

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0015

STATE OF LOUISIANA

VERSUS

HENRY BREAUX, JR.

Judgment Rendered: DEC - 8 2011

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APPEALED FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT  
IN AND FOR THE PARISH OF LAFOURCHE  
STATE OF LOUISIANA  
DOCKET NUMBER 463597

THE HONORABLE JEROME J. BARBERA III, JUDGE

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Camille A. Morvant, II  
District Attorney  
Thibodaux, Louisiana  
Kristine M. Russell  
Assistant District Attorney

Attorney for Appellee  
State of Louisiana

Frank Sloan  
Mandeville, Louisiana

Attorney for Defendant/Appellant  
Henry Breaux, Jr., Pro Se  
Angola, La.

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

*Hughes, J., dissents with reasons.*

**McDONALD, J.**

Defendant, H.B.<sup>1</sup>, was charged by grand jury indictment with sexual battery of a person under the age of thirteen (count 1) and second degree cruelty to a juvenile (count 2), violations of La. R.S. 14:43.1<sup>2</sup> and 14:93.2.3, respectively. Defendant pleaded not guilty and, following a trial by jury, was unanimously found guilty as charged on both counts. The trial court sentenced him for the sexual battery conviction to 40 years at hard labor, with the first 25 years to be without benefit of parole, probation or suspension of sentence, and to 30 years at hard labor for the second degree cruelty to a juvenile conviction. The sentences were made concurrent. Thereafter, the state filed a habitual offender bill of information seeking to enhance defendant's sentences pursuant to La. R.S. 15:529.1.<sup>3</sup>

Following a habitual offender hearing on October 12, 2010, the trial court adjudicated defendant to be a fourth-felony habitual offender and sentenced him to life imprisonment without benefit of parole, probation or suspension of sentence. The trial court subsequently realized it had failed to specify which sentence was enhanced and, on its own motion, set a hearing to modify and amend the habitual offender sentence it imposed. Accordingly, on November 23, 2010, the trial court sentenced defendant pursuant to La. R.S. 15:529.1A(1)(b)(i) as a third-felony habitual offender on his conviction for sexual battery of a person under the age of thirteen to 75 years at hard labor, the first 25 years to be without benefit of parole, probation or suspension of sentence. Pursuant to La. R.S. 15:529.1A(1)(c)(ii), defendant was sentenced as a fourth-felony habitual offender for the second degree

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<sup>1</sup> In order to protect the identity of the minor victim, the initials of defendant, the victim, and the victim's uncle will be used herein. See La. R.S. 46:1844W.

<sup>2</sup> Prior to its amendment by 2011 La. Acts No. 67, §1.

<sup>3</sup> All references made herein to La. R.S. 15:529.1 are made to that provision as it existed prior to its amendment by 2010 La. Acts No. 911, §1 and No. 973, §2.

cruelty to a juvenile conviction to life imprisonment at hard labor. The sentences were made concurrent.

Defendant now appeals, raising four counseled and six pro se assignments of error. For the following reasons, we affirm both convictions and defendant's adjudication and sentence as a third-felony habitual offender on count one (sexual battery). We reverse defendant's adjudication and sentence as a fourth-felony habitual offender on count two (second degree cruelty to a juvenile) and remand this matter for resentencing on that conviction.

### ASSIGNMENTS OF ERROR

#### Counseled Assignments of Error:

1. The trial court erred and/or abused its discretion in preventing defendant from impeaching the reliability of the victim's testimony by introducing evidence that she previously had recanted rape allegations she made against her uncle.
2. The trial court erred and/or abused its discretion in preventing defendant from presenting evidence that the victim's uncle had the predisposition and opportunity to have caused the injuries to the victim's "privates."
3. The trial court erred in adjudicating defendant to be a fourth-felony habitual offender and in sentencing him to life imprisonment.
4. The trial court erred in failing to vacate the life sentence previously imposed when it resentenced defendant.

#### Pro se Assignments of Error:

1. The trial court erred in charging defendant as a fourth-felony habitual offender.
2. The disclosure requirements of **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), were violated by the state and the trial court.
3. The sentence imposed upon defendant for the sexual battery conviction was grossly excessive because it exceeded the sentencing guidelines.
4. The grand jury indictment was defective in that it failed to include the essential facts constituting the offenses charged against defendant, as required by La. C.Cr.P. art. 464.

5. The trial court lacked subject matter jurisdiction over the instant prosecution.

6. The trial court erred in sentencing defendant under the habitual offender statute, La. R.S. 15:529.1, which is an unconstitutional statute.

### FACTS

In April 2008, defendant obtained custody of his five-year-old biological daughter, P.L. Several months later, on August 18, 2008, shortly after the child returned to defendant's home following a court-ordered visitation with her maternal relatives, defendant filed a complaint with the Lafourche Parish Sheriff's Office (LPSO) concerning bruises on the rear portion of her body. During the follow-up investigation, the child was observed to be frail and limping. Investigators were told by both defendant and P.L. that she had fallen off a jungle gym and broken her left leg in July of 2008, and had required surgery on that leg.

As a result of the continued investigation by the Office of Community Services and the LPSO, P.L. eventually was removed from defendant's home and placed in a foster home. On her first evening in the foster home, P.L.'s foster mother noticed what appeared to be blood on P.L.'s panties. On August 28, 2008, P.L. was taken to Children's Hospital in New Orleans for an examination by Dr. Yameika Head, stipulated by the parties to be an expert in the field of child abuse pediatrics.

The results of the examination by Dr. Head were highly abnormal. Dr. Head, who indicated that she has seen over a thousand children suspected of being maltreated, indicated that the traumatic genital and anal injuries she observed during P.L.'s examination were the worst she had ever seen. Additionally, Dr. Head testified that, while P.L. initially told her she broke her leg falling off of monkey bars, she later stated that defendant broke her leg.

At trial, P.L. testified that defendant wiped her "bottom," which she also

called her "privates," frequently while they were in the bathroom together. In describing how defendant broke her leg she stated, "He was wiping me and I always kick because it hurts and he didn't want me to kick him so he pulled my leg back and it broke." She indicated defendant was wiping her "hard" when this occurred.

### **RECONTATION OF PRIOR ACCUSATIONS**

In his first counseled assignment of error, defendant contends the trial court erred in barring the introduction of evidence that P.L. had recanted prior accusations of sexual abuse that she had made against her uncle. Defendant argues this ruling violated his constitutional rights to confront his accuser and to present a defense, because it prevented him from attacking the reliability and credibility of P.L.'s accusations against him.

Prior to trial, defendant filed a motion in limine to allow admission of evidence regarding allegations of sexual abuse made and later recanted by P.L. in March or April of 2008. The motion was based on the fact that, prior to defendant obtaining custody of P.L. in 2008, she made accusations of being sexually abused by her maternal uncle, U.L., and a juvenile cousin. She later recanted the accusations made against her uncle. However, her uncle gave a detailed confession and pleaded guilty to forcible rape in connection with the accusations made by P.L.

At the hearing on the motion in limine, defendant argued that the rape shield law, La. C.E. art. 412, did not prevent him from cross-examining P.L. for impeachment purposes on her history of recanted accusations. Defendant maintained that since the accusations and recantation were inconsistent with each other, the jury could conclude either that the accusations by P.L. were false or that she was susceptible to undue influence by maternal family members. The trial court denied the motion in limine, finding that a reasonable juror could not have

concluded, despite the recantation, that P.L. made false accusations against her uncle.<sup>4</sup>

The Sixth Amendment to the United States Constitution and Article I, § 16 of the Louisiana Constitution guarantee an accused in a criminal prosecution the right to be confronted with the witnesses against him. This right includes the right to cross-examine the prosecution's witnesses. **Davis v. Alaska**, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974); **State v. Vaughn**, 448 So.2d 1260, 1267 (1983) (on rehearing). Further, an accused also has a constitutional right to present a defense. **Washington v. Texas**, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

However, constitutional guarantees do not assure the defendant the right to the admissibility of any type of evidence, only that which is deemed trustworthy and has probative value. **State v. Governor**, 331 So.2d 443, 449 (La. 1976); **State v. Freeman**, 07-0470, p. 6 (La. App. 1st Cir. 9/14/07), 970 So.2d 621, 624, writ denied, 2007-2129 (La. 3/14/08), 977 So.2d 930. Even relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. See La. C.E. art. 403. Further, a trial judge's determination regarding the relevancy and admissibility of evidence will not be overturned on appeal absent a clear abuse of discretion. **Freeman**, 07-0470 at p. 7, 970 So.2d at 625.

