NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-2085**
VERSUS	*	**COURT OF APPEAL**
RANNELL R. CRAIG	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 385-324, SECTION "D"
Honorable Frank A. Marullo, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge James F. McKay III, and Judge Dennis R. Bagneris, Sr.)

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CONVICTION AND SENTENCE VACATED/ REMANDED

STATEMENT OF THE CASE

Defendant Rannel R. Craig was charged by bill of information on September 24, 1996 with distribution of heroin, a violation of La. R.S. 40:966(A). Defendant pleaded not guilty at his October 22, 1996 arraignment. The trial court denied defendant's motion to suppress the evidence on January 15, 1997. On April 22, 1997, defendant was sentenced to six months in parish prison for contempt of court. On August 6, 1997, this court granted defendant's writ application, and ordered the trial court to conduct a speedy trial hearing unless trial proceeded as scheduled on August 26, 1997. On September 11, 1997, this court directed the court to conduct a speedy trial hearing unless trial proceeded as scheduled on October 2, 1997. On October 2, 1997, the trial court held a speedy trial hearing, but determined that defendant was not entitled to release. On March 19, 1998, this court denied defendant's writ application seeking review of the trial court's denial of his motion to suppress the evidence. On March 31, 1998, defendant was tried and found guilty by a twelve-person jury of possession of heroin. On April 17, 1998, defendant moved for a lunacy hearing. The

trial court found defendant competent at a June 4, 1998 lunacy hearing. On July 9, 1998, the trial court adjudicated defendant a third-felony habitual offender and sentenced him to life imprisonment at hard labor without the benefit of probation, parole or suspension of sentence. Defendant filed a motion to reconsider sentence, and noted his intent to appeal.

Defendant filed a motion for an out-of-time appeal in the trial court on September 14, 1998. On December 11, 1998, this court granted defendant's writ application, ordering it transferred to the trial court as a motion for an out-of-time appeal. On May 7, 1999, this court denied defendant's writ application, noting that the trial court had granted defendant an out-of-time appeal.

FACTS

New Orleans Police Officer Raymond Veit testified that on June 26, 1996, based on a telephone tip called in to a federal anti-crime hotline, he and federal Alcohol, Tobacco and Firearms Agent Mike Hutton set up a surveillance in the 2800 block of First Street. Officer Veit immediately observed defendant sitting on some steps at the corner. One-half hour later, a blue truck stopped. Defendant approached the driver's side and leaned into the truck. He removed a white shopping bag and, furtively looking

around, ran into 2815 First Street. Defendant emerged within five minutes, at which time five or six males approached him. The men conversed, and then disbursed. Officer Veit and Agent Hutton, along with other law enforcement personnel, stopped the men. They detained defendant for investigation. When asked for identification, defendant replied that it was inside of his residence at 2815 First Street. Officers obtained a search warrant for the residence. Two pieces of documentation with defendant's name and address on them were found on a bedroom dresser in the residence. Officer Veit had information that defendant's mother might reside at the address, but she was not there. Some currency, two rolls of aluminum foil and a bottle of Mannitol were found in a dresser drawer in defendant's bedroom. Officer Veit testified that aluminum foil was a common packaging material for heroin, and that Mannitol was used to dilute illegal contraband. A scale was found on the top of the dresser. Deputy U.S. Marshal Jerry Stewart handed Officer Veit a small plastic bag containing four pieces of foil containing what Officer Veit believed to be heroin.

ATF Special Agent Mike Hutton's testimony essentially tracked that of Officer Veit. Agent Hutton said the address of the residence defendant was seen entering was the same as the one given by the hotline tipster. After

Officer Veit returned with the search warrant, defendant let the officers into the residence with a key. Defendant pointed out his bedroom. Agent Hutton recovered two hundred dollars secreted in the toe of a boot found in that bedroom. Agent Hutton stated that Officer Veit showed him a bag containing several foils of what was believed to be heroin. Agent Hutton replied in the affirmative when asked by defense counsel whether defendant had been under restraints when the search warrant was executed. Defense counsel inquired why defendant had been restrained, and Agent Hutton replied that defendant had an outstanding warrant from Jefferson Parish.

Deputy U.S. Marshal Jerry Stewart testified that he secured defendant in the living room during the search. Defendant's hands were handcuffed in front of him. Defendant acted nervous and fidgety, and was pushing down on the cuffs of his shorts, unrolling them. Deputy Stewart asked defendant to stand up, and when defendant did so, a plastic bag containing four pieces of foil fell out of the left cuff to the floor.

Timothy Suzineaux, an investigator with the Orleans Parish District Attorney's Office and a former New Orleans police officer, was qualified by stipulation as an expert in the field of fingerprint examination. Mr. Suzineaux obtained a latent fingerprint from one of the four foil packets found in the plastic bag that fell from the cuff of defendant's shorts. He

photographed the print and placed it on the police property and evidence books, to be examined for identification purposes.

New Orleans Police Department Criminalist John F. Palm Jr. was qualified by stipulation as expert in the analyses of controlled dangerous substances. He performed tests on the contents of the packets seized by Deputy Stewart, and said they all contained heroin.

Defendant testified that on the day in question he was sitting on his mother's porch waiting for the mail. He said he received his mail at that address. Some police officers stopped and called him over to their car. The police also called over some individuals who had been standing on the corner. The police checked his name and informed him that he had a warrant for his arrest from Jefferson Parish. Officers handcuffed him and asked him where he lived. He told them he was waiting for the mail carrier to deliver to his mother's residence. He said the officers wanted to go into his mother's residence. Defendant said he did not live there, and he could not authorize them to enter his mother's residence. Police obtained a search warrant. Defendant admitted to sitting on the sofa in the residence, but denied attempting to remove anything from the cuffs of his shorts. He denied possessing heroin that day. Defendant admitted prior convictions for marijuana and cocaine, as well as a couple of misdemeanors.

Defendant testified on cross-examination that before the officers took him inside they performed a strip search on him in the alley. He said Officer Veit and another one performed the strip search. Defendant said he did not keep anything at his mother's residence.

ERRORS PATENT

A review of the record reveals one error patent. Defendant was charged by bill of information with distribution of heroin. At the time the bill of information was filed, September 24, 1996, distribution of heroin carried a mandatory sentence of life imprisonment at hard labor. See La. R.S. 40:966(B)(1), as amended by Acts 1973, No. 207, § 3. Because the offense was punishable by life imprisonment, prosecution therefore had to be instituted by grand jury indictment. La. Const. art. 1, § 15 ("no person shall be held to answer for a capital crime or a crime punishable by life imprisonment except on indictment by a grand jury."); see also La. C.Cr.P. art. 382 (a prosecution for an offense punishable by life imprisonment "shall be instituted by indictment by a grand jury.").

