K" (6)

Before: Stanwood R. DUVAL, JR.,
United States District Court Judge

The Court, after considering the complaint, the record, the applicable law, the Report and Recommendation of the United States Magistrate Judge and petitioner's objections filed on March 31, 2004, hereby approves the Report and Recommendation of the United States Magistrate Judge and adopts it as its opinion in this matter.

Pursuant to 28 U.S.C. § 636(b)(1), the Court has made a de novo review of those portions of the report

and recommendations to which objection is made. Petitioner specifically objects to the Magistrate Judge's recommendation that his *habeas* application be dismissed, because "petitioner has failed to exhaust his available state court remedies." (Rec. Doc. No. 10) (citing 28 U.S.C. § 2254; *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982); *Preiser v. Rogriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); *Serio v. Members of the Louisiana Board of Pardons*, 821 F.2d 1112, 1117 (5th Cir. 1987). Petitioner notes that federal courts may dispense with the exhaustion requirement in rare and exceptional circumstances, *e.g.*, where further state litigation would be futile (*citing Doctor v. Walters*, 96 F.3d 675, 681-82 (3d Cir. 1996); *Granberry v. Greer*, 481 U.S. 129, 135-36 (1987)). Those cases are inapposite, however, because petitioner's unexhausted claims are not procedurally barred, and because it would not serve the interests of comity and federalism to circumvent the exhaustion requirement under these unexceptional circumstances.

Petitioner also contends that federal courts may dispense with the exhaustion requirement because of delay on the part of the state, or manifest injustice to the petitioner (*citing Brooks v. Jones*, 875 F.2d 30, 31-32 (2d Cir. 1989)), or in the absence of an available state corrective process. (Rec. Doc. No. 10, at 2). Petitioner concludes that the exhaustion requirement should be waived and habeas relief granted, because his case "involves unusual, rare, and exceptional circumstances of peculiar urgency" *Id.* This Court disagrees. Petitioner has not exhausted available state court remedies, and pursuit of those remedies would not result in futility, delay, or manifest injustice. Fur-

ther, petitioner's written objections do not reveal the kind of exceptional circumstances warranting circumvention of the exhaustion requirement. Accordingly,

IT IS ORDERED that the petition of Ronnie M. Lyles for federal *habeas corpus* relief be DISMISSED WITHOUT PREJUDICE.

New Orleans, Louisiana, this 20th day of July, 2004.

/s/ Stanwood R. Duval, Jr.
United States District Court Judge

APPENDIX B3
UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA
JUDGMENT NO. 03-2948, U.S. DISTRICT
JUDGE'S DECREE, DENIED,
DATED: SEPTEMBER 21, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE M. LYLES,

v.

JAMES D. MILLER, Warden,

Civil Action No. 03-2948
Section "K" (6)

Before: Stanwood R. DUVAL, JR.,
United States District Judge

Considering the order on July 22, 2004,

IT IS ORDERED, ADJUDGED, AND DECREED
that the petition of Ronnie M. Lyles for federal habeas
corpus relief is DISMISSED WITHOUT PREJUDICE.

New Orleans, Louisiana, this 20th day of Sep-
tember, 2004.

/s/ Stanwood R. Duval, Jr.
United States District Judge

APPENDIX B4
UNITED STATES DISTRICT COURT, EASTERN
DISTRICT OF LOUISIANA ORDER NO. 03-2948,
CERTIFICATE APPEALABILITY, DENIED,
DATED: SEPTEMBER 30, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE M. LYLES #102175

v.

JAMES D. MILLER

Civil Action No. 03-2948 Section "K" (6)

A notice of appeal having been filed in the captioned habeas corpus case, in which the detention complained of arises out of process issued by a state court, the court, considering the record in the case and the requirement of FRAP 22(b), hereby orders that:

- a certificate of appealability shall not be issued for the following reason(s):

There is absolutely no showing of the denial of a constitutional right. The Petitioner did not exhaust his State remedies.

/s/

United States District Judge

Date: September 30, 2004

APPENDIX B5
24TH JD-ASSISTANT DISTRICT
ATTORNEY'S RESPONSE IN OPPOSITION TO
GRANTING WRIT OF HABEAS CORPUS,
DATED: DECEMBER 5, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE M. LYLES #102175

v.

JAMES D. MILLER (Warden)

Civil Action No. 03-2948 Section "K" (6)

Statement of the Case

Petitioner, Ronnie M. Lyles, is a state court prisoner currently incarcerated at the Washington Correctional Institution in Angie, Louisiana.

The petitioner was charged by bill of information on September 20, 2000 with two counts of indecent behavior with a juvenile in violation of LSA-R.S. 14:81. (Vol. 2, pp. 28-29). Petitioner entered a plea of not guilty and filed various pre-trial motions, and the omnibus motions were satisfied as of October 30, 2000. (Vol. 2, pp. 3, 5). On March 12, 2000, the petitioner filed a Motion to Sever Offenses and filed a Motion to Quash the Indictment two days later. (Vol. 2, pp. 48, 49). On March 14, 2000, the trial court

denied both motions; the trial court also denied Petitioner's two oral motions in limine to exclude or limit the testimony of two state witnesses and an oral motion to allow the jury to hear both the bill of information and the amended bill of information. (Vol. 2, pp. 13). After the motions were denied on that date, trial by jury commenced. (Vol. 2, pp. 13-14). On March 15, 2000, the jury returned a verdict of guilty as charged as to both counts. (Vol. 2, pp. 15).

Thereafter, on April 10, 2000, Petitioner filed a Motion For New Trial, and the State filed a multiple offender bill of information. (Vol. 2, pp. 65-66, 67-68). After an evidentiary hearing with witness testimony on May 9, 2001, the trial court denied the Motion for New Trial and sentenced the petitioner to serve six years at hard labor on each count, concurrent. (R., Vol. 3, pp. 266-304). Petitioner entered a plea of not guilty to the multiple bill of information on May 9, 2001 and subsequently filed objections and a written motion for discovery relative to the multiple bill on May 24, 2001. (Vol. 2, pp. 17, 72-73, 74-75). Thereafter, supplemental objections to the multiple offender bill of information were filed on July 9, 2001, and a memorandum in support of the objections was filed on October 10, 2001. (Vol. 2, pp. 82-84; 87-90). A hearing on the multiple bill was conducted on October 11, 2001, and the trial court took the matter under advisement. (Vol. 3, pp. 308-334).

On December 10, 2001, Petitioner filed a supplemental memorandum in support of the objections to the multiple offender bill of information, and he filed a second supplemental memorandum on January 14, 2002. (Vol. 2, pp. 91-93, 96-97). Subsequently, on July 10, 2002, the trial court found Petitioner to be a

fourth felony offender, vacated the previously imposed sentence as to count one, and sentenced Petitioner to serve twenty years at hard labor without benefit of probation or suspension of sentence and with credit for time served. (Vol. 2, p. 104; Vol. 3, pp. 336-338). Petitioner objected to the sentence imposed and filed a motion for appeal on July 11, 2002. (Vol. 2, pp. 106-107; Vol. 3, pp. 338-339).

On March 26, 2003, the petitioner filed a motion by letter requesting a complete list of all parties or entities who had purchased the record/transcripts on behalf of the petitioner. (Vol. 1). The trial court denied the motion on April 2, 2003 and directed the petitioner to contact either the Clerk of Court or the Chief of Court Reporters for the information. (Vol. 1). On April 17, 2003, counsel for Petitioner filed a brief with the Louisiana Fifth Circuit Court of Appeal on behalf of the petitioner. (Vol. 3). On May 12, 2003, the petitioner filed a pro se Supplemental Memorandum on Behalf of Appellant Ronnie M Lyles with the intermediate appellate court. (Vol. 3). The State filed an opposition brief on May 14, 2003. (Vol. 3).

Thereafter, on July 30, 2003, counsel for the petitioner filed a supplemental brief on behalf of the petitioner.¹ (Vol. 3). On August 6, 2003, Petitioner filed a pro se Motion to Correct Defects and Deficiencies, which the Louisiana Fifth Circuit Court of Appeal denied on August 8, 2003. (Vol. 3). In the interim, on August 7, 2003, counsel for Petitioner filed a Motion

¹ The State did not file a brief in response but instead filed a September 2, 2003 letter advising the intermediate court of appeal of the State's position with respect to the supplemental case cited in support of Petitioner's claim.

to Withdraw as Counsel of Record due to the fact that the petitioner had terminated the representation. (Vol. 3). On August 8, 2003, the Fifth Circuit Court of Appeal granted the motion to withdraw and ordered the petitioner to have new appellate counsel sign the record by September 8, 2003. (Vol. 3).

Subsequently, on August 23, 2003, counsel with the Louisiana Appellate Project filed a letter with the Louisiana Fifth Circuit Court of Appeal to inform the court that counsel had met with the petitioner and that the petitioner expressed to him that no counsel was needed for oral argument, that the briefs and filings were sufficient for purposes of the appeal, and that oral argument should be deemed waived. (Vol. 3). On August 25, 2003, the petitioner filed a Response to the Order of the Court in Regard to Representation of Counsel advising the appellate court that he would be representing himself on appeal. (Vol. 3).

On September 8, 2003, the petitioner filed a writ application with the Louisiana Fifth Circuit Court of Appeal under docket number 03-KH-1050 relative to a complaint against counsel with the Louisiana Appellate Project, which the intermediate appellate court denied on September 9, 2003 on the grounds that the petitioner sought relief beyond the jurisdiction of the court. (Vol. 1, Tab 4). Subsequently, Petitioner filed a writ application with the Supreme Court of Louisiana under docket number 2003-KH-2523 on September 10, 2003, asserting that the intermediate appellate court erred in denying his Motion to Correct Defects and Deficiencies relative to the record on direct appeal. (Vol. 1, Tab 2).

On September 16, 2003, the Louisiana Fifth Circuit Court of Appeal affirmed the petitioner's conviction

and sentence and remanded the matter for the trial court to notify the defendant of the sex offender registration requirements of LSA-R.S. 15:542. (Vol. 1, Tab 1). Thereafter, on September 26, 2003, the Supreme Court of Louisiana, citing LSA-C.Cr.P. art. 924.1, denied the petitioner's writ application.² *State ex rel. Ronnie M Lyles v. State of Louisiana*, 2003-2523 (La. 9/26/03), 854 So.2d 350. (Vol. 1, Tab 3).

Subsequently, the Petitioner applied to this Honorable Court for a writ of habeas corpus dated October 7, 2003.³ The respondent submits that the petition is timely but that the petitioner has submitted unexhausted claims for review. Respondent has produced a copy of the state court record in three volumes and submits that disposition of this matter should occur without an evidentiary hearing.

Statement of the Issues

The petitioner has set forth the following claims for review:

1. "Under U.S.C.A. Const. Amend. 14 § 1; Petitioner states a claim for denial of Due Process; malicious abuse of process and prosecution." (Memorandum, p. 6).

² Louisiana Code of Criminal Procedure Article 924.1 provides that "[a]n application for post conviction relief shall not be entertained if the petitioner may appeal the conviction and sentence which he seeks to challenge, or if an appeal is pending."

³ Subsequent to filing in federal court, the petitioner filed a motion by letter with the trial court on October 27, 2003 seeking production of transcripts and evidence, which the trial court denied on November 4, 2003. (Vol. 1).

(Petitioner asserts in argument that the State withheld unspecified exculpatory and impeaching evidence relative to an OCS report.)

2. "Under U.S.C.A. Const. Amend. 6; Petitioner states a claim for denial of right to compulsory process; to have compulsory process for obtaining witnesses in favor of Petitioner." (Memorandum, p. 8).

(Petitioner asserts in argument that his right to subpoena favorable witnesses on his behalf was abridged due to the "willful suppression of exculpatory and impeaching evidence" relative to documentation of the OCS investigation.)

3. "Under U.S.C.A. Const. Amend. 1; Petitioner states a claim for denial of freedoms of speech; the right to testify in trial in Petitioner's own defense." (Memorandum, p. 9).

(Petitioner asserts in argument that he was denied the right to testify in his own behalf and that the trial court made no inquiry as to whether or not he was "willing and able to do so.")

4. "Under U.S.C.A. Const. Amend. XIV § 1; Petitioner states a claim for denial of Due Process and Equal Protection; no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws." (Memorandum, p. 10).

