IN THE SUPREME COURT OF THE

STATE OF LOUISIANA

No. **2005-KA-1981**

STATE OF LOUISIANA, *Plaintiff-Appellee*

v.

PATRICK KENNEDY, *Defendant-Appellant.*

Appeal from Conviction and Death Sentence Imposed
In Jefferson Parish, the 24th Judicial District
Hon. Ross LaDart, Judge Presiding.

THIS IS A DEATH PENALTY CASE

ORIGINAL BRIEF ON APPEAL

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ASSIGNMENTS OF ERROR

1. *The Execution of a Defendant for a Non-Homicide Offense Violates the Eighth Amendment to the United States Constitution and Article I, Section 20 of the Louisiana Constitution*

2. *The Capital Punishment Scheme Used in this Case Failed to Narrow the Class of Defendants Eligible for the Death Penalty.*

3. *Imposition of the death penalty where the defendant did not "kill, attempt to kill, or intend that killing take place" violates the Eighth Amendment.*

4. *Delayed Disclosure of Exculpatory Evidence Denied Mr. Kennedy a Fair Trial and Secured the State Sufficient Time to Procure a Conviction and Death Sentence*

5. *The State Improperly Delayed in Turning over Exculpatory Evidence – including lab reports, a videotape, and exculpatory phone records – in violation of its statutory and constitutional obligations.*

6. *Mr. Kennedy Was Prejudiced by the State's Delay in turning over discoverable material*

7. *The Trial Court Erroneously Denied the Defense Request for a Mistrial, a Recess, and his Subsequent request for Alternate Remedies*

8. *The Trial Court's Refusal to Assess Lavelle Hammond's Competency Violated Mr. Kennedy's Right to Due Process of Law and a Fair Trial*

9. *The Trial Court Erroneously Denied the Defense Request to Assess Ms. Hammond's Competency*

10. *The District Court Should Have Considered Whether the Taint of Leading Questions and Manipulation Undermined Ms. Hammond's Competence.*

11. *The District Court Should Have Considered the Taint That May have Impacted the Competency of Ms. Hammond's testimony.*

12. *The Conviction in this Case Was Secured with the Use of Rampant Hearsay and Violated Mr. Kennedy's Sixth Amendment Right to be Present, his Right to Counsel, and His Right to Confront and Cross-examine Witnesses*

13. *The Admission of the Videotape of Lavelle Hammond Constituted a Statutory Violation of La. R.s.15:440 et Seq Because She Was Not Available for Cross Examination.*

14. *The Application of La. R.S. 15:440.4 in this Case Unconstitutionally Deprived Mr. Kennedy of the Right to Confront Lavelle Hamond as Well as the Right to Counsel and to Be Present*

PROCEDURAL HISTORY

Patrick Kennedy was indicted on May 7, 1998, for "aggravated rape upon a female juvenile under the age of 12 years" in violation of La. R.S. 14:42. R. 83.[1] The victim in this case was Mr. Kennedy's step-daughter, eight year old Lavelle Hammond. Jury selection began over five years later, on August 8, 2003. R. 55. Opening statements were made on August 15, 2003, and the trial began the next morning. Mr. Kennedy was found guilty on August 25, 2003. R. 80. Less than 24 hours later, the jury returned a death verdict based upon two aggravating circumstances: 1) that the defendant committed aggravated rape, and 2) that the victim was under the age of twelve. R. 82. On October 2, 2003, the trial court formally sentenced Mr. Kennedy to death. R. 6068.

Since 1977, over six thousand, eight hundred (6,800) defendants have been sentenced to death; there have been over one thousand (1,000) executions.[2] If the sentence in this case is upheld, Mr. Kennedy would be the first of these defendants executed for rape; no such execution has occurred for in the United States in over forty years.[3] Appellant's automatic appeal ensues.

INTRODUCTION

There is no question that eight year old Lavelle Hammond was raped on March 2, 1998. Following Mr. Kennedy's call for assistance, she was taken to the hospital where surgery was performed to repair a tear in her vaginal cavity. R. 5743. There was no debate that this was a serious offense. Ultimately, the critical questions presented to the jury were 1) whether the rape was committed by Ms. Hammond's step-father Patrick Kennedy, or, as Ms. Hammond insisted for the first eighteen months after the rape, committed by two teenage boys who lived in the Woodmere neighborhood, and 2) whether considering the doubt about the perpetrator, the lack of a homicide, Mr. Kennedy's I.Q., and errors below, Mr. Kennedy should be sentenced to death.

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[1] Citations to the appellate record are indicated by R. __. References to the supplemental volume are cited as Supp. R. __. Citations to documents filed along with the appellate record are referred to by box number, exhibit, and date of document. Throughout the brief, all emphasis unless otherwise indicated is supplied.

[2] See www.deathpenaltyinfo.org/article.php?scid=9&did=873 (noting number of death sentences between 1977-2005) (Last visited 5/16/2006).

[3] See also Michael Mello, *Executing Rapists: a Reluctant Essay on the Ethics of Legal Scholarship*, 4 Wm. & Mary J. of Women & L. 129, 129-30 (1997) (noting that since 1977,"400 people have been executed in America - all for capital murder. More than 3,000 prisoners live on America's death rows, awaiting execution - all for murder. No person has been executed in America for a non-homicide offense since 1964."); see also Emily Marie Moeller, *Comment: Devolving Standards of Decency: * Using the Death Penalty to Punish Child Rapists*, 102 Dick. L. Rev. 621, 621 (1998) (noting " Not since 1964 has any person been executed in the United States for the crime of rape." citing Michael Higgins, *Is Capital Punishment for Killers Only?*, A.B.A.J., Aug. 1997, at 30. Higgins characterized using the death penalty to punish child rape as an example of "devolving" standards of decency. See id. Since Mello's article in 1997, over six hundred defendants have been executed and over one thousand six hundred and ninety-three defendants have been sentenced to death, none for the offense of rape, and all for the offense of murder. See www.deathpenaltyinfo.org/article.php?scid=9&did=873 ; www.deathpenaltyinfo.org/article.php?scid=8&did=146 (Last visited 5/16/2006).

STATEMENT OF THE CASE
FACTS OF THE OFFENSE

At 9:18 a.m., on March 2, 1998, Patrick Kennedy called 911 to notify the authorities that his step-daughter Lavelle Hammond had been raped. Deputy Burgess arrived at the scene between 9:20 and 9:30 a.m., on March 2, 1998. He immediately went to the side of the house where he observed a dog that was not barking or agitated. R. 4773.

Deputy Burgess then went into the house where he observed Mr. Kennedy on the phone, clearly agitated, discussing what had happened to his step-daughter. Mr. Kennedy brought the deputy to his step-daughter, and attempted to answer all of his questions. Ms. Hammond reported that two teenage men approached her while she and her younger brother were selling Girl Scout cookies in the garage, and that they took her out of the garage and around the side of the garage and raped her. R. 4510, 4528. The younger brother, though afflicted with a severe speech impediment, took Deputy Burgess around the side of the garage and pointed to the site of the rape, where Deputy Burgess and detectives found spots of blood on the grass. R. 975 ("So, I took him [step-son] downstairs and he took me between the two houses and showed me where it happened, where upon arrival on that spot I found a spot of blood. I dug it up . . ."). The state proceeded to secure four separate search warrants, to seize numerous items, including carpet samples, a bed-spread, blankets, and other material. The bed-spread from the underside of Lavelle Hammond's bed and a number of carpet samples had blood on them.

When Ms. Hammond was taken to the hospital, she again reported that she was raped by two teenage men after being led from the garage and into the corridor between the houses.[4] R. 4777. Ms. Hammond reported the same description of the perpetrators the next day. See R. 4879. She repeated the same chronology to the detective several more times. R. 4929. Several days after the offense, she told a psychologist and social worker the same version of events. R. 4936.

The Child Protection Services were engaged on April 7, 1998, and Lavelle Hammond was removed from her mother's home. See Box III, Exhibit K, Referral Form of 4/7/1998 at 1.[5] The investigating officer observed that the reason for the removal was that "Mrs. Kennedy believes the story that her daughter tells her about two strangers dragging her from the garage and raping her on the side of their house. Mr. Kennedy repeats the same story except that the physical and forensic evidence do not support that story." *Id.* at 4.[6] Department of Social Services social workers identified the problem that required the initiation of "treatment" and removal from home as:

> allegations of sexual abuse by step-father; mother is denying abuse; child has alleged other perpetrators, however evidence points to step-father. Child removed from home to protect her from negative influences.

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[4] Dr. Benton noted that "after two days the swelling is gone" and that the genital area came "back to normal in two weeks."(R. 5744).

[5] In response to a subpoena for the Department of Social Service records, the defense was provided thirty-seven (37) pages of records detailing the removal of Lavelle Hammond from her home, and the initial three months of treatment and assessment by Department of Social Services case-workers. These documents are filed in the record on appeal in Box III, Exhibit K.

[6] Office of Career Services records lodged with the appellate record reflect that Ms. Hammond also appeared to recover quickly from the emotional trauma, with Ms. Hammond indicating no fear or psychological disturbance:

> Lavelle appeared to be a very active and friendly 8 year old. She did not appear distraught, depressed or in any way saddened by the event of the rape.

Box III, Exhibit K, Subpoena Return on Lavelle Hammond's Child Protection Records, CPI Referral Form,.4/7/1998, pg.2.

Box III, Exhibit K, Quarterly Report, June 18, 1998, pg 1. As noted below, at that time there was no evidence – except the conjecture of the investigating officers – that "pointed to her step-father." The Department of Social Services laid out three goals that Mrs. Kennedy needed to achieve before she could secure custody of her daughter again: "1. Enable Ms. Kennedy to support child emotionally; 2) enable Ms. Kennedy to be objective concerning evidence;[7] 3) enable Ms. Kennedy to become more independent." See Box III, Exhibit K, Quarterly Report Dated June 15,1998, pg. 1. The Department of Social Services, OCS worker's report reflected that Mrs. Kennedy was able to regain custody of her daughter by making the following progress toward the completion of her goals:

> 1. *Ms. Kennedy has been able to tell her child that she believes that her step-father molested her,* initially Ms. Kennedy supported her husband over her child. She now feels he is probably the one who molested the child even though the child still states that young boys were the rapists.
> 2. Ms. Kennedy has yet to see the evidence which the District Attorney has; she feels that Mr. Kennedy is capable of committing the crime because of his behavior since he was incarcerated.

See Box III, Exhibit K, Quarterly Report Dated June 15,1998, pg. 2. While Mrs. Kennedy emphatically disputed at trial that the Department asked her to "change her views" on the evidence, or communicate her new views to her daughter, the records filed at the Supreme Court appear to undermine that position.

Despite her mother's efforts, Lavelle Hammond continued to insist that she was raped by two young boys. See *id.* She then reported the same to defense counsel and his investigator. R. 4422, 5819. Indeed for over a year and a half, including the time during which she was taken from her home and placed in state custody, Ms. Hammond insisted that she was raped by two unknown teenagers. R. 5820.

While the Department of Social Services asserted that the "evidence pointed to Mr. Kennedy," the investigation by Jefferson Parish Sheriff's Officers also uncovered individuals that fit Ms. Hammond's and Mr. Kennedy's description of the perpetrator, indeed identifying Devon Otis as a potential suspect based upon a shirt located in the environs to the rape, the identification of his bicycle, and his false assertion of an alibi for the rape. Defense questioning by the lead detective, Sergeant Jones, established that Devon Otis generally matched the description given by Lavelle Hammond and Mr. Kennedy, that his bicycle was identified as the one used by the perpetrators, and that he lied to the investigating officers in an effort o create an alibi

:

> Q: When you re-interviewed Devon Oatis and his mother on March the 4th, you had the following evidence: You had information that the person who raped Lavelle Hammond wore a black shirt and left the scene on a blue bicycle, correct?
> A. That's brief information.
> Q You had a blue bicycle that had been identified by Patrick Kennedy as the bicycle he had seen leaving the scene of the rape, correct?
> A. Yes.
> Q. You had information that that bicycle is owned by Devon Oatis who lived at 3725 Longleaf, correct?
> A. Yes.
> Q. You had a black shirt with an envelope inside addressed to 3725 Longleaf, correct?
> A. Yes.
> Q. Alright, that's the information that you had when you interviewed Devon Oatis and his mother on

[7] It is unclear how Mrs. Kennedy was supposed to be more objective concerning the evidence, as the State had no physical, or direct evidence against Mr. Kennedy at that time, or until 18 months later when Lavelle Hammond adopted the State's allegations.

March the 4th, correct?

A. Yes.

* * *

Q. The information that you got from John Ehret High School led you to realize that the information that you had gotten from Devon Oatis as to his whereabouts on March the 2nd was false, correct?

A. That's correct.

R. 4904, 4908-4909.[8]

Despite this evidence, the State justified the detention of Mr. Kennedy on the *allegation*[9] that he made several phone calls between 6:15 and 8:00 a.m., to his work indicating he was unavailable because of his daughter's first menstrual cycle and to a carpet cleaning agency concerning the need to remove stains from his carpet. While much of the State's claims of guilt were predicated on these phone-calls, a subpoena return from Bell South reflects that neither call was made. See Exhibit A, Attached.[10] The State did not disclose these phone records for over a twenty months, and maintained the alleged phone calls and the blood-stain on the underside of Ms. Hammond's mattress pad, demonstrated 1) that the rape occurred in Ms. Hammond's bed well before the 911 call was made, and 2) that Mr. Kennedy had attempted to cover it up by turning over the mattress pad.