Generally, a defendant may attack the credibility of a witness by examining him or her concerning any matter having a reasonable tendency to disprove the truthfulness of his or her testimony. La. C.E. art. 607C. However, the right of an accused sex offender to present a defense must be balanced against the victim's

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<sup>4</sup> Defendant filed a writ application seeking review of the trial court's ruling, which this Court declined to consider due to its noncompliance with several procedural requirements. Thereafter, defendant filed a new writ application, which was denied by this Court. However, a denial of supervisory review is merely a decision not to exercise the extraordinary powers of supervisory jurisdiction, and does not bar reconsideration of, or a different conclusion on, the same issue when an appeal is taken. See Display South, Inc. v. Express Computer Supply, Inc., 06-1137, p. 4 n.3 (La. App. 1st Cir. 5/4/07), 961 So.2d 451, 453 n.3.

interests under La. C. E. art. 412, which is intended to protect a victim of sexual assault from having her sexual history made public. **State v. Everidge**, 96-2665, p. 5 (La. 12/2/97), 702 So.2d 680, 684. Thus, in a prosecution for sexually assaultive behavior, Article 412 prohibits the introduction of evidence of the victim's past sexual behavior, with certain limited exceptions. **Freeman**, 07-0470 at p. 5, 970 So.2d at 624. However, the rape shield law is not applicable when a defendant attempts to use evidence of a victim's false allegations of improper sexual behavior to impeach the victim's credibility. **State v. Smith**, 98-2045, p. 5 (La. 9/8/99), 743 So.2d 199, 202-03. In such instances, the relevant inquiry for the trial court is whether reasonable jurors could find, based on the evidence presented by the defendant, that the victim made prior false accusations. **Smith**, 98-2045, p. 6, 743 So.2d at 203.

In the instant case, considering that P.L.'s uncle confessed and pleaded guilty to forcible rape, we find no error in the trial court's conclusion that defendant failed to establish that P.L.'s accusations against him were false. In any event, defendant appears on appeal to have abandoned his contention that P.L.'s accusations against her uncle might be false. Rather, defendant now argues that the trial court erred in concluding that only evidence of prior false accusations of sexual abuse by P.L. could be used to impeach her testimony. He asserts that evidence regarding P.L.'s "false" recantation of her accusations against her uncle was relevant to demonstrate that her ability to recall and report events consistently over time was flawed, that she was unable to distinguish between real and imagined events, and that she was susceptible to the suggestions of her maternal grandmother. He further argues that when his interests in admitting the evidence are weighed against those of the state in protecting the victim's privacy, the result requires the admission of the evidence concerning the recantation.

Defendant's contentions are unpersuasive. The evidence as to the victim's recantation would be of little, if any, probative value for the purposes asserted. The mere fact that P.L. recanted her accusations against her uncle has no evidentiary value in establishing that she is susceptible to influence by her maternal grandmother. Additionally, even if the evidence as to the recantation would have some slight probative value in establishing P.L.'s ability to recall and report past events and distinguish between real and imagined events, it is greatly outweighed by the interest in protecting her sexual history from becoming public.

Defendant suggests that embarrassment and humiliation to the victim could have been minimized by allowing him to present evidence of the recantation to the jury by means other than cross-examining P.L. However, doing so would have defeated the very purposes for which defendant claims the evidence was relevant, which purportedly was to demonstrate the victim's ability to recall and report past events consistently, her ability to distinguish what is real or imagined, and her susceptibility to familial influence. Merely informing the jury that a false recantation occurred would be of little evidentiary value as to any of these issues, since the recantation could have been the result of a myriad of other factors. Moreover, defense counsel could have explored P.L.'s ability to recall past events, to distinguish between what is real or imagined, and her susceptibility to familial influence of her maternal relatives, by cross-examining her on matters having no connection to her past sexual history.

This assignment of error is without merit.

#### **PREDISPOSITION AND OPPORTUNITY TO CAUSE INJURIES**

In his counseled and pro se assignments of error number two, defendant argues the trial court violated his right to present a defense by preventing him from presenting evidence that P.L.'s uncle had the predisposition and opportunity to have caused her genital and anal injuries. Defendant asserts he was erroneously



denied his right under La. C.E. art. 412B(1) to introduce evidence of past sexual behavior of the victim in order to show that someone else, namely P.L.'s uncle,<sup>5</sup> was responsible for her injuries. Additionally, defendant contends in his pro se assignment of error, that his constitutional right to present a defense was denied by the trial court's refusal to admit evidence regarding the confession and conviction of P.L.'s uncle for her forcible rape.

As previously noted, evidence of the sexual history of a victim of sexually assaultive behavior generally is not admissible at trial, except for limited purposes. Louisiana Code of Evidence article 412 provides, in pertinent part, that:

**B. Other evidence; exceptions.** When an accused is charged with a crime involving sexually assaultive behavior, evidence of specific instances of the victim's past sexual behavior is also not admissible except for:

(1) Evidence of past sexual behavior with persons other than the accused, upon the issue of whether or not the accused was the source of semen or injury; provided that such evidence is limited to a period not to exceed seventy-two hours prior to the time of the offense

....

...

**F. Past sexual behavior defined.** For purposes of this Article, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which the offense of sexually assaultive behavior is alleged.

On the first day of trial in this case, defendant filed a motion in limine pursuant to Article 412 to admit evidence that P.L. previously was sexually assaulted by her uncle and a juvenile cousin, for the purpose of suggesting that those assaults were the source of her injuries. Defendant further asserted that P.L.'s uncle was a frequent visitor to his mother's house during P.L.'s court-ordered weekend visitation and, therefore, still had access to her at the time of the most recent sexual assaults, further suggesting he may have caused the injuries in

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<sup>5</sup> Defendant never raised the possibility or mentioned any evidence that anyone other than P.L.'s uncle, and possibly her juvenile cousin, could have been responsible for P.L.'s injuries.

question. On the same date, the state also filed a motion in limine to exclude evidence by the defense that someone else committed the sexual assault of the victim that resulted in her vaginal and anal injuries, since the defense failed to comply with the procedural requirements for admitting such evidence.

At the hearing held on the opposing motions, the state argued that defendant was precluded from introducing evidence regarding the prior sexual abuse of P.L. by her uncle because he failed to file a timely motion as required by Article 412D. In order to offer evidence under the exception provided by Article 412B(1) that a person other than the accused was the source of the victim's injury, the accused is required to file a written motion within the time limit provided for pretrial motions, accompanied by a written statement of evidence delineating persons to be called as witnesses. See La. C.E. art. 412C & D. If the trial court determines that the statement of evidence contains evidence such as that described in Article 412B, a hearing should be ordered to determine if the evidence is admissible. La. C.E. art. 412(E).

In the instant case, the trial court granted the parties until October 30, 2009, to file pretrial motions. Since defendant did not file his motion to introduce evidence of the victim's prior injuries from sexual assaults until January 26, 2010, the trial court found the motion untimely. The trial court further concluded that, even if the motion had been timely, defendant's statement of evidence did not present competent evidence of any of the exceptions described in Article 412B(1).<sup>6</sup> Specifically, although defendant sought to introduce the evidence in question in order to establish that the prior abuse was the source of P.L.'s injuries, he offered

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<sup>6</sup> Defendant's statement of evidence listed four witnesses, who allegedly would have testified as follows: (1) a neighbor of P.L.'s maternal grandmother would testify that she knew P.L.'s uncle was at his mother's house at the same time that P.L. was there for court-ordered overnight visitation with her grandmother; (2) a therapist who treated P.L. during the time in question would testify that she "knows" that the child complained of abuse by her uncle rather than her father; (3) defendant's ex-girlfriend would testify she wrote to defendant in jail that she was tired of people lying about him; and (4) defendant's sister would testify she was told by P.L. that her uncle was still abusing her.

no competent evidence that any specific acts of sexual behavior occurred within 72 hours of the instant offense. According to defendant's statement of evidence, the prior sexual abuse resulting in the guilty plea of P.L.'s uncle occurred in February of 2008. However, the medical evidence indicated that P.L.'s genital and anal injuries were inflicted within two to four weeks of her August 28, 2008 physical examination.