(Petitioner asserts in argument that he was denied the right to testify in his own defense under the right to freedom of speech due in part to the State's failure to provide OCS documents to the petitioner. He further asserts a claim for "discrimination against non-residents" based upon the contention that the State alleged that Petitioner was a fugitive from justice from the State of Louisiana when the Petitioner was in fact a resident of Mississippi.)

5. "Under U.S.C.A. Const. Amend. 6; Petitioner states a claim for ineffective assistance of counsel; under U.S.C.A. Const. Amend. 14 § 1 denial of Due Process and Equal Protection." (Memorandum, p. 12).

(Petitioner asserts in argument that he received ineffective assistance of counsel from his trial attorney.)

6. "Under U.S.C.A. Const. Amend. 6; Petitioner states a claim for ineffective assistance of counsel; under U.S.C.A. Const. Amend. 14 § 1 denial of Due Process and Equal Protection." (Memorandum, p. 15).

(Petitioner asserts in argument that he received ineffective assistance of counsel from his appellate attorney.)

7. "Under U.S.C.A. Const. Amend. 14 § 1; Petitioner states a claim for denial of Due

Process and Equal Protection.” (Memorandum, p. 18).

(Petitioner asserts in argument that the Louisiana Fifth Circuit Court of Appeal and/or District Attorney’s Office either failed to address/act on motions and/or complaints filed. He further asserts that the Louisiana Fifth Circuit Court of Appeal erroneously denied his Motion to Correct Defects and Deficiencies relative to the record and that the ruling affirming his conviction and sentence where exculpatory and impeaching evidence was withheld and where the record was incomplete is contrary to federal law and a violation of the Fourteenth Amendment.)

8. “Under U.S.C.A. Const. Amend. 5; Petitioner states a claim for Double Jeopardy.” (Memorandum, p. 21).

(Petitioner asserts that his adjudication as a fourth felony offender violated the Fifth Amendment protection against double jeopardy.)

9. In an unnumbered claim, encaptioned as “LSA-Ch.C. Art. 326. Competent Evidence; Procedures for Making Videotape,” the petitioner appears to assert that the forensic interview procedures utilized were improper and that the detective and forensic interviewer prepared investigative reports that contained willful misrepresentations. (Memorandum, p. 22).

Standard of Review

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214. The standard of review is governed by 28 U.S.C. 2254(d), which provides that:

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
 - (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
 - (2) resulted in a decision that was 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).

As recognized by the Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000), “§ 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner’s application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.” Under § 2254(d)(1), a federal habeas court may not grant a state prisoner’s application for a writ of habeas corpus as to claims adjudicated on the merits in state court unless the state court adjudication resulted in a decision that

was (1) contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. 2254(d). The Supreme Court has clarified that a decision is “contrary to” clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 120 S.Ct. at 1523.

With regard to the “unreasonable application” clause, the Court has held that a federal habeas court may grant the writ only if the state court unreasonably applies the correct governing legal principle to the facts of the prisoner’s case. *Id.* “A federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable.” *Williams v. Taylor*, 120 S.Ct. at 1521. As noted by the United States Fifth Circuit, because the standard of review is one of objective reasonableness, “mere disagreement” with the state court is not enough to warrant relief. *Orman v. Cain*, 228 F.3d 616, 619 (5th Cir. 2000). Under 28 U.S.C. 2254(e)(1), the state court’s findings of fact are entitled to a presumption of correctness. Of additional significance, pursuant to 28 U.S.C. 2254(e)(1), the petitioner bears the burden of rebutting this presumption of correctness by clear and convincing evidence.

Procedural Objection: Failure to Exhaust

Pursuant to 28 U.S.C. § 2244(b) and (c), a habeas petitioner is required to exhaust the available state court remedies before proceeding to federal court. The exhaustion doctrine requires that the federal claim must have been presented to the highest court of the state, either on direct review of the conviction or in a post-conviction attack. *Bufalino v. Reno*, 613 F.2d 568, 570 (5th Cir. 1980). The doctrine is designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. *Rose v. Lundy*, 455 U.S. 509, 518, 102 S. Ct 1198, 1203, 71 L.Ed.2d 379.

Recently, the United States Supreme Court addressed the AEDPA's exhaustion rule in *Duncan v. Walker*, 531 U.S. 991, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). The *Duncan* Court recognized that the exhaustion requirement of § 2254(b) ensures that the state courts have the opportunity to fully consider federal-law challenges to a state court judgment before the federal courts may entertain a collateral attack upon that judgment. *Duncan v. Walker*, 121 S.Ct. at 2127-2128 (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999)). Moreover, the *Duncan* Court recognized its earlier holdings that federal courts must adhere to a strict enforcement of the exhaustion rule: "[a] rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Id.* at 2128 (citing *Rose v. Lundy*, 455 U.S. 509, 518-519, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)). The Court further stated that the exhaustion rule promotes comity in our dual

system of government in that a federal district court must first allow the state courts the opportunity to correct a constitutional violation prior to its upsetting that state court conviction. *Ibid.*

For a claim to be exhausted, a petitioner “must have fairly presented the substance of his claim to the state courts.” *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997) (citing *Picard v. Connor*, 404 U.S. 270, 275-76, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)), *cert. denied*, 523 U.S. 1139, 118 S.Ct. 1845, 140 L.Ed.2d 1094 (1998). Moreover, “[i]t is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made.” *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (citation omitted). Additionally, a habeas petition containing both exhausted and unexhausted claims is a mixed petition which should be dismissed without prejudice. *Alexander v. Johnson*, 163 F.3d 906, 908 (5th Cir. 1998).

In the instant case, the petitioner has failed to exhaust his claims with the State’s highest court. As demonstrated by the record, the petitioner has thus far presented only one issue to the Supreme Court of Louisiana. *State ex rel. Ronnie M Lyles v. State of Louisiana*, 2003-2523 (La. 9/26/03), 854 So.2d 350. Of note, the writ application in question did not attack the petitioner’s conviction and sentence, as the direct appeal was still pending when the application was filed, but rather asserted that the intermediate appellate court erred in denying the petitioner’s Motion To Correct Defects and Deficiencies relative to the record on appeal. (Vol. 1, Tab 2). Consequently, the petitioner did not exhaust his current claims with

the Supreme Court of Louisiana prior to filing his petition for a writ of habeas corpus.

Of significance, Petitioner acknowledges that he has failed to present the claims to the highest court of the State of Louisiana. (Petition, p. 4). However, he asserts that he is still entitled to federal habeas review because "(c)ircumstances exist that render such process in State court ineffective to protect the rights of the petitioner." (Petition, p. 4; Memorandum, p. 2). The State respectfully maintains that the petitioner has asserted unsubstantiated allegations in an effort to excuse his failure to exhaust and has failed to demonstrate any legitimate basis for contending that circumstances exist that render such process ineffective to protect his rights. *See* 28 U.S.C. 2254(b)(1)(B) (ii).

Of significance, the petitioner failed to seek review with the Supreme Court of Louisiana on direct appeal and has since failed to pursue any other form of relief with the state courts subsequent to his conviction being affirmed by the Louisiana Fifth Circuit Court of Appeal. The fact that the petitioner has filed a civil suit against the District Attorney's Office is immaterial to the exhaustion issue, since the petitioner's claims in state court would be reviewed and ruled upon by an independent and objective state tribunal. Therefore, the State maintains that Petitioner has failed to demonstrate that he should be excused from exhausting his claims in the present case.

Procedural Objection:

Failure to State a Federal Question

The law is well-settled that federal habeas relief is available only on behalf of a person in custody "in

violation-of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); *see also West v. Johnson*, 92 F.3d 1385, 1404 (5 Cir. 1996) (“asserted violations of state law do not constitute a basis for federal habeas relief”).

In his fourth claim for relief, the petitioner contends that he is entitled to relief because of “discrimination against non-residents” based upon the contention that the State alleged that Petitioner was a fugitive from justice from the State of Louisiana when the Petitioner was in fact a resident of Mississippi. Petitioner appears to assert that erroneous evidence with respect to his residency was introduced at trial. The respondent maintains that the issue of evidence relative to the petitioner’s purported residency addresses state court laws of evidence as to the admission of relevant and irrelevant evidence and that the petitioner has failed to state a cognizable claim for federal relief.

Additionally, in his seventh claim designated for review, Petitioner asserts that the Louisiana Fifth Circuit Court of Appeal and/or District Attorney’s Office either failed to address and/or act on motions and/or complaints which he filed. He further asserts that the Louisiana Fifth Circuit Court of Appeal erroneously denied his Motion to Correct Defects and Deficiencies relative to the record and that the ruling affirming his conviction and sentence where exculpatory and impeaching evidence was withheld and where the record was incomplete is contrary to federal law and a violation of the Fourteenth Amendment.⁴ With re-

⁴ The petitioner’s contentions regarding the withholding of exculpatory and impeachment evidence in this claim appear duplicative and are raised in other claims in the petition.

spect to the issues presented addressing the District Attorney's Office and the state courts acts or omissions in addressing Petitioner's complaints and the policies of the courts in addressing oral argument and record supplementation procedures, Respondent submits that Petitioner should not be entitled to advance these issues because he has failed to present a federal question for review. The respondent further maintains that the District Attorney's Office and the state courts have policies and procedures for addressing such issues, none of which fall within the ambit of a federal constitutional claim.

With respect to the ninth (undesignated) claim, the petitioner appears to assert in significant part that the forensic interview procedures utilized were improper. The respondent maintains that the procedures for utilizing videotape evidence are specifically set forth in LSA-R.S. 15:440.5, which provides guidelines for the admission of the videotape as evidence. Since the petitioner's claim addresses the procedures for admission of evidence under state law, the respondent maintains that he has failed to present a cognizable federal claim for review.⁵

Reservation of Rights

The respondent asserts that the petition of Ronnie M. Lyles should be dismissed without prejudice due to his failure to exhaust his claims. Respondent would

⁵ Of note, the petitioner cites to LSA-Ch.C. Art. 326 as the basis of his complaint. This article is from the Louisiana Children's Code and is inapplicable to the petitioner. The State introduced the videotape pursuant to the procedures set forth in LSA-R.S. 15:440.1 *et seq.*, which contains the state rules of evidence for the electronic recording of child victims.

respectfully reserve the right to submit argument on the merits should this Honorable Court deem such argument as necessary upon review. Further, Respondent does not expressly waive any procedural objections.

Conclusion

Respondent respectfully submits that Ronnie M. Lyles is not entitled to federal habeas corpus relief because he has failed to exhaust his claims for relief and has failed to state cognizable federal claims for relief as to claims four, seven, and nine. As such, the respondent submits that the petition should be dismissed.

Respectfully Submitted,

/s/ Andrea F. Long #24157

Assistant District Attorney

Courthouse Annex

Gretna, Louisiana 70053

(504) 368-1020

APPENDIX C
LOUISIANA SUPREME COURT RULING
NO. 2003-KH-2523, PETITION FOR
WRIT OF CERTIORARI, DENIED,
DATED: SEPTEMBER 26, 2003

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

STATE OF LOUISIANA

v.

RONNIE M. LYLES

No. 03-KA-141

On Appeal from the Twenty-Fourth Judicial District
Court Parish of Jefferson, State of Louisiana
No. 00-4973, Division "L", Honorable Charles V.
CUSIMANO, II, Judge Presiding

Before: James L. CANNELLA,
Walter J. ROTHSCHILD, Judges and
Emile St. PIERRE, Pro Tempore

... the Defendant had done something to her. L.W. eventually told Z.H. about the incidents concerning the Defendant. L.W. testified that she was not sure exactly when the incidents occurred but that she was in the fifth grade.

The second victim, B.H., testified that she had also been interviewed at the Jefferson Parish Children's

Advocacy Center. The videotaped interview was played for the jury. Thereafter, B.H. testified that the incident involving the Defendant occurred at the family home in Westwego during Christmas holidays. B.H. testified that, when she was in the fourth or fifth grade, she and some of her cousins were in her Aunt Paula's room watching television and having their toenails polished. The Defendant, who was also on the bed, took her hand and made her touch his "private." The Defendant then kissed her, putting his tongue into her mouth. B.H. testified that she did not tell anyone what happened because she was afraid. However, at some point, she told L.W. and Z.H. about the incident. B.H. further testified that when she told L.W. what had happened to her, L.W. told her that the Defendant had done something to her, too.