The State presented testimony from Alvin Arguello[11] and Rodney Mader[12] concerning phone-calls allegedly made prior to 8:00 A.M. on March 2, 1998. Mr. Mader testified that Mr. Kennedy was concerned with getting carpet cleaning services to get blood out from the carpet. R.4474. Mr. Arguello testified that Mr. Kennedy called to inform him that he wouldn't be coming to work that day because his daughter had "become a lady." R. 4749.[13] The phone records do reflect that Mr. Kennedy made two phone calls in the morning of March 2, 1998 – both of these were to 411. The first call generated a call to a Winn Dixie in Marrero; and the second one did not produce a called number. The billing records also reflect that several calls were made to Mr. Kennedy's

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[8] The State presented evidence that the bicycle identified by Mr. Kennedy was used because of the condition of the tires (flat) and the discoloration of the grass underneath the bicycle. See R. 5327. The defense elicited testimony from Kim Parnell – a woman who lived in the neighborhood near Devon Otis – who was adamant that the bicycle was being used by one of the teenage boys that lived down the street from her at 3725 Longleaf Ave. R. 5802. Mr. Otis lived at that address. R. 5804.

[9] As discussed *infra*, the phone records subpoenaed by the Jefferson Parish District Attorney's office, at the request of the lead detective, do not reflect that these outgoing phone-calls were ever made.

[10] The records returned pursuant to the State's subpoena to Bell South are identified in the record below. Counsel has been unable to locate them in the record on appeal. Given the state of the record on appeal, counsel attaches the relevant documents to the Brief on Appeal for the Convenience of the Court.

[11] In closing, the prosecutor emphasized that Mr. Arguello's testimony was crucial:

> Alvin Argueello testified to you, didn't he, that he went to work and there was a message from the Defendant saying he wasn't going to come in. He then told you there was another callback. He said that it wasn't really at 7:30; it was earlier than that, because at 7:3 0 then his workers come in, that he needs to tell them where they need to go. He wouldn't have had time to handle the telephone call.
>
> He told you that the Defendant called him to tell him that his little girl had become a woman; did he know how to get blood out of a carpet, and that's important ladies and gentleman because you know that a call doesn't go out until 9:18 of a rape in progress. Said "How do you get blood out of a carpet, I've been trying to do it for a while."

R. 5832-5833.

[12] The State argued that Mr. Mader was, along with the call of Mr. Arguello, especially "damning." R. 5864.

[13] The Uniform Capital Sentence Report indicates that "crucial" evidence was secured from Alvin Arguello who indicated that":

> Mr. Kennedy had telephoned his work (A-Arpin, 4745 River Road, New Orleans, 734-9595) on March 2, 1998 (the morning of the attak on his stepdaughter) between 6:30- and 7:00. Mr Kennedy reportedly spoke to the dispatcher, Alvin Arguello and told him that he (Kennedy) would not be in for work on this date because his daughter had "become a young lady." [According to Arguello] Kennedy stated that the child was running all over the house bleeding, and asked Arguello if he "knew how to get blood out of white carpet."

UCSR, Capital Sentence Review, Pg 7. The phone records do not reflect that any such call was made to, or from that number.

number.

When Lavelle Hammond insisted that her step-father had not raped her, her mother – Carolyn Kennedy – did not try and disabuse her of that position. Mrs. Kennedy supported her husband's plea of innocence. In response, the State removed Ms. Hammond from her home and placed her in foster-care. While Mrs. Kennedy ultimately testified at trial that she was not coerced into changing her mind about her husband's innocence, it is clear that one of the three requirements for reunification with her child was changing her view about her husband's innocence. Both Mrs. Kennedy and Lavelle Hammond were required to attend counseling sessions with State actors, overseen by one of the assistant district attorneys prosecuting Mr. Kennedy for Lavelle's rape. One of the disturbing aspects of the process is that the therapist required Mrs. Kennedy and Ms. Hammond to arrive at a *"different"* view of the evidence before reunification would occur. The psychiatric professionals, starting with Dr. McDermott and including Department of Social Services Social Worker Gail Wise, all had been convinced by the police that Ms. Hammond's initial statement was contradicted by the forensic evidence, and were actively attempting to change the victim and her mother's assessment of the evidence. See e.g. Box III, Exhibit K, Quarterly Report Dated June 15,1998, pg. 2. As it turns out, however, at no point did the forensic evidence indicate that Mr. Kennedy was the perpetrator.

Indeed the documents reflect that in the weeks and months after the rape the Department of Social Service welfare providers had been informed that the "evidence points to the step-father" – despite the fact that no such evidence existed – and that one of the goals of treatment was for both Lavelle Hammond and her mother Carolyn Kennedy to identify Mr. Kennedy as the perpetrator. Indeed, in order for Carolyn Kennedy to be re-united with her daughter, Mrs. Kennedy was required to "support her child emotionally" (Goal 1) and "*be more objective concerning the evidence,*" (Goal 2). Box III, Exhibit K, Quarterly Report Dated June 15, 1998, pg. 1. Mrs. Kennedy was able to regain custody when she fulfilled Goals 1 and 2.

In June of 1998, Carolyn Kennedy fulfilled reunification requirement Goal 1 by informing her daughter that "she believes that her step-father molested her; initially Ms. Kennedy supported her husband over her child. She now feels he is probably the one who molested the child even though the child still states that young boys were the rapists." Box III, Exhibit K, Quarterly Report Dated June 15, 1998, pg. 2. She fulfilled Goal 2 by acknowledging that although she "has yet to see the evidence which the District Attorney has, she feels Mr. Kennedy is capable of committing the crime because of his behavior since incarcerated." *Id.*

After this period of approximately eighteen months–during which Ms. Hammond was taken from her mother's home and placed in state custody, and then returned to her mother's care after Mrs. Kennedy has achieved the goals discussed above–Ms. Hammond changed her story and agreed to the State's version of events and informed her mother that it was Mr. Kennedy who had raped her. Mrs. Kennedy then took her daughter to the Child Advocacy Center where a videotape deposition was made detailing Ms. Hammond's current allegation. A victim-advocate working with the Sheriff's Office and District Attorney's Office was present throughout the process. Neither Mr. Kennedy nor his counsel were present during the taking of the deposition, which was ultimately introduced at trial to bolster the testimony of Ms. Hammond.

LEGAL PROCEEDINGS

Mr. Kennedy was arrested and charged with aggravated rape on March 10, 1998. R. 121. Mr. Kennedy immediately insisted upon his innocence and asked for a speedy trial. R. 2, 90. An indictment was issued on May 8, 1998.[14] R. 83. The two primary basis for the State's arrest were 1) discrepancies in the timing of events and phone calls made before Mr. Kennedy called 911, and 2) blood found on the underside of the mattress in Lavelle Hammond's room.[15] Indeed, the State specifically identified Mr. Kennedy as the perpetrator by reference to results of tests performed on physical evidence.

The State's Failure to Provide Timely Discovery of An Exculpatory Videotape

For the first eighteen months after the offense, Ms. Hammond repeatedly informed the State that she was raped not by her step-father but by two unknown teenage boys. The State secured at least one videotape detailing that statement, taken on March 6 and 7 of 1998. The State, however, for much of the pre-trial period claimed that no such videotape existed. Indeed the prosecutor at one point vociferously claimed that Lavelle Hammond had never done an interview in March of 1998:

> Prosecutor: And like I said. . . I know this little girl did not go to the Child Advocacy Center in March of 1998 and give - the only interview that she had was in December of 1999.

R. 1168. The prosecutor's claim that no exculpatory videotape existed was ultimately proved untrue, and the State finally acknowledged the existence of the initial videotape and agreed to provide a copy to the defense. However, the State had resisted giving that exculpatory videotape to the defense until well after Ms. Hammond had changed her story.

The State's Failure to Provide Timely Discovery of Reports and the Blood on the Mattress Pad

The State also failed to timely turn over physical evidence for defense testing, and to turn over exculpatory reports of testing performed by the Connecticut Crime Laboratory. As indicated in the *State's Response to the Defense Request for Bill of Particulars*, discussed below, the State initially attempted to identify Mr. Kennedy as the perpetrator by reference to tests performed on physical evidence. These claims were necessary because, at the time of the offense and for the next eighteen months, Ms. Hammond's statements made clear that Mr. Kennedy was not involved. On July 17, 1998, the defense filed an initial motion for discovery. R. 111. One of the critical questions in the *Bill of Particulars* concerned the manner in which the State identified appellant as the perpetrator. The defense inquired:

> *Identification of the Defendant* . . .14. a. If said identification was by real, demonstrative or tangible evidence, such as, but not limited to look, hair, fingerprints, clothing, etc, where, when and by whom was said evidence obtained?

R. 117. On August 26, 1998, the State's response indicated that Mr. Kennedy was identified as the perpetrator by the physical

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[14] The defense moved to quash the indictment based upon racial and gender discrimination in the selection of grand jury forepersons, the exclusion of qualified individuals, and the exclusion of individuals from the grand jury venire who were previously convicted of offenses but who had "full rights of citizenship restored upon termination of state and federal supervision following conviction for any offense." These issues are discussed more fully in section XII and XIII.

[15] See, *e.g.*, Affidavit in Application In Support of Arrest Warrant:

> While inspecting the victims mattress, officers used Luminol to determine the possible presence of blood. The Luminal reacted positive to possible blood on a large presence of the mattress that had been turned down toward the box spring. That portion of the mattress padding was also removed for further testing concerning the possible presence of blood. (Officers noted at the scene that the sheets and comforter on the bed at the time of the initial arrival were neat and unstained.)

Application by Sergeant Kelly Jones for Arrest Warrant of 3/10/1998.

evidence seized at his residence, specifically pointing to the testing of Dr. Henry Lee. The State's response was:

> *14. a. See reports of forensic analysis by Dr. Henry Lee provided. Reports of forensic analysis by the Jefferson Parish Sheriff's Office will be provided upon receipt by the District Attorney.*

R. 137. See also R. 140 (State's Response to question no. 53). While the State did in fact turn over some of the reports generated by the Connecticut Crime Laboratory, if failed to turn over the key reports.

At the time of the State's response, the Connecticut Crime Laboratory had in fact conducted tests on blood from the mattress pad. But unlike the representation in the State's response to the Bill of Particulars, those results indicated that the blood on the mattress pad did not match the victim or the defendant. The results of this testing were not included in the reports turned over to the defense until after trial began.

The defense repeatedly tried to secure access to the reports. R. 948-1048 (hearing of November 12, 1999 concerning discovery); R. 1091 (noting in hearing on January 20, 2000, that State had promised to provide discovery of certain documents but had failed to do so; State given ten days to comply with discovery); R. 21 (minute entry of hearing of February 11, 2000, noting discovery is now due March 15, 2000).

With a trial setting less than two months away, and the defense without complete discovery, the trial court–on April 7, 2000–specifically ordered the State to review its discovery and ensure that the defense had all of the reports relevant to the case within ten days. R. 1137 ("It's rather odd that I'm having to remember somewhere in one of those professionalism lectures; what we ought to do, and now I find myself in a position of having to order it. I'm ordering so. . . . I can't order the State to be professional, nor can I order the - Well, I can, but I'm not inclined to do so."). The exculpatory Connecticut Crime Laboratory documents were still not disclosed.[16]

The trial court became increasingly frustrated, noting that the "certificates of service" were "cavalierly" being placed on motions and notices. See ,*e.g.*, R. 1135. When the State repeatedly indicated that it did not know whether information had been turned over to the defense, the trial court recalled:

> The Court: I'm recalling a program called Hogan's Heros. You remember Hogan's Heros. Is there anybody in this Courtroom other than the bailiff who is old enough? There was a rather large German corporal in that program, what did he use to say?
>
> Prosecutor: Sgt. Schultz?
>
> The Court: Sgt. Schultz.
>
> Prosecutor: I know nothing.
>
> The Court: I don't know nothing. Your words remind me of his dialogue.

R. 1379.

Well prior to trial, the defense again moved for disclosure of blood spatter reports and all scientific test results. See *Motion for Production of Reports*, filed September 12, 2001. R. 412. The matter ultimately came for a show-cause hearing on Thursday, September 20, 2001, where the trial prosecutor stated: "I have not yet had a chance to check with Dr. Lee in the

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[16] In fairness, the trial court – while finding that the defense was being accurate and honest when it indicated that it did not have various reports – also took fault with the preparation of defense counsel, noting in one instance that it wanted to provide the defense with the assistance of a document manager because of how ill-prepared defense counsel was, but decided it was not permitted to do so. R. 1159 ("The Court: I was going to lend you someone to help you get your files in order; but I can't do that.").

Connecticut State Police, as well as Lt. Buras to determine whether or not any reports were generated." R. 1880. The trial court again specifically ordered the State to disclose all test results by the following Tuesday, September 25, 2001. *Id.* Again this was not done. At trial – over the objection of the defense – the State introduced the testimony of Dr. Henry Lee, on issues of blood spatter and as well on the significance of the apparent grass blade breakage rate where Mr. Kennedy indicated that the offense occurred. No report concerning this analysis was ever provided to the defense.