We find no error in the denial of defendant's motion in limine on the grounds that it was not timely filed. In **Michigan v. Lucas**, 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991), the United States Supreme Court reversed a lower court decision holding that a notice and hearing requirement similar to that provided in Article 412 was per se unconstitutional. In reaching this holding, the Supreme Court noted that to the extent that a rape shield statute operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse witnesses and present a defense is diminished, but this does not necessarily render the statute unconstitutional. **Michigan v. Lucas**, 500 U.S. at 149, 111 S.Ct. at 1746. Moreover, some courts of this state have upheld the exclusion of evidence of the victim's prior sexual behavior when the defendant failed to file a timely motion as required by Article 412C & D. See State v. Kinsel, 00-1610, p. 10-11 (La. App. 5th Cir. 3/28/01), 783 So.2d 532, 538, writ denied, 01-1230 (La. 3/28/02), 812 So.2d 641; **State v. Billings**, 93-1542, p. 3 (La. App. 3d Cir. 5/4/94), 640 So.2d 500, 501, writ denied, 94-1437 (La. 10/7/94), 644 So.2d 631.

In the instant case, there was a period of over nine months from the time that the grand jury returned the indictment until the deadline for filing pretrial motions. Defense counsel offered no explanation for failing to file the required motion during this extensive time period. Moreover, we reject defendant's contention that

the state was not prejudiced by the defendant's failure to file a timely motion because his first motion in limine sought the admissibility of the same evidence.

The two motions in limine filed by defendant were radically different. The first was directed at introducing evidence of the victim's prior accusation of sexual abuse and her subsequent recantation thereof for the purpose of impeaching her credibility. As such, it did not fall within the scope of Article 412. See Smith, 98-2045, p. 5, 743 So.2d at 203. In contrast, evidence that prior sexual abuse of the victim may have been the source of her injuries fell squarely within the contemplation of Article 412B(1), which necessitated a timely motion and accompanying statement of evidence. Defendant's failure to meet these requirements deprived the state, as well as the victim, of proper notice. Thus, the state was deprived of an opportunity to investigate the evidence and witnesses included in the requisite statement of evidence attached to defendant's motion.

Additionally, we agree with the trial court that, even if defendant's motion had been timely, the attached statement of evidence failed to describe evidence that would have allowed the introduction of evidence regarding the prior sexual abuse under any of the exceptions provided by Article 412B(1). In particular, it failed to describe competent evidence of sexual behavior of the victim with anyone other than defendant within 72 hours of the instant offense. The only evidence included in the statement as to possible sexual abuse of P.L. by her uncle during the applicable period suggested by the medical evidence consisted of hearsay testimony regarding unspecified complaints of abuse purportedly made by P.L. Considering this fact, as well as the medical evidence indicating the prior abuse was not the source of P.L.'s injuries, we find no error in the trial court's ruling that the statement of evidence did not include evidence such as that described in Article 412B(1).

On appeal, defendant argues the trial court erred in excluding evidence that went beyond the bounds of Article 412, specifically that P.L.'s uncle pleaded guilty to forcible rape, as long as the jury was not told that P.L. was the victim. He contends he should have been allowed to present this evidence, together with evidence that the uncle was a visitor to his mother's house during P.L.'s court-ordered weekend visitation during the period that the latest abuse occurred. However, it should be noted that the defense never indicated to the trial court that it wished to introduce evidence of the uncle's rape conviction without designating P.L. as the victim, nor did the defense attempt to offer such evidence at trial. It is clear from a review of the record that the overall focus of defendant's motion was to obtain admission of evidence of her uncle's prior sexual abuse of P.L.

Finally, in his pro se assignment of error, defendant further argues that the state was required by **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to present all material evidence to the jury, including the fact that P.L.'s uncle confessed to and was convicted of forcibly raping her on a prior occasion. This argument misconstrues the holding of **Brady**, which requires the state to disclose to the defendant, upon request, any evidence that is favorable to the accused when the evidence is material to guilt or punishment. See In re Riehlmann, 2004-0680 (La. 1/19/05), 891 So.2d 1239, 1243 n.1 (per curiam). The **Brady** rule imposes no obligation upon the state to present to the jury at trial all evidence favorable to the accused.

These assignments of error lack merit.

#### **ADJUDICATION AS FOURTH-FELONY HABITUAL OFFENDER**

In his third counseled and first pro se assignments of error, defendant argues the trial court erred in adjudicating him to be a fourth-felony habitual offender. Specifically, he complains that the trial court erred in utilizing one of the two convictions obtained in the instant matter as a predicate in adjudicating him to be a

habitual offender with respect to the other conviction obtained that same date. Thus, defendant asserts he can only be adjudicated to be a third-felony habitual offender.

At the habitual offender hearing, the state presented evidence establishing that defendant had prior felony convictions for aggravated flight from an officer and for possession of marijuana, second offense. Relying on these two predicate offenses, as well as the convictions obtained in the present matter for sexual battery and cruelty to a juvenile, the state argued that defendant was a fourth-felony habitual offender. Moreover, because the instant conviction for sexual battery was a sex offense as defined in La. R.S. 15:540 et seq. and the convictions for aggravated flight from an officer and second degree cruelty to a juvenile were crimes of violence under La. R.S. 14:2B, the state argued that defendant should be sentenced to life imprisonment under La. R.S. 15:529.1A(1)(c)(ii). The trial court accepted the state's position and, utilizing the instant conviction for sexual battery as a predicate conviction, adjudicated defendant to be a fourth-felony habitual offender and sentenced him to life imprisonment on the conviction for second degree cruelty to a juvenile.

We find merit in defendant's contention that the trial court erred in adjudicating defendant to be a fourth-felony habitual offender. In pertinent part, La. R.S. 15:529.1A(1) states, "Any person who, after having been convicted within this state of a felony ... thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows...." (emphasis added). The Supreme Court has held that the plain language of this provision reflects a legislative intent to expose a person who has previously been convicted of a felony to imposition of habitual offender penalties for any felony committed after the date of the prior felony conviction. See State v. Shaw, 06-2467, p. 16 (La. 11/27/07), 969 So.2d 1233, 1243. Therefore, La. R.S. 15:529.1A(1), as well as the

jurisprudence interpreting it, require that a predicate conviction must precede the principal offense in order to be used to enhance a defendant's status as a multiple offender. See State v. Johnson, 03-2993, p. 17-18 (La. 10/19/04), 884 So.2d 568, 578.

In the instant case, defendant's conviction for sexual battery could not be used as a predicate to enhance his conviction for second degree cruelty to a juvenile because it did not precede the latter conviction as required by La. R.S. 15:529.1A(1).<sup>7</sup> Defendant did not commit the cruelty to a juvenile offense after being convicted for sexual battery. Thus, because he was convicted of both offenses on the same date, the sequencing requirement was not met in this case.

Accordingly, defendant's adjudication as a fourth-felony offender is reversed, and the life sentence imposed thereon is vacated. This matter is remanded to the trial court for further proceedings consistent with this opinion.<sup>8</sup>

#### **FAILURE TO VACATE PRIOR SENTENCE**

In his fourth counseled assignment of error, defendant argues the trial court erred in imposing new habitual offender sentences on November 23, 2010, without vacating the earlier life sentence imposed on October 12, 2010.

As previously noted, defendant originally was sentenced on both of the instant convictions on March 18, 2010. He was subsequently adjudicated to be a fourth-felony habitual offender and sentenced to life imprisonment without benefit of parole, probation or suspension of sentence following a habitual offender hearing on October 12, 2010. However, because the trial court failed to specify on

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<sup>7</sup> Contrary to the state's argument to the trial court, the fact that La. R.S. 15:529.1B allows multiple convictions obtained on the same day (if obtained after October 19, 2004) to be treated as separate convictions for future enhancement purposes does not eliminate the sequencing requirement of La. R.S. 15:529.1A(1).

<sup>8</sup> Defendant is not protected by principles of double jeopardy from being adjudicated again under the Habitual Offender Law. See State v. Thomas, 05-2210, p. 12 (La. App. 1st Cir. 6/9/06), 938 So.2d 168, 177, writ denied, 2006-2403 (La. 4/27/07), 955 So.2d 683.

which conviction the life sentence was imposed, defendant was resentenced as a habitual offender on both convictions on November 23, 2010. At that time, the trial court vacated the original sentences imposed on March 18, 2010, but failed to specifically vacate the habitual offender life sentence imposed on October 12, 2010.