Additionally, S.W., the mother of L.W., testified that L.W. lives with Z.H. in order to attend a school in that district. S.W. testified that L.W. did not tell her anything concerning the Defendant or any inappropriate touching and that she knew little about the case. In his appeal, the Defendant assigns ten trial court errors.¹⁰

¹⁰ Defendant was represented by retained counsel, who filed a brief on the Defendant's behalf with ten assignments of error. The Defendant filed a pro se brief with one assigned error. Thereafter, the Defendant's attorney withdrew and the Defendant was notified. In response to that notification this Court was informed, by letter from counsel with the Louisiana Appellate Project who visited the Defendant and by the Defendant himself, that the Defendant did not want new counsel, and wanted the matter submitted on the previously filed briefs.

Assignment of Error Number One

The Defendant argues that the trial court erred in permitting the State to allege only the period of one year, without further specification, within which the crimes allegedly occurred and in denying his Motion to Quash. The Defendant argues that the trial court erred in refusing to require the State to narrow its claims.

APPENDIX D
LOUISIANA FIFTH CIRCUIT
COURT OF APPEALS RULING NO. 03-KA-141,
CONVICTION AND SENTENCES AFFIRMED,
DATED: SEPTEMBER 16, 2003

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

STATE OF LOUISIANA

v.

RONNIE M. LYLES

No. 03-KA-141

On Appeal from the Twenty-Fourth Judicial District
Court Parish of Jefferson, State of Louisiana
No. 00-4973, Division "L", Honorable Charles V.
Cusimano, II, Judge Presiding

Before: James L. CANNELLA,
Walter J. ROTHSCHILD, Judges and
Emile St. PIERRE, Pro Tempore

Defendant, Ronnie Lyles, appeals from his convictions on two counts of indecent behavior with a juvenile and respective imprisonment at hard labor sentences to six years on count two and, as a fourth felony offender, to 20 years without benefit of probation or suspension of sentence. For the reasons which follow, we affirm the convictions and sentences and remand.

On September 20, 2000, the Jefferson Parish District Attorney's Office filed a bill of information charging the Defendant with two counts of indecent behavior with a juvenile in violation of La. R.S. 14:81. The Defendant was arraigned and entered pleas of not guilty. On March 14, 2001, immediately prior to trial, the dates of the offenses on the bill of information were amended. The Defendant's previously filed motions to quash the indictment and to sever the offenses were heard and denied. Additionally, the Defendant made two oral motions in limine, urging the exclusion of a portion of one victim's statement and the exclusion of a portion of the arresting officer's testimony, which were heard and denied. Finally, an oral motion by the Defendant to allow both the original bill of information and the amended bill of information to be read to the jury was heard and denied. The case then proceeded to a jury trial.

After a two day trial, a six-person jury unanimously found the Defendant guilty as charged on both counts. The Defendant filed a motion for new trial, which was heard and denied on May 9, 2001. Immediately following the denial of the motion for new trial, the Defendant was sentenced on each count to concurrent six year imprisonment sentences at hard labor.

Also on May 9, 2001, the State filed a habitual offender bill of information against the Defendant alleging that he was a fourth felony offender relative to count one. The Defendant denied the allegations in the habitual offender bill of information and filed objections. On July 9, 2001, the Defendant filed supplemental objections and a motion to quash. On October 11, 2001, the Defendant's motion to quash was

heard and a hearing on the habitual offender bill was held. Both matters were taken under advisement and, on July 10, 2002, the Defendant was found to be a fourth felony offender. After he waived delays, the Defendant's original sentence on count one was vacated and he was sentenced to 20 years imprisonment at hard labor, without benefit of probation or suspension of sentence. On July 16, 2002, the Defendant filed a motion for appeal which was granted.

At trial, Z.H., the mother of the victim, B.H., testified that B.H. is her 11 year old daughter and, the other victim, L.W., is her 14 year old niece, who resides with her in New Orleans.¹ Z.H. testified that she was informed of allegations of sexual abuse by her daughter, B.H. After watching a movie concerning sexual abuse, B.H. hesitantly told her that the Defendant, who at the time was dating Z.H.'s sister, Paula, made her touch his private part and kissed her. B.H. stated that the incident occurred in Paula's room at the family house in Westwego where family parties were often held. B.H. informed her that, during Christmas break, when she was in the fourth grade, she and her cousins were watching television while the Defendant painted their toenails. B.H. told Z.H. that the Defendant placed her hand on his "private part" and kissed her. Z.H. then asked L.W. if she needed to tell her anything, but L.W. did not disclose what had happened to her at that time. The day after B.H.'s disclosure, Z.H. telephoned the police and made a complaint against the Defendant.

¹ In accordance with La. R.S. 46:1844, to protect the identity of the minor victims, they will be referred to by their initials, B.H. and L.W. Additionally, the victims' mothers will be referred to by their initials, Z.H. and S.W, respectively.

Detective Larry Dyess of the Jefferson Parish Sheriff's Office's (JPSO) Personal Violence Unit testified that, on July 18, 2000, a report was filed involving two victims, B.H. and L.W. On July 24, 2000, Detective Dyess contacted the reporting person, Z.H., and scheduled an interview with the victims at the Children's Advocacy Center. Detective Dyess first spoke with Z.H. regarding the information she received from B.H. and L.W. The detective then spoke briefly with the victims. The victims next met with the center's forensic interviewer.

Detective Dyess was questioned at trial about the portion of his report detailing his interview with Z.H. The report reflected that L.W. informed Z.H. that the Defendant had put his hand on her "stuff" and put his finger inside of her. Nothing in the report indicated that the Defendant ever kissed or attempted to kiss L.W., nor did Detective Dyess recall L.W. disclosing that to him. Detective Dyess was also questioned about his testimony at a preliminary hearing that both victims were together with the Defendant when the crime occurred and that the Defendant was helping them paint their toenails. Detective Dyess was told that the incidents occurred in 1998 or 1999 and the time was not further specified.

Omalee Gordon (Gordon) of the Gretna Police Department testified that she was assigned to the Jefferson Parish Children's Advocacy Center to conduct forensic interviews with children. Gordon testified that, on August 8, 2000, she interviewed both B.H. and L.W. at the center. L.W. told her that the Defendant put his tongue in her mouth and put his hand on her private part, and that B.H. said the Defendant put his tongue in her and mouth and put her hand on his

private part. Gordon testified that she did not question the victims about any family members or review any therapy or school reports. She also did not recall if the victims informed her of the specific time the incidents occurred.

L.W., the fourteen year old victim, testified that she was interviewed at the Jefferson Parish Children's Advocacy Center. A video tape of the interview was played for the jury. In conformity with her videotaped statement, L.W. testified that she was at the family home in Westwego in her Aunt Paula's room watching television with her cousin when the Defendant walked into the room. The Defendant sat on the bed next to her. When her cousin went to the bathroom, the Defendant put his hand on her "privacy part." L.W. told the Defendant to stop but he did not do so immediately. L.W. testified that she did not tell anyone at the time of the incident because she was scared.

L.W. further testified that, on another occasion, she was playing hide-and-go-seek with her cousins and hiding in the garage, when the Defendant walked into the garage looking for her. When the Defendant found her, he kissed her, putting his tongue into her mouth. L.W. told him to stop and the Defendant left the garage. L.W. also testified that, on one occasion, the Defendant walked out of the bathroom with a towel partially covering him and that she could see his "private parts." The Defendant asked her a question, stated he was going to get dressed, and went downstairs.

L.W. testified that she never told anyone what happened until after watching a movie with B.H. and Z.H. B.H. told L.W. that she was scared to sleep and that she had a secret concerning herself and the

Defendant. L.W. then told B.H. that the Defendant had done something to her. L.W. eventually told Z.H. about the incidents concerning the Defendant. L.W. testified that she was not sure exactly when the incidents occurred but that she was in the fifth grade.

The second victim, B.H., testified that she had also been interviewed at the Jefferson Parish Children's Advocacy Center. The videotaped interview was played for the jury. Thereafter, B.H. testified that the incident involving the Defendant occurred at the family home in Westwego during Christmas holidays. B.H. testified that, when she was in the fourth or fifth grade, she and some of her cousins were in her Aunt Paula's room watching television and having their toenails polished. The Defendant, who was also on the bed, took her hand and made her touch his "private." The Defendant then kissed her, putting his tongue into her mouth. B.H. testified that she did not tell anyone what happened because she was afraid. However, at some point, she told L.W. and Z.H. about the incident. B.H. further testified that when she told L.W. what had happened to her, L.W. told her that the Defendant had done something to her, too.

Additionally, S.W., the mother of L.W., testified that L.W. lives with Z.H. in order to attend a school in that district. S.W. testified that L.W. did not tell her anything concerning the Defendant or any inappropriate touching and that she knew little about the case.

In his appeal, the Defendant assigns ten trial court errors.²

² Defendant was represented by retained counsel, who filed a brief on the Defendant's behalf with ten assignments of error.

Assignment of Error Number One

The Defendant argues that the trial court erred in permitting the State to allege only the period of one year, without further specification, within which the crimes allegedly occurred and in denying his Motion to Quash. The Defendant argues that the trial court erred in refusing to require the State to narrow its claims as to when the crimes were committed, because it hampered his ability to establish his precise whereabouts during times when the crimes were alleged.

The State responds that it is not required to specify the exact dates for alleged offenses of indecent behavior with juveniles and, under La. C.Cr.P. art. 468, the lack of exact dates does not render the bill of information insufficient. Further, the State contends that the Defendant was presented with all available information in its possession concerning the dates of the offenses.

Article 468 of the Louisiana Code of Criminal Procedure provides as follows:

The date or time of the commission of the offense need not be alleged in the indictment, unless the date or time is essential to the offense.

The Defendant filed a pro se brief with one assigned error. Thereafter, the Defendant's attorney withdrew. The Defendant was notified. In response to that notification this Court was informed, by letter from counsel with the Louisiana Appellate Project who visited the Defendant and by the Defendant himself, that the Defendant did not want new counsel, and wanted the matter submitted on the previously filed briefs.

If the date or time is not essential to the offense, an indictment shall not be held insufficient if it does not state the proper date or time, or if it states the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day.

All allegations of the indictment and bill of particulars shall be considered as referring to the same date or time, unless otherwise stated.

The date and time of the offenses are not essential elements of the offense of indecent behavior with a juvenile and, therefore, a bill of information which does not reflect the date and time of the offense is not insufficient. La. C.Cr.P. art. 468; *State v. Case*, 357 So.2d 498 (1978); *State v. Mickens*, 31,737 (La. App. 2nd Cir. 3/31/99), 731 So.2d 463, 468. Furthermore, the victims prior to and during trial were unable to specify an exact period of time in which the offenses occurred. Therefore, the State could not have particularized the dates of the offenses regardless of the Defendant's request.

Because date and time are not essential elements of the offense of indecent behavior with a juvenile, we find that the trial court did not err in denying the Defendant's motion to quash the bill of information for lack of specificity. This assignment of error lacks merit.

Assignment of Error Number Two

The Defendant argues that the trial court erred in refusing to sever the two counts of the bill of information. The Defendant argues that the offenses were

remote from each other in time and had the two counts not been tried together, it is likely that he would not have been convicted.

The State responds that severance of the offenses was not required and that the testimony was presented in a logical and concise manner. It was highly improbable that the jury was confused by the two separate counts.

La. C.Cr.P. art. 493 provides:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial.

In the present case, the two counts, although perpetrated upon different victims and at different times, occurred at the same location, and under similar circumstances. Consequently, we find that the counts are of the same or similar character as contemplated by La. C.Cr.P. art. 493 and were, therefore, properly charged in the same bill of information.

The Defendant, nevertheless, contends that the two counts should have been severed to prevent prejudice.

La. C.Cr.P. art. 495.1 provides for severance of joined offenses, and states:

If it appears that a defendant or the state is prejudiced by a joinder of offenses in an indictment or bill of information or by such joinder for trial together the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires.

It is well settled that a defendant has a substantial burden of proof when he alleges prejudicial joinder of offenses. *State v. Machon*, 410 So.2d 1065 (La. 1982); *State v. Every*, 96-185 (La. App. 5th Cir. 7/30/96), 678 So.2d 952, 958. Motions to sever under La. C.Cr.P. art. 495.1 are left to the sound discretion of the trial court and should not be disturbed on appeal in the absence of an abuse of discretion. *State v. Celestine*, 452 So. 2d 676 (La. 1984); *State v. Every*, 678 So.2d at 958.