Not only did the State fail to turn over the exculpatory reports, but the State also resisted providing the defense access to the actual physical evidence. It took the defense three years and two separate threats of contempt of court to secure independent testing of the physical evidence, including the mattress pad. See R. 34, R. 1831 ("The Court: Milton Dureau. Can't wait to hear how the director of the lab gets to interpret orders that are rather straight forward on their face. Get him here."); R. 1846 (noting State had not sent evidence at least one month after it had received order to do so); R.1848 (indicating that trial court did not place the JPSO Lab Director under oath concerning his failure to transmit evidence based upon his desire not to have to "send [him] back to the correctional center" for a "vacation.").[17] Over this period, again and again the State had withheld its own exculpatory testing results that indicated that the blood found on the mattress pad did not belong to the defendant or victim in this case. During this lengthy interval, Ms. Hammond's version of events transformed from a detailed exculpatory statement into a generic accusation against Mr. Kennedy. The State's delay in turning over the evidence required the trial court to continue the September 10, 2001, trial date.

On January 14th, 2002, the State moved for a continuance claiming surprise at the independent findings–that the blood on the mattress pad did not match the defendant or victim:

> Mr. Rowan and I basically had a - not so much a theory, but we had a Trial strategy mapped out. This significantly changes that Trial strategy and the witnesses that we intended to call and the evidence that we had intended to present, and the focus that we had, that we intended to take as far as our case. This significantly alters that. And therefore, I've been trying to also get a hold of the persons in Connecticut; Dr. Henry Lee as well as Debra Messina, who were the persons responsible for the testing done on behalf of the State. I have been unsuccessful in reaching them as well last week.

R. 2044. Unbeknownst to the defense or the trial court, the Connecticut Laboratory had conducted tests on the mattress pad that was consistent with the defense's testing – reflecting that the rape had not occurred on Ms. Hammond's mattress, and that Mr. Kennedy had not attempted to conceal the evidence by reversing the mattress. Nonetheless, the court granted the State's continuance.

On July 23, 2003, the State again filed a motion to continue the trial due to the unavailability of witnesses from the Connecticut State Police Forensic Science Laboratory, including Dr. Debra Messina. See R. 54.The matter was rendered moot when the defense agreed to stipulate to the authenticity of the reports attached to the motion for a continuance. Notably, the one report that reflected the State's unsuccessful efforts to match the blood on the mattress pad to the victim or the defendant was not included with those attachments. With no knowledge of the *Messina* report, the defense agreed to stipulate to the authenticity

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[17] After securing for independent testing the physical evidence, including the mattress pad, in July 2001, counsel for Mr. Kennedy received the report from the defense expert on January 3, 2002. R. 2047. The defense provided the State with the report upon receipt on Monday, January 7, 2002. R. 2040.

of the documents.

When the case finally came to trial on August 15, 2003, the defense in opening statements made its theory of the case crystal clear:

> They found a mattress, it was the mattress on Lavelle's bed and it had blood on it, and it was turned over so that the blood was on the bottom side. Lord, they found their man, they found their man, because guess what, that didn't match up to the story about her being raped outside, she was raped in her own bed, right?
>
> Her story is, she was raped outside, his story is, she was outside. Now they have their man because he's lying, right? **Well guess what they never bothered to do, they never bothered to test the blood and find out if it was really hers.** Well, we tested it, and it was not hers, there was not any chance that it's hers. And you're going to hear testimony about that. You're going to hear testimony from her, at this point, today–not today, but in this trial, that she was raped in that bed, but that blood is not hers.

R. 4420-4421.[18]

Midway through the trial proceedings, defense counsel was able to view mattress pad for the first time. The State concurred that the defense had been prevented from looking at the mattress pad until after the trial began but claimed it wasn't intentional. R. 4972 ("The State: . . .There was nothing intentionally being hidden"). When the defense looked at the mattress pad, it became clear that the State had conducted its own tests on the mattress pad but failed to inform the defense of the results.[19]

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[18] After opening statements, it appeared that at least one of the two trial prosecutors was not even aware of defendant's independent testing of the mattress pad, even though it's disclosure had been the basis for a prior prosecutor's successful motion to continue the proceedings; when the defense indicated that it would present these test results at trial, the State immediately raised questions about disclosure of the test results:

Prosecutor (1):	Yes, Judge, I do have a question of the defense, and as you know, I came into this case much later, but I wasn't aware of a witness that they listed during voir dire, who would testify about testing blood on the bed, who is that?
Defense counsel:	That was Carolyn Vanwinkle.
Prosecutor (1):	Okay, thanks. Do we have a report from her?
Defense counsel:	Yes. That was the reason for the continuance for the first trial setting, yes.
The Court:	The State acknowledges receipt of a report from this expert?
Prosecutor (2):	She gave it to Greg, probably. I don't have it, she probably gave it to Greg, and God knows where Greg put it, I'll go look.
Prosecutor (1):	If Graham tells us that she gave it to us, I'm sure that she did.
Prosecutor (2):	I'm not disputing that Graham did it. She knows I'm talking about Greg the right way.
The Court:	Greg Kennedy?
Prosecutor (2):	Yes, sir.
The Court:	Okay. Former ADA
Prosecutor (2):	Yes, sir.

R. 4229-4230.

[19] In the motion for mistrial, defense counsel stated:

> We had it tested and the results were that the blood on the mattress was not consistent with Lavelle Hammond's blood. What we have now learned is that it has also been tested by the Connecticut crime lab. There are swatches missing from it with Connecticut crime lab personnel initials written, showing that they removed swatches from the lab. We're talking about exculpatory evidence that was hidden from the defense for years, four years, Your Honor. Now, we know about it now and we can bring it into evidence and we can show that we tested it. . . . There's no reference at all to this mattress pad that was apparently tested by them, shown not to be Lavelle Hammond's blood on the mattress pad, and there's no reference to it. And we were told by the State it was not tested. I can have my expert, who we planned to have testify tomorrow, testify for the purposes of this motion that it is the practice of forensic labs to never remove swatches from evidence unless they are planning to test it. There are several swatches removed from this. So, what we have is a report that we stipulated to that does not mention testing that they've done and we know that it turns out that that evidence would have been favorable to the defense. So, we're seeing it for the first time today after requesting over a month ago, it was in July, sometime in July, to view.

R. 4952.

The defense's motion for mistrial, or in the alternative to recess the trial so that counsel could secure witnesses from out of state concerning the prosecutor's fidelity to their *Brady* obligations, interrupted the trial and took several days. During this hearing, the trial court encapsulated the State's peculiar explanation concerning the absence of these scientific witnesses:

> What counsel has informed the Court, . . and this may or may not be on the . . .record . . . was that a) no subpoenas had ever been issued to Dr. Lee's laboratory, to Dr. Lee or any of his assistants at any time during the past five years. Secondly, . . . Dr. Messina, it would seem was the lead analyst in this case, the forensic scientist and that her presence would have to be here. All the State indicated to this Court was [] that some emergency surgical procedure or some surgical procedure had to be performed, the nature of which was not disclosed, you don't know it. Secondly, I sure don't know what it is. Thirdly, I don't even know if it was elective or not. As a matter of fact, I got the impression that there was something secretive about this and nobody is supposed to know the circumstances of that. Fourthly, nobody told me when this surgery was to occur. The next thing the State informed me of was that, and I might say with some frustration, Mr. Rowen, that the District Attorney's Office was informed by Dr. Lee that he couldn't come because he was to be out of the country. I think it was the Philippines. And then we of course, we look at the, is it the Fox News cite? And we discover that, in fact, he's in California involved in the Lacy Peterson case.

R. 5269-5270. Nevertheless, the trial court denied the motion for mistrial and a recess; the State was able to secure the helpful (to the State) testimony of Dr. Henry Lee and Mr. Abramowitz, however the defense was unable to present the testimony of Dr. Messina, who approved the exculpatory report and apparently would have been responsible for transmitting the results to the prosecution. The trial court also denied the defense request for an additional opportunity to make opening statements at the outset of the defense's case, as a remedy for the State's discovery violations.

Gruesome Photographs

Prior to trial the defense moved to exclude gruesome photographs. R. 623. The defense indicated that it would stipulate that Ms. Hammond was raped and would accept the use of diagram drawings. The trial court ultimately limited the State to a specific number of 5 by 7 photographs. At trial, the State, over defense objection, introduced a series of additional photographs, two of which were approximately 8 by 10 close-up pictures of Ms. Hammond's genitalia.

Mental Retardation and Cognitive Deficits

In May of 2003, the defense moved for a stay of proceedings based upon the decision in *Atkins v. Virginia*, and the legislature's consideration of a statute to bar the execution of mentally retarded defendants; Mr. Kennedy had received a score of 70 on an IQ test. The trial was set for August 8, 2003. The court found reasonable grounds to suspect that Mr. Kennedy was mentally retarded. The trial court nevertheless denied the stay and appointed a sanity commission.

The state sanity commission members testified that they viewed the IQ score valid, but determined that Mr. Kennedy was not mentally retarded because they had no information of adaptive deficits. The examining doctors noted that Mr. Kennedy was adamant that he was *not* mentally retarded, and that despite initial hesitance to discuss matters with them, he ultimately cooperated with their investigation. Like the sanity commission, the trial court ultimately ruled that Mr. Kennedy was not mentally retarded. Nevertheless, the trial court ruled that the defense could not litigate the matter before the jury based upon the limitation in the prospective statute, not yet in effect, which labeled *full* cooperation a prerequisite to litigating the matter before the jury; Mr. Kennedy, the trial court found, was not initially cooperative with the sanity commission doctors. As such, the trial court rejected the defense request for an instruction that mentally retarded individuals could not be executed, and granted the State's motion

to preclude the defense from arguing for such a bar. R. 51,679-681, 2439.

Moreover, at trial, the State was adamant that the time line of the phone-calls established that the rape had occurred well before 9:18 a.m., presenting evidence that Mr. Kennedy had made phone-calls concerning his daughter's bleeding before 7:30 a.m. Of particular significance to the state was a photograph of a computer log which indicated that a phone-call was made to the carpet-cleaners at 7:18 a.m.[20] While the State plainly relied on Mr. Kennedy's statements during the course of the proceedings and his unusual behavior on the morning of the rape, the trial court prevented the defense from introducing evidence of his low I.Q. in order to rebut or explain statements and unusual behavior by the defendant in the period after the rape occurred. R. 778-779.

Lavelle Hammond's Testimony

The defense moved prior to trial to assess the competence of Ms. Hammond to testify. R. 626-628. The trial court refused the request. R. 2470. However, cross-examination of Ms. Hammond was made near impossible based upon her lack of memory of preceding events, as she repeatedly indicated that she could not remember what she had occurred or what she had said previously.

Perhaps more significant than Ms. Hammond's testimony was the emotional portrait she conveyed to the jury. Ms. Hammond was brought to the stand by the State, and left for a period of five minutes in front of the jury crying, before the second prosecutor appeared and began questioning.[21] The trial court castigated the prosecution for engineering this display, but denied the defense request for a mistrial. The entirety of the State's questioning of Ms. Hammond concerning the offense is below:

> Q. And you're here because something happened to you in back in 1998, you understand that?
>
> A. Yes.
>
> Q. Do you remember what happened to you in 1998?
>
> A. Yes.
>
> Q. I want you to tell the ladies and gentlemen over here, I know as hard as it is, tell them what happened to you back then.
>
> A. I woke up one morning and Patrick was on top of me and --

R. 5336-5337. Ms. Hammond then broke into tears, and the prosecution requested a recess. The defense unsuccessfully requested a mistrial again based upon the continued dramatic interplay and emotional outbursts.

Thereafter the prosecution played a videotape recording of Ms. Hammond's prior statement. R. 5344. At the end of the tape, the trial court acknowledged: "Obviously this is an emotional moment in this trial and I'm saying this to counsel for both sides as well as everybody in the spectator's seats, alright." R. 5344. As defense counsel noted after the playing of the tape:

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[20] The defense attempted to undermine legitimacy of that time-line by attempting to demonstrate that the photograph of the computer log showed that the call came in one day before on March 1, 1998 at 7:18 a.m. However the defense forgot to bring the photograph of the computer-log and was forced to alert the State to the discrepancy. Undersigned counsel has uncovered no reference to the subpoena return from Bell South, that indicated no such phone calls were made from Mr. Kennedy's phone on the morning of March 2, 1998.

[21] Defense counsel described the situation, at R. 5348:

> before she began testifying, I would note, and I don't know if it's already been noted for the record, or it has or hasn't, but I would just note for the record that she was brought in and left for five minutes on the witness stand without any support from the District Attorney's Office. I guess before the District Attorney's Office was ready to begin questioning.

> The record needs to reflect that during the entire twenty-three or twenty-four minute tape, the victim was on the witness stand crying. I am certainly not impugning, I'm not suggesting anything other than it was prejudicial.