The habitual offender statute clearly requires the sentencing court, when imposing a habitual offender sentence, to vacate any sentence previously imposed in the case. See La. R.S. 15:529.1D(3). A trial court's failure to comply with this requirement results in an illegal habitual offender sentence. **State v. Jackson**, 00-0717, p. 3 (La. App. 1st Cir. 2/16/01), 814 So.2d 6, 9 (en banc), writ denied, 01-0673 (La. 3/15/02), 811 So.2d 895. However, in those cases where the trial court clearly intended to impose a new sentence as a substitute for the original sentence, no sentencing discretion is involved in the correction of the illegal sentence, and an appellate court has authority under La. C.Cr.P. art. 882A to correct the sentence without the necessity of vacating the habitual offender sentence or remanding for resentencing. See Jackson, 00-0717, p. 4 and 6, 814 So.2d at 9 and 11.

In sentencing defendant at the second habitual offender hearing, the trial court evidently overlooked its duty under La. R.S. 15:529.1D(3) to vacate the prior life sentence imposed. The trial court clearly did not intend to impose two life sentences upon defendant for the same conviction. Accordingly, we hereby vacate the life sentence imposed upon defendant on October 12, 2010 to conform to the requirements of La. R.S. 15:529.1D(3). See Jackson, 00-0717, p. 6, 814 So.2d at 11. Having already ordered remand of this matter on other grounds, we further instruct the trial court to amend the minute entry and commitment to reflect that the life sentence imposed on October 12, 2010, has been vacated.

This assignment of error lacks merit.



## SEXUAL BATTERY SENTENCE

In his third pro se assignment of error, defendant contends the sentence imposed on his sexual battery conviction is illegal, unconstitutional, and excessive because it exceeds the ten-year maximum sentence authorized by La. R.S. 14:43.1C for this offense.

Under La. R.S. 14:43.1C(1), a defendant convicted of sexual battery is exposed to a penalty of imprisonment, with or without hard labor, of not more than ten years. However, since the victim in the instant case was under the age of thirteen, the applicable sentencing provision was La. R.S. 14:43.1C(2). Under this provision, when the victim of the sexual battery is under the age of thirteen and the offender is at least seventeen years old, the offender is exposed to imprisonment at hard labor for not less than 25 years and not more than 99 years, with the first 25 years to be without benefit of parole, probation, or suspension of sentence. The trial court originally sentenced defendant under this provision to 40 years at hard labor.

Subsequently, defendant was adjudicated to be a third-felony habitual offender with respect to his sexual battery conviction. The trial court then sentenced him under La. R.S. 15:529.1A(1)(b)(i), which exposed him to a potential sentence on that conviction of not less than 66 years nor more than 198 years. The trial court sentenced him to 75 years at hard labor, the first 25 years to be without benefit of parole, probation, or suspension of sentence. The sentence imposed was within the applicable statutory limits and, in fact, near the lower end of the continuum of possible sentences.

This assignment of error lacks merit.

## GRAND JURY INDICTMENT

In his fourth pro se assignment of error, defendant contends the indictment returned by the grand jury was defective because it did not state the essential facts comprising the charged offenses as required by La. C.Cr.P. art. 464.

The time for testing the sufficiency of an indictment or bill of information is before trial by means of a motion to quash or an application for a bill of particulars. Normally, a postverdict attack on the sufficiency of an indictment should be rejected unless the indictment failed to give fair notice of the offense charged or failed to set forth any identifiable offense. **State v. Manning**, 03-1982, p. 48 (La. 10/19/04), 885 So.2d 1044, 1089, cert. denied, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005). Since defendant failed to file a motion to quash in the instant case, he waived any claim based on the allegedly defective indictment.

Moreover, the indictment was not fatally defective. In accordance with La. C.Cr.P. art. 464, an indictment should be “a plain, concise, and definite written statement of the essential facts constituting the offense charged,” and should include a citation to the statute that the defendant is alleged to have violated. Nevertheless, the indictment itself need not set out the detailed facts constituting the violation, because a defendant may procure such details through a bill of particulars. **State v. Gainey**, 376 So.2d 1240, 1243-44 (La. 1979); **State v. Tupa**, 515 So.2d 516, 517 n.2 (La. App. 1st Cir. 1987). Thus, if the indictment sufficiently identifies the conduct charged and the statute violated, a motion to quash will not be granted. **Gainey**, 376 So.2d at 1244. A review of the indictment indicates these requirements were met in the instant case.

This assignment of error is without merit.

## SUBJECT MATTER JURISDICTION

In his fifth pro se assignment of error, defendant contends the trial court lacked subject matter jurisdiction over this prosecution because the charges against

him were invalid. Specifically, he complains that the grand jury indictment was defective because it did not contain an “enabling clause.”

Under La. Const. art. V, § 16A, the district court is vested with original jurisdiction over criminal prosecutions. No legal basis exists for defendant’s claim that a criminal indictment must contain an “enabling clause.” Furthermore, the offenses of which defendant was charged and convicted were enacted by legislative acts containing proper enacting clauses as required by La. Const. art. III, § 14.<sup>9</sup> See 1991 La. Acts No. 654, 2003 La. Acts No. 232, and 1999 La. Acts No. 191.

This assignment of error lacks merit.

#### **CONSTITUTIONALITY OF HABITUAL OFFENDER STATUTE**

In his final pro se assignment of error, defendant contends the Habitual Offender Statute, La. R.S. 15:529.1, unconstitutionally violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it removes from the jury the determination of facts relating to a defendant’s prior convictions. Citing **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and numerous other cases, defendant argues that predicate convictions are an essential element of the offense and, therefore, must be found by a jury beyond a reasonable doubt.

Initially, we note that defendant failed to raise this issue before the trial court. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or sought, the party made known to the court the action that he desired the court to take, or of his objections to the court’s action, and the grounds therefor. La. C.Cr.P. art. 841; **State v. Dudley**, 06-1087, p. 31 (La. App. 1st Cir. 9/19/07), 984 So.2d 11, 30-31, writ not considered, 08-1285

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<sup>9</sup> This provision states that: “The style of a law enacted by the legislature shall be, ‘**Be it enacted by the Legislature of Louisiana.**’ It shall be unnecessary to repeat the enacting clause after the first section of an act.” (Emphasis added.)

(La. 11/20/09), 25 So.2d 783. In any event, the Louisiana Supreme Court has held on numerous occasions that the Habitual Offender Law is constitutional in its entirety. See State v. Johnson, 97-1906, p. 5-6 (La. 3/4/98), 709 So.2d 672, 675. Moreover, **Apprendi**, by its own language, is not applicable to habitual offender proceedings. See Apprendi, 530 U.S. at 476, 120 S.Ct. at 2355; **State v. LeBlanc**, 04-1032, p. 12 (La. App. 1st Cir. 12/17/04), 897 So.2d 736, 744, writ denied, 05-0150 (La. 4/29/05), 901 So.2d 1063, cert. denied, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005). It is well settled that a habitual offender proceeding is a status, rather than a criminal, proceeding. Accordingly, the right to a jury trial does not apply to such a proceeding as a matter of federal or state constitutional law. **LeBlanc**, 897 So.2d at 744.

This assignment of error lacks merit.

**CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE ON COUNT ONE (SEXUAL BATTERY) AFFIRMED; ON COUNT TWO (SECOND DEGREE CRUELTY TO A JUVENILE) CONVICTION AFFIRMED, HABITUAL OFFENDER ADJUDICATION REVERSED, AND SENTENCE VACATED; THE CASE IS REMANDED FOR RESENTENCING, WITH INSTRUCTIONS.**

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2011 KA 0015**

**STATE OF LOUISIANA**

**VERSUS**



**HENRY BREAUX, JR.**

**\* \* \* \* \***

**HUGHES, J.**, dissenting.

The issue in this case is whether at trial evidence of a brutal sexual assault on the five year old victim can be excluded as “past sexual behavior” of the victim. The trial court ruled that it could, and this court would affirm that ruling.

“Past sexual behavior” contemplates consensual sexual activity of a sex crime victim, even if promiscuous, or involving prostitution. The victim is not subject to character attack when testifying against an assailant.