In the instant case, the record contains the district attorney's screening action form, reflecting that a charge was accepted against defendant for possession of heroin, while a charge of possession of heroin with intent to

distribute was refused. Defendant was not arrested for distribution of heroin, and prosecution of him on that charge was obviously never contemplated by the district attorney's office. Through an obvious error, defendant was charged in the bill of information with distribution of heroin. Defendant waived the reading of the bill of information at his arraignment. The docket master lists the charge against defendant as possession of heroin. The transcript of trial notes that the bill of information was read to the jury, but that reading was not transcribed. The trial transcript does not contain a transcription of the court's instruction to the jury. The record does not contain a typed verdict sheet listing responsive verdicts to the crime charged. In any case, the only instrument charging defendant with an offense in the instant prosecution is the bill of information contained in the record. It must be assumed that he was prosecuted for the offense charged in that bill of information.

In State v. Stevenson, 334 So. 2d 195 (La. 1976), the defendant was charged by bill of information with possession of heroin with intent to distribute, a crime punishable by life imprisonment, like the offense of distribution of heroin charged in the instant case. Both of these offenses are proscribed by the same statutory provision, La. R.S. 40:966(A)(1). In Stevenson, the defendant was convicted of the offense charged. The

Louisiana Supreme Court reversed the conviction on the ground of the error in the institution of prosecution. In State v. Demolle, 621 So. 2d 167 (La. App. 4 Cir. 1993), this court reversed the conviction of the defendant because he had been charged by bill of information with aggravated rape and convicted of that crime. The court stated: "any conviction rendered under this legally defective prosecution is reversible as a matter of law …". 621 So. 2d at 168.

It is beyond any question that, where a defendant is charged by bill of information with a capital offense or one punishable by life imprisonment, and convicted of that offense, such conviction cannot stand. However, in the instant case, unlike in Demolle and Stevenson, defendant was not convicted of the crime charged, but was convicted of possession of heroin, which is a responsive verdict and a lesser included offense for which the institution of prosecution could have been by bill of information. Nevertheless, the prosecution of an offense punishable by life imprisonment, where that prosecution is instituted by a bill of information instead of a grand jury indictment, is a legal defect which may not be cured by the return of a responsive verdict of a lesser included offense which could have been charged by a bill information. State v. Ruple, 437 So. 2d 873, 875 (La. App. 2 Cir. 1983). See also State v. Davis, 385 So. 2d 193, 196 (La. 1980) (a

person should not be accused of an offense punishable by life imprisonment except by a group of his fellow citizens acting independently of either prosecuting attorney or judge); Demolle, supra.

Accordingly, because of the defect in instituting prosecution, defendant's conviction and sentence must be reversed, and the case remanded for further proceedings.

ASSIGNMENT OF ERROR NO. 1
PRO SE ASSIGNMENT OF ERROR NO. 1

In appellate counsel's first assignment of error, defendant claims that the trial court erred in denying his motion to suppress the evidence, as there was insufficient probable cause for the issuance of the search warrant. Appellate counsel's argument is directed to the four foils of heroin that fell from the cuff of his shorts when he stood up.

In his pro se argument, defendant claims the search warrant was fatally defective because the trial judge could not identify the signature of the issuing judge. There is no merit to this argument. Officer Veit testified that he applied for the search warrant, and that it was signed the same day. Although the signature is illegible, and the trial court commented at trial that it was "hard to decipher," defendant fails to show that an authorized judge or magistrate did not sign the warrant.

Defendant claims that he discarded the heroin. Deputy U.S. Marshall Jerry Stewart testified that when he asked the handcuffed defendant to stand up, the heroin fell from the left cuff of defendant's shorts. He said it appeared that defendant had been unrolling the cuff as he sat handcuffed on the sofa during the one-hour search. Defendant was attempting to discard the heroin as he sat on the sofa, and it fell out when he was ordered to stand up. Defendant submits that the seizure of the foils was "directly related" to the illegal search of 2815 First Street, and correctly notes that the foils were not seized during a search incident to defendant's arrest on the Jefferson Parish warrant.

Defendant submits that the illegal search of the residence caused him to discard the heroin. However, defendant testified at trial that officers learned during their initial encounter with him that he had an outstanding warrant for his arrest from Jefferson Parish. Defendant testified that he was handcuffed after a name check revealed the outstanding arrest warrant. According to the chronology by defendant, this occurred prior to the officers asking him where he lived. Counsel for defendant elicited testimony from ATF Agent Hutton that at the time the heroin fell out of the cuff of defendant's shorts, defendant was being restrained "[f] or an open warrant he had out of the Jefferson Parish sheriff's Office." It is clear that defendant

was under arrest prior to the time officers entered defendant's residence, even prior to Officer Veit leaving the scene to secure the search warrant. Defendant was going to be taken to jail regardless of whether the search of his residence unearthed any controlled dangerous substances or other illegal contraband.

Defendant discarded the heroin, or was attempting to do so when it fell from the cuff of his shorts, while he was being detained after his lawful arrest. He discarded the heroin not because police were searching his residence, but because he was under arrest and on his way to jail. There was no controlled dangerous substance recovered by police during the search, or as a result of the search. Whether or not the search warrant was issued on probable cause is irrelevant as to the seizure of the heroin. Similarly, whether or not there was a valid signature on the search warrant is irrelevant as to the seizure of the heroin.

As previously noted, defendant's argument with regard to the denial of his motion to suppress the evidence is directed to the seizure of the heroin. However, there was also testimony at trial about the drug paraphernalia seized from defendant's bedroom—two rolls of aluminum foil and a bottle of Mannitol—with testimony indicating these items were associated with drug distribution. There was also testimony that a scale was

seized from the bedroom. These items were seized pursuant to the execution of the search warrant, and the testimony with regard to the items was inculpatory.