R. 5346. In response to the defense motion for a mistrial, and the repeated emotional outbursts that occurred, the trial court indicated that it would instruct the jury that

> I'm going to instruct this jury on the record to disregard anything they've seen on the witness stand in terms of, if they saw any emotional displays or outbursts, okay, and confine their attention to the evidence presented and nothing more.

R. 5351-5352. The State objected to the instruction; the defense asked for the instruction. R. 5352. At the State's behest, the trial court decided ***not*** to give the instruction. R. 5353. The prosecutor then completed its questioning of Ms. Hammond:

> BY MR. PACIERA: You're alright?
>
> A: Yes.
>
> Q: Okay, when we looked at that tape, that was I think from December of 1999. You were a lot younger then?
>
> A: Yes.
>
> Q: And that was almost a year and a half after this happened to you, is that right?
>
> A: Yes.
>
> Q: So when this happened to you, you were even smaller and younger?
>
> A: Yes.

R. 5454. The court then admonished the prosecution to stop leading the witness.

Ms. Hammond then testified that she had initially told the police that "two black boys had raped me." R. 5355. She indicated that that was not true. Thereafter, the prosecutor turned to events that occurred after the rape:

> Q: Who was home the day that this happened?
>
> A: Me, my brother and Patrick.
>
> Q: And where had your mom gone?
>
> A: To work.
>
> Q: Was it still early morning or mid day or do you remember what time this happened?
>
> A: Morning.
>
> Q: After this happened to you, what did Patrick do?
>
> A: He got up, I'm not sure where he went but he left my room and he came back.
>
> Q: Did he have anything when he came back?
>
> A: No.
>
> Q: Was he carrying anything?
>
> A: No.
>
> Q: Okay, was there some point when he came in and he was carrying anything?
>
> A: Yes.
>
> Q: What was he carrying?
>
> A: A cup of orange juice and pills chopped up in it.
>
> Q: And what did he do with the orange juice with the chopped up pills?
>
> A: He gave it to me.
>
> Q: Now after this happened to you, did it injure you, did you bleed? Not the orange juice, when you were raped.
>
> A: Yes.

R. 5359-5360. After the State introduced the word "rape" into the discourse, the prosecutor then proceeded to ensure that the

witness identified Mr. Patrick Kennedy as the perpetrator:

Q: The person, **Patrick**, that you said did this to you, I want you to point to him right now.

MR. PACIERA: Please let the record reflect that the witness is pointing to the defendant, Patrick Kennedy

MR. PACIERA: Is everything that you're saying in this courtroom today the truth?

A: Yes.

Q: Did you hear yourself when you were on that tape from December of 1999?

A: Yes.

Q: Is everything you heard on the there the truth?

A: Yes.

Q: That this person raped you?

A: Yes.

Q: Nobody else?

A: Nobody else.

Q: In your room?

A: In my room.

Q: Thank you, Lavelle.

R. 5363. When defense counsel attempted to cross-examine Ms. Hammond she indicated that she could not remember what had happened or what she had said at least **sixteen** times during a six page cross-examination.[22]

The jury was then left to decide whether Ms. Hammond's initial statements to the police, psychologists, and lawyers over the first 18 months after the rape were the truth, or whether her testimony fraught with mis-rememberences, devoid of detail, and prompted by the leading questions of the prosecutor, was accurate. The State was able to bolster her testimony with her prior videotaped statement, and with the testimony of her mother (Mr. Kennedy's ex-wife) who reported, over defense objection, out-of-court statements made by Lavelle Hammond several years after the offense.

The defense was able to present some evidence that the Department of Social Services had placed pressure on Ms. Hammond and her mother to name Patrick Kennedy as the perpetrator,[23] but was not able to elicit evidence from the lead detective that another suspect had made statements against penal interests. R. 4909 , see also R. 5279. The State did not correct Mrs. Kennedy's assertion that she was never pressured into encouraging her daughter to identify Patrick Kennedy as the perpetrator. Indeed, Mrs. Kennedy testified:

Q. Okay, now up until when she told you this, did you all talk about the incident, the rape?

A. Never, never.

Q. Okay, did anyone pressure you or your daughter to say that Patrick Kennedy did this?

---

[22] See e.g. R. 5365 ("Not at that time, I don't."), R. 5365 (doesn't remember Mr. Armato coming to see her); R. 5366 (doesn't remember Mr. Armato at her house): R. 5366 (doesn't remember telling him somebody else did it.); R. 5366 (doesn't remember giving another videotaped statement); R. 5366 (doesn't remember talking to another therapist); R. 5366 (doesn't remember talking to Ms. Renee, one of the police officers on the case); R. 5366 (doesn't remember Detective Kelly); R. 5367 (doesn't remember going with policemen to a doctor's office); R. 5367 (doesn't remember when Patrick was in jail) R. 5368 (remembers "some of it" about the time that she first said that it was Patrick that did this to her); 5368 (doesn't remember how long ago that was); R. 5368 (doesn't remember if talking to her mom was "right before" making tape with Ms. Amalee); R. 5369 (doesn't remember first time she met with D.A.s); R. 5369 (doesn't remember whether she met with D.A.'s around the time she made the tape); R. 5370 (doesn't recognize Defense No. 5).

[23] See R. 5812 (establishing that Carolyn Hammond told Catherine Holmes that social services had told Mrs. Hammond that she had to tell her daughter "that it was okay for her to say that her Daddy did it."); R. 5815 (indicating that Carolyn Hammond "expressed that they might take [Lavelle] from her, that was a great fear that she had, that they would take her children from her."); R. R. 5820 (noting that Mrs. Hammond told defense investigators that she was scared that social services would remove her daughter).

A. No.

R. 5378. Moreover she claimed: *"Me and her never discussed what happened to her."* R. 5381.

Department of Social Services records lodged with this Court reflect:

> Since the last hearing on June 2, 1998, Mrs. Kennedy has continued to make progress. She has actively participated in weekly individual therapy sessions with Deanna Miles CSW at Center for Change. *According to Ms. Miles' report, Mrs. Kennedy was able to tell her daughter that she believes that her step-father molested her.* This discussion took place during a family visit on May 19, 1998, the child listened to her mother, but maintained her story of being attacked by two boys.

Box III, Exhibit K , June 18, 1998 progress report letter to Judge Janzen, Pg 2 of 3.

Without this evidence, the jury proceeded to deliberate at 4:47. The minutes reflect that the jury presented a note to the court. See Bench 1, R. 80. The transcript does not reflect how this was addressed. See 5908. At 06:25 p.m., the jury returned with a guilty verdict. R. 5909.

Penalty Phase

While the presentation of evidence at the culpability stage ran over nine days, and into the thousands of pages, the presentation of penalty phase evidence (by both the State and the defense) began after 10:00 a.m., and was completed, along with argument and instruction before 4:00, including time for a number of short recesses and for lunch. Indeed the presentation of evidence at the penalty phase took less than 75 pages. See R. 5929 - 6002.

The penalty phase began with the State's argument that Mr. Kennedy had raped another young girl–Ms. Shwanda Logan–and that the rape had transformed her life. The defense then introduced a number of witnesses who testified concerning attributes of Mr. Kennedy's personality, including his ability to cook and his singing voice. The court would not allow in a videotape of Mr. Kennedy singing in his church choir.

The State did stipulate that Mr. Kennedy had a full scale I.Q. of 70. See R. 5985. The trial court, however, refused to instruct the jury that it could not execute a mentally retarded defendant. R. 2462. The jury returned prior to dinner and imposed a death sentence. Formal sentencing occurred on October 2, 2002. This appeal ensues.

SUMMARY OF ARGUMENT

> *I'm beginning to realize that memories are not as accurate, apparently, in these cases, as we would like them to be.*
>
> The Trial Court, R. 1171, dealing with dispute between State and defense over whether one or two videotapes of Lavelle Hammond were taken.

In the last forty years, 6,800 defendants have been sentenced to death, and over 1,000 defendants have been executed; if the sentence were upheld in this case, Mr. Kennedy would be the first person over this period of time, who was sentence to death for rape. The State of Louisiana seeks to uphold this singularly unusual sentence based upon a record that is replete with errors, constitutional transgressions, and other deficiencies.

First the evidence of guilt, regardless of whether it meets a *Jackson* sufficiency standard, is hardly overwhelming based upon the troubling testimony of Lavelle Hammond, and circumstantial evidence (phone-calls and irregularities in the physical

evidence) that is either rebutted or at least called into question by the State's own evidence. The State's delayed disclosure of exculpatory evidence is especially significant because – although she ultimately testified that Mr. Kennedy committed the rape – Ms. Hammond had maintained for the first 18 months after the offense that he had not done it; moreover the State withheld throughout that period forensic evidence that emphatically rebutted the State's claim that blood on Lavelle Hammond's mattress pad established that Mr. Kennedy and Lavelle Hammond's initial statements were false.

While the State claimed that the testimony of Dr. Lee established that the rape occurred on Ms. Hammond's bed and not outside where the victim's blood was located, the DNA tests results suppressed by the State reflected that the blood on the victim's bed did not belong to the victim. Moreover, while the State claimed that testimony that Mr. Kennedy made a series of phone calls after the rape before he called 911 was especially damning, the State's own records – turned over after much difficulty – do not reflect those calls were made on the morning of the rape.

Second, the most damning evidence introduced by the State was a videotape taken 18 months after the offense which contained the allegations made by Ms. Hammond against Mr. Kennedy. The State was only able to secure this videotape by delaying the disclosure of exculpatory evidence and by delaying turning over physical evidence for testing. Mr. Kennedy was not present during the deposition, nor was Ms. Hammond placed under oath or questioned about her understanding of the truth prior to that questioning. When the tape was ultimately introduced at trial, Ms. Hammond was physically present to testify at trial, however the defense was effectively unable to cross-examine her due to her repeated inability to remember what occurred. Moreover, the wrenching spectacle of Ms. Hammond sitting on the witness stand, crying, occurred without any assessment of her competency to testify – despite a specific request for such an assessment to the trial court.

The trial court not only denied the defense request to present an *Atkins* defense at the penalty phase, but it also denied the defense request to present evidence concerning Mr. Kennedy's low IQ – 70 – to help explain the statements and conduct alleged by the State at the culpability phase. What appears like abnormal, guilty behavior for a person of ordinary intelligence – cleaning rugs, placing Ms. Hammond in a bath – might well have been explained by evidence of Mr. Kennedy's low IQ. Yet the defense was prevented from presenting this and other significant exculpatory evidence.

Ultimately, the question before this Court is whether it can have confidence in upholding a conviction and death sentence based upon a record with these and other significant issues. Appellant respectfully suggests that it cannot.

I. THE EXECUTION OF A DEFENDANT FOR A NON-HOMICIDE OFFENSE VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 20 OF THE LOUISIANA CONSTITUTION AND THE CAPITAL PUNISHMENT SCHEME USED IN THIS CASE FAILED TO NARROW THE CLASS OF DEFENDANTS ELIGIBLE FOR THE DEATH PENALTY. (Assignments 1-3)

As discussed more fully in the Supplemental Brief, filed contemporaneous to this Brief, pursuant to Rule I, Section 12 of the Louisiana Supreme Court rules, and per the order of this Court of May 5, 2006, the execution of a defendant for the rape of a child violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 20 of the Louisiana Constitution. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding the death sentence imposed on a repeat offender for aggravated rape of a sixteen year old girl unconstitutional). But see *State v. Wilson*, 685 So. 2d 1063, 1073 (La. 1996). Other

authorities have recognized that critical to the *Coker* analysis was the loss of life that results from a murder. *Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981) ("Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life."); see also *State v. Coleman*, 605 P.2d 1000, 1017 (Mont. 1979) (finding *Coker* relevant to all crimes for which death penalty is imposed that did not result in loss of life). Indeed, the Supreme Court held that the imposition of the death penalty where a defendant did not kill or intend to kill is unconstitutional. *See Enmund v. Florida*, 458 U.S. 782, 795 (1982) (holding that the Eight Amendment does not permit the imposition of the death penalty of a defendant who does not "himself kill, attempt to kill, or intend that killing take place."). Similarly, in *Tison v. Arizona*, 481 U.S. 137, 154 (1987), the Court made clear that even a mental culpability of at least "reckless disregard for human life" is sufficient to warrant the death penalty where it occurs with the loss of life. *Id* at 157.

Moreover, even were the death penalty acceptable in specific non-homicide instances, the imposition of the death penalty under the statutory scheme employed in this case failed to narrow the class of defendants eligible for the death penalty. See *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.") See also *Wilson*, 685 So. 2d at 1071 (decision limited to constitutionality of La. R.S. 14:42 and not to sufficiency of aggravating circumstances in La. C.Cr. P. art. 905); *id.* at 1074, Victory, J., concurring ("I write separately to express my view that the Legislature should immediately amend Articles 905 *et seq.* of the Code of Criminal Procedure (especially article 905.2) to clarify the sentencing procedure for an aggravated rape case in which the death sentence may be imposed.")