It makes no sense to think of a five year old as having “past sexual behavior.” Anything that occurs with a five year old would obviously not be consensual and would constitute a crime. In this case this “behavior” involves a convicted rapist against whom the child has made detailed and explicit videotaped statements. There can be no justification for excluding this evidence from the trial of the child’s father, against whom the child at, a later date, made much less serious allegations, thus denying the father his constitutional right to a defense, to show the identity of the actual perpetrator of the crimes against his daughter. To

allow the rape shield law to protect, not the victim, but the perpetrator of a horrendous sexual assault against a five year old child, is absurd.

This case involves a five year old little girl. Her "past sexual behavior" is non existent. There can be no testimony that she was having sex with others as contemplated by the rape shield law. And she does not allege that she had sex with the defendant, her father. At trial in January, 2010 as a 6 year old, the child testified only that her father "wiped" her bottom or privates "hard" and that it hurt. Yet in April of 2008 she gave a detailed video statement that [UL] and [CM] had put their privates in her private and put their fingers in her private and twisted their fingers in her hard, at [S's] house.

The father only obtained custody of his daughter after these allegations arose. He contacted the Sheriff's office after he observed bruises on his daughter's back after she returned from court-ordered visitation. His parental skills certainly may be lacking. But it is understandable that if his daughter had been abused it would hurt when he wiped her in the bathroom. When the child's testimony at trial is compared with her earlier statements against [UL] and [CM] it is a travesty to exclude that evidence and the evidence that [UL] had access to the child during the time frame that the state's medical expert, Dr. Yameika Head, set for the injuries in this case to have occurred. Although [UL] eventually pled guilty to forcible rape, it is obvious he was not incarcerated immediately and may well have had continuing access to the child even after she reported his initial attacks. It is inconceivable that the defendant would not be allowed to present this defense at trial.

I must therefore dissent from the majority opinion in this matter, for the following reasons: (1) the defendant was sentenced, as a habitual offender, to life at hard labor prior to the amendment of LSA-R.S. 15:529.1, by 2010 La. Acts, No. 69, to authorize hard labor for habitual offenders, and the underlying criminal

offense statutes (LSA-R.S. 14:43.1 and 14:93.2.3) do not authorize a life sentence at hard labor; and (2) defense evidence was improperly excluded concerning the fact that the victim's uncle, U.L., had confessed to raping the victim earlier in the same year and had access to the victim during the time the crime was committed.

With respect to the latter, the evidence was excluded by the trial court on the basis that the defense did not timely notify the prosecution of its intent to introduce the evidence, and thus, LSA-C.E. art. 412 precluded introduction of the testimony.

Article 412 provides as follows:

**A. Opinion and reputation evidence.** When an accused is charged with a crime involving sexually assaultive behavior, reputation or opinion evidence of the past sexual behavior of the victim is not admissible.

**B. Other evidence; exceptions.** When an accused is charged with a crime involving sexually assaultive behavior, evidence of specific instances of the victim's past sexual behavior is also not admissible except for:

(1) Evidence of past sexual behavior with persons other than the accused, upon the issue of whether or not the accused was the source of semen or injury; provided that such evidence is limited to a period not to exceed seventy-two hours prior to the time of the offense, and further provided that the jury be instructed at the time and in its final charge regarding the limited purpose for which the evidence is admitted; or

(2) Evidence of past sexual behavior with the accused offered by the accused upon the issue of whether or not the victim consented to the sexually assaultive behavior.

**C. Motion.** (1) Before the person accused of committing a crime that involves sexually assaultive behavior may offer under Paragraph B of this Article evidence of specific instances of the victim's past sexual behavior, the accused shall make a written motion in camera to offer such evidence. The motion shall be accompanied by a written statement of evidence setting forth the names and addresses of persons to be called as witnesses.

(2) The motion and statement of evidence shall be served on the state which shall make a reasonable effort to notify the victim prior to the hearing.

**D. Time for a motion.** The motion shall be made within the time for filing pre-trial motions specified in Code of Criminal Procedure Article 521,<sup>[1]</sup> except that the court shall allow the motion to be made at a later date, if the court determines that:

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<sup>1</sup> Code of Criminal Procedure Article 521 provides:

(1) The evidence is of past sexual behavior with the accused, and the accused establishes that the motion was not timely made because of an impossibility arising through no fault of his own; or

(2) The evidence is of past sexual behavior with someone other than the accused, and the accused establishes that the evidence or the issue to which it relates is newly discovered and could not have been obtained earlier through the exercise of due diligence.

**E. Hearing.** (1) If the court determines that the statement of evidence contains evidence described in Paragraph B, the court shall order a hearing which shall be closed to determine if such evidence is admissible. At such hearing the parties may call witnesses.

(2) The victim, if present, has the right to attend the hearing and may be accompanied by counsel.

(3) If the court determines on the basis of the hearing described in Subparagraph (E)(1) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence may be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the victim may be examined or cross-examined. Introduction of such evidence shall be limited to that specified in the order.

(4) Any motion made under Subparagraph C and any statement of evidence, brief, record of a hearing, or like material made or used in connection with the motion shall be kept in a separate, sealed package as part of the record in the case. Nothing in this Article shall preclude the use of the testimony at such hearing in a subsequent prosecution for perjury or false swearing.

**F. Past sexual behavior defined.** For purposes of this Article, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which the offense of sexually assaultive behavior is alleged.

First, I would conclude that Article 412 was inapplicable under the facts of the instant case. Article 412 applies by its terms to restrict introduction of "evidence of the past sexual behavior of the victim." See LSA-C.E. art. 412(A). "Past sexual behavior" is defined as "sexual behavior other than the sexual behavior with respect to which the offense of sexually assaultive behavior is alleged." See LSA-C.E. art. 412(F). Under rules of statutory construction, the word "behavior" should be given its generally accepted meaning; i.e., the manner

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Pretrial motions shall be made or filed within fifteen days after arraignment, unless a different time is provided by law or fixed by the court at arraignment upon a showing of good cause why fifteen days is inadequate.

Upon written motion at any time and a showing of good cause, the court shall allow additional time to file pretrial motions.



of conducting oneself. See LSA-C.C. art. 11; LSA-R.S. 1:3; LSA-R.S. 14:3; **State v. Taylor**, 99-2935, p. 3 (La. 10/17/00), 769 So.2d 535, 537; <http://www.merriam-webster.com/dictionary/behavior>. Thus, in using the term “behavior,” the legislature must have intended to reference prior sexual actions taken *by the victim*. In this case, the evidence sought to be introduced involved prior sexual actions taken *by U.L.*, the victim’s uncle, not actions of the victim.<sup>2</sup>

Furthermore, the supreme court, in **State v. Williams**, stated that the purpose of a rape shield law (LSA-C.E. 412) is to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior. See **State v. Williams**, 2005-1560 (La. 4/24/06), 927 So.2d 266, 267, citing **Michigan v. Lucas**, 500 U.S. 145, 146, 111 S.Ct. 1743, 1745, 114 L.Ed.2d 205 (1991). Further, Comment (g) to Article 412 provides: “This Article is primarily intended to protect the victim from improper character attacks by the accused.”

Therefore, I would conclude that neither the plain language of Article 412 (in governing only evidence of prior sexual behavior of a victim, rather than

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<sup>2</sup> While we note that LSA-C.E. art. 412 has been discussed in prior cases of the supreme court and this court in conjunction with the admissibility of prior sexual abuse of a child, the evidence was deemed inadmissible and the propriety of the application of Article 412 was not a litigated issue in the cases. See **State v. Smith**, 98-2045 (La. 9/8/99), 743 So.2d 199 (holding that because the evidence defendant attempted to introduce did not concern the victim's prior sexual behavior, history, or reputation for chastity, prior false allegations of sexual assault by the victim did not constitute “past sexual behavior” for purposes of the rape shield statute, and therefore, Article 412 was found inapplicable in sexual assault cases where the defendant seeks to question witnesses regarding the victim's prior false allegations concerning sexual behavior for impeachment purposes; consequently, no Article 412 hearing is required when defendant seeks to introduce such evidence); **State v. Kirsch**, 202-0993 (La. App. 1 Cir. 12/20/02), 836 So.2d 390, writ denied, 2003-0238 (La. 9/5/03), 852 So.2d 1024 (court held that evidence of eight-year-old victim’s prior allegedly false accusations of sexual activity with her 9-year-old biological brother was inadmissible, since the prior accusations were not proven to be false); **State v. Michel**, 93-0789 (La. App. 1 Cir. 3/11/94), 633 So.2d 941 (in which it was held that evidence of prior molestation of child, three years previously, was properly excluded where defendant was found by law enforcement officers naked from the waist down, in bed with child, who was also naked from the waist down); **State v. Blue**, 591 So.2d 1173 (La. App. 1 Cir. 1991), vacated in part on other grounds, 591 So.2d 1172 (La. 1992) (evidence of prior molestation was not shown to be relevant). The other cases in which the issue was directly addressed were: **State v. Zierhut**, 93-673 (La. App. 5 Cir. 6/3/94), 631 So.2d 1378, 1381, writ denied, 94-0607 (La. 6/3/94), 637 So.2d 500, and **State v. Hotoph**, 99-243 (La. App. 5 Cir. 11/10/99), 750 So.2d 1036, writs denied, 99-3477, 2000-0150 (La. 6/30/00), 765 So.2d 1062, 1066. However, the stated proposition, i.e. that Article 412 applies to both the voluntary and involuntary sexual history of a victim, was unsupported by convincing authority. In **Hotoph**, the Third Circuit cited **State v. Everidge**, 96-2665 (La. 12/2/97), 702 So.2d 680, 684, although the supreme court did not so hold, and **State v. Zierhut**, which cited no authority for that position.