In determining whether prejudice may result from a joinder of offenses, a trial court should consider whether the jury would be confused by the various counts, whether the jury would be able to segregate the various charges and evidence, whether the defendant would be confounded in presenting his various defenses, whether the crimes charged would be used by the jury to infer a criminal disposition, and whether, especially considering the nature of the charges, the charging of several crimes would make the jury hostile. *State v. Washington*, 386 So.2d 1368 (La. 1980); *State v. Every*, 678 So.2d at 958.

The Defendant herein offered no evidence at the hearing on the motion to sever and does not argue here that the joinder of the offenses confused the jury

or confounded his defense. Rather, the Defendant contends that, by trying the two counts together, a “spill over” or “tainting” effect occurred, causing the jury to infer a criminal disposition. The Defendant argues that if the counts had been severed, he would likely have been found not guilty on the count involving L.W., due to the contradictory accounts of the incident.

In determining whether two charged offenses should be severed for trial, the trial court may consider whether evidence of one offense would have been admissible as other crimes evidence at the trial of the other offense under *State v. Prieur*, 277 So.2d 126 (La. 1973) and La. C.E. art. 404(B)(1). *State v. Lewis*, 97-2854 (La. App. 4th Cir. 5/19/99), 736 So.2d 1004, 1015, *writs denied*, 99-2694 (La. 4/17/00), 756 So.2d 325 and 01-3388 (La. 2/11/02), 808 So.2d 345. Following the pronouncements by the Louisiana Supreme Court in *State v. Jackson*, 625 So.2d 146 (La. 1993) and *State v. Miller*, 98-0301 (La. 9/9/98), 718 So.2d 960, we find that the evidence of each crime in the instant case would have been admissible at the trial of the other. Indecent behavior with a juvenile is a specific intent crime. *See, State v. Blanchard*, 00-1147 (La. 4/20/01), 786 So.2d 701, 705. “Where the element of intent is regarded as an essential ingredient of the crime charged, it is proper to admit proof of similar but disconnected crimes to show the intent with which the act charged was committed.” *State v. Miller*, 718 So.2d at 964; *State v. Jackson*, 625 So.2d at 150. Based on the above, we find that the evidence of the offense committed against either victim could have been introduced at the trial of the offenses committed

against the other to establish the Defendant's specific intent.³

Therefore, we find no error in the trial court action denying the Defendant's motion to sever the two offenses for trial. This assignment of error lacks merit.

Assignment of Error Number Three

The Defendant argues that the trial court erred in refusing to exclude evidence that he appeared before the victim with a towel wrapped around him. The Defendant contends that the evidence was provocative and inflammatory. The Defendant also contends that such evidence should not have been admitted without a *Prieur* hearing.

The State responds that, even if the incident constituted improper evidence of "other crimes," the Defendant is not entitled to relief because such evidence was harmless error.

Prior to trial, the Defendant filed a motion in limine to exclude a portion of L.W.'s testimony recounting a portion of her taped interview regarding an occasion when the Defendant allegedly walked out of the bathroom with a towel wrapped around him and his "private part" was exposed. The motion was denied and L.W. testified at trial that once the Defendant walked out of the shower wearing a towel with his "private part" exposed, asked her a question, and left the room.

³ Although not effective at the time of trial, La. C.E. art. 412.2 allows for the introduction of evidence of similar crimes in cases involving sex offenses involving a victim who was under the age of seventeen at the time of the offense. *See also*, La. C.E. art. 404(B).

On appeal, an improper reference to other crimes is subject to harmless error review. *State v. Johnson*, 94-1379 (La. 11/27/95), 664 So.2d 94, 101-102; *State v. Thomas*, 96-464 (La. App. 5th Cir. 11/14/96), 685 So.2d 261, 263-264. The test for determining harmless error is whether the verdict actually rendered in that case was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *State v. Pittman*, 95-382 (La. App. 5th Cir. 10/1/96), 683 So.2d 748, 758.

Here, both victims testified that the Defendant kissed them using his tongue and engaged in inappropriate contact with them. These are the offenses with which the Defendant was charged and convicted. Based upon the victims' testimony, it is clear that the evidence supported the Defendant's convictions for indecent behavior with a juvenile. Thus, we find that the introduction of the evidence of the "other acts", while improper, did not attribute to the verdict and was harmless. This assignment of error lacks merit.

Assignment of Error Number Four

The Defendant argues that the trial court erred in admitting evidence of the location of the Defendant's arrest and in refusing to exclude evidence that he was arrested while staying at a motel. The Defendant contends that the evidence created an improper inference that the Defendant was running or hiding. The State responds that the evidence was relevant to establish the Defendant's consciousness of guilt because he was not registered at the hotel under his own name.

At trial, Sergeant Wine testified that, after learning that the Defendant was possibly located at the Bon Soir Motel, he proceeded to that location.

Upon his arrival, he ascertained that no one under the name of Lyles was registered at the motel. The officer was then informed by the complainants that the Defendant had used someone else's identification to register at the motel and that he was staying in a specific room. Sergeant Wine then knocked on the door to that room and the Defendant answered and admitted his identity.

The Louisiana Supreme Court has recognized that using a false name may be indicative of consciousness of guilt. *State v. Toups*, 2001-1875 (La. 10/15/02), 833 So.2d 910, 913-914 (citing, *State v. Wade*, 33,121 (La. App. 2nd Cir. 5/15/00), 758 So.2d 987, 991).

To rebut this inference, however, defense counsel had the opportunity to elicit testimony on cross-examination which could have explained the Defendant's presence at the motel. At trial, defense counsel asked Sergeant Wine whether it would be unusual for the Defendant, who was from Mississippi, to be staying at a motel while in Louisiana, to which Sergeant Wine responded that it would not. Additionally, Sergeant Wine testified on cross-examination that when he knocked on the Defendant's motel room door, the Defendant answered the door and, when the officer asked him for his name, he identified himself as Ronnie Lyles.

Considering the above, we find that the evidence that the Defendant was arrested at the Bon Soir Motel was relevant and not erroneously admitted. Any adverse inferences were explained in cross examination. This assignment of error lacks merit.

Assignment of Error Number Five

The Defendant argues that the trial court erred in refusing to permit the jury to review both bills of information which had been filed by the State and which alleged different and contradictory dates of the alleged crimes. The Defendant claims that both the original and amended bills of information, which contained different dates of the same offenses, should have been presented to the jury. The Defendant contends that the evidence of the date change was significant considering L.W.'s propensity for lying. Additionally, the Defendant claims that the change in dates constituted potentially exculpatory evidence of which the jury should have been made aware.

The State responds that the trial court was correct in denying the Defendant's motion, noting that the amendment was necessitated simply because of a typographical error.

All relevant evidence is admissible, except as otherwise provided by law. La. C.E. art. 402. Louisiana Code of Evidence article 401 provides that "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, risk of misleading the jury, or by considerations of undue delay, or waste of time. La. C.E. art. 403; *See, State v. Mosby*, 595 So.2d 1135, 1138 (La. 1992). Absent a clear abuse of discretion, the trial judge's determinations concerning relevancy and admissibility should

not be overturned. *State v. Vaughn*, 431 So.2d 358, 361 (La. 1982); *State v. Dickerson*, 01-1287 (La. App. 5th Cir. 6/27/02), 822 So.2d 849, 858, writ denied, 02-2108 (La. 2/21/03), 837 So.2d 627.

In *State v. Dickerson*, *supra*, this Court was presented with facts much like those in the instant case. In *Dickerson*, the defendant was charged with the aggravated rape of a five year old girl. Prior to trial, the State amended the indictment, changing the dates of the offenses. The defendant argued that he should have been allowed to present evidence to the jury showing that the state had amended the dates of occurrence on the indictment. This Court, in concluding that the trial court did not err in refusing to permit the defendant to introduce a copy of the amended indictment, noted that the indictment was irrelevant and, therefore, inadmissible, because the amendment had no relation to the issues the jury had to resolve. This Court further found that the defendant was not prejudiced by his inability to introduce the amended indictment because he was able to question witnesses concerning the dates.

Here, as in *Dickerson*, the amendment to the bill of information was irrelevant to the issues that the jury had to resolve and, therefore, inadmissible, because dates and times are not essential elements of the offense of indecent behavior with a juvenile. Furthermore, as in *Dickerson*, the Defendant was able to and did question numerous witnesses concerning the dates when the offenses occurred.

Based on the above, we find that the trial court did not err in refusing to permit the Defendant to introduce a copy of the original and amended bills of information. This assignment of error lacks merit.

Assignment of Error Number Six

The Defendant argues that the trial court erred in allowing the alleged victims/witnesses to remain in the courtroom and observe the video tapes of their prior statements while they were shown to the jury. The Defendant does not dispute that the videotaped interviews were properly admitted under La. R.S. 15:440.5, however, he argues that the provisions of La. R.S. 15:440.5 do not negate the dictates of La. C.E. art. 612, which permits the use of a recording only to refresh the memory of a witness.

The State responds that the videotapes were properly introduced under La. R.S. 15:440.5 and that it was not error to allow the victims to remain in the courtroom while the tapes were played.

The videotaped interviews in the instant case were not introduced under the provisions of La. C.E. art. 612 but, rather, under La. R.S. 15:440.5, which permits the State to introduce the videotape of the oral statement of the child made prior to the commencement of trial if certain conditions are met. La. R.S. 15:440.5(A). The statute further provides that "[t]he admission into evidence of the videotape of a child as authorized herein shall not preclude the prosecution from calling the child as a witness or taking the child's testimony outside of the courtroom as authorized in R.S. 15:283. . . ." La. R.S. 15:440.5(B).

Based on La. R.S. 15:440.5, we find that the videotaped interviews were admissible at trial and that their introduction into evidence did not prevent the victims from testifying at trial.

In reference to the Defendant's contention that it was error to allow the victims to remain in the court-

room while the videotapes were played prior to their testimony, La. C.E. art. 615 provides in pertinent part:

A. As a matter of right. On its own motion the court may, and on request of a party the court shall, order that the witnesses be excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case with anyone other than counsel in the case. In the interests of justice, the court may exempt any witness from its order of exclusion.

B. Exceptions. This Article does not authorize exclusion of any of the following:

...

- (4) The victim of the offense or the family of the victim.

Because B.H. and L.W. were victims in the instant case, they were not subject to sequestration under La. C.E. art. 615. Accordingly, we find no error in the trial court action allowing the victims to remain in the courtroom during the playing of the videotapes. This assignment of error lacks merit.

Assignment of Error Number Seven

The Defendant argues that the trial court erred in sending into the jury room during deliberations a diagram made by a witness while testifying during the trial. The Defendant contends that the trial court erred in allowing the jury to view, during jury deliberations, a diagram drawn by victim, B.H. The Defendant also contends that allowing the jury to view the diagram during deliberations was not harmless

error. The State responds that the diagram was not evidence of written testimony and, even if it was, its introduction was harmless.

B.H. drew a diagram during her trial testimony, depicting the layout of the room in which the offense occurred, and the location of other individuals in the room, including the Defendant. The diagram was marked Exhibit 3 for identification and received into evidence without objection. During jury deliberations, the jury requested the diagram for review. Over a defense objection, the trial court ruled that the jury could view the diagram.

At the time of trial, La. C.Cr.P. art. 793 stated in pertinent part:

A juror must rely upon his memory in reaching a verdict. He shall not be permitted to refer to notes or to have access to any written evidence. Testimony shall not be repeated to the jury. Upon the request of a juror and in the discretion of the court, the jury may take with it or have sent to it any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict.

The general rule is that the jury is not to inspect written evidence except for the sole purpose of a physical examination of the document itself to determine an issue which does not require the examination of the verbal contents of the document. *State v. Perkins*, 423 So.2d 1103, 1109-1110 (La. 1982). A jury can examine a written statement to ascertain or compare a signature or to see or feel it with regard to

its actual existence, but not to examine its verbal contents. *Id.*

The State argues that the drawing is similar to a photograph and as such is not “written” evidence of “testimony” within the meaning of La. C.Cr.P. art. 793. However, unlike a photograph, which is a reproduction of a physical object or scene, the diagram in the instant case was drawn by a witness/victim in conjunction with her testimony. The jury’s viewing of the diagram was for its verbal contents, *i.e.*, B.H.’s testimony regarding the description of the room and its occupants. Therefore, we find that the trial court erred in allowing the jury to view the diagram. Next, we consider whether said error was harmless.