This court set out the applicable law pertaining to the issuance of search warrants in State v. Martin, 97-2904 (La. App. 4 Cir. 2/24/99), 730 So. 2d 1029, as follows:

> La.C.Cr.P. article 162 provides that a search warrant may be issued "only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for the issuance of the warrant." The Louisiana Supreme Court has held that probable cause exists when the facts and circumstances within the affiant's knowledge, and those of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that evidence or contraband may be found at the place to be searched. State v. Duncan, 420 So.2d 1105 (La.1982). The facts which form the basis for probable cause to issue a search warrant must be contained "within the four corners" of the affidavit. Id. A magistrate must be given enough information to make an independent judgment that probable cause exists for the issuance of the warrant. State v. Manso, 449 So.2d 480 (La.1984), cert. denied Manso v. Louisiana, 469 U.S. 835, 105 S.Ct. 129, 83 L.Ed.2d 70 (1984). The determination of probable cause involves probabilities of human behavior as understood by persons trained in law enforcement. State v. Hernandez, 513 So.2d 312 (La.App. 4 Cir.1987), writ denied, 516 So.2d 130 (La.1987).
>
> In its review of a magistrate's finding of probable cause, the reviewing court must determine whether the "totality of circumstances" set forth in the affidavit is sufficient to allow the magistrate to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a reasonable

> probability that contraband ... will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclu[ding] that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2232, 76 L.Ed.2d 527 (1983).

97-2904 at pp. 4-5, 730 So. 2d at 1031-1032.

The defendant bears the burden of proving that evidence pursuant to the issuance of a search warrant should be suppressed. La. C.Cr.P. art. 703 (D); State v. Hodge, 2000-0515, p. 12 (La. App. 4 Cir. 1/17/01), 781 So. 2d 575, 583, writ denied, 2001-0432 (La. 1/25/02), 806 So. 2d 666.

Officer Raymond Veit, who testified at trial that he secured the search warrant for defendant's residence, averred in the search warrant affidavit/application that:

> ON 6-25-96 OFFICER RAY VEIT ASSIGNED TO THE A.T.F. TASK FORCE RECEIVED INFORMATION FROM THE "GUN HOT LINE" ABOUT ILLEGAL DRUG ACTIVITY IN THE AREA OF FIRST STREET AND CLARA STREET.
>
> THE COMPLAINT STATED THAT AN INDIVIDUAL KNOWN AS "RANNEL CRAIG" WHO LIVED AT 2815 FIRST STREET, WAS INVOLVED IN ILLEGAL DRUG ACTIVITY. THE COMPLAINT STATED THAT "RANNEL HANDLED ALL THE DRUG TRAFFIC IN THE BLOCK, NAMELY THAT HE WOULD RECEIVE A PACKAGE FROM A VEHICLE AND STASH THE PACKAGE INSIDE OF HIS RESIDENCE." THE CALLER ALSO STATED THAT RANNEL KEEPS THE BULK SUPPLY OF NARCOTICS INSIDE OF HIS HOUSE, UNTIL HE DISTRIBUTES IT TO THE STREET LEVEL DEALERS, A LITTLE AT A TIME.
>
> IN AN ATTEMPT TO VERIFY THE INFORMATION GIVEN BY THE CALLER, VEIT CHECKED THE NAME IN

THE N.O.P.D. MOTION COMPUTER AND LOCATED A RANNELL CRAIG N/M 12-30-63 IN THE SYSTEM. VEIT ALSO NOTED THAT CRAIG LISTED 2815 FIRST STREET AS HIS RESIDENCE.

ON 6-26-96 OFFICER VEIT THEN RELOCATED TO THE AREA AND INITIATED A SURVEILLANCE OF THE LOCATION IN AN ATTEMPT TO VERIFY THE COMPLAINT. AT APPROXIMATELY 2:00 PM VEIT OBSERVED AN UNKNOWN BLACK MALE SUBJECT SITTING IN FRONT OF 2809 FIRST STREET. THE MALE SUBJECT THEN APPROACHED A BLUE TOYOTA PICK-UP TRUCK THAT STOPPED IN FRONT OF HIM. THE MALE SUBJECT THEN IMMEDIATELY JUMPED UP AND APPROACHED THE TRUCK.

THE MALE SUBJECT THEN BECAME INVOLVED IN A BRIEF CONVERSATION WITH THE DRIVER OF THE TRUCK. THE MALE SUBJECT WAS CONSISTENTLY LOOKING ALL AROUND. THE DRIVER THEN HANDED THE MALE SUBJECT A SMALL WHITE PLASTIC BAG AND THEN IMMEDIATELY DROVE OFF.

THE MALE SUBJECT THEN TURNED AND RAN INTO 2815 FIRST STREET WITH THE SMALL PACKAGE.

THE MALE SUBJECT THEN EXITED THE HOUSE AND WALKED BACK ONTO THE CORNER. SEVERAL OTHERS [sic] MALE SUBJECTS THEN STARTED RUNNING DOWN THE STREET TOWARDS THE MALE SUBJECT. THEY THEN GATHERED IN FRONT OF 2815 FIRST STREET AND BECAME INVOLVED IN A BRIEF CONVERSATION. THE MALE SUBJECT THEN TURNED AND STARTED TO HEAD BACK TOWARDS HIS RESIDENCE.

OFFICER VEIT BELIEVING THAT THE PACKAGE WAS AS DESCRIBED BY THE CALLER ATTEMPTED TO STOP THE SUBJECT ALONG WITH THE OTHER INDIVIDUALS. AS VEIT APPROACHED THE SUBJECTS ALL STARTED WALKING IN DIFFERENT DIRECTIONS BUT WERE ABLE TO BE STOPPED BY VEIT AND THE ASSISTING OFFICERS.

VEIT THEN STOPPED THE SUBJECT WHO RECEIVED THE PACKAGE, WHO IDENTIFIED HIMSELF AS RANNEL CRAIG. CRAIG THEN STATED THAT HE

> LIVED AT 2815 FIRST STREET. VEIT THEN CONDUCTED A PROTECTIVE SEARCH OF CRAIG FOR WEAPONS AND OBSERVED A SMALL CLEAR PLASTIC BAG PROTRUDING FROM CRAIG'S FRONT RIGHT POCKET.
>
> VEIT THEN CONFISCATED THE BAG BELIEVING IT TO HAVE BEEN USED TO PACKAGE ILLEGAL CONTRABAND.
>
> For this reason, it is the belief of the officer that Powder Cocaine is being secreted within and distributed from 2825 FIRST … (partially legible request that a search warrant be signed and issued.)