evidence relative to someone who has imposed his sexual behavior upon the victim), nor the purpose underlying the enactment of Article 412 (the prevention of improper character attacks on victims) justifies its application to instances of prior sexual behavior inflicted on a child victim.<sup>3</sup>

Nevertheless, even if Article 412 were determined by this court or the supreme court to be applicable to acts of sexual abuse against a child victim, its application cannot override the constitutional right of the defendant to present a defense. An accused is afforded the right not only to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, and to testify in his own behalf, but also “to present a defense.” See LSA-Const. Art. I, § 16. See also U.S. Const. Amend. VI.

The defendant in this case contends that his Constitutional right to present a defense and/or to confront the witnesses against him has been abridged. The State contends and the trial court ruled that the defendant’s failure to timely comply with LSA-C.E. art. 412’s notice requirements resulted in the loss of any right the defendant had to present the evidence at issue. In support of his position, the defendant has cited **Olden v. Kentucky**, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988), and **State v. Williams**, *supra*.

In **State v. Williams**, the supreme court acknowledged that Article 412 does not and cannot preclude defense evidence, given a defendant’s Sixth Amendment right to confront adverse witnesses and present a defense, sought to be introduced to counter the prosecution’s introduction of physical evidence. See **State v. Williams**, 2005-1560 at p. 2, 927 So.2d at 267. In so holding, the supreme court

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<sup>3</sup> Contrast **State v. Taylor**, 31,224 (La. App. 2 Cir. 11/13/98), 722 So.2d 1073, writ denied, 99-0024 (La. 4/30/99), 741 So.2d 9 (wherein the Second Circuit ruled that the trial court erred in excluding evidence that the eleven-year-old victim (allegedly raped by her stepfather, the defendant) had made a prior inconsistent statement, contradicting her trial testimony that she had only had sexual intercourse with her stepfather, when, in fact, she had admitted to a social worker that she had also had sex with some neighborhood boys; the appellate court concluded the defendant’s right to present a defense was clearly compromised and that the exclusion of the prior inconsistent statement was not harmless beyond a reasonable doubt, as the case turned on the credibility of the victim).

cited the Advisory Committee Notes to Federal Rules of Evidence Article 412, upon which LSA-C.E. art. 412 was based, which states: "Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible."<sup>4</sup> See also LSA-C.E. art. 412, Comment (b), providing:

The Louisiana Supreme Court, in **State v. Vaughn**, 448 So.2d 1260 (La. 1984), has indicated that a restriction of a defendant's offer to introduce testimony as to the victim's prior sexual history may violate the defendant's right to confrontation and fair trial. Federal Rule of Evidence 412 addresses this problem by explicitly providing for the admissibility of evidence (other than reputation or opinion) of a victim's past sexual behavior when such evidence "is constitutionally required to be admitted." This Article, like every Article in this Code is necessarily subject to constitutional requirements, and it has not been the general practice in this Code specifically to refer to them. See Art. 102, comment (b); comments to Art. 403.

Louisiana Code of Evidence Article 102 provides: "These articles shall be construed to secure fairness and efficiency in administration of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Comment (b) to Article 102 further states:

The rules and procedures embodied in the Articles of this Code do not represent an attempt to interpret the Federal or Louisiana constitution. Constitutional questions should be resolved by the principles and rules of constitutional law. In criminal matters especially the Articles of this Code must be interpreted and applied in light of and within the confines mandated by the Louisiana and federal constitutions. Louisiana has developed a firm tradition of commitment to the scrupulous observance of the basic tenets of fair play inherent in the constitutional safeguards of due process. In various particulars the Louisiana Constitution of 1974 goes further than its federal counterpart in protecting the interests of the accused and the general

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<sup>4</sup> See **State v. Williams**, 2005-1560 at pp. 2-3, 927 So.2d at 267, wherein the defense sought to introduce evidence that the defendant's son had also engaged in sexual behavior with the victim (to counter the prosecution's DNA test results of the victim's aborted fetus that indicated a high probability that that defendant fathered the aborted fetus and thus had raped the victim). The **State v. Williams** court held that Article 412 could not and did not preclude the defendant from raising any and all reasonable doubts as to the validity of the DNA results even if that challenge tended to show that the aborted fetus was the product of the victim's sexual behavior with another person. The supreme court also held that in the context of record assertions by the State that its prosecution of defendant rested on two acts of sexual intercourse, the second of which led to impregnation of the victim resulting in an early term abortion of the fetus, scientific evidence regarding the identity of the father is not evidence relating to the victim's past sexual behavior as specifically defined in Article 412, but evidence related to the charged criminal acts placed at issue and made directly relevant to the question of defendant's guilt or innocence by the State.

citizenry against governmental and private abuses, intrusions, and improprieties. No intent to alter or delimit these safeguards and principles is intended, nor would any such attempt or effect be constitutionally permissible. Under special factual circumstances certain specific and otherwise mandatory provisions of this Code must necessarily bow to these notions of fundamental fairness. The constitutional interpretation and application of this Code in these circumstances is entrusted to the judiciary. [Citations omitted.]

Further, Comment (c) to LSA-C.E. art. 403 states: "Because of the great deference paid in the American system of justice to the rights of the accused in criminal cases (his rights to make out a defense, adduce evidence, confront and cross-examine the witnesses called against him, etc.), serious constitutional questions may be presented when an accused is precluded from introducing relevant, otherwise admissible evidence. See also State v. Smith, 98-2045 (La. 9/8/99), 743 So.2d 199, 202 n.1.<sup>5</sup>

In **Olden v. Kentucky**, the defendant, who was accused of rape, sought to introduce evidence of the victim's alleged extramarital relationship and subsequent co-habitation with his half-brother, as being relevant to the victim's motivation to falsely accuse the defendant of rape in order to protect her relationship with her boyfriend (the defendant's half-brother). Although the state court had held the evidence was not barred by the state's rape shield law and acknowledged the evidence in question was relevant to the defendant's theory of the case, it nonetheless excluded the evidence on the basis that its probative value was outweighed by its possibility for prejudice. (The state court was concerned that revealing to the jury the fact that the victim was involved in an interracial relationship with her boyfriend would subject her to unfavorable prejudice by the

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<sup>5</sup> The **State v. Smith** court noted:

Federal Rule of Evidence 412 includes the two exceptions that are found in La. C.E. art. 412. Additionally, F.R.E. 412(b)(1) provides that evidence of a victim's past sexual behavior is admissible when such evidence is "constitutionally required to be admitted." Although La. C.E. art. 412 does not specifically contain this exception, the official comments recognize this additional exception in the Federal Rules of Evidence and state that La. C.E. art. 412, "like every Article in this Code is necessarily subject to constitutional requirements, and it has not been the general practice of this Code specifically to refer to them." La. C.E. art. 412, Comment (b).

jury members.) In reversing the state court decision, the U.S. Supreme Court explained that while a trial court may impose reasonable limits on a defense counsel's inquiry into the potential bias of a prosecution witness to take account of such factors as harassment, prejudice, confusion of the issues, the witness's safety, or repetitive or marginally relevant interrogation, the state court limitation in the **Olden** case was beyond reason. Thus, the Supreme Court held that speculation as to the effect of jurors' racial bias could not justify exclusion of evidence with such strong potential to demonstrate the falsity of the victim's testimony. See Olden v. Kentucky, 488 U.S. at 230-32, 109 S.Ct. at 482-83.<sup>6</sup>