The diagram indicated where the offense had occurred and who was present in the room, but did not depict what occurred or any other significant fact. *See, State v. Calloway*, 00-1230 (La. App. 5th Cir. 2/28/01), 781 So.2d 849, 853 (which found that allowing a jury in deliberations to view a map of a crime scene which was written on by a witness was harmless error). It did not bear directly on an element of the crime. Here, the evidence of each element of the offenses was clear. Therefore, we do not find that the jury’s erroneous review of the diagram during deliberations contributed to their verdict and the error was harmless. This assignment of error lacks merit.

Assignment of Error Number Eight

The Defendant argues that the trial court erred in denying his motion for a new trial because the verdict was contrary to the law and evidence. The Defendant also argues that newly admitted evidence

at the hearing on the motion for new trial established that a principal prosecuting witness had lied.

The State counters that the trial court did not err in denying the Defendant's motion, noting that the evidence at trial established the Defendant's guilt beyond a reasonable doubt and the newly discovered evidence was not sufficient to warrant a new trial.

Sufficiency of the Evidence⁴

On April 10, 2001, the Defendant filed a written motion for new trial alleging that the verdict was contrary to the law and evidence and that the trial court erred in denying several pretrial motions. The denial of a defendant's motion for new trial, based on La. C.Cr.P. art. 851(1), presents nothing for review on appeal. *State v. Hampton*, 98-331 (La. 4/23/99), 750 So.2d 867, 1999. However, the Louisiana Supreme Court and this Court have addressed the constitutional issue of sufficiency of the evidence under such circumstances. *See, State v. Hampton, supra*, and *State v. Pascual*, 98-1052 (La. App. 5th Cir. 3/30/99), 735 So. 2d 98. Therefore, we will address it herein.

⁴ When the issues on appeal relate to both the sufficiency of evidence and one or more trial errors, such as the erroneous admission of evidence, the reviewing court should first determine the sufficiency of the evidence by considering all of the evidence, including evidence that the trial court may have erroneously admitted. *State v. Hearold*, 603 So.2d 731, 734 (La. 1992); *State v. Mayeux*, 94-105 (La. App. 5th Cir. 6/28/94), 639 So.2d 828, 834. However, because this assignment of error alleges that the trial court erred in denying the motion for new trial based on insufficient evidence grounds, the issue is addressed at this point in the opinion.

The standard for appellate review of the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560. A determination of the weight of evidence is a question of fact, resting solely with the trier of fact who may accept or reject, in whole or in part, the testimony of any witnesses. *State v. Silman*, 95-0154 (La. 11/27/95), 663 So.2d 27, 35. A reviewing court may impinge on the factfinding function of the jury only to the extent necessary to assure the Jackson standard of review. *State v. Bordenave*, 95-2328 (La. 4/26/96), 678 So.2d 19, 20 (quoting *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789). It is not the function of an appellate court to assess credibility or reweigh the evidence. Appellate review for minimal constitutional sufficiency of evidence is a limited one, restricted by the standard developed in *Jackson*, *State v. Rosiere*, 488 So.2d 965, 968 (La. 1986) and the cases cited therein.

La. R.S. 14:81 provides in part that

Indecent behavior with juveniles is the commission of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person. Lack of knowledge of the child's age shall not be a defense.

To convict a defendant of this offense, the State must prove that (1) there was an age difference of

greater than two years between the accused and the victim, who was not yet seventeen, (2) the accused committed a lewd or lascivious act upon the person or in the presence of a child, and (3) the accused intended to arouse or gratify either his own or the victim's sexual desires. *State v. Stec*, 99-633 (La. App. 5th Cir. 11/30/99), 749 So.2d 784, 787. Specific intent is a state of mind and, as such, need not be proven as a fact, but may be inferred from the circumstances and actions of the accused. *State v. Harris*, 99-1288 (La. App. 5th Cir. 1/24/01), 782 So.2d 1055, 1059. Further, victim testimony alone can be sufficient to establish the elements of a sexual offense, even where the State does not introduce medical, scientific, or physical evidence to prove the commission of the crime. *State v. Hotoph*, 99-243 (La. App. 5th Cir. 11/10/99), 750 So.2d 1036, 1045.

The evidence in this case established that the two victims were under the age of seventeen and that there was an age difference of greater than two years between the victims and the Defendant. B.H. testified that when she was eight or nine years old, Defendant took her hand, placed it on his "private," and moved her hand on top of his "private." The Defendant then kissed her, putting his tongue in her mouth. Likewise, L.W. testified that, when she was in fifth grade, Defendant touched her "privacy part" in the front between her legs and moved his hand up and down. L.W. testified that, on a separate occasion, when she was playing hide and seek with her cousins, the Defendant found her in the garage and kissed her, putting his tongue in her mouth.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have

found, beyond a reasonable doubt, that the Defendant committed two counts of indecent behavior with a juvenile.

At the May 9, 2001 hearing on the Motion for New Trial, the Defendant sought to orally supplement his motion to introduce newly discovered evidence pursuant to La. C.Cr.P. art. 851(3). Although the supplemental motion was not written as required by La. C.Cr.P. art. 852, the trial court heard the newly discovered testimony.

Under La. C.Cr.P. art. 851(3), a defendant must establish the following four elements to obtain a grant of a new trial: (1) that the new evidence was discovered after trial; (2) that defendant's failure to discover the evidence before trial was not attributable to his lack of diligence; (3) that the evidence is material to the issues at trial; and (4) that the evidence is of such a nature that it would probably produce a different verdict in the event of retrial.

In reviewing the denial of a new trial based on newly discovered evidence, this Court has noted that, "the motion for new trial is based upon the supposition that injustice has been done to defendant, and unless such injustice is shown, the new trial motion shall be denied no matter upon what allegations the motion is grounded." *State v. Washington*, 98-69 (La. App. 5th Cir. 1/26/99), 727 So.2d 673, 677. This court has further held that the trial court's determination of the merits of the motion for new trial will be disturbed only for an abuse of the court's discretion. *Id.*

At the hearing on the motion for new trial, Paula Pearson (Pearson), the Defendant's ex-girlfriend and the victims' aunt, testified that she contacted defense

counsel shortly after trial indicating that she had information regarding the Defendant's case. Pearson testified that she believed that L.W. may have changed her story based on information received from her sister, Kiana. However, she had no personal knowledge that L.W. had done so.

Additionally, the defense called Ernest Pearson (Ernest), Paula's son, to testify. He stated that, on one occasion while he was talking on the telephone to his girlfriend, he overheard a conditional between Z.H. and his Aunt Kiana regarding L.W. changing her statement. Ernest testified that he did not speak to either victim about the incidents.

After Ernest testified, Z.H. was called by the State and testified that the conditional which Ernest overheard involved her telling Kiana that she thought L.W. had changed her story. However, Z.H. explained that her feeling that L.W. changed her story was the result of a misunderstanding. Z.H. testified that, when L.W. told her that the Defendant had been "playing with her," she initially thought that L.W. meant inside her panties, but L.W. later stated that it was on the outside of her panties. Z.H. also testified that she never thought L.W. was not telling the truth about the incident.

In the instant case, we do not find that the introduction of the newly discovered evidence would lead the jury to reach a different result because the testimony of Z.H. adequately explained the reasons she earlier believed that L.W. had changed her story. Further, we find that the newly discovered testimony was only introduced to challenge the credibility of L.W. Newly discovered evidence affecting only a witness' credibility "ordinarily will not support a motion

for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial." *Mesarosh v. United States*, 352 U.S. 1, 9, 77 S.Ct. 1, 5, 1 L.Ed.2d 1 (1956); *State v. Cavalier*, 96-3052 (La. 10/31/97), 701 So.2d 949, 951.

Based upon the above, we find no error in the trial court ruling denying Defendant's motion for new trial. This assignment of error lacks merit.

Assignment of Error Number Nine

The Defendant argues that the trial court erred in sentencing him as a fourth felony offender and in refusing to quash all or portions of the Multiple Offender (Quad) Bill of Information because of defects in the predicate convictions alleged by the State.⁵

The State responds that the testimony and the prior convictions introduced at the multiple offender hearing were sufficient to support the trial court's finding that the Defendant was a four time felony offender.

In *State v. Hollins*, 98-768 (La. App. 5th Cir. 9/1/99), 742 So.2d 671, *writ denied*, 99-2853 (La. 1/1/01), 778 So.2d 587 this Court, citing *State v. Shelton*, 621 So.2d 769 (La. 1993), summarized the burden of proof in habitual offender proceedings as follows:

⁵ In the Defendant's pro se assignment of error, he addresses the same issue. The Defendant contends that the applicable "cleansing period" at the time of his 1991 conviction was five years. The Defendant argues that five years elapsed between the commission of the offense set forth in count one and his release from confinement for the 1991 conviction.

To prove that a defendant is an habitual offender, the State must establish by competent evidence the prior felony convictions and that defendant is the same person who was convicted of the prior felonies. The State may establish this by various means, such as the testimony of witnesses to prior crimes, expert testimony matching fingerprints of the accused with those in the record of prior proceedings or photographs contained in a duly authenticated record. The State must further show that the prior convictions fall within the ten year cleansing period prescribed by La. R.S. 15:529.1(C).

Where a prior conviction resulted from a guilty plea, the State must show that the defendant was advised of his constitutional rights and that he knowingly waived those rights prior to the guilty plea, as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d. 274. If defendant denies the allegations of the bill of information, the State has the burden of proving the existence of the prior guilty pleas and that defendant was represented by counsel. Once the State meets this burden, defendant must produce some affirmative evidence of an infringement of his rights or of a procedural irregularity. Thereafter, the State must prove the constitutionality of the plea.

In proving the constitutionality of the plea, the State must produce either a 'perfect' transcript of the Boykin colloquy between the defendant and the trial judge or any

combination of (1) a guilty plea form, (2) a minute entry, or (3) an 'imperfect' transcript. If anything less than a 'perfect' transcript is presented, the trial court must weigh the evidence submitted by the defendant and the State to determine whether the State met its burden of proof that defendant's prior guilty plea was informed and voluntary.

State v. Hollins, 742 So.2d at 684-685; *State v. Morris*, 01-179 (La. App. 5th Cir. 8/28/01), 798 So.2d 1004, 1008.

In the present case, the State filed a habitual offender bill of information alleging that the Defendant was a fourth felony offender, listing the following three prior convictions: Case number 91-5928 of the 24th Judicial District Court, tendered on September 30, 1992, the Defendant pled guilty to simple burglary of an inhabited dwelling; case number 289-725 of the Orleans Parish Criminal District Court, tendered on May 18, 1983, the Defendant pled guilty to possession of pentazocine; and case number 81-220 of the 29th Judicial District Court, tendered on December 9, 1981, defendant pled guilty to simple burglary. Pursuant to La. R.S. 15:529.1, the Defendant filed written objections to the multiple offender bill of information and a motion to quash it, stating various objections to the previous convictions.

The 1992 Guilty Plea in Case Number 91-5928

As proof of the Defendant's 1992 guilty plea, the State introduced a certified copy of the bill of information charging the Defendant with one count of simple burglary of an inhabited dwelling, as well as, "WAIVER OF RIGHTS ON ENTRY OF A PLEA OF GUILTY" form signed by the Defendant, his attorney,

and the trial judge. The form evidenced that the Defendant was advised of his right to trial by jury, the right to a judge trial, the privilege against self-incrimination, and the right to confront his accusers. Additionally, the State introduced a certified copy of an arrest register from the JPSO (State's Exhibit Number 4), related to case number 91-5928, pertaining to the November 21, 1991 arrest of the Defendant for simple burglary of an inhabited dwelling.

Sergeant McKenzie, a latent fingerprint examiner with the JPSO, testified that the fingerprints he took from the Defendant prior to the hearing matched the fingerprints on the arrest register in State's Exhibit Number 4. The arrest register was linked to the bill of information containing the same type of offense, name of victim, date of offense, and complaint number. *See, State v. Duplessis*, 00-971 (La. App. 5th Cir. 12/14/00), 777 So.2d 529 (testimony comparing a defendant's current fingerprints with fingerprints found on prior arrest records is sufficient to prove that the defendant was the person convicted of a prior felony). Thus, the State proved that the Defendant was the same person convicted of this offense.