In 1996, this Court upheld a pre-trial challenge to the constitutionality of the aggravated rape statute. *State v. Wilson*, 685 So. 2d 1063, 1073 (La. 1996). This Court held that the United States Supreme Court decision in *Coker v. Georgia*, 433 U.S. 584 (1977), only held the imposition of the death penalty for aggravated rape unconstitutional where the victim was an adult woman. This Court also held that the imposition of the death penalty did not violate the evolving standards of decency because – although Louisiana was the only State that permitted the death penalty for the rape of a child under twelve – other states might follow suit because it was "difficult to believe that it will remain alone in punishing rape by death if the years ahead demonstrate a drastic reduction in the incidence of child rape, an increase in cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the role of law on the part of the people." *Id.* In the ensuing ten years, there has been neither a dramatic reduction in the incidence of child rape nor an increase in cooperation by rape victims; and Louisiana has remained alone in the view that executing child-sex offenders was appropriate.[24]

The Supreme Court's analysis of the Eighth Amendment issue in the recent cases of *Atkins v. Virginia*[25] and *Roper v.*

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[24] See e.g. Angela West, *Death as Deterrent or Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law, Criminal Justice Policy Review*, Vol. No. 2, at 156, June 2002.

[25] *Atkins v. Virginia*, 536 U.S. 304 (2002).

Simmons,[26] confirms that there is a national consensus opposing the imposition of the death penalty for rape, even where the victim is under twelve. In *Atkins* and *Simmon,* the United States Supreme Court invalidated the death penalty for child and mentally retarded offenders, based in large measure upon a national consensus that the death penalty was inappropriate for these offenders. Notably, in those cases twenty out of fifty states authorized the death penalty: *Roper v. Simmons*, 543 U.S. at 565 (noting consensus against executing mentally retarded defendants in *Atkins* and juveniles there was established by its rejection in thirty (30) states, observing that since *Stanford* ten (10) states have executed defendants for crimes committed as juveniles, and that only three (3) had done so in the last ten years).

The numbers establishing a national consensus against executing a defendant for rape of a child are far stronger than they were in *Roper* and *Atkins*. As this Court noted in *Wilson*, Louisiana was the only state that authorized the death penalty for a single aggravated rape of a child. *State v. Wilson*, 685 So. 2d 1063, 1068 (La. 1996). In the district court below, the uncontradicted evidence established that Louisiana still remains alone in attempting to execute a defendant for a single conviction for the rape of a child. See R. 822-850. Despite this Court's observation that the legislation in Louisiana would result in the rampant adoption of similar statutes – "[I]t is difficult to believe that it will remain alone in punishing rape by death if the years ahead demonstrate a drastic reduction in the incidence of child rape, an increase in cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the role of law on the part of the people" -- neither the legislative developments in other states, nor the actions of juries in Louisiana has reflected an endorsement of the punishment.[27] See also *Buford v. State*, 403 So. 2d 943, 950-951 (Fla. 1981) (holding death penalty for aggravated rape of a child is "grossly disproportionate and excessive punishment" "forbidden by the Eighth Amendment as cruel and unusual punishment."); *Leatherwood v. State*, 548 So. 2d 389, 403 (Miss. 1989) (invalidating death penalty for rape of a child).[28]

II. DELAYED DISCLOSURE OF EXCULPATORY EVIDENCE DENIED MR. KENNEDY A FAIR TRIAL AND SECURED THE STATE SUFFICIENT TIME TO PROCURE A CONVICTION AND DEATH SENTENCE (Assignments 4-7)

Delayed disclosure of exculpatory evidence secured the State sufficient time to procure evidence necessary to support

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[26] *Roper v. Simmons*, 543 U.S. 551 (2005).

[27] After this court upheld the constitutionality of title 14, section 42 of the Louisiana Revised Statute in *State v. Wilson,* inaction by other states suggests that national legislative attitudes do not support capital punishment for child rape. Examination of current trends show that state legislatures and courts are still unwilling to apply the death penalty to incidents of child rape, in spite of the *Wilson* court upholding the constitutionality of the statute almost ten years ago. No other state has passed capital child rape statutes for a single aggravated rape since *Wilson*, and there have been no other cases of individuals sentenced to death. *See* BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf. This period of relative inactivity, almost ten years after the decision in *Wilson,* can no longer be attributed to other states taking a wait and see approach. There has been enough time for states to analyze the effects of the Louisiana statute and ratify their own version if they intend to do so. The Court in *Coker* in 1977 considered the five-year period following the decision in *Furman* sufficient to measure legislative attitude. *See Coker,* 433 U.S. at 584. This lack of activity by other states after the *Wilson* decision demonstrates a lack of legislative support for capital child rape statutes and can be analogized to the failure of legislatures to ratify capital rape statutes after the *Furman* decision.

[28] Concurring in the *Leatherwood* decision, Justices Robertson and Prather noted: "However heinous or offensive child rape may be -- and is, the victim's life is not taken"and that "the harshness of the death penalty is qualitatively greater than the gravity of the offense." Further, the Justices noted that upholding the death penalty would be misleading and disingenuous because:

> [t]here is as much chance of the Supreme Court sanctioning death as a penalty for any non-fatal rape as the proverbial snowball enjoys in the nether regions. . . .

Id. at 404-405 *(citing inter alia,* Brownmiller, *Against Our Will,* 379-80 (1975); Estrich, *Rape,* 95 Yale L.J. 1087 (1986) for the proposition that "one may search the feminist literature on the subject of rape and find not the first argument that our society ought execute rapists.").

a conviction and death sentence. As the trial court recognized at one of the State's myriad delays:

This Defendant does not deserve to languish in prison until the State decides it's ready to move it's case.

R. 1113. But languish the defendant did, until there was sufficient evidence to proceed to trial. The delayed disclosure of exculpatory information had a significant and deleterious impact on Mr. Kennedy's rights.

The delayed disclosure of exculpatory evidence constitutes an independent constitutional violation warranting reversal of Mr. Kennedy's conviction and death sentence. *State v. Kemp*, 00-2228 (La. 10/15/02), 828 So.2d 540 (reversing conviction as delayed disclosure of exculpatory evidence violated due process). The suppression of favorable evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *State v. Knapper*, 579 So.2d 956 (La. 1991)(citing *Brady v. Maryland*, 373 U.S. 83 (1963). Indeed, the State has a fundamental obligation to provide exculpatory evidence to the defense in sufficient time so that counsel may harness that information on the defendant's behalf. In this case, the delayed disclosure of critical exculpatory evidence denied Mr. Kennedy a fair trial and reliable determination of sentence.

A. The State delayed in turning over exculpatory evidence

The State delayed in turning over exculpatory evidence until it had secured the evidence necessary to convict Mr. Kennedy. At the same time, the State was able to affirmatively mislead the defense about the strength of its case, by failing to disclose this evidence. The State delayed for over five years, and at least two days into the presentation of evidence, before turning over a report generated by the Connecticut Laboratory that indicated that the blood on the mattress was not connected with the offense. See R. 5685. The State delayed for a number of years turning over the videotape containing an exculpatory statement by Ms. Hammond on which she plainly asserted that Mr. Kennedy did not commit this rape. The State also delayed turning over phone records that undermined the credibility of its allegations. These materials were not turned over to the defense until after Ms. Hammond had changed her story and decided to implicate Mr. Kennedy. The production of this evidence by the State, at any point prior to the transformation of Ms. Hammond's story, would undoubtably have led to a renewed demand for a speedy trial and resulted in an acquittal.

1. <u>The State Improperly Delayed Disclosing the Exculpatory Test Results from the Connecticut Crime Laboratory</u>

When defense counsel was informed–after opening statements, and at least two days into the proceedings–that the State for over five years had critical exculpatory evidence which undermined the prosecution's case, the defense moved for a mistrial, and then alternatively for a recess to secure additional witnesses, and then ultimately for other sanctions. The trial court, while agreeing with the defense's characterization of the suppression of favorable evidence, denied the defense requests and overruled the defense objections. R. 5261 (noting that "*The temporal aspect of this revelation, of the newly discovered reports does give me some trouble.*").[29]

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[29] The Court did reject the State's request to retain the stipulation it had secured from the defense noting:

THE COURT: Okay, there's a bumper sticker out there that says bleep happens and you may be a victim of that, okay. But to suggest now that the State is prejudiced because of my ruling on withdrawing a stipulation in view of the fact that

The State's basis for holding Mr. Kennedy–for thefirst year and a half after his arrest– was its claim that scientific evidence linked Mr. Kennedy to the offense. The State's Response to the Bill of Particulars made clear its claim that the State was identifying Mr. Kennedy as the perpetrator through forensic analysis. In response to the defense request for information concerning the manner in which Mr. Kennedy was identified, R. 117 (noting defense request for manner of identification of defendant), the State alleged that forensic reports by the Connecticut Crime Laboratory and the Jefferson Parish Sheriff's Office identified Mr. Kennedy as the perpetrator. See R. 137 ("14. a. See reports of forensic analysis by Dr. Henry Lee provided. Reports of forensic analysis by the Jefferson Parish Sheriff's Office will be provided upon receipt by the District Attorney."); see also R. 140 (State's response to question no. 53). However the reports that indicated that DNA testing excluded Mr. Kennedy and Ms. Hammond as the source of blood found on the mattress pad in Ms. Hammond's room, were not attached. At the preliminary hearing, the lead detective recounted her belief that the blood on that mattress pad identified Mr. Kennedy as the perpetrator:

> We later, through the use of forensic analysis and chemicals, specifically Luminol (phonetic), detected the possible presence of blood on the mattress of the bed, which would have been turned downward on the box springs.

R. 866. However the State withheld evidence that indicated that the blood on the mattress was not connected to the victim or defendant in this case. See R. 5050 (indicating that JPSO had sent mattress pad back to Connecticut Crime Laboratory because "we had determined that additional testing should be conducted on the mattress."); R. 5076 (quoting letter from JPSO indicating the evidentiary significance of the mattress pad); R. 5077 (noting correspondence from Colonel Gorman of the JPSO requesting further testing of relevant evidence: "In speaking with *Assistant District Attorney Debbie Villio,* Lt. A. Ulmer and lab personnel concerning the evidence in the Hammond case, there are several pieces of evidence I would like Dr. Lee to further review. . . . As you will remember, when officers arrived at the scene, the victim's bed was made up and no blood was on the bedding. Later we learned the scene had been altered. On the reverse side of the mattress was what appeared to be a circular blood spot which tested positive for blood."). Ultimately, the trial court ruled that the delayed disclosure of this test results did not require a mistrial because it was exculpatory rather than inculpatory – however the trial court simultaneously denied the defense request for a continuance to secure the witnesses that conducted the tests on this evidence. R. 5266 ("The Court: The information I've heard so far does anything but prejudice the defense, it enhances it, it bolsters it.").

2. The State Improperly Delayed Disclosing the Exculpatory Videotape of Lavelle Hammond

At trial, the critical evidence against Mr. Kennedy was an inculpatory videotape taken of Ms. Hammond on December 16, 1999. Prior to the creation of the videotape, there was no direct evidence inculpating Mr. Kennedy. There was, however, considerable exculpatory evidence in addition to the test results discussed above, which if provided to the defense would have resulted in a speedy trial or release. Indeed, the defense asked for discovery of a much more detailed videotape taken in March of 1998. The State's response was that the tape did not exist:

> you're responsible, the State's responsible for now revealing the existence of two reports that your crime lab should have known about and gotten years ago, doesn't sound like you're in a position to argue, okay, equity.

R. 5271.

The State: I know this little girl did not go to the Child Advocacy Center in March of 1998 and give - the only interview that she had was in December of 1999.

R. 1168 For the majority of the pre-trial litigation, the State withheld an earlier – more detailed – videotape on which Ms. Hammond insisted that she was raped by two teenage boys. The State delayed turning over this exculpatory tape until after it had secured a different, inculpatory version.

3. The State Improperly Delayed Disclosing Exculpatory Phone Records

On March 25, 1998, the Jefferson Parish Sheriff's office received a response from its subpoena for Mr. Kennedy's phone records. These are attached as Exhibit A. On April 1 and April 2, 1998, the Jefferson Parish District Attorney's Office secured a similar response detailing the phone calls made from Mr. Kennedy's phone on the morning of the rape. *Id.* These phone records made clear that Mr. Kennedy had not made a phone-call to his employer or to a carpet cleaning service on the morning of the rape.[30] The records detail eight phone calls; six of these phone calls were made *to* Mr. Kennedy's number; the remaining two phone calls were to 411 for information.[31] The records also indicate that Mr. Kennedy called 911 at 9:20a.m. The State had within its possession phone records that emphatically impeached its claim that Mr. Kennedy was making phone calls to a number of locations after the rape but before calling 911. Instead of turning over the evidence, the State sat on it. The State objected when the defense attempted to question Detective Jones about basis for her claims about the phone-calls. See R. 879. Ultimately, on November 12, 1999, the trial court specifically ordered disclosure of the phone records immediately. R. 1071. The defense did not receive those records until February 1, 2000. See R. 214 (para. 5).

B. Mr. Kennedy was Prejudiced by the Delay

Mr. Kennedy was devastated by the delay in turning over exculpatory evidence. Upon his arrest, Mr. Kennedy moved for a speedy trial, insisting on his innocence. His lawyers were effectively handcuffed from proceeding until they had received the physical evidence to corroborate Mr. Kennedy's assertion that the blood on the mattress pad did not belong to Lavelle Hammond. Without the exculpatory videotape, and the Connecticut Crime Laboratory DNA-exclusion tests, the defense repeatedly continued the proceedings in order to initiate independent investigation. Had the evidence been timely disclosed, the defense could have proceeded to trial in August of 1998, and there would have been legally insufficient evidence to support a conviction. As a number of appellate courts have made clear, the delayed disclosure of exculpatory evidence may render the defendant "irreparably harmed":

We have observed in contexts other than the nondisclosure of exculpatory evidence that a defendant's inability

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[30] Jefferson Parish Sheriff's Office, Detective Jones testified that she "verified" the fact that Mr. Kennedy had made a phone call to Mr. Madeire, the propieter of B&B Carpet Cleaners from Mr. Kennedys "home phone" by reference to the caller i.d. See R. 880. At trial, the State elicited evidence from Lieutenant Thurman, that he had taken a picture of the computer screen from the establishment. See 4700. The defense elicited evidence that the picture concerning the appointment reflected that the phone-cal was made prior to the alleged rape and that the appointment had been regularly scheduled for several days later: "The screen said that it was made, that the appointment was made on March 1st,. . And it said that the appointment was made for March the 5th. . . I believe the March 5th date was typed in afterwards. I think that was a correction that was made based upon not being able to go on March 2nd because the police cars were in front of the home, it was rescheduled for the 5th."R. 4701

[31] A separate sheet indicated that on one of the 411 calls, made at 7:12 a.m., the "operator gave information on 504-340-0170. The 504-340-0170 was dialed automatically and the customer was charged" On the second call to 411, at 8:20 a.m. "The # requested is unknown because the number was not auto dialed."

> to obtain a fair trial occasioned by circumstances beyond his control will warrant the dismissal of an indictment against him. . . . Other courts also have reached such results. See, e.g., *United States v. Levy,* 577 F.2d 200, 210 (3d Cir. 1978); *State v. Cory,* 62 Wash. 2d 371, 376-377 (1963). Similarly, improper delay by the prosecution in bringing a case to trial may so prejudice a defendant as to warrant the dismissal of an indictment with no possibility of retrial. *Barker v. Wingo,* 407 U.S. 514, 532-533 (1972) (prejudice to defendant's ability to prepare defense is "most serious" interest right to speedy trial was designed to protect).. . . .
>
> While we have not had occasion specifically so to hold, we have suggested in the past that the dismissal of an indictment may be a proper remedy for the Commonwealth's failure to comply with a discovery order.

Commonwealth v. Lam Hue To, 461 N.E.2d 776, 784-785 (Mass. 1984);[32] see also *People v. Rutter,* 202 A.D.2d 123, 132 (N.Y. App. Div. 1994) (finding counsel ineffective for failing to raise delayed disclosure issue under similar circumstances).

Ultimately, the delayed disclosure resulted in a plain denial of Mr. Kennedy's constitutional right to a speedy trial guaranteed under the state and federal constitutions. The delayed disclosure also appears to have caused ample memory loss regarding significant issues. Indeed Carolyn Hammond Kennedy–who initially vigorously supported Mr. Kennedy's innocence–had almost total memory loss concerning much of the exculpatory information that she previously maintained. See R. 5379 (can't remember when she met with Mr. Armato); R. 5380 (same); R. 5380 ("I don't remember the conversation but I remember us talking to you. . . . I don't remember, I remember talking to you, I remember your face, but I don't remember exactly what we talked about."); R. 5380 (doesn't remember Lavell saying anything in her presence); R. 5381 ("I don't remember" whether Lavelle Hammond insisted on Mr. Kennedy's innocence); R. 5382 (doesn't remember Dr. McDermott); R. 5383 (doesn't remember whether she told defense counsel personally that someone besides Mr. Kennedy committed the rape); R. 5385 (can't remember telling Mr. Tucker that she was afraid that if she talked with defense counsel Lavelle would be taken away); *id.* (can't remember refusing to talk to Mr. Tucker); *id.* (can't remember telling anyone she was scared for the police to take her daughter); R. 5387 (doesn't remember talking to Manuel and Kathy Holmes regarding the removal of her daughter); R. 5388 (doesn't remember card from Lavelle Hammond to Patrick Kennedy); *id.* (doesn't remember hearings in November of 1999); R. 5390 (doesn't remember whether she met with prosecutor Richard Bates just prior to Lavelle Hammond changing her story). The failure to timely disclose evidence resulted in a lengthy delay in the trial; ultimately because of this delay, Lavelle Hammond was rendered unavailable due to her lack of memory. Indeed, the State's bungling of discovery, and its affirmative misrepresentation of the strength of its case, effectively ensured that Mr. Kennedy would be forced to waive his speedy trial rights and acquiesce to the delay the case until such time as there was sufficient evidence to proceed to trial.

C. *The Trial Court Erroneously Denied The Defense Request for A Mistrial, And for Alternate Remedies*

When the defense discovered thirteen days into trial, and well into the presentation of the evidence, that the State had suppressed favorable evidence, defense counsel moved for a mistrial. The trial court erroneously denied the motion for mistrial, asserting that the evidence was ultimately disclosed to the defense and was exculpatory rather than inculpatory.

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[32] *Id.* citing *Commonwealth v. Douzanis,* 384 Mass. 434, 436 (1981) ("There is no question that a judge may in his discretion order discovery of information necessary to the defense of a criminal case [Mass. R. Crim. P. 14 (a)(2), 378 Mass. 874 (1979)], and that, on failure of the Commonwealth to comply with a lawful discovery order, the judge may impose appropriate sanctions, which may include dismissal of the criminal charge [Mass. R. Crim. P. 14(c)(1)]"). See also *Commonwealth v. Baldwin,* 385 Mass. 165, 176 (1982).*Commonwealth v. Silva,* 10 Mass. App. Ct. 784, 790 (1980) ("We . . . think that the prosecution's defaults on discovery warranted an order of dismissal which would bar a subsequent indictment").

Assuming, *arguendo,* that the trial court was not required to grant the defendant's request for a mistrial based upon the discovery violations, the court was empowered and obligated to provide alternate remedies. The defense specifically asked for a series of remedial actions to alleviate the harm of the delayed disclosure of the exculpatory forensic report. First, the defense asked for a short delay so that it could secure the testimony of Dr. Debra Messina, the author of the exculpatory report. Second, the defense requested an additional opportunity to make an opening statement at the outset of its presentation.

Not only did the State's suppression of the exculpatory report result in the lengthy delay of trial, the fact that it was not turned over until after opening statements meant that the defense was precluded from providing a complete theory of the defense to the jury. Prior to the defense's inadvertent discovery that the State had suppressed evidence, the defense merely opined that the State had failed to conduct tests that would have determined Mr. Kennedy's guilt or innocence. After the disclosure, the defense could no longer make this claim–but had the potentially more controversial defense that the State had been involved in a "cover-up." Deborah Messina was the only witness who could testify concerning whether she had disclosed the exculpatory results to the Jefferson Parish District Attorney's Office or the Jefferson Parish Sheriff's Office.

When the defense asked for a recess in order to locate her, the trial court denied the request.[33] R. 5265. When the defense requested the opportunity to make a second opening statement, the State opined:

> The State: Judge, there's no way that allows for them to give a supplemental opening statement. Basically, there is no forensics that links the defendant to this crime. That has not changed as to what he said. We don't have any evidence that's going to say Patrick Kennedy is here. He did this because we have DNA evidence to show that he left, I'm sorry.
>
> The Court: Pardon me, Mr. Rowen. I don't think that that's what they want to say. I think what they want to do is that they want to get in now the cover up theory.
>
> The State: They're going to get that in through all the police officers. There's nothing that provides for them at this point to give another opening statement.

R. 5679-5680. The trial court agreed with the State's argument, and over defense objection denied the motion to re-urge opening statements. R. 5681.

While the Code of Criminal Procedure lays out the ordinary course of events in a trial, La. C. Cr. P. Art. 765, the refusal to deviate from that procedure under circumstances such as this tramples upon a defendant's statutory and constitutional right to make a complete opening statement. See e.g. *State v. Dauzart,* 99-3471 (10/30/2000), 769 So. 2d 1206 (reversing conviction where strict adherence to the order of the trial cost defendant the opportunity to face jurors and persuade them of his version of events; as applied to defendant); *State v. Harper,* 93-2682 (La. 11/30/94), 646 So. 2d 338.[34] The denial of the request for a recess to secure Dr. Messina's testimony, as well as the flat out rejection of the defense's request to re-open the case, violates due process and warrants a new trial.

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[33] The State had indicated that Dr. Messina was unavailable due to a medical procedure; however the State had also indicated that Dr. Henry Lee was unavailable because he was in the Philippines, until he was seen on television in California testifying in a murder case.

[34] A defendant has a constitutional and statutory right to make opening statements; he also has the right to waive them. La. C.Cr. P. art. 765. Courts of our sister states have repeatedly recognized that statutory or regulatory provisions for opening statements merely codify a defendant's constitutional right to make an opening statement. In *People v. Chivas,* 34 N.W.2d 22, 26 (Mich. 1948), the court said that "It is fundamental law that defense counsel has a right to make an opening statement to the jury outlining the theory of his defense." Where the State fails to disclose favorable evidence until after the defendant's opening, it is not too much for the defense to seek a new opportunity to frame his theory of defense with the evidence newly available to him.

III. THE TRIAL COURT'S REFUSAL TO ASSESS LAVELLE HAMMOND'S COMPETENCY VIOLATED MR. KENNEDY'S RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL (Assignments 8-11)

The trial court's failure to assess Lavelle Hammond's competency undermines confidence in the legality of the proceedings. Prior to trial, the defense moved for a hearing outside the presence of the jury to assess Ms. Hammond's competence. The motion alleged, in part:

> In addition to a witness's understanding, her ability to remember the events about which she which she will be called to testify is a factor which should be considered in assessing her competency. The most recent documentation of Lavell Hammond's recollection of the events of March 2, 1998, is a videotape recorded on December 16, 1999. That interview, conducted by Ms. Omalee Gordon of the Child Advocacy Center, is the first documentation of Lavelle Hammond's accusation against the defendant (for the prior 21 months, she had maintained she was attacked by two strangers). That tape reveals lapses of memory for significant details of the incident. For at least eight questions regarding specific details of the incident, Lavell states she has no memory.
>
> Despite the fact Lavell Hammond is now 13 years old, the events which she is being asked to recall at this capital trial occurred when she was at an age at which her competency to testify would surely have been at issue. Her reported memory of these events is vague and spotty, casting doubt on her reliability as a witness. Accordingly, a hearing prior to the trial of this matter should be convened, so that this court may make a determination as to whether Lavell Hammond is competent to testify as to events which occurred when she was at an age at which her understanding would have been challenged, and for which her memory now is significantly impaired.

R. 627. Over defense counsel objection, the trial court denied the motion. R. 2470. The Court noted that neither the State nor the defense had questioned Ms. Hammond's competency at the time she testified during the *Prieur* hearing, and observed that the basis for his determination that she was competent arose from her admission that she wasn't always truthful: "what sort of underscored that point in my mind was that she readily admitted that she didn't always tell the truth." R. 2469.

Pretermitting the constitutional issues concerning the admissibility of that statement, the case-law clearly holds that a defendant has a right to test the competency of a declarant before a videotaped statement may be introduced. Indeed, commentators have made clear that a competency assessment is an essential component to the validity of a statute that authorizes the admission of a videotaped statement. Indeed two commentators involved in drafting the statute used to introduce the videotape acknowledged that an assessment of the child's competency was a prerequisite to its admissibility:

> Consequently, we assume that ruling on the competency objection is properly reserved until after the videotape is tendered and viewed. At that point, the defendant must be offered the right to cross-examine the child further on the issue of the reliability of the videotaped statement *and the child's competency as a witness* if he is to give testimony at the trial.

Lucy S. McGough and Mark L. Hornsby *Reflections Upon Louisiana's Child Witness Videotaping Statute: Utility and Constitutionality in the Wake of* Stincer. 47 La. L. Rev. 1255, 1285 (1987). In this case, Mr. Kennedy was not permitted to test Lavelle Hammond's competency at the time the statement was taken or at the time of trial.

A. The Trial Court Erroneously Denied the Defense Request to Assess Ms. Hammond's Competency

Louisiana law provides that every person of proper understanding is competent to be a witness, except as otherwise provided by legislation. La. C.E. 601. The competency of a person to be a witness is a question to be determined by the trial court. La. C.E. 104(A). Understanding, not age, is the test of competency for any witness. *State v. Foy*, 439 So. 2d 433, 435 (La. 1983); *State v. Francis*, 337 So. 2d 487 (La. 1976).

In recent years, the trend has been to assess whether a child has been coached as one factor to be considered by a trial court in ruling on competency. See e.g. *State v. Michaels*, 642 A.2d 1372 (N.J. 1994) (reversing conviction, holding " a hearing must be held to determine whether those clearly improper interrogations so infected the ability of the children to recall the alleged abusive events that their pretrial statements and in-court testimony based on that recollection are unreliable and should not be admitted into evidence."); *State v. Crandell*, 604 So. 2d 123 (La. App. 2nd Cir. 1992).

Prior to trial, the defense requested that the district court assess Ms. Hammond's competency to testify. See R. 2415. The defense observed:

> I'm asking the Court to conduct a hearing pre-trial, outside the presence of any Jury to determine whether the witness today is competent to testify to events which occurred five years ago when the witness was eight. The only recorded information that we have about the victim's testimony regarding the incident which gives rise to this litigation is a videotape which was made with Ms. Omley Gordon (phonetically) of the Office of Social Services or Family Services, wherever she is; in which the victim indicates significant memory lapses for the incident. The Court, I believe, in assessing whether a witness is competent to testify can look at not only whether she appears to be truthful, whether she understands the difference between a falsehood and the truth, whether she has the proper understanding to be a competent witness. . . .

R. 2460. The State responded that the trial court could determine that Ms. Hammond was competent merely based upon her prior testimony during a *Prieur* hearing:

> Your Honor, though I haven't been active on this since it's inception, since it's been around for so long, it is my understanding that the victim in this case testified in Court before Your Honor on April 7, 2000; and there is a transcript of her testimony, which seems to extend from page 110 to 208. . . .I have a transcript. And the transcript made for interesting reading. And I don't mean that in any perjuritive (sic) sense. The young lady was able to state her full name, her date of birth, names of family members, as well as the names of the street and the neighborhood that she lived in previous to the time of the alleged rape for which your client has been charged. . . .

R.2460-2461. In contrast to the State's assertion, the testimony at the *Prieur* hearing actually further supports the defense request for a competency evaluation. The State was apparently unaware that the trial court found Ms. Hammond's rendition of a number of prior instances of molestation detailed in that transcript unreliable and excluded them from the trial. Indeed, in that *Prieur* hearing, the Court found:

> As to Ms. Hammond. We were asked to consider incidences I thought that numbered no more than three. Then I hear five, and then possibly as many as ten; when you accumulate - or rather, when you calculate the total allegations of the incidences. *I find that there were questions that could have been asked that weren't asked; that would have helped me determine her credibility.* . . . I find with a great deal of soul searching that the first incident as referenced, I believe in the Gentilly home, that occurred in the bathroom, clears the bar on Preponderance of the Evidence. I am not impressed with every other incident mentioned by the young lady thereafter, as clearing the bar by standard of Preponderance of the Evidence.

R. 1279. In addition to these inconsistences, the transcript of the *Prieur* hearing contained other comments that give further rise to questions concerning Ms. Hammond's competence. Ms. Hammond insisted, at R. 1127, that she had never mer Mr. Armato or Ms. Duponte before– although she had met with defense counsel, and conducted a videotaped interview. See also R. 1129. When defense counsel asked her "what the truth is and what a lie is," Ms. Hammond answered: "A lie is when somebody believes something, and they don't tell what they did to you." R. 1128.

Of particular relevance, Ms. Hammond indicated that Kelly Jones was the first person that she told about the rape–even though her mother insisted that Ms. Hammond had spoken to her before she made a statement to Ms. Jones. R. 1232, 1240. Moreover, Ms. Hammond was under the false belief that Ms. Jones was a therapist not a police officer. R. 1130. These

contradictions, along with the significant lacunae in her memory, gave the defense a legitimate interest in seeking to assess Ms. Hammond's competency prior to trial.

B. The District Court Should Have Considered Whether The Taint of Leading Questions and Manipulation Undermined Ms. Hammond's Competence.

For over one hundred years, the courts have recognized that "young children 'repeat with phonographic precision the things that have been told them to say, be they true or false.' Neither reason nor authority justifies the admission of such witnesses." *State v. Dykes,* 440 So. 2d 88, 93 (La. 1983) quoting *State v. Michael,* 37 W.Va. 565, 16 S.E. 803 (1893). *See also State v. Jones,* 360 Mo. 723, 230 S.W.2d 678 (1950). Courts have begun to understand that children not only repeat the things that they have been told to say, but that they often *believe* the things as if they were true. For this reason, courts are charged with the responsibility of determining whether the witness's competency has been tainted by the manner of interrogation.

There is an emerging understanding that children-witnesses are susceptible to leading questions and manipulation. In recent years, studies have confirmed that the use of suggestive interviewing techniques can exacerbate a child's predisposition towards suggestibility, "creating a significant risk in some forensic contexts - notably but not exclusively those of suspected child abuse - that children will make false assertions of fact." Stephen J. Ceci and Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications,* 86 Cornell L. Rev. 33 (2000). Experts have noted that leading questions and prompted answers may have significant impact on a child's memory.

In New Jersey, where a scandal at a day care center led to "bizarre" charges against a day-care worker involving hundreds of allegations of sexual impropriety, the State Supreme Court reversed a 115-count conviction based upon the trial court's failure to conduct a competency hearing that was specifically responsive to concerns about taint:

> This Court has been especially vigilant in its insistence that children, as a class, are not to be viewed as inherently suspect witnesses. We have specifically held that age per se cannot render a witness incompetent. *State in re R.R.,* 79 N.J. 97, 398 A.2d 76 (1979)., , , Nevertheless, our common experience tells us that children generate special concerns because of their vulnerability, immaturity, and impressionability, and our laws have recognized and attempted to accommodate those concerns, particularly in the area of child sexual abuse. E.g., *State v. Bethune,* 121 N.J. 137, 143-44, 578 A.2d 364 (1990) (recognizing special vulnerability of child-victims in "fresh-complaint" jurisprudence); *D.R., supra,* 109 N.J. at 360, 537 A.2d 667 (recognizing that child sexual-abuse victims, whose victimizers are often members of family or household, are particularly susceptible to pressure to recant prior to trial). . .

State v. Michaels, 642 A.2d 1372 (N.J. 1994).

Indeed other courts have recognized that children are susceptible to leading and misleading questions. See e.g. *State v. Wright,* 775 P.2d 1224 (Idaho1989). As courts and scientific research have suggested, this is especially true when allegations of abuse arise:

> In abuse litigation, children often endure a series of interviews with police officers, child protective service workers, therapists, investigators, and attorneys. The possibility of coaching exists during each interview. While the law enforcement and legal professionals who work with abused children attempt to guard against improper influence, the desire to win, which drives the adversary system, sometimes tempts conscientious individuals over the line.
>
> . . . Mary Ann King and John C. Yuille suggest that if an interviewer gives signals as to what the interviewer is searching for in an answer, children are very responsive to such signals. Mary Ann King and John C. Yuille, Suggestibility and the Child Witness, in Children's Eyewitness Memory 29 (Stephen J. Ceci et al. eds., 1987).
>
> Relative to adults, children are more suggestible because they find themselves in more situations in which they

> are unfamiliar. . . . [I]f a child lacks competence concerning the event, and/or the interviewer is not adept at anticipating potential confusions, then problems will arise. Thus, the child will be susceptible to leading questions and may make an erroneous choice . . . or he or she may invent answers to questions.
>
> * * *
>
> Experiments conducted on children who varied in age from three to twelve years suggested that younger children, after receiving misleading information, provided less accurate details about the original event than did older children. Stephen J. Ceci et al., Age Differences in Suggestibility, in Children's Eyewitness Memory 82 (Stephen J. Ceci et al. eds., 1987). . . . *Ceci and his colleagues concluded that if erroneous information is suggested to the young child, this erroneous information may "resurface in the form of the child's reconstruction of the events" if the child is given a choice between the original information and the misleading information.*

State v. Michaels, 625 A.2d 489, 513-514 (N.J. 1993). Here, Ms. Hammond endured numerous interviews by law enforcement personnel and mental health professionals – all of whom believed that Mr. Kennedy was responsible, and all of whom encouraged Ms. Hammond to fulfill their investigatory needs – under the guise of becoming "more objective" about the evidence. Their investigative interviews had the potential to become "self-fulfilling prophecies" rendering it impossible to determine not only whether Ms. Hammond was telling the truth or not, but also whether her memory had been altered. In this case, at the State's behest, the trial court simply abdicated its responsibility to determine whether Ms. Hammond's statements were the product of improper suggestion and taint. See *Wright, supra.*[35]

C. Leading Questions And the Expectation of Adults Can Taint Child Witnesses

Other courts have similarly recognized that leading questions and the expectations of adults can taint the reliability of statements taken from young children. In *Michaels* the New Jersey Supreme Court cited a series of research findings calling for close scrutiny of the investigative techniques that elicited statements from young children:

> [C]ourts should pay particular attention to whether the abuse investigator had a preconceived notion of what happened to the child and then sought the child's confirmation. . . . When interviews include suggestive and leading questions, children may eventually incorporate the suggested responses into memory. Vitally important is the fact that the children's credibility will not be disturbed because the children actually believe what they are saying.

Id., at 515, *citing* Diana Younts, *Evaluating And Admitting Expert Opinion Testimony In Child Sexual Abuse Prosecutions,* 41 Duke L.J. 691 (1991) . Moreover, in *Michaels,* the court specifically made clear that the district court was responsible for determining whether there is a taint:

> [W]e believe that courts must provide a remedy where the record demonstrates that an accuser's testimony is founded upon unreliable perceptions, or memory caused by improper investigative procedures if it results in a defendant's right to a fair trial being irretrievably lost. A factual hearing would be required for this purpose. . . . Further, the testimony of a child-victim might be stricken without dismissal of the charge in an appropriate case if there is other independent untainted evidence of guilt.

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[35] Affirming the Idaho Supreme Court opinion that reversed a defendant's conviction based upon the admission of statements (by young children) that should have been suppressed, the United States Supreme Court explained:

> The [Idaho] court found Dr. Jambura's interview technique inadequate because "the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial; and, blatantly leading questions were used in the interrogation." The statements also lacked trustworthiness, according to the court, because "this interrogation was performed by someone with a preconceived idea of what the child should be disclosing." Noting that expert testimony and child psychology texts indicated that children are susceptible to suggestion and are therefore likely to be misled by leading questions, the court found that "the circumstances surrounding this interview demonstrate dangers of unreliability which, because the interview was not [audio or video] recorded, can never be fully assessed." . . . Because the court was not convinced, beyond a reasonable doubt, that the jury would have reached the same result had the error not occurred, the court reversed respondent's conviction on the count involving the younger daughter and remanded for a new trial.

Idaho v. Wright, 497 U.S. 805 (1990).

State v. Michaels, supra at 516-517 (internal citations omitted.) Ultimately, an investigator's conduct while questioning young children about abuse can violate due process by actually transforming the memory of the child. In *Wright*, the Court explained that leading questions of a well-meaning doctor, tread upon a defendant's due process rights:

> Younger children have memories, but may lack the ability to recall and relate them. . . . Leading questions, such as those asked by Dr. Jambura, are tempting because they may serve to help a child recall. However, they are extremely dangerous as a means leading to admissible evidence at a criminal trial (as opposed to as an aid in therapy for the child) because of the nature of children's memory. Even adults' memory can be tainted to the point that their actual testimony is deemed too unreliable to be admitted without offense to due process. Examples include the tainted identification resulting from an unduly suggestive lineup or the effect of hypnosis. Cf. *State v. Iwakiri,* 106 Idaho 618, 682 P.2d 571 (1984) (in determining question of admissibility of hypnotically induced testimony, circumstances surrounding hypnotic sessions should be examined in light of suggestive safeguards, and it should then be determined if, in the totality of circumstances, it appears that testimony proposed is sufficiently reliable to merit admission). The problem of tainted memory is much more severe in young children. See e.g., Cohen & Harnick, The Susceptibility of Child Witnesses to Suggestion, 4 LAW & HUMAN BEHAVIOR 210 (1980).

Id. at 1227-1228 affirmed *Idaho v. Wright,* 497 U.S. 805 (1990).

Indeed, leading questions may forever taint a young child's ability to testify accurately. See *State v. Michaels, supra.* In *State v. Wright, supra,* the case ultimately affirmed by the United States Supreme Court, the court noted the opinions of experts:

> The risk with young children is that they may be unable to distinguish between a memory of something which actually happened from a memory of something they imagine happening. . . . *If an interview technique leads a child to imagine an event, the child's memory of that imagined event will be indistinguishable from memories of events which the child actually experienced. . . . Once this tainting of memory has occurred, the problem is irremediable. That memory is, from then on, as real to the child as any other.*

Id. at 1228 (citations omitted).

Because of these problems, trial courts are tasked with responsibility for reviewing the methods employed by police, investigators, and social workers when eliciting statements from young children, and ultimately for assessing whether the child-witness is "competent" to testify. In this case, there are significant problems concerning the manner in which Ms. Hammond was initially questioned. While there is no debate that she was raped, it is also clear that authorities and subsequently her mother repeatedly insisted that her stepfather was the perpetrator. In the face of this, it was error for the district court to deny the request for a hearing on Ms. Hammond's competency to testify.

IV. THE CONVICTION IN THIS CASE WAS SECURED WITH THE USE OF RAMPANT HEARSAY AND VIOLATED MR. KENNEDY'S SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES (Assignments 12-17)

The conviction in this case was secured with the use of rampant hearsay and was predicated on the introduction of a videotaped statement that violated Mr. Kennedy's right to be present, to counsel, and to confront and cross-examine witnesses. Given Ms. Hammond's inability to answer questions on cross-examination, the State was able to substitute a videotaped deposition taken outside the presence of Mr. Kennedy and his counsel, manufactured for the very purpose of being introduced at Mr. Kennedy's trial, for the live testimony and truth-finding cross-examination that our criminal justice system requires.

The critical evidence against Mr. Kennedy was a videotaped deposition of Lavelle Hammond taken by Jefferson Parish Sheriff's Office Omalee Gordon, on December 16, 1999, where the State for the first time was able to procure allegations by Ms.

Hammond against Mr. Kennedy.[36] Ms. Hammond had made an "initial complaint" on March 2, 1998 – that she had been raped by two unknown teenage African-American boys. After the initial complaint, Ms. Hammond was taken to the office of psychologist Barbara McDermott, where she made a tape recorded statement detailing her assertion that she was raped by two unknown teenage boys. While this interview was taped recorded, the State obtained numerous interviews of Ms. Hammond with psychologists, police officers, social workers, that were not recorded. In the face of Ms. Hammond's insistence on Mr. Kennedy's innocence, OCS records detail the efforts of, *inter alia*, social workers, police officers, and Ms. Hammond's mother to convince the girl to arrive at a "different" view of the evidence.

After almost twenty months, the State made a second tape; neither Mr. Kennedy nor his counsel was present during the confection of this videotape. During this deposition, Ms. Hammond indicated that she was making the claim that Mr. Kennedy committed the rape for the very first time. At trial, during its direct examination of Ms. Hammond, the State introduced the second videotape, claiming authority under La. R.S. 15:440.5.[37] While Ms. Hammond was putatively present to testify, she simply adopted the assertions in the second videotape and then responded to the majority of defense counsel's questions with an assertion of lack of memory. Indeed, Ms. Hammond's testimony at trial was interrupted by sixteen assertions of lack of memory, and numerous instances in which she was unable to answer State and defense questions.

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[36] Whether Ms. Gordon was employed by the Children's Advocacy Center, by the Gretna Police, or by the Jefferson Parish Sheriff's Office was unclear; however, it appears that she held regular responsibility for testifying in child abuse cases. See *State v. Maise*, 00-1158 (La. 01/15/02); 805 So. 2d 1141, 1144 ("C.M. recounted the events of the incident to Ms. Gordon. The interview was videotaped and subsequently used at trial."); *State v. Polizzi*, 05-478 (La. App. 5 Cir. 02/14/06); 924 So. 2d 303 ("A.R. was interviewed by Omalee Gordon (Gordon) on June 23, 2003 at the Jefferson Parish Children's Advocacy Center. At trial, A.R. testified that she remembered being interviewed by Gordon. A videotape of this interview was introduced into evidence and played for the jury without objection."); *State v. Myles, 04-434* (La. App. 5th Cir. 10/12/04); 887 So. 2d 118, 122 (La. App. 5th Cir. 2004) ("Omalee Gordon, a forensic interviewer with the Jefferson Parish Children's Advocacy Center, testified that she interviewed B.W. about the incident. Their interview, which was videotaped, was played for the jury."); *State v. Williams*, 05-317 (La. App. 5 Cir. 11/29/05), 918 So. 2d 466, 469("Omalee Gordon, a forensic interviewer with the Children's Advocacy Center, testified that she conducted a videotaped interview of A.L. the victim in Count 1, which was played for the jury. In that interview, dated March 5, 2003, A.L., age 12, stated that defendant, her stepfather, had sex with her for the first time when she was eight or nine years old during the summer after fifth grade in her room in their house on Second Street in Marrero."); *State v. McClain*, 04-98 (La.App. 5 Cir. 06/29/04); 877 So. 2d 1135, 1137 ("According to K.T.'s taped interview with Omalee Gordon at the Children's Advocacy Center (CAC), given ten days after the incident on June 13, 2002 . . ."); *State v. Lyles*, 03-141 (La.App. 5 Cir. 09/17/03); 858 So. 2d 35, 42("Omalee Gordon (Gordon) of the Gretna Police Department testified that she was assigned to the Jefferson Parish Children's Advocacy Center to conduct forensic interviews with children."); *State v. Bolden*, 2003 0266 (La.App. 5 Cir. 08/01/2003); 852 So. 2d 1050, 1055(" Omalee Gordon, a forensic interviewer with the Children's Advocacy Center, testified that she interviewed T.B. on May 26, 1999"); *State v. Simmons*, 2003-20 (La.App. 5 Cir. 04/29/03); 845 So. 2d 1249, 1252 ("Detective Carrone took the victim and her mother to the Jefferson Parish Children's Advocacy Center, where the victim met with Omalle Gordon, an employee of the Gretna Police Department assigned to the Children's Advocacy Center."); *State v. Dickerson*, 2001-1287 (La. App. 5th Cir. 06/27/02); 822 So. 2d 849, 853(" Sergeant Jones escorted A.R. and D.R. to an interview with Omalee Gordon of the Gretna Police Department, Children's Advocacy Center regarding allegations of sexual abuse."); *State v. Noil*, 01-521 (La.App. 5 Cir. 12/26/01); 807 So. 2d 295, 302 ("Omalee Gordon, a Gretna police officer assigned to the Jefferson Parish Children's Advocacy Center, testified that she conducted a videotaped interview of S.R. on July 14, 1999."); State v. Badeaux, 01-406 (La.App. 5 Cir. 09/25/01); 798 So. 2d 234, 237 (" Omalee Gordon of the Jefferson Parish Children's Advocacy Center interviewed H.G. in November of 1994."); *State v. Arwood*, 00-152 (La.App. 5 Cir. 06/27/00); 762 So. 2d 1266, 1268("Officer Omalee Gordon, a Gretna police officer assigned to the Children's Advocacy Center, conducted a taped interview with C.A. on November 25, 1996. The videotaped interview that Ms. Omelee Gordon conducted with C.A. when she was seven was admitted as evidence at trial and played for the jury"); *State v. Maise*, 99-734 (La.App. 5 Cir. 03/22/00); 759 So. 2d 884, 889 ("Amelie Gordon, an employee of the Jefferson Parish Sheriff's Office assigned to the Jefferson Children's Advocacy Center, testified that she interviewed the victim on May 20, 1998. She stated that she asked C.M. non-leading questions and she identified State Exhibit 1 as the videotape she made of the interview.").

[37] The defense stipulated that the videotape had been taken under the circumstances identified in the statute. While it is unclear whether defense counsel objected to the constitutionality of the statute below, the conviction was clearly based upon the introduction of the videotape, and as such this Court may address the constitutionality of the statute without an objection. *See State v. Hoofkin*, 596 So.2d 536 (La. 1992) (observing that the Court "has consistently held that the facial unconstitutionality of a statute on which a conviction is based is an error discoverable by the mere inspection of pleadings and proceedings, without inspection of the evidence . . . even though the defendant did not raise the issue in the trial court and did not comply with the assignment of error procedure in LSA-C.Cr.P. art. 844 or with the contemporaneous objection rule of LSA-C.Cr.P. art. 841."). Moreover, given the devastating impact of the videotape, to the extent the failure to object constitutes a waiver, it is clear that such a failure would constitute ineffective assistance of counsel. The interests of justice and judicial economy warrant review of the statute without regard to an objection.

At trial, the State introduced – not only the videotape taken of Ms. Hammond – but also the testimony of Carolyn Hammond in an effort to bolster Ms. Hammond's testimony. The trial court's admission of this hearsay evidence further frustrated Mr. Kennedy's right to due process of law and to cross-examine witnesses, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.[38]

A. The admission of the videotape of Lavelle Hammond constituted a statutory violation of La. R.S.15:440 et seq. because she was not available for cross examination.

The admission of the videotape of Lavelle Hammond constituted a statutory violation of La. R.S.15:440 *et seq* because she was effectively unavailable for cross-examination. A prerequisite to the admissibility of such a videotaped statement is that "the child is available to testify." La. R.S. 15:440.5 (A)(8).[39] In Louisiana, a witness is not available if she testifies to a lack of memory concerning the subject matter of her statement. Indeed the statutory **"Definition of Unavailibility"** specifically "includes situations in which the declarant: . . . (3) Testifies to a lack of memory of the subject matter of his statement." La. C.E. Art. 804.[40] While questions concerning the constitutionality of the statute are addressed below, it is clear that if the statute is constitutional it is only so where the witness is "available" and the defendant is given a full opportunity to cross-examine the witness.[41]

Prior to trial, the defense moved to assess Ms. Hammond's competency including, *inter alia*, her memory of events. In that motion, the defense noted that the videotape contained at least eight instances in which Ms. Hammond had no memory of the rape The defense specifically requested a pre-trial hearing on this issue. The trial court denied the motion, and permitted

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[38] Hearsay evidence is:

> [A]n out-of-court statement made by a third party who made the statement while he was not under oath and not subject to cross-examination. McCormick, Law of Evidence 225 at 449 (Hornbook ed. 1954); II Wharton's Criminal Evidence 265, at 3 (13th ed. 1972); 21 Loy.L.Rev. 279 (1975). The validity of hearsay evidence rests in part on the truthfulness of the third person. Hearsay evidence is excluded from trials because the safeguards which tend to insure that a person speaks truthfully and on the basis of his own knowledge are lacking: the third person was not under oath when he made the statement; there was no opportunity to cross-examine him at the time he made the statement; and the jury cannot observe his demeanor so as to judge his credibility. Wharton's, id. *See generally*, Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv.L.Rev. 177 (1948). Moreover, there is a chance that the witness is consciously or unconsciously misrepresenting what he was told by the third person. Wharton's, id. at 6. For these reasons, hearsay evidence is inadmissible in Louisiana criminal trials unless otherwise provided by law. R.S. 15:434.

State v. Jacobs, 344 So. 2d 659, 661 (La. 1976).

[39] While the record does not appear to reflect an objection to the lack of availability of Ms. Hammond, see *State v. McClain*, 04-98 (La.App. 5 Cir. 06/29/04); 877 So. 2d 1135, 1144 (noting that failure to object to admissibility of videotape on the basis of the victim's unavailability at the trial court level barred issue from appellate review), this Court has – especially in capital cases – addressed the merits of a claim on direct appeal where the failure to object would constitute obvious ineffective assistance of counsel. See also *State v. Lacaze*, 99-0584 (La. 01/25/02); 824 So. 2d 1063, 1079 ("When the record permits, this court will reach the merits of claims about counsel's performance and grant relief when appropriate.") *citing State v. Strickland*, 94-0025 (La. 11/1/96), 683 So. 2d 218, 238-239 (remand for a hearing on whether it was strategy or dereliction for counsel to omit opening and closing statements, fail to investigate and present mitigating evidence, and prepare witnesses); *State v. Sullivan*, 559 So. 2d 1356 (La. 1990) (remanding for a hearing to determine if Brady material was suppressed and if counsel was ineffective at the penalty phase of trial); *State v. Wille*, 559 So. 2d 1321, 1339 (La. 1990) (claims of incompetent counsel spanning both phases of trial which cannot be resolved on the record require remand and evidentiary hearing). *See also State v. Ratcliff*, 416 So. 2d 528, 532 (La. 1982) (addressing introduction of unobjected to hearsay on appeal despite contemporaneous objection rule, under rubric of ineffective assistance of counsel). Appellant counsel can discern no strategic reason for accepting the admissibility of the videotape, or for failing to object to the lack of ability to cross-examine Ms. Hammond. Moreover, the inadmissibility of the videotape would be plainly a dispositive issue on appeal. As such, counsel respectfully suggests that the Court should address the merits of the claim.

[40] The videotaped statement introduced in the State's case in chief was not introduced pursuant to an exception to the hearsay rules for unavailable declarants. *See* La. C.E. art. 804 (B). For instance, the videotaped statement taken 19 months after the rape and initial complaint was not "A statement made by a person under the age of twelve years and the statement is one of *initial* or otherwise trustworthy complaint of sexually assaultive behavior." *Id* at (B)5.

[41] *See also* Art. I, Section 16 (guaranteeing not simply the right to confront witnesses provided in the Sixth Amendment to the United States Constitution, but as well the right to cross-examination).

Ms. Hammond to testify. On direct examination, Ms. Hammond answered a series of leading questions. Indeed while defense counsel objected to the leading questions, and the trial court instructed the State to stop leading Ms. Hammond, the State continued to do so throughout its examination.[42] In fact, the bulk of the inculpatory testimony came in response to leading questions, or was an endorsement of the hearsay videotape,

BY MR. PACIERA:

Q. Is everything that you're saying in this courtroom today the truth?

A. Yes.

Q. Did you hear yourself when you were on that tape from December of 1999?

A. Yes.

Q. Is everything you heard on there the truth?

A. Yes.

Q. That this person raped you?

A. Yes.

Q: Nobody else?

A: Nobody else.

Q: in your room?

A: in my room.

R. 5363. On cross-examination, Ms. Hammond just clammed up and claimed a lack of memory to any of the details that might be relevant to assessing her credibility:

Q: Do you remember Mr. Armato coming to see you about a year and a half later?

A: No.

Q: You don't remember his coming to your house? Okay, and for the record, you're shaking your head no, right?

A: No

Q: Okay and you don't remember telling him that somebody else did it?

A: No.

Q: Okay do you remember giving another statement that was videotaped besides the one that we just saw when it first happened?

A: No.

Q: Alright, you don't remember talking