In the seminal case of Illinois v. Gateses, supra, the United States Supreme Court employed the totality of the circumstances analysis to find probable cause for the issuance of a search warrant, based on an anonymous tip containing predictive information about the defendants' activities, which information was confirmed as accurate by law enforcement officers. Police in a Chicago, Illinois suburb received an anonymous handwritten letter stating that Lance and Sue Gateses supported themselves selling drugs. The letter stated that the Gateses lived in a condominium, and purchased most of their drugs in Florida. Sue Gateses would drive to Florida and leave the car to be loaded with drugs. Lance Gateses would fly down and drive it back. The informant advised that on May 3, Sue Gateses would drive to Florida, and Lance Gateses would fly down in a few days to drive the vehicle back. The informant said that the Gateses presently had over $100,000 worth of drugs in their basement, and that at the time Lance Gates drives the car back

he has the trunk loaded with over $100,000 worth of drugs.

Police confirmed that an Illinois driver's license had been issued to Lance Gateses, residing at the address given by the informant, and that an "L. Gateses" had an airline reservation for a flight from Chicago to West Palm Beach, Florida, departing Chicago on May 5. Federal agents in Florida subsequently followed Lance Gates from the West Palm Beach airport to a nearby motel, where he went to a room registered to a "Susan Gateses." At 7:00 a.m. the next morning, Lance Gateses left the motel in an automobile bearing an Illinois license plate registered to a vehicle owned by him. A search warrant was issued for the Gateses' condominium and automobile based on this information.

The United States Supreme Court stated that the facts obtained through the independent investigation of the officers at least suggested that the Gateses were involved in drug trafficking. The court noted that Florida was well-known as a source of illegal drugs, and that Lance Gateses' flight to Florida, his brief overnight stay in a motel, and apparent immediate return north to Chicago in the family car, conveniently awaiting him in Florida, was as suggestive of a prearranged drug run as it was of an ordinary vacation trip. More importantly, the court stated that the judge could rely on the allegations of criminal activity in the anonymous letter, in view of the

corroboration of the predictions contained therein. In addition, the court noted that the anonymous letter contained "a range of details" relating "not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." 462 U.S. at 245, 103 S.Ct. at 2335-36. Citing the predictions concerning the Gateses' travel plans; the court reasoned that if the informant had access to accurate information of this type, a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gateses' illegal activities. While recognizing that the Gateses' travel plans might have been learned from a talkative neighbor or travel agent, the court noted that for purposes of probable cause it was sufficient that there was a fair probability that the informant had obtained his entire story from the Gateses or someone they trusted. The court said corroboration of major portions of the letter's predictions provided just that probability. The court concluded that the judge issuing the search warrant had a substantial basis for concluding that probable cause to search the Gateses' home and car existed.

In State v. Smith, 99-2129 (La. App. 4 Cir. 4/26/00), 761 So. 2d 642, this court reversed the trial court's denial of the defendant's motion to suppress evidence, on the ground that police lacked probable cause to arrest him. Police received information from an untested informant that the

defendant lived at 2745 St. Peter Street, drove a red Ford F-150 pickup truck, and that he delivered drugs to various individuals in the 2300 block of Aubrey Street each night between 11:45 p.m. and midnight. A police officer was familiar with defendant from other informants, and knew the 2300 block of Aubrey Street for illegal activity involving large quantities of drugs. Police set up surveillance at 2745 St. Peter Street, and observed a red Ford F-150 pickup truck. At 11:40 p.m., police observed a man, later identified as the defendant, walk out of the front door of 2745 St. Peter Street to the back of the truck, put something in his mouth, get into the truck, and drive away. Police stopped the defendant six blocks away by boxing in his truck with two police vehicles. The defendant exited his truck, quickly placed something in his mouth, and began chewing. Officers handcuffed the defendant and took him back to his residence, where cocaine was found. The defendant's stomach was later pumped and cocaine was found.

This court held that the defendant had been arrested without probable cause. The court noted that the defendant was arrested before police corroborated the prediction by the informant that the defendant was on his way to deliver narcotics in the 2300 block of Aubrey Street. The corroboration of the type of vehicle, the defendant's address, and the time the defendant left his residence were insufficient to establish probable cause.

This court also noted that the defendant's action in putting something unidentified into his mouth before entering his truck was not in itself a particularly suspicious act evidencing that he was engaged in the sale of narcotics.

In State v. Gereighty, 2000-0830 (La. App. 4 Cir. 7/26/00), 775 So. 2d 468, police received an anonymous tip that a white male, approximately twenty-eight years old, named "John Gerrity," was selling marijuana from the bottom left door of 8014 Panola Street. The caller said she had witnessed several drug sales from that address within twenty-four hours of calling, and that "Gerrity" had been selling drugs for many years. On that same date, police set up a surveillance, and within a short time thereafter observed the occupant of the residence, who matched the description given by the tipster, make what appeared to be three separate drug sales to visitors. Each purchaser would drive up, knock on the door, hand the defendant money, with the defendant retreating back inside before returning minutes later to give each man a plastic bag. Based on this information, a search warrant was obtained and executed. This court held that the circumstances were sufficient to establish probable cause to believe that the residence contained contraband.

In State v. Johnson, 2000-2406 (La. 1/12/01), 778 So. 2d 546, a per

curiam decision setting forth limited facts, an anonymous tipster telephoned a hotline to report drug activity out of a residence by the particularly described resident. Police computer checks revealed that the defendant matched the caller's description, and police surveillance detected a steady amount of foot traffic in and out of the defendant's residence. One individual backed his car out of the defendant's driveway and turned it around so that it faced the street, an action one officer characterized as an attempt to conceal the license plate, a circumstance the officer said was indicative of narcotics trafficking. Finally, the owner of that vehicle and the defendant had records of prior drug arrests. The court found that all of these circumstances provided the magistrate with a substantial basis for finding probable cause to issue a search warrant for the defendant's residence.

In the instant case, the information in the affidavit concerning defendant's name and his residence could have been known by any number of people—but, this also could have been the case in Johnson, supra. The confirmation of this information simply indicates that the tipster knew defendant's name and where he lived. Unlike in Illinois v. Gates, supra, the affidavit in the instant case reads that the informant described the method in which Rannel Craig would receive a package, but did not predict that he would be receiving a package in that manner on that day, or at any particular

point in time. Nevertheless, the officers' verification of the exactly described method of delivery, shortly after beginning their surveillance, somewhat supported the tipster's reliability. Officer Veit did not recite that the tipster told police that these "packages" received by defendant contained narcotics, although it appears that was the implicit thrust of the tip. Officer Veit's affidavit recites that the officers observed defendant furtively looking around as he briefly conversed with the driver of the vehicle, before taking the white shopping bag from the vehicle and taking it inside of his residence. Furtiveness is a factor which, when viewed in light of other factors, may suggest criminal activity. See State v. Bazile, 99-1821, p. 9 (La. App. 4 Cir. 3/15/00), 757 So. 2d 851, 856. On the other hand, it is common knowledge that crime prevention experts stress always being aware of one's surroundings, which could account for someone repeatedly looking around while innocently conversing with an acquaintance on the street.