**Michigan v. Lucas**, 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991), is also relevant to this discussion. In **Michigan**, the Supreme Court recognized that a criminal defendant's right to present relevant testimony is not without limitation, and may, in appropriate cases, "bow to accommodate other legitimate interests in the criminal trial process." The **Michigan v. Lucas** court stated that to the extent such state action operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse witnesses and present a defense is diminished; however, the statute is not thereby necessarily rendered unconstitutional. At issue in the case was Michigan's rape shield law, the notice and hearing requirement of which was recognized to be supported by valid state interests, such as: heightened protection for victims against surprise, harassment, and unnecessary invasions of privacy; avoidance of undue delay; and

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<sup>6</sup> Once it was determined that the lower court erred in excluding the evidence, the Supreme Court stated that the correct inquiry then became whether, "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Whether such an error is harmless in a particular case depends upon a host of factors, which include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. After considering the relevant factors within the context of the case before, the Supreme Court concluded that it was impossible to conclude beyond a reasonable doubt that the restriction on the defendant's right to confrontation was harmless. See Olden v. Kentucky, 488 U.S. at 232-33, 109 S.Ct. at 483-84.

protection against surprise to the prosecution.<sup>7</sup> See Michigan v. Lucas, 500 U.S. at 149-53, 111 S.Ct. at 1746-48.

The **Michigan v. Lucas** court then considered whether the legitimate interests served by a notice requirement, such as that contained in the rape shield law, can ever justify precluding probative evidence (which evidence, in that case, was of a prior consensual sexual relationship between a rape victim and a criminal defendant). In discussing the issue, the Supreme Court pointed out that probative evidence may, in certain circumstances, be precluded when a criminal defendant fails to comply with a valid discovery rule. Citing **United States v. Nobles**, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), and **Taylor v. Illinois**, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), the court stated that the Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system, and where a discovery violation amounts to willful misconduct designed to obtain a tactical advantage, evidence preclusion may be justified, particularly when a less severe penalty would perpetuate rather than limit the prejudice to the State and the harm to the adversary process.<sup>8</sup> However, preclusion is not permissible every time a discovery rule is violated, rather, alternative sanctions should be considered if adequate and appropriate in the case. See Michigan v. Lucas, 500 U.S. at 151-52, 111 S.Ct. 1747-48.

Based on these authorities, it must be concluded that even if LSA-C.E. art. 412 is applicable in the instant case, its dictates cannot take precedence over the validly asserted constitutional rights of a criminal defendant. An examination of

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<sup>7</sup> The Supreme Court described notice requirements as a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. **Michigan v. Lucas**, 500 U.S. at 150-51, 111 S.Ct. at 1747.

<sup>8</sup> In **United States v. Nobles**, the defendant refused to comply with the district court's order to submit a copy of a witness/investigator's report to the prosecution. In **Taylor v. Illinois**, the defendant violated a state procedural rule by failing to identify a particular defense witness in response to a pretrial discovery request. In both cases, the sanction imposed for the violation was exclusion of the undisclosed evidence and/or witness. See Michigan v. Lucas, 500 U.S. at 151-52, 111 S.Ct. 1747-48.

the facts and procedural history of this case indicates that the trial court applied LSA-C.E. art. 412 as written, without giving adequate weight to the defendant's rights under both Article I, § 16, of Louisiana's Constitution and the Sixth Amendment of the U.S. Constitution.

In the instant case, when the January 26, 2010 trial date was set, the trial court also set an October 30, 2009 deadline for the filing of motions; the order fixing these dates was signed on October 14, 2009. On October 20, 2009 the defendant filed a "Motion in Limine Requesting Admissibility of Recanted Testimony," in which a declaration as to the admissibility of "the victim's recanted testimony" was sought. In the motion, the defendant asserted:

All of the victim's recanted accusations should now be admissible in the trial of [the defendant]. They would be offered not for the truth of the matter asserted but to document that she has a history of making false allegations. The recent disclosure also raises the necessity for the defense to request an additional psychological evaluation of the victim to determine if she has been unduly influenced by her mother's family. Furthermore, the Rape Shield Law should not be invoked to prevent from proving the victim's history of accusations and recanted accusations.

A hearing on this motion was scheduled for November 16, 2009. In the defendant's November 13, 2009 pre-hearing memorandum in support of his motion, he further stated that : he sought to introduced a video tape, made in connection with Child Advocacy Center forensic interviews, in which P.L. accused her uncle, U.L., and her teenaged cousin, C.M., of sexual abuse; P.L. had "recently" recanted these accusations; he also intended to call U.L. as a witness, asserting that U.L. had pled guilty to the forcible rape of P.L.; and U.L.'s confession coupled with P.L.'s recanting the accusations show that P.L. had been improperly influenced by her mother's family<sup>9</sup> to transfer blame from her uncle to her father (the defendant). The prosecutor acknowledged that U.L. had, in fact, pled guilty to the charge of forcible rape of P.L. Both the State and the defense

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<sup>9</sup> The record shows that U.L. is P.L.'s maternal grandmother's son.

agreed that P.L. previously lived with her maternal grandmother, where U.L. either lived or visited regularly, until April of 2008, when the abuse by U.L. was discovered and the defendant obtained custody of P.L. by means of a temporary court order. However, the defendant asserts that U.L. continued to have access to P.L. when she visited at her grandmother's house.<sup>10</sup> The defendant argued that he could present witnesses (neighbors of P.L.'s grandmother), who would testify that when P.L. was at her grandmother's house, U.L. would also be there, even after the defendant obtained custody of P.L.; a fact that the defendant contends showed the abuse, for which he was charged, was committed by U.L. at P.L.'s grandmother's house. During the hearing, the parties stipulated that there were four video tapes in which P.L. accused U.L. of sexual abuse, leading to his plea of guilty to forcible rape, and that P.L. later recanted those accusations in an unrecorded, unwritten statement. At the conclusion of the hearing, the trial court ruled that the video tapes of P.L.'s allegations against U.L. could not be admitted into evidence, as prior inconsistent statements, because the jurisprudence required that such a statement be false to be admissible.<sup>11</sup> See State v. Smith, 743 So.2d at 202-03 (wherein the supreme court held that prior *false* allegations of sexual assault by the victim are submitted as evidence for impeachment purposes and are not considered "past sexual behavior," and so may be used at trial without previously requesting an Article 412 hearing). See also State v. Kirsch, 202-0993 (La. App. 1 Cir. 12/20/02), 836 So.2d 390, writ denied, 2003-0238 (La. 9/5/03), 852 So.2d 1024.

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<sup>10</sup> Testimony was presented at the defendant's criminal trial that a consent judgment reached by the parties (including P.L.'s mother, C.L., who was incarcerated at the time) on August 15, 2008, which gave the defendant custody of P.L, but required the defendant to allow visitation with her grandmother (C.L.'s and U.L.'s mother). P.L. went for an overnight visitation with her grandmother on August 16, 2008, just prior to the time her injuries began to be discovered on August 18, 2008.

<sup>11</sup> After receiving an adverse ruling on his October 2009 motion in limine, the defendant herein applied to this court for supervisory review of the trial court's ruling. His first application was not considered for failure to comply with the Uniform Rules for Louisiana Courts of Appeal. See State v. Breaux, 2009 KW 2382 (La. App. 1 Cir. 1/19/10) (unpublished). On the defendant's second application for review, this court denied the application. See State v. Breaux, 2010 KW 0132 (La. App. 1 Cir. 1/26/10) (unpublished).