Pursuant to *Hollins*, the burden then shifted to the Defendant to produce some affirmative evidence of an infringement of his rights or of a procedural irregularity. At the hearing and now on appeal, the Defendant alleges that there was no evidence presented that a factual basis for the *Alford* plea was presented. Further, he alleges that there was no "perfect transcript" of his "Boykinization." The Defendant, however, did not present any affirmative evidence of a procedural irregularity or an infringement of his

rights. Therefore, the Defendant has not met his burden to exclude consideration of this conviction.

The 1983 Guilty Plea in Case Number 289-725⁶

The State introduced a certified copy of the bill of information charging the Defendant with one count of possession of pentazocine, as well as a minute entry that he appeared in court, represented by counsel, and entered a plea of guilty. Additionally, the State introduced a "WAIVER OF CONSTITUTIONAL RIGHTS PLEA OF GUILTY" form signed by the Defendant, his attorney, and the trial judge evidencing that the Defendant was advised and waived his rights to trial by jury, his right to confront his accusers, and his right against self-incrimination.

The State also introduced a certified copy of an arrest register from case number 289-725 pertaining to the May 22, 1982 arrest of the Defendant for possession of pentazocine. The State then introduced the testimony of Sergeant McKenzie, who testified that the fingerprints he took from the Defendant prior to the multiple offender hearing matched the fingerprints on the arrest register in State's Exhibit Num-

⁶ In connection with State's Exhibit Number 3, in addition to the conviction in case number 289-725, the State introduced a multiple offender bill of information filed in the same case. The Defendant contends on appeal that no proper and legal evidence of prior convictions was offered to support the multiple offender bill of information and that there was no evidence of a "Boykinization" proceeding in connection with it. While we agree that no such evidence was introduced in connection with the multiple offender bill of information, it is irrelevant because the State was using the 1983 conviction in case number 289-725 as the prior conviction and not the conviction on the multiple offender bill of information.

ber 3. Further, the arrest register and the bill of information contained the same name, date of offense, and type of offense. Therefore, we find that the State linked the arrest register to the bill of information and adequately proved the conviction and the Defendant's identity.

As stated above, the burden then shifted to the Defendant. The Defendant correctly alleged at the hearing that the waiver form contained no indication that he was advised of his right to appointed counsel through the appellate process or that he was advised of the potential for enhanced penalties for conviction of subsequent felonies. However, these defects do not render the pleas defective for enhancement purposes. Such advice was not mandated by statute until the institution of La. C.Cr.P. art. 556.1, added by Acts 1997, No. 1061 § 1, effective date, August 15, 1998. Because the trial courts were not required by statute to advise the Defendant of these rights at the time of his prior guilty pleas, he has failed to present affirmative evidence of any procedural irregularity which would have warranted the shift of the burden of proof back to the State. *See, State v. Perkins*, 99-1109 (La. App. 5th Cir. 4/25/00), 762 So.2d 67, 73, *modified by*, 99-1109 (La. App. 5th Cir. 6/27/00), 762 So.2d 67. This conviction was properly considered by the trial court in the multiple offender proceeding.

The 1981 Guilty Plea in Case Number 81-220

The State introduced a certified copy of the bill of information charging the Defendant with simple burglary, a transcript of "Boykin Warning and Sentencing" of December 9, 1981, a Conditions of Proba-

tion form, a fingerprint card of October 21, 1981,⁷ and the court minutes from November 2, 1981 through August 4, 1982. Sergeant McKenzie testified that the fingerprints on the fingerprint card matched the fingerprints of the Defendant which he took prior to the multiple offender hearing. Here, the date of the offense on the fingerprint card reflects a different date than on the bill of information, the transcript, and the Conditions of Probation form. However, the fingerprint card reflects the same name as that of the Defendant and the same offense that was included in the bill of information. Additionally, the fingerprint card reflects the same date of birth of the Defendant as is contained in the transcript and the Conditions of Probation form. Therefore, we find that the State linked the fingerprint card to the bill of information and Conditions of Probation form, establishing the Defendant's identity for this offense.

Furthermore, the minute entry and transcript reveal that the Defendant was advised of his constitutional rights. Specifically, the transcript shows that the Defendant was advised of his right to a jury trial, his right to confront his accusers, and his right against self-incrimination. Also, the transcript and minute entry indicate that the Defendant was represented by counsel at the time of his guilty plea.

The burden then shifted to the Defendant. The Defendant alleges that he was not advised of his right

⁷ The Defendant alleges that there were no fingerprints included in State's Exhibit Number 2 which would establish that the defendant in case number 81-220 was the same individual in the instant case. To the contrary, however, an examination of State's exhibit number 2 reveals that in fact a fingerprint card was included.

to counsel at the appellate level. However, as explained above, the trial courts were not required to advise a defendant of that right at the time of the 1981 guilty plea. *See, State v. Perkins, supra.*

The Defendant also alleges that at the time of his 1991 conviction, the applicable "cleansing period" contained in La. 15:529.1 was five years and that five years had elapsed between that conviction and his release from custody for the 1981 and 1983 convictions. The Defendant contends that because the five year period had elapsed, the State is prevented from using the 1981 and 1983 convictions for purposes of enhancement in the present case.

This issue was recently addressed by our Supreme Court in *State v. Everett*, 00-2998 (La. 5/14/02), 816 So.2d 1272. In *Everett*, the defendant argued, as does the Defendant herein, that where his earlier conviction could not have been used to make him a third offender, it cannot now be use, under a change in the law that extends the period from five years to ten years, to make him a fourth felony offender. The Supreme Court held, contrary to the defendant's position, that a prior conviction that could not have been used to enhance his sentence under the law at that time, could be used under the amended version of the law that extended the period where the new law was in effect at the time the defendant committed the latest offense. Thus, the Supreme Court held that where less than ten years had passed between the Defendant's discharge from being subject to penitentiary confinement for the previous conviction and the commission of the underlying felony, all prior felonies could be considered in the multiple offender proceeding.

Based on the reasoning in *Everett*, the fact that five years may have elapsed between the Defendant's discharge from being subject to penitentiary confinement for his 1981 conviction for simple burglary and his 1983 conviction for possession of pentazocine and the commission of the 1991 offense is not relevant. Rather, the relevant time period in the instant case is between the instant offense (December 1998) and the one immediately preceding it (the 1991 conviction of simple burglary of an inhabited dwelling). Also, the applicable time period to be considered is ten years under La. R.S. 15:529.1(C), in effect at the time the Defendant committed the latest offense.

The Defendant correctly notes that the State did not provide documentation concerning the Defendant's discharge from being subject to penitentiary confinement for his 1991 conviction. However, it is clear on the face of the record that less than ten years have elapsed between the 1991 conviction and the commission of the underlying offenses. Since we find that the Defendant is qualified to be sentenced a multiple felony offender under the statute, all of his previous convictions may be counted for enhancement purposes. *See, State v. Abram*, 01-1513 (La. App. 4th Cir. 11/13/02), 832 So.2d 850.

In a supplemental brief, the defense argues that the recent United States Supreme Court decision in *Stogner v. California*, No. 01-1757 (U.S. S.Ct., 06/26/03), 123 S.Ct. 2446, supports his argument that his 1991 conviction for simple burglary of an inhabited dwelling should not have been used to support the finding that he was a multiple offender because the statute of limitations was extended by the Legislature after it had run as to this Defendant. We find no merit in

this argument because the *Stogner* case is distinguishable.

In *Stogner*, the defendant committed the offense or criminal act at a time when the statute of limitations was three years. After the three years had run, the Legislature passed a law increasing the statute of limitations for that offense and the state thereafter attempted to prosecute the defendant for the earlier offense. In this case, we are concerned with a multiple offender statute. The Defendant committed the crime which gave rise to his prosecution after the statute of limitations had been increased by the Legislature for multiple offender prosecution. Therefore, we find that the reasoning in *Stogner* is not controlling in this case and there was no error in the trial court's use of the 1991 conviction to support the multiple offender conviction.

Based on the foregoing, we find no error in the trial court ruling denying the Defendant's motion to quash the habitual offender bill of information or in sentencing the Defendant as a fourth felony offender. This assignment of error lacks merit.

Assignment of Error Number Ten

The Defendant argues that the trial court erred in sentencing him to a term of imprisonment of 20 years. The Defendant contends that the trial court should have considered making a departure from the mandatory minimum sentence.

The State responds that the trial court did not err in imposing the mandatory minimum sentence in light of the fact that the Defendant failed to introduce

any appreciable evidence which would support a downward departure from the minimum sentence.

The Defendant acknowledged that the 20 year sentence was the mandatory minimum, but asked the trial court to consider a downward departure from that sentence.

The United States and Louisiana Constitutions both prohibit the imposition of excessive or cruel punishment. U.S. Const. amend. VIII; La. Const., art. I, § 20. The Louisiana Supreme Court has recognized that a mandatory minimum sentence under the Habitual Offender Law may still be reviewed for constitutional excessiveness. *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So.2d 672; *State v. Dorthey*, 623 So.2d 1276 (La. 1993); *State v. Cushinello*, 01-109 (La. App. 5th Cir. 7/30/01), 792 So.2d 926, 929, *writ denied*, 01-2505 (La. 9/20/02), 825 So.2d 1159. When a trial court determines that the minimum sentence mandated by La. R.S. 15:529.1 makes no “measurable contribution to acceptable goals of punishment,” or that the sentence amounts to nothing more than “the purposeful imposition of pain and suffering” and is “grossly out of proportion to the severity of the crime,” the trial judge must reduce the sentence to one that would not be constitutionally excessive. *State v. Dorthey*, 623 So.2d at 1280; *State v. Ventress*, 01-1165 (La. App. 5th Cir. 4/30/02), 817 So.2d 377, 383. However, it is presumed that the mandatory minimum sentence under the Habitual Offender Law is constitutional. *State v. Johnson*, 709 So.2d at 676; *State v. Harbor*, 01-1261 (La. App. 5th Cir. 4/10/02), 817 So.2d 223, 226. In order to rebut the presumption of constitutionality, the Defendant must clearly and convincingly show that he is “excep-

tional, which . . . means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense and the circumstances of the case." *Id.* at 227.

There must be substantial evidence to rebut the presumption of constitutionality. The "trial court may not depart from the legislatively mandated minimum simply because of some subjective impression or feeling about the defendant." *State v. Mims*, 00-1507 (La. App. 5th Cir. 12/26/01), 806 So.2d 760, 765-766; *State v. Bell*, 97-1134 (La. App. 5th Cir. 2/25/98), 709 So.2d 921, 927, *writ denied*, 98-0792 (La. 9/16/98), 721 So.2d 477. Additionally, a defendant's record of non-violent offenses cannot be the sole reason, or even the major reason, for declaring a mandatory minimum sentence excessive. *State v. Knight*, 01-881 (La. App. 5th Cir. 2/13/02), 811 So.2d 947, 950-951. The Louisiana Supreme Court has strongly emphasized that downward departures from a mandatory minimum sentence should only occur in rare situations. *State v. Lindsey*, 99-3256 c/w 99-3302 (La. 10/17/00), 770 So.2d 339, *cert. denied*, 532 U.S. 1010, 121 S.Ct. 1739, 149 L.Ed.2d 663, 69 U.S.L.W. 3700 (2001); *State v. Johnson*, *supra*.

In the present case, although the Defendant did request that the trial court consider a downward departure from the mandatory minimum sentence of 20 years, he made no showing of exceptional circumstances to justify such a downward departure. Rather, the Defendant argues that the sentence is excessive because his prior convictions involved non-violent crimes. As explained by *State v. Lindsey*, *supra*, the mere fact

none of a defendant's crimes were crimes of violence has already been taken into account by the habitual offender laws. Accordingly, we find no error in the imposition by the trial court upon the Defendant of the mandatory minimum sentence of 20 years. This assignment of error lacks merit.

Error Patent Discussion

The record was reviewed for errors patent, according to La. C.Cr.P. art. 920; *State v. Oliveaux*, 312 So.2d 337 (La. 1975); *State v. Weiland*, 556 So.2d 175 (La. App. 5th Cir. 1990).

The Defendant was convicted of La. R.S. 14:81, a "sex offense" as defined by La. R.S. 15:541(14.1). La. R.S. 15:540 *et. seq.* requires registration of persons convicted of sex offenses. However, we note that the trial court failed to inform the Defendant of the registration requirements of La. R.S. 15:542 as required by La. R.S. 15:543(A). Therefore, the matter must be remanded for the trial court to inform the Defendant of the registration requirements of La. R.S. 15:542 by sending appropriate written notice to the Defendant within ten days of this opinion and to file written proof in the record that the Defendant received such notice. *State v. Dickerson*, 822 So.2d at 859.