Officers did find a clear plastic bag protruding from defendant's pants pocket, which Officer Veit averred he believed had been used to package illegal contraband. However, Officer Veit did not say it had a white residue or anything of that nature on or inside of it, or otherwise indicate why its appearance suggested contraband packaging material. Officer Veit did not state in his affidavit that he or any other officer observed any actions by

defendant, which, based on their police experience, suggested drug activity. They did not observe any drug sales by defendant, or any one else. No money or contraband was exchanged between defendant and any of the individuals he spoke to on the street. No one approached defendant as he sat on the porch. No one but defendant entered his residence, and he did so only once.

Considering the totality of the circumstances, the information contained in Officer Veit's affidavit was not sufficient to furnish a magistrate a substantial basis to believe that probable cause existed that defendant's residence contained contraband or evidence of a crime. The trial court erred in denying the motion to suppress the evidence seized from defendant's residence.

However, as previously stated, no controlled dangerous substances were found in defendant's residence. He was convicted for possession of the four packets of heroin he attempted to discard from the cuff of his shorts. That heroin was lawfully seized, apart from the search of his residence. The testimony was clear and straightforward that defendant was under arrest on a warrant from Jefferson Parish, and that he attempted to discard the heroin for the obvious reason that he did not want it later discovered by police during a further search incidental to his arrest, or by corrections personnel during

processing in jail. Defendant stressed the fact that he was under arrest as part of his misguided defense, that police immediately should have taken him to jail.

Considering these circumstances, the trial court's erroneous denial of defendant's motion to suppress the contraband seized from his residence pursuant to the search warrant, and the admission of that evidence at trial, was harmless error; the guilty verdict rendered by the jury in this case was surely unattributable to the error. State v. Snyder, 98-1078, p. 15 (La. 4/14/99), 750 So. 2d 832, 845 (a verdict is harmless if the guilty verdict rendered was surely unattributable to the error).

There is some merit to this assignment of error, but the error was harmless.

ASSIGNMENT OF ERROR NO. 2
PRO SE ASSIGNMENT OF ERROR NO. 2

In these assignments of error, defendant claims that the trial court erred in adjudicating him a third-felony habitual offender. He contends that because the guilty plea forms from the two predicate convictions do not include an explanation of the privilege against self-incrimination, and are not signed. Further, there was no minute entry indicating that the respective trial courts made any finding that the guilty pleas were entered knowingly and

voluntarily.

La. R.S. 15:529.1(D)(1)(a) requires that a defendant claiming that a prior conviction alleged in a habitual offender bill information was obtained in violation of the laws or Constitution of Louisiana shall set forth his claims, and the factual basis therefor, with particularity in his response to the bill of information. La. R.S. 15:529.1(D)(1)(a) further provides that any challenge to a previous conviction that is not made before sentence is imposed may not thereafter be raised to attack the sentence.

Defendant incorrectly asserts that he objected to the validity of the prior guilty pleas at the habitual offender hearing. Defendant simply noted an unspecific objection for the record immediately after the trial court adjudicated him a third-felony habitual offender. Defendant's counsel neither crossed examine the only witness to testify at the habitual offender hearing, the police fingerprint expert who matched defendant's fingerprints to the respective arrest registers. Also, Defendant's counsel failed to object in any way to the introduction of documents evidencing the two predicate convictions. Defendant's argument is that his prior guilty pleas were obtained in violation of his constitutional rights under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A specific oral objection is sufficient to preserve for review a Boykin deficiency with regard

to a prior guilty plea. See State v. Alexander, 98-1377, p. 4 (La. App. 4 Cir. 2/16/00), 753 So.2d 933, 937 (objection to use of prior conviction on specific ground of insufficient proof of adequate Boykinization). In the instant case, defendant did not object at the hearing to an inadequate Boykinization as to either of the two prior convictions, and thus failing to preserve these issues for review.

Defendant cites State v. Shelton, 621 So. 2d 769 (La. 1993) for the proposition that the State had to prove the constitutionality of the prior guilty pleas. However, under Shelton, where the defendant denies the allegations in the habitual offender bill of information, as defendant effectively did in the instant case, the State must simply prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. The State proved the existence of the prior guilty pleas and, contrary to the assertion in defendant's pro se assignment of error, that the respective docket master and/or minute entries showed counsel represented defendant when both guilty pleas were taken. Once the State has met that initial burden, the defendant must produce some affirmative evidence showing a procedural irregularity in the taking of the plea in order to shift the burden to the State to prove the constitutionality of the plea. In the instant case, defendant failed to point out to the trial court any procedural irregularity in

the taking of the two guilty pleas. Thus, the burden to prove the constitutionality of the pleas, e.g., that he was properly Boykinized prior to entering them, was never shifted to the State.

Nevertheless, as defendant may again be indicted and convicted of the instant offense, and again be charged as a third-felony habitual offender, the issues will be addressed. With respect to defendant's 1989 conviction for possession of cocaine, although the record contains a copy of a guilty plea form, the bottom of it is appears to have been cut, and thus does not contain defendant's signature, or the signature of any person, such as his counsel or the trial judge. It contains defendant's name and the initials "R.C." are next to paragraphs reflecting that he waived his three Boykin rights. However, the copy of the minute entry contained in the record is illegible. Neither the legible docket master entry nor the plea of guilty form reflects that defendant was personally advised of his Boykin rights by the trial court. This is a procedural irregularity, as the minimum proof necessary to satisfy Boykin is a very general minute entry indicating a colloquy between the court and the defendant, for instance, one showing that the trial court "questioned the accused under oath regarding his plea of guilty," and a copy of a guilty plea form initialed by the defendant indicating that he understood and waived each of his three Boykin rights. See Shelton, 621 So. 2d at 777 (quoting

State v. Tucker, 405 So. 2d 506 (La. 1981)). The documentation contained in the record would not meet this minimum requirement as to the 1989 cocaine conviction, although the original minute entry, presumably presented in the trial court, may have set forth that the trial court advised defendant of his rights.