Thereafter, the defendant filed a second motion in limine on January 26, 2010, entitled "Motion in Limine Pursuant to C.E. Art. 412 to Admit Evidence Concerning Victim's Prior Injuries from Sexual Assault(s)." In this motion, the defendant sought to be allowed to "present evidence suggesting that [U.L.] and/or [C.M.] caused the vaginal and anal injuries sustained by the victim P.L." The defendant's motion also stated that he had "previously made clear his intention to raise the issue of whether someone else could have inflicted the child's injuries" in his October 26, 2009 motion in limine and during the subsequent November 16, 2009 hearing, wherein "defense counsel made clear his intention to use the defense that the sexual abuse of P.L. was perpetrated by the victim's maternal uncle, [U.L.,] and by a juvenile cousin." The defendant further asserted that during the prior hearing he "sought permission to introduce the video tapes in which the victim P.L. graphically detail[ed] the vaginal and anal rapes committed upon her by [U.L.]," noting that U.L. had confessed and pled guilty to the crimes.<sup>12</sup> The defendant made the following additional assertions:

It would be highly misleading to the jury to allow the prosecution to suggest that [U.L.] could not have been the source of the child's injuries. As set forth in the attached statement of defense evidence, there is abundant proof available that [U.L.] sexually assaulted the child on more than one occasion. Even more import to the defense is the evidence that [U.L.] still had access to P.L. during the period of time when the most-recent sexually assaultive acts are alleged to have taken place. Specifically, neighbors of the victim's maternal grandmother will attest to the fact that [U.L.] was a frequent visitor to P.L.'s maternal grandmother's house during her court-ordered weekend visits during the time period when the most recent sexual abuse reportedly occurred. [Emphasis omitted.]

In the "Statement of Defense Evidence" attached to this motion, the defendant claimed the listed witnesses would testify as follows: (1) Rhonda Celestine would testify that she entered into a written contract to rent U.L. a

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<sup>12</sup> It should be noted that the prosecutor also acknowledged, during the course of these proceedings, that U.L. did, in fact, confess and plead guilty to the forcible rape of P.L. The guilty plea was received in the same judicial district court as the instant proceeding, in the latter part of October, 2009, as referenced by the trial court judge during his ruling at the November 16, 2009 hearing.

television set at the address of P.L.'s maternal grandmother, and that she knows that U.L. was at the grandmother's house when P.L. was there for court-ordered overnight visitation during the time the most recent assaults occurred; (2) Dawn Chadwick would testify that she conducted counseling sessions with P.L., who was brought to her office by the defendant, and that she knows that P.L. complained of abuse by her uncle, but not by her father; (3) Lanie Falgout (the defendant's then-girlfriend) would testify that she wrote to the defendant in jail, telling him that she was tired of people lying about him; and (4) Jessica Bergeron (the defendant's sister and P.L.'s aunt) would testify that she was told by P.L. that U.L. was still abusing her.

On the same date, January 26, 2010, the State filed a motion in limine, seeking a pre-trial determination as to the admissibility, at the defendant's criminal trial, of any defense evidence "to show someone else may have committed the sexual assault" and inflicted the "horrific vaginal and anal injuries" on P.L. "sometime in the months of July and August, 2008." In its motion, the State contended that the defense had not complied with LSA-C.E. art. 412, stating, "[T]here has been nothing filed referencing Code of Evidence Article 412."<sup>13</sup>

A hearing on both the State's and the defendant's motions in limine was held on January 26, 2010, during which the defense counsel argued that the defense it sought to present at trial was well-known to the State, as follows:

[I]t's clear that [the State] knew where we were going with this, that the defense was that [U.L.] caused the child's injuries. And the issue is really broader than whether he caused the injuries or not. It's my position that the defendant has a right to offer to the jury alternative explanations or alternative persons who may have caused - - or may have committed the crime. That he could - - he can rebut the State's

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<sup>13</sup> It is the duty of a prosecutor to seek the truth, not win the case. It is troubling for a prosecutor to seek to exclude evidence on procedural grounds that someone else committed the crime. If further investigation is needed, the state can seek a continuance to avoid prejudice to its case. Convicting the wrong person allows the real perpetrator to escape justice. Prosecutors represent a sovereign "whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." **Berger v. United States**, 295 U.S. 78 (1935).

inference that he was the only adult male in this child's life who stayed overnight under the same roof with her. And that would be clearly misleading to the jury since the evidence that we proposed, and I have a list of witnesses who could attest to, this is that the child was making overnight visits, under a court order, with her maternal grandmother and that other people in the neighborhood knew that [U.L.] was at the house when the child was.

[U.L.] being the same person who has confessed to raping the child on a previous occasion, who has plead guilty in this court to forcible rape of this child. And it would be very misleading to the jury to let them think that only [the defendant] could have done this when the child is known to be staying under the same roof with a convicted rapist. And to not allow me to introduce that evidence is to hamstring the [d]efense to the point where he loses his right to present an obvious defense.

And it's broader than the issue of whether I can prove [U.L.] caused the injuries, it deals with the issue of whether I can offer another potential suspect and point out to the jury that the prosecution has not eliminated a reasonable hypothesis of innocence[,] which this could be. That although the child was raped, that the rape did not - - was not done by her father, [the defendant].

The transcript of the November 16, 2009 hearing on the defendant's first motion in limine corroborates the defense argument that these issues were raised at that time. Although the primary focus of the defense counsel's argument during the November 16, 2009 hearing was that the evidence that P.L. had previously made accusations of sexual abuse against U.L., statements recanting those accusations, which were made to a social worker, should be admissible as impeachment evidence, counsel made the following statements:

I think that the theme of the cases in both Louisiana and in the federal court is that the defendant's Sixth Amendment Constitutional Right to confront his accuser trumps any limitation on the rape shield law or anything else, as long as the evidence is probative, and I think in this case it's definitively probative the fact that she's given inconsistent statements and the facts aren't quite as clear cut as [the prosecutor] has stated.

I believe the evidence at trial will show that after the victim was in the custody of her grandmother and was abused by [U.L.], [the defendant], her father, was awarded custody in a court proceeding and during the time that he had custody, the child was still having contact with [U.L.]. She was staying at the grandmother's house. I have neighbors, who are witnesses, who will say that [U.L.] was frequently at the house during that time period.

So, the issue about when these injuries occurred and when the rape occurred is not that clear cut because there's a lot of evidence that will be presented that [U.L.] still was having contact with the

child even after custody had been awarded to [the defendant], and [the defendant] was being ordered by the court to bring the child to visit her maternal grandmother on a regular basis, and when she was at that house is when the abuse occurred. And for that reason, all of the statements made against [U.L.] are very probative, they're relevant, they show prior inconsistency, possible influence, bias, motive, and for that reason I ask the Court to admit them.

Under the particular facts and circumstances of this case, I would conclude that the evidence sought to be introduced was probative as to the identity of the perpetrator and that the failure of the trial court to allow the presentation of the evidence during the criminal trial was a violation of the defendant's Constitutional right to present a defense. After considering the relevant factors set forth in **Olden v. Kentucky**, 488 U.S. at 232-33, 109 S.Ct. at 483-84, I would also conclude that it was impossible to determine that the trial court's restriction on the defendant's right to present a defense was harmless. I would further conclude that any violation of LSA-C.E. art. 412's notice requirement did not prejudice the State,<sup>14</sup> when: the State had notice of the defendant's contentions with respect the victim's uncle, during the November 16, 2009 in limine hearing, at the latest; a less severe penalty for the rule violation could have been imposed, given that it did not appear the defendant had willfully failed to comply with the LSA-C.E. art. 412's time delay<sup>15</sup> in order to obtain a tactical advantage; and considering the fact that U.L. had plead guilty to raping P.L. only "a few weeks" prior to the November 16, 2009 hearing.

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<sup>14</sup> The State did not argue at the January 26, 2010 hearing that it had been prejudiced, only that the defendant had not complied with LSA-C.E. art. 412's time limits for giving notice of the evidence sought to be introduced.

<sup>15</sup> Paragraph (D) of Article 412 provides that the motion shall be made within the time for filing pre-trial motions specified in LSA-C.Cr.P. art. 521, except that the court shall allow the motion to be made at a later date, if the court determines that: (1) the evidence is of past sexual behavior with the accused, and the accused establishes that the motion was not timely made because of an impossibility arising through no fault of his own; or (2) the evidence is of past sexual behavior with someone other than the accused, and the accused establishes that the evidence or the issue to which it relates is newly discovered and could not have been obtained earlier through the exercise of due diligence. LSA-C.Cr.P. art. 521 further authorizes the court to allow for additional time to file pretrial motions "[u]pon written motion at any time and a showing of good cause."

### Conclusion

The defendant has a constitutional right to present a defense that someone else committed the crime, even if a five year old child could be considered to exhibit "past sexual behavior," which she cannot. There is a reasonable hypothesis of innocence that the crime was committed by the convicted rapist of the same child who had access to the child during the time frame involved, and that evidence should not have been excluded from the defendant's trial.