Accordingly, for the reasons set forth above, the Defendant's two convictions for indecent behavior with a juvenile and his hard labor sentences to six years imprisonment on count two and, as a fourth felony offender, to 20 years imprisonment without benefit of probation or suspension of sentence on count one are affirmed. The case is remanded to the district court to provide proof in the record of the

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Defendant's receipt of appropriate notice of the registration requirements of La. R.S. 15:542.

Convictions and Sentences Affirmed; Case Remanded.

APPENDIX D1
LOUISIANA FIFTH CIRCUIT COURT OF
APPEALS ORDER NO. 03-KA-141, APPEAL
SUBMITTED FOR CONSIDERATION AND
JUDGMENT, DATED: AUGUST 28, 2003

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

STATE OF LOUISIANA

v.

RONNIE M. LYLES

No. 03-KA-141

Before: James L. CANNELLA, Judge

IT IS ORDERED THAT the appeal herein is
submitted for consideration and judgment after
response of defendant received August 25, 2003.

GRETN, LOUISIANA, THIS 28TH DAY OF
AUGUST, 2003.

/s/ James L. Cannella
Judge

APPENDIX D2
LOUISIANA FIFTH CIRCUIT COURT OF
APPEALS ORDER NO. 03-KA-141, ORDER
FOR THE DEFENDANT TO HAVE A NEW
APPELLATE COUNSEL SIGN THE
RECORD AS REPRESENTING HIM,
DATED: AUGUST 8, 2003

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

STATE OF LOUISIANA

v.

RONNIE M. LYLES

No. 03-KA-141

Before: James L. CANNELLA, Judge

IT IS ORDERED that the defendant, Ronnie M. Lyles, by September 8, 2003, have new appellate counsel sign this record as representing him.

GRETN, LOUISIANA, THIS 8TH DAY OF
AUGUST, 2003.

/s/ James L. Cannella
Judge

APPENDIX D3
LOUISIANA FIFTH CIRCUIT COURT OF
APPEALS ORDER NO. 03-KA-141, ORDER
GRANTING FERDINAND J. KLEPPNER'S
MOTION TO WITHDRAW AS COUNSEL OF
RECORD, DATED: AUGUST 8, 2003.

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

STATE OF LOUISIANA

Appellee,

v.

RONNIE M. LYLES

Appellant.

No. 03-KA-141

NOW INTO COURT, comes FERDINAND J. KLEPPNER, who suggests to the Court that he has received from appellant, RONNIE M. LYLES, a document dated August 3, 2003 entitled "Certificate of Termination of Representation of Counsel Ferdinand J. Kleppner" in the above entitled and numbered proceeding in which he has also declared that, "the Courts have been notified . . ." of the termination in question.

Mover further suggests to the Court that appellant has filed a civil suit against undersigned counsel and others in connection with the litigation which is the basis for this appeal.

In view of the forgoing circumstances, undersigned counsel is compelled to move this Court to permit him to withdraw as counsel for appellant in these proceedings.

Mover certifies to the Court that he has informed appellant of the next Court appearance scheduled in this matter, that is, oral argument at 9:00 A.M. on August 14, 2003.

WHEREFORE, mover prays that he be permitted to withdraw as counsel of record for appellant in these proceedings.

/s/ Ferdinand J. Kleppner (#07450)
Attorney at Law
Law Offices of
Ferdinand J. Kleppner, Ltd.
Suite 1200—Executive Tower
3500 N. Causeway Boulevard
Metairie, LA 70002
(504) 831-2244

CERTIFICATE

I hereby certify that copies of the above and forgoing pleading has been forwarded to Ronnie M. Lyles and to the District Attorney for the Parish of Jefferson by United States Mail, postage pre-paid, this 7th day of August, 2003.

/s/ Ferdinand J. Kleppner

ORDER

Considering the above and forgoing motion, IT IS ORDERED, that be and he is hereby permitted to withdraw as counsel of record for appellant in these proceedings and that his name be removed from the record hereof.

GRETN, LOUISIANA, this 8th day of August, 2003.

/s/ James L. Cannella
Judge

APPENDIX E
24TH JUDICIAL DISTRICT COURT
JUDGMENT NO. 00-4973 JURY VERDICT OF
GUILTY AND MOTION TO ADOPT THE VERDICT
OF THE JURY BY THE COURT,
DATED: MARCH 15, 2001

THE CLERK: Twenty-fourth Judicial District Court,
Parish of Jefferson, State of Louisiana, Docket
No. 00-4973, Division L, State of Louisiana versus
Ronnie M. Lyles.

Verdict as to Count I, Brianne Harney: We, the
Jury, find the Defendant guilty of Indecent
Behavior with a Juvenile, Gretna, Louisiana, this
15th day of March 2001, signed by the foreperson,
Michael Dunmeyer. Verdict as to Count II,
LaQuinta Washington: We, the jury, find the
Defendant guilty of Indecent Behavior with a
Juvenile, signed Gretna, Louisiana, 15th Mr.
Acivedo, both counts?

JUROR: Yes, sir.

THE COURT: And Mr. Daquin, both counts?

JUROR: Yes, sir.

THE COURT: Motion to adopt the verdict of the Jury
by the Court.

MS. CALOGERO: State moves let it be a motion.

THE COURT: So ordered.

MS. CALOGERO: State also motions that the
Defendant be remanded.

THE COURT: Yes.
(Proceedings concluded.)

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**APPENDIX E1
JEFFERSON PARISH SHERIFF'S OFFICE
POLICE REPORT, PROBABLE CAUSE AFFIDAVIT
OF SERGEANT JAMES WINE
DATED: JULY 26, 2000**

**JEFFERSON PARISH SHERIFF'S OFFICE
GRETNA, LA**

Arrest Report and Probable Cause Affidavit

Arrestee name: Lyles, Ronnie

Race: Black

D.O.B.: 1/20/58

Size: Medium

Nationality: U.S.

Address: 601 N. Hyler Rd., Newton, MS

Height: 6' 1"

Weight: 190#

Hair: Black

Eyes: Brown

S.S.A.N.: 435-04-7678

Arrest Data

Location: 600 West Bank Expressway #65

Date: July 26, 2000

Time: 00:06

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Arresting Officer: Sgt. James Wine

Officer's No.: 99873

Transporting Officer: Dep. Todd Rivere

No.: 106202 Probable Cause

/s/

Judge or Magistrate

Charges

R.S. 14:81 Indecent behavior with a juvenile (2 counts)

Item No.: G-15812-00

Location of Offense: 7800 Alma St., Westwego, LA

Date of Offense: July 18, 2000

Time: 13:05

Probable Cause Affidavit

Suspect was named by two female ten years old victims and family members, to have put one of the female's hand onto his penis, covered by clothing, and to have physically touched second victim's genital region, through clothing, with his hand. Sworn to and subscribed before me, this 26th day of July, 2000.

/s/

Ex Officio Notary Public

APPENDIX E2
JEFFERSON PARISH SHERIFF'S OFFICE
POLICE REPORT, RIGHTS OF ARRESTEE OR
SUSPECTS-FORM OF DEPUTY TODD REVERE,
DATED: JULY 26, 2000

JEFFERSON PARISH SHERIFF'S OFFICE
GRETNA, LOUISIANA

Rights of Arrestee or Suspects

Day Wed Date 07-26-00 Time 00:20 Location 600 Westbank Expwy., Westwego, LA Name Ronnie Lyles
Date of Birth 01-20-1958 Age 42 Race B/M Address 601 N. Polly Avenue, Newton, MS Education 11th Grade ☒ You are under arrest for and will be charged with violation of: R.S. 14:81 Relative to Indecent Behavior with Juveniles (2 counts). ☒ Before we ask you any questions, you must understand your rights. ☒ You have the right to remain silent. ☒ Anything you say can and will be used against you in court. ☒ You have the right to talk with a lawyer for advice before we ask you any questions and to have him with you during questioning. ☒ If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. ☒ If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer. Arrestee was properly advised of his rights per Miranda (TR).

I have read this statement of my rights, X refused to sign.

App.80a

This statement of my rights has been read to me
by the undersigned officer

/s/ Det. Todd Rivere #106202

Waiver of Rights

SIGNED refused to sign.

App.81a

APPENDIX E3
24TH JDC-BILL OF INFORMATION,
DATED: SEPTEMBER 21, 2000

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON

STATE OF LOUISIANA

v.

RONNIE M. LYLES, B/M (01/20/1958).

No. 00-4973

PAUL D. CONNICK, JR. District Attorney of the
Twenty-Fourth Judicial District Court of the State of
Louisiana comes into said Court here to understand
and be informed that one

RONNIE M. LYLES (Jail)

In the Parish aforesaid, on or between December
1999 and January 2000, violated R.S. 14:81, he being
over the age of 17, did commit a lewd and lascivious
act upon the person of a juvenile by squeezing juvenile's
hand over defendant's groin/penis and kissing another
with the intent of arousing and gratifying sexual
desires.

/s/ Assistant District Attorney

App.82a

- Count 1 to timeframe December 1998 to January 1999
- Count 2 to timeframe in 1998 date 3/14/01

/s/ Amanda L. Calogero

Asst. D.A.

DA00-04273:1 Class III Complaint G-15812-00

G-15812-00 R.S. 14:81 Indecent behavior w/juvenile

G-15812-00 R.S. 14:81 Indecent behavior w/juvenile

APPENDIX E4
LYLES MOTION TO SUPPRESS THE EVIDENCE,
DATED: AUGUST 24, 2000

24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA, DIVISION "L"

STATE OF LOUISIANA

v.

RONNIE LYLES

No. 00-4973

NOW INTO COURT, through undersigned counsel comes the defendant in the above captioned matter who respectfully moves this honorable Court for entry of an Order ruling that all confessions, identifications, and physical evidence in this case are inadmissible at the trial of this matter. In support of this motion defendant relies on the Constitutions of the United States and the State of Louisiana, as well as applicable statutory and Code articles and the authority of the jurisprudence, as well general considerations of fundamental fairness. Upon information and belief, defendant declares:

All inculpatory statements and/or confessions to be used against the defendant by the State in this matter were obtained unlawfully and illegally because:

1. They were not made to police officers or to anyone else freely and voluntarily, but were made under the influence of fear, intimidation, threats or other duress, or because of promises or other inducements; and/or
2. Defendant had not been advised of his rights under *Miranda* or had invoked his right to remain silent or to have an attorney and this right had not been honored.

II.

All identifications of this defendant as the alleged perpetrator of this offense were illegally and unlawfully obtained because:

1. Defendant was viewed under circumstances which impermissibly suggested he was the perpetrator of the crime charged, in violation of *United States v. Wade*, 87 S.Ct. 1926 (1967); and/or
2. The identification procedure was conducted without the defendant's counsel, in violation of the defendant's Sixth Amendment rights; and/or
3. The identification procedure, whether line-up, photographic line-up, or show-up (witness confrontation) was so suggestive that it tainted defendant's rights and must be suppressed.

III.

The physical evidence intended for use against the defendant in this case was seized unlawfully and must be suppressed because:

1. A warrant was issued without probable cause, or the evidence was seized without a valid warrant; and/or
2. The evidence was seized without a valid exception to the warrant requirement and without probable cause to either arrest the defendant or to search the premises, persons, vehicles or areas searched.

WHEREFORE defendant requests this honorable Court to grant all relief to which he is lawfully entitled, including an Order suppressing the use of confessions, statements, evidence and/or identifications, and also an Order to Dismiss the State's case if the facts so warrant.

Respectfully submitted:

/s/ Christopher B. Edwards #22349
Attorney for Defendant
501 Derbigny Street
Gretna, Louisiana 70053
(504) 366-1121

App.86a

ORDER

FOREGOING MOTION CONSIDERED, let the state show cause on the day of ___, 2000, at ___, a.m. why the requested relief should not be granted to the defense.

Gretna, Louisiana this ___ day of ___, 2000.

/s/_____
Judge

APPENDIX E5
LYLES MOTION FOR DISCOVERY,
DATED: AUGUST 24, 2000

24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA, DIVISION "L"

STATE OF LOUISIANA

v.