With regard to defendant's 1986 conviction for possession of marijuana with intent to distribute, the record contains a plea of guilty form with defendant's name and his initials next to paragraphs reflecting that he waived his three Boykin rights. As with the form in the 1989 conviction, the copy in the record cut off the bottom of the form, and it does not show defendant's signature. A minute entry reflects that defendant was sworn and Boykinized. This would be sufficient for the State to meet its burden under Shelton.

There is no merit to this assignment of error, as defendant failed to preserve the issues for appellate review.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, defendant claims his sentence is constitutionally excessive. The trial court filed a motion to reconsider the sentence on behalf of defendant, but failed to rule on it. This court cannot

review a sentence for excessiveness where the trial court has not ruled on a motion to reconsider the sentence; ordinarily the case must be remanded for a ruling on the motion to reconsider, reserving to defendant his right to thereafter appeal his sentence. State v. Allen, 99-2579, p.11 (La. App. 4 Cir. 1/24/01), 781 So.2d 88, 95, writ denied, 2001-1187 (La. 3/15/02), __ So. 2d __, 2002 WL 464021; State v. Boyd, 2000-0274, p. 3 (La. App. 4 Cir. 7/19/00), 775 So.2d 463, 465. Under the circumstances in the instant case, because defendant's conviction and sentence must be reversed, the case cannot be remanded for a ruling on the motion for reconsideration.

However, because defendant may again be sentenced to life imprisonment as a third-felony habitual offender, the claim of excessiveness will be addressed. Even though a sentence under the Habitual Offender Law is the minimum provided by that statute, the sentence may still be unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, or is nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677; State v. Dorthey, 623 So. 2d 1276, 1280-81 (La. 1993). However, the entire Habitual Offender Law has been held constitutional, and, thus, the minimum sentences it imposes upon habitual offenders are

also presumed to be constitutional. Johnson, 97-1906 at pp. 5-6, 709 So. 2d at 675; see also State v. Young, 94-1636, p. 5 (La. App. 4 Cir. 10/26/95), 663 So. 2d 525, 527. There must be substantial evidence to rebut the presumption of constitutionality. State v. Francis, 96-2389, p. 7 (La. App. 4 Cir. 4/15/98), 715 So. 2d 457, 461. To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must show by clear and convincing evidence that he is exceptional, which in this context means that because of unusual circumstances he 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. State v. Lindsey, 99-3256, p. 5 (La. 10/17/00), 770 So. 2d 339, 343; Johnson, 97-1906 at p. 8, 709 So.2d at 677. "Departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations." Johnson, 97-1906 at p. 9, 709 So. 2d at 677.

In State v. Burns, 97-1553 (La. App. 4 Cir. 11/10/98), 723 So. 2d 1013, this court vacated the life sentence of a fourth felony habitual offender sentenced pursuant to La. R.S. 15:529.1(A)(1)(c)(ii)–essentially the same provision at issue in the instant case, except it applies to fourth felony offenders–after his conviction for distribution of one rock of crack cocaine. This court found that, on the facts pertaining to that defendant, it was

"unable to conclude that this life sentence is not excessive under the constitutional standard." 97-1553 at p. 11, 723 So. 2d at 1020.

The defendant in Burns was observed by police selling one rock of crack cocaine to a third person. When arrested, the defendant was in possession of two more rocks and fifty-seven dollars. Defendant testified at trial that he was addicted to cocaine. Noting that two of defendant's prior convictions were for possession of cocaine, this court concluded, "thus it is safe to assume he deals to support his habit," 97-1553 at p. 9, 723 So. 2d at 1019. The defendant was twenty-five years old, and this court felt that the defendant was "young enough to be rehabilitated." This court noted that a sentence less than life would "afford him the opportunity to partake in self-improvement classes while incarcerated and the possibility of a productive future." Id. The defendant's father testified at trial, stating that the defendant was well liked in the community and would go out of his way to help anyone. Though recognizing that the fact that none of the defendant's felonies were violent that alone was insufficient to override the legislatively designated sentences of the Habitual Offender Law. This court cited Johnson for the proposition that this fact should not be discounted. This court also noted that there were no allegations that the defendant ever possessed a dangerous weapon. Finally, the court noted that the defendant

had difficulties with memory regarding time and place, attributing the problems to a previous gunshot wound to the head. The court noted that this "surely must affect [the defendant's] ability to function in the same manner as someone who has not been shot in the head." 97-1553 at p. 10, 723 So. 2d at 1020. The court also cited two economic impact considerations–that the defendant would never be a productive taxpayer in prison, and that life imprisonment imposes an undue burden on taxpayers of the state who must feed, house, and clothe the defendant for life, and provide geriatric care in later years.

In State v. Finch, 97-2060 (La. App. 4 Cir. 2/24/99), 730 So. 2d 1020, this court declined to extend Burns to a case where there was no evidence that the defendant, convicted of possession of eight bags of heroin, with one prior conviction for possession with intent to distribute twenty-four rocks of cocaine, and another conviction for possession of stolen property valued at more than $500, was driven by his addiction to sell drugs to support his drug habit, and where the record was devoid of any testimony suggesting that the defendant might possess any redeeming virtues. This court stated:

> Where a minimum sentence does not transcend constitutional limits, it may not be reformed by this Court merely because it seems harsh. This Court does not have the authority to second guess the legislature concerning the wisdom of minimum sentencing on any ground other than that of constitutional excessiveness.

97-2060 at p. 13, 730 So. 2d at 1027-28.

In State v. Long, 97-2434 (La. App. 4 Cir. 8/26/99), 744 So. 2d 143, this court affirmed a mandatory life sentence imposed on a third-felony habitual offender convicted of distribution of marijuana and cocaine, who had prior convictions for distribution of false drugs and possession of cocaine. There was no evidence introduced at trial to indicate that defendant was addicted to drugs, as there had been in Burns, and the record revealed no testimony concerning any redeeming virtues the defendant might have possessed, as there had been in Burns. The court held that the defendant had failed to meet his burden of showing by clear and convincing evidence that his sentence was unconstitutionally excessive, as required by Johnson.

In State v. Stevenson, 99-2824 (La. App. 4 Cir. 3/15/00), 757 So. 2d 872, this court reversed the mandatory life sentence imposed upon a third-felony habitual offender, likening it to Burns. In Stevenson, the defendant was a thirty-eight year old mother convicted of distribution of one rock of crack cocaine, with prior felony convictions for theft and simple burglary of an inhabited dwelling. No drugs were found on her person after her arrest for distribution of the cocaine. The court noted that, like the defendant in Burns, the defendant in Stevenson had no record of violent crimes, nor was there any evidence she had ever used a dangerous weapon. The court

conceded that, unlike in Burns, the defendant in Stevenson did not testify that she was a drug addict, and no one testified in her behalf. However, this court noted that the trial court had ordered the defendant to report to a substance abuse program, and inferred the possibility that she, like the defendant in Burns, was a drug addict who sold the cocaine to support her own habit. The court concluded by stating that, based on the record before it, it was "unable to conclude either that defendant's mandatory life sentence is constitutional or that there is clear and convincing evidence to the contrary." 99-2824 at p. 6, 757 So. 2d at 876. The court vacated the defendant's sentence and remanded the case for a hearing at which defendant could present evidence that she was exceptional, and thus deserving of a lesser sentence.

Thus, in Stevenson, the court found that the scant record evidence suggested that the mandatory life sentence might be unconstitutionally excessive, but because the evidence was insufficient to definitely resolve the issue, the court vacated the sentence and remanded the case to allow defendant the opportunity to do what he had not done at the original habitual offender hearing—prove by clear and convincing evidence that the mandatory minimum sentence under the Habitual Offender Law was unconstitutionally excessive as applied to her. This result takes Burns a step

further; in Burns there was significantly more evidence to suggest that the defendant's sentence might be excessive.

In State v. Briscoe, 99-1841 (La. App. 4 Cir. 1/17/01), 779 So. 2d 30, the defendant was sentenced to life imprisonment as a third-felony habitual offender under La. R.S. 15:529.1(A)(1)(b)(ii). The thirty-two year old defendant's three felonies were all drug offenses—one for possession with intent to distribute three bags of cocaine, one for possession of cocaine, and one for attempted possession of one rock of crack cocaine. No one testified on the defendant's behalf regarding any of his redeeming virtues. It was noted that, as in Stevenson, the defendant had been ordered to participate in a substance abuse treatment program as a condition of his probation following his earlier convictions. This court further noted that, as in Burns and Stevenson there was no evidence that the defendant had ever been arrested for a violent crime or had ever illegally used a weapon. Finally, noting a minute entry reflecting that the defendant had been offered a plea agreement whereby the defendant would pled guilty in exchange for a sentence of five years at hard labor, this court inferred that the State did not feel that the defendant presented an undue danger to society. This court concluded by stating that it could not distinguish the defendant in Briscoe from the defendant in Stevenson, especially considering that in Stevenson

only one of the defendant's convictions was for drugs, the others being for theft and simple burglary of an inhabited dwelling. Therefore, this court found that the record suggested that the defendant in Briscoe might simply be a drug addict undeserving of the minimum mandatory life sentence, and as a result remanded the case for a hearing at which the defendant might show by clear and convincing evidence that the mandatory life sentence was unconstitutionally excessive as applied to him.

In State v. Williams, 2000-0011 (La. App. 4 Cir. 5/9/01), 788 So.2d 515, the defendant was convicted of possession with intent to distribute cocaine, and pleaded guilty to attempted possession of a firearm by a convicted felon. He was adjudicated a third-felony habitual offender and sentenced to life imprisonment pursuant to La. R.S. 15:529.1(A)(1)(b)(ii), like defendant in the instant case. On appeal the defendant argued that he was like the defendant in Burns, not a recidivist but a drug addict. This court rejected that argument, upholding the mandatory life sentence imposed on defendant, stating:

> Unlike in Burns, at the time defendant in the instant case was sentenced, a charge of possession of a firearm by a convicted felon was pending against him. In addition, he had a prior arrest for the same weapons offense, which occurred at the same time as his 1988 drug arrest. Also, unlike in Burns, there is no evidence to substantiate defendant's claim of drug addiction other than his history of drug arrests. Det. Henry testified in the instant case that he witnessed defendant engage in approximately eleven drug transactions immediately prior to

> executing the search warrant. Defendant's instant conviction was based on four bags of powdered cocaine and two bags of crack cocaine recovered from his residence. Although defendant's 1988 arrest involved a single unit of cocaine, his 1993 arrest was for possession with intent to distribute sixty-four rocks of crack cocaine. Defendant received an eight-year prison sentence on September 30, 1993, and was arrested for the instant offense on November 18, 1997. It can therefore be assumed that defendant had been out of prison for only a brief time before he was rearrested for the instant offense. Moreover, there was no testimony as to any redeeming virtues possessed by defendant.
>
> We therefore conclude that defendant has failed to show by clear and convincing evidence that because of unusual circumstances he is exceptional, or that he 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. According to Johnson, supra, defendant has failed to rebut the presumption that the mandatory life sentence imposed on him as a third-felony habitual offender is unconstitutionally excessive.

2000-0011, pp. 25-27, 788 So.2d at 533-534.

In State v. Davis, 2001-0392 (La. App. 4 Cir. 11/7/01), 801 So. 2d 543, the defendant was convicted of simple burglary, and sentenced to life imprisonment as a third-felony habitual offender, based on prior convictions for possession of cocaine and possession of marijuana with intent to distribute. This court found the defendant's circumstances similar to those of the defendants in Stevenson and Briscoe, and further found that, as in those cases, the record suggested that the defendant might not be deserving of the minimum mandatory life sentence provided by La. R.S. 15:529.1(A)

(1)(b)(ii). This court vacated the defendant's sentence and remanded for resentencing at a hearing at which the defendant might show by clear and convincing evidence that the mandatory life sentence would be unconstitutionally excessive as applied to him.

In State v. Wilson, 2000-1736 (La. App. 4 Cir. 11/14/01), 803 So. 2d 102, this court found, as it did in Stevenson, supra, that on the record before it, it was unable to conclude either that the defendant's mandatory life sentence under La. R.S. 15:529.1(A)(1)(b)(ii) was constitutional, or that there was clear and convincing evidence to the contrary. The thirty-one year old defendant, convicted of distribution of cocaine and possession of cocaine with intent to distribute, where both offenses arose out of a single transaction, was adjudicated a third-felony habitual offender based on prior convictions for possession of stolen property valued at over $500 and of possession of cocaine. The defendant also had another prior conviction for possession of stolen property. Following Stevenson, this court vacated the defendant's life sentence and remanded the case for a hearing at which the defendant could present evidence to establish that he was exceptional and thus deserving of a lesser sentence.

In the instant case, defendant was twenty-four years old at the time he was sentenced to life imprisonment based on his instant conviction for

possession of heroin and on two prior drug convictions, one for possession of marijuana with intent to distribute and one for possession of cocaine. Defendant introduced no evidence at trial that he was a drug "addict," although he conceded at trial that he had two prior convictions for possession of marijuana, as well as the one for possession with intent to distribute marijuana and the one for possession of cocaine. It can be noted that the arrest register for the possession of cocaine conviction reflects that defendant was originally arrested for possession with intent to distribute three rocks of cocaine and three ounces of PCP, and was also charged with resisting arrest. The arrest register for the conviction of possession of marijuana with intent to distribute reflects that defendant was arrested in possession of fifty-one marijuana cigarettes. Thus, there is an indication that defendant was a drug distributor at some point, not simply a user. However, the defendant in Stevenson had been convicted of selling a rock of crack cocaine, and one of the three convictions for each of the defendants in Briscoe, Davis, and Wilson was for possession with intent to distribute a controlled dangerous substance. A rap sheet contained in the record reflects that defendant was arrested in 1991 for being a convicted felon in possession of a firearm, but pleaded guilty to a misdemeanor offense, presumably carrying a concealed weapon, and received a six-month sentence. The rap

sheet also reflects one arrest in 1995 for felony theft over one hundred dollars, and at least one other theft arrest from Jefferson Parish. He was arrested in 1986 for felony possession of stolen property, but the victim refused to prosecute the charge. Defendant had arrests for distribution of marijuana and battery in 1984, neither of which resulted in a conviction.

Defendant failed to present any mitigating evidence at trial or sentencing. He failed to rebut the presumption that the mandatory life sentence is constitutional by showing by clear and convincing evidence that he is exceptional, i.e., that because of unusual circumstances he 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. Lindsey, supra; Johnson, supra. Although defendant's three convictions, like the three in Briscoe, were all for drugs, defendant in the instant case has a weapons-related misdemeanor conviction, not for using a weapon, but for carrying one. Defendant also had other arrests, apparently unlike the defendant in Briscoe. None of the defendants in Burns, Stevenson, Davis or Wilson had a weapons conviction, or at least had ever "used" a weapon.

In this assignment of error, defendant also attacks the constitutionality of La. R.S. 15:529.1(A)(1)(b)(ii), which at the time of defendant's arrest,

conviction and adjudication and sentencing as a habitual offender, provided for a mandatory sentence of life imprisonment where the third felony or either of the two prior felonies was a crime of violence under La. R.S. 14:2 (13), a drug law violation punishable by imprisonment for more than five years, or any other crime punishable by imprisonment for more than twelve years. Defendant argues that the statute constitutes cruel and unusual punishment as applied to him, a non-violent, drug–addicted third offender, and provides for an excessive sentence on its face.

Statutes are presumed to be valid, and their constitutionality should be upheld whenever possible. State v. Hart, 96-0599, p. 2 (La.1/14/97), 687 So.2d 94, 95. The party challenging the constitutionality of the statute bears a heavy burden in proving the statute to be unconstitutional. State v. Chester, 97-2790, p. 8 (La. 12/1/98), 724 So. 2d 1276,1282; State v. Wilson, 96-1392, p. 7 (La. 12/13/96), 685 So.2d 1063, 1067. To meet his burden, the party must clearly establish the unconstitutionality of the statute. State v. Muschkat, 96-2922, p. 4 (La. 3/4/98), 706 So.2d 429, 432.

Defendant claims that the mandatory life sentence imposed on him, as a drug addict driven to commit drug offenses by his compulsion to possess and use drugs, is unconstitutional. Defendant introduced no evidence at trial that he was a drug "addict," although he had two prior convictions for

possession of marijuana, one for possession with intent to distribute marijuana and one for possession of cocaine. As previously noted, there is an indication that defendant was a drug distributor, not simply a user, and he was adjudicated a third-felony offender based on one conviction for possession with intent to distribute.

Defendant submits that the Louisiana legislature's enactment of a single mandatory sentence for all habitual drug offenders, no matter their addiction or low-level involvement, is not rationally related to the legislature's intended purpose of stopping recidivist serious criminal behavior. However, as defendant's crimes are covered by the statutory provision, the legislature obviously intended to stop the type of criminal behavior perpetrated by defendant.

Defendant has failed to clearly show that La. R.S. 15:529.1(A)(1)(b)(ii) is unconstitutional, i.e., that it constitutes cruel and unusual punishment or provides for excessive sentences for those in his circumstances.

As previously noted, even assuming the record was insufficient to conclude that defendant's sentence was excessive, defendant's conviction and sentence must be reversed due to the defective bill of information.

ASSIGNMENT OF ERROR NO. 4

In this assignment of error, defendant claims that the delay in his appeal was tantamount to the denial of his right to appeal. At the close of sentencing on July 9, 1998, defense counsel orally noted defendant's intent to appeal, which he said he would supplement by a written motion. The trial court did not grant defendant's oral motion for appeal. The record does not contain a minute entry from the date of sentencing, and the docket master entry does not reflect the grant of a motion for appeal. Defendant filed a motion in the trial court for an out-of-time appeal on September 14, 1998, averring that his trial and appellate counsels did not pursue his right to a direct appeal. On December 11, 1998, this court granted defendant's writ application, ordering it transferred to the trial court as a motion for an out-of-time appeal. On May 7, 1999, this court denied defendant's writ application, noting that the trial court had granted defendant an out-of-time appeal (on March 31, 1999). The record was not lodged in this court until November 6, 2001.

Defendant claims his appeal rights are substantial rights as that term is used in La. C.Cr.P. art. 921. He submits that because the overall delay in his appeal process has affected his substantial rights, the harmless error rule does not apply and he is entitled to a reversal of his conviction and sentence. La. C.Cr.P. art. 921 state that a judgment "shall not be reversed by an

appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." The term "affects," as it used in this provision, has been interpreted as "prejudices." See State v. Williams, 2000-0011, p. 14 (La. App. 4 Cir. 5/9/01), 788 So. 2d 515, 527.

Defendant has received a full appellate review. He cites no prejudice as a result of any delay in receiving that review. Therefore, he has failed to establish that any appellate delay warrants the reversal of his conviction and sentence.

There is no merit to this assignment of error.

CONCLUSION

Accordingly, defendant's conviction and sentence are vacated, and the case is remanded for further proceeding consistent with this opinion.

CONVICTION AND SENTENCE VACATED/ REMANDED