RONNIE LYLES

No. 00-4973

Motion for Discovery and Inspection and for
Exculpatory Evidence for Defendant

The defendant, through undersigned counsel, moves the Court, pursuant to the statutes of Louisiana, including L.C.Cr.P. Articles 716-722, and the Constitutions of Louisiana and the United States for an order permitting discovery and inspection and for obtaining exculpatory evidence in the above styled case. The State is requested to provide the following information separately for each count under which the defendant stands charged:

1. A copy of any written or recorded statements, admissions or confessions made by the defendant. (716A)

App.88a

2. The Substance of any oral declarations, statements or confessions of any nature made by the defendant which the State intends to offer in evidence at the trial, with the information as to when, where and to whom such oral confessions or statements were made. (716B, C)
3. Copy of any waiver(s) signed by the defendant or prepared for the defendant to sign.
4. Copy of defendant's prior criminal record, if any, which is known, or by the exercise of due diligence may become known, to the prosecuting authority. (717)
5. A specific listing of the felony and misdemeanor convictions, if any, which the state intends to introduce against the defendant. (717)
6. The nature, date and place of any criminal offenses or acts of misconduct, other than those charge in the present bill of information/ indictment and those offered for impeachment purposes, which the State will attempt to prove at the trial against the defendant. (720) (La.C.Evid. 404B)
7. Inspection of any tangible objects, photographs, or documents which are within the possession, custody or control of the State which are intended for use by the prosecuting authority as evidence at the trial. (718)
8. Inspection of any tangible objects, photographs, or documents which are within the possession, custody or control of the State

which was obtained from or belong to the defendant.

9. Copies of results or reports of scientific tests, experiments, or comparisons made in connection with this particular case which are known to the prosecuting authority and are within the possession, custody, or control of any governmental agency and which are material to the preparation of the defense or are intended for use by the prosecuting authority as evidence at the trial. (719)
10. What, if any, fingerprints, shoeprints, or footprints of the defendant and/or anyone else were lifted at or near the scene of the alleged offense, and/or from any other places or objects related to the incident; and the defendant requests an inspection and examination of said prints and a listing of the names and addresses of those whose fingerprints were lifted. (719)
11. Defense at this time demands notice of the state's intent to introduce hearsay statements of co-conspirators. (721)
12. Copy of any statement, admission, or confession of any written or recorded statement made by a co-defendant. (722)
13. By what means was the defendant identified as the alleged perpetrator of the crime charged?
14. Copies of the search and arrest warrants, if any, and if so, copies of the affidavit in sup-

port thereof, the application, and the return of the warrant.

15. Copies of any consent searches and re-turns thereon.
16. Copy of the initial police report of the crime charged. *State v. Shropshire*, 471 So.2d 707 (La. 1985).
17. Copies of any inconsistent statements of witnesses. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763 (1972). Wherefore, the defendant respectfully prays that this Motion for Discovery and Inspection and Exculpatory Evidence be granted.

Respectfully submitted:

/s/ Christopher B. Edwards #22349
Attorney for Defendant
501 Derbigny Street
Gretna, Louisiana 70053
(504) 366-1121

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ORDER

LET the District Attorney Show cause on the ____
day of ____, 2000, at ____ o'clock a.m., why the foregoing
motion should not be granted.

Gretna, Louisiana, this ____ day of ____, 2000

/s/ _____
Judge

APPENDIX E6
24TH JDC-EXCERPTS FROM THE PRELIMINARY
HEARING TRANSCRIPTS (PG. 14-15), DATED:
SEPTEMBER 8, 2000; EXCERPTS FROM THE
TRIAL TRANSCRIPTS (PG. 67-68),
DATED: MARCH 15, 2001

[September 8, 2000 Transcript, p. 14]

- Q. Have the children received any sort of medical treatment after this?
- A. They have scheduled appointments with Dr. Benton.
- Q. Hold on.
- A. But I have yet to receive the results.
- Q. I take it Dr. Benton will be doing more of a Physical evaluation of the children?

[...]

[March 15, 2001 Transcript, p. 67]

You cannot discuss your testimony with anyone; is that understood? All right. Next witness.

MR. OUBRE: The State will call Omalee Gordon, your Honor. Omalee Gordon, a witness after having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name and address for the record, and spell your name.

THE WITNESS: Omalee, O-m-a-l-e-e, G-o-r-d-o-n, Gordon, 200 Fifth Street, Gretna.

DIRECT EXAMINATION

BY MR. OUBRE:

Q. Omalee, where do you work?

A. I work for Gretna Police Department, and I'm assigned to the Jefferson Children's Advocacy Center.

Q. And what is the acronym for the Children's Advocacy Center? What do you often call it?

A. CAC.

Q. And what's the history or purpose of the CAC, so the Jury can be aware of what it is?

A. The Advocacy Center is a facility that was established in Jefferson Parish in 1991, and the purpose is to conduct forensic interviews for children in a child-friendly comfortable atmosphere. And these interviews are videotaped.

Q. Do you conduct those interviews?

A. Yes, Sir.

Q. What is your background and training?

A. Since 1987, I've attended over 37 seminars dealing with forensic interviewing of children. And since 1987, I've also conducted forensic interviews of children. In 1991, I was assigned to the Advocacy Center as the forensic interviewer.

Q. And when you say interview, explain the process. Explain how it works.

A. The Advocacy Center is contacted by either Law Enforcement of Child protection, and at that time, an appointment is set for the child and the family

to come to the Advocacy Center. At that date and time, the law enforcement officer, Child Protection, if they're involved, and the family, they come to the Advocacy Center. And the family waits in the waiting room. The child is asked if they want to see a video. They pick out a video. They're given some toys. And then they return to the waiting room.

At that point, I am in the conference area with the law enforcement officer and child protection worker, and the door is shut between the waiting room and the conference area so that nothing is overheard. The law enforcement officer gives me their background on the case. After that, we bring in the caretaker, and the child remains in the waiting area with the door shut. We get whatever background information the caretaker has, and we see if they're any questions that they have. Once that's done, we ask them to step in the waiting area, speak to the child and let them.

APPENDIX E7
24TH JDC-EXCERPT FROM THE PRELIMINARY
HEARING TRANSCRIPTS (PG. 20),
DATED: SEPTEMBER 8, 2000

[September 8, 2000 Transcript, p. 20]

THE DEFENDANT: Can I say something?

MR. EDWARDS: No, no.

THE COURT: Mr. Edwards did not call you as a witness so you have not been sworn. Don't say anything. Anything further?

MR. EDWARDS: No.

THE COURT: I've heard the testimony. I've heard the arguments. I find that there is probable cause for both counts of indecent behavior with a juvenile.

APPENDIX E8
24TH JDC-EXCERPT FROM
THE TRIAL TRANSCRIPTS (PG. 8),
DATED: MARCH 14, 2001

[March 14, 2001 Transcript, p. 8]

THE CLERK: You're going to waive your client's presence, Mr. Edwards?

MR. EDWARDS: Yes, Your Honor, Chris Edwards on behalf of Ronnie Lyles. I will waive his presence for the purpose of some motions, a little house cleaning I would like to do before trial.

THE COURT: Sure.

APPENDIX E9
24TH JDC-EXCERPT FROM
THE TRIAL TRANSCRIPTS (PG. 6-7),
DATED: MARCH 15, 2001

[March 15, 2001 Transcript, p. 6]

MR. OUBRE: Your Honor, and that falls in to what the State's discovery was all about, you know, requesting alibis or whatever information that the Defense may have, and he said that there was none. The Defense is he didn't do it, so it's—I think that, at least for that part, it becomes moot.

MR. EDWARDS: I'll let your Honor rule on the motion to quash before I address the discovery issue.

THE COURT: All right. Motion denied. Next one.

MR. EDWARDS: Please note my objection. Your Honor, on the discovery, I'll take that out of order. I actually did receive discovery from the State, and I told Mr. Oubre that I didn't have any, and that remains the case.

It's not a question of not having an alibi. It's a question of not having an alibi, because they can't—you know, give me a specific time. So I think it did relate to the motion to quash in that sense, but in terms of their motion for discovery. I do not have any for them.

MR. OUBRE: And I guess for the record, your Honor, the State will ask the same question, I believe, that you don't have anything for us? Is that what you said?

MR. EDWARDS: Right.

MR. OUBRE: And you are satisfied—

MR. EDWARDS: Well, in a sense that we don't have an alibi, we don't have any reports to give you.

MR. OUBRE: And you are satisfied with what's been given by us to you?

MR. EDWARDS: I've been given what I believe is the discovery I'm entitled to.

APPENDIX E10
24TH JDC-EXCERPT FROM
THE TRIAL TRANSCRIPTS (PG. 11),
DATED: MARCH 15, 2001

[March 15, 2001 Transcript, p. 11]

I think they're trying to have the Jury draw some sort of prurient inferences for the fact that he was at the Bon Soir Motel.

[...]

There was no warrant. The arrest was based on probable cause from the prior report, so it wasn't a warrant for an arrest. It was based on probable cause.

App.100a

APPENDIX E11
24TH JDC-EXCERPT FROM
THE TRIAL TRANSCRIPTS (PG. 12),
DATED: MARCH 15, 2001

[March 15, 2001 Transcript, p. 12]

[...]

THE COURT: All right. Denied. Next one up.

MR. EDWARDS: Note my objection.

APPENDIX E12
24TH JDC-EXCERPT FROM
THE TRIAL TRANSCRIPTS (PG. 19),
DATED: MARCH 15, 2001

[March 15, 2001 Transcript, p. 14]

[...]

- A. Myself and another deputy went to the Bon Soir.
I believe his room number was 65.

APPENDIX E13
24TH JDC-EXCERPT FROM
THE TRIAL TRANSCRIPTS (PG. 20),
DATED: MARCH 15, 2001

[March 15, 2001 Transcript, p. 20]

[...]

At the hotel, we just did a simple knock and announce. And I believe the sole occupant in the room at the time was Mr. Lyles.

APPENDIX E14
24TH JDC-EXCERPT FROM
THE TRIAL TRANSCRIPTS (PG. 21),
DATED: MARCH 15, 2001

[March 15, 2001 Transcript, p. 21]

- A. At that time, I placed Mr. Lyles under investigative detention, eventually placed him under arrest and had him transported to the correctional facility.

[...]

- Q. All right. When you talked to him, what did he say his name was?
- A. I believe when I asked him for his identity, I think he verbally told me his name was Lyles, if my recollection serves.

APPENDIX E15
24TH JDC-EXCERPT FROM
THE TRIAL TRANSCRIPTS (PG. 22),
DATED: MARCH 15, 2001

[March 15, 2001 Transcript, p. 22]

[...]

- A. The only corroborating thing that I had was the fact that Mr. Lyles was at Room #65.

APPENDIX E16
24TH JDC-EXCERPT FROM
THE TRIAL TRANSCRIPTS (PG. 23),
DATED: MARCH 15, 2001

[March 15, 2001 Transcript, p. 23]

- Q. Okay. Were there any other particular circumstances that made you make an arrest that night?
- A. Yes, ma'am. I was told by the complainants that I had that Mr. Lyles had relocated to Mississippi, and I believe on the initial report, upon interview, Mr. Lyles' girlfriend, who was the link between the victims and himself, be girlfriend, that he had relocated to Mississippi when they attempted to contact him upon the first report. It was my fear, too, that he may again leave for Mississippi without being detained and booked for the pending charges.

APPENDIX E17
24TH JDC-EXCERPT FROM
THE TRIAL TRANSCRIPTS (PG. 40-41, 50, 61),
DATED: MARCH 15, 2001

[March 15, 2001 Transcript, p. 40]

[...]

Q. What was the last holiday that you remember being at the family house?

A. Christmas and Thanksgiving.

[...]

Q. Okay. Were there ever times when you would let the girls stay at the family house and you weren't staying there?

A. Not really, because I barely let Brianne spend the night out. And that particular night that she spent the night out, she begged to spend the night.

Q. I'm sorry?

A. I said the particular night that we're talking about that Brianne wants to spend the night out, she'll ask, you know, can she spend the night out.

MS. CALOGERO: Judge, can we approach?

THE COURT: Sure.

(Bench Conference)

[...]

Q. Okay. Did she use the words "Christmas holidays?"

A. Yeah.

Q. Okay. Was she sure that it wasn't during Thanksgiving holidays or whatever or did she just know that she was at Aunt Paula's house?

A. She knew it was Christmas time. She said she remembered a big tree, a big white tree that touched the ceiling.

[...]

Q. And that it happened at Christmas time, because there was a big white tree that touched the ceiling?

A. Yes.

MR. EDWARDS: No further questions.

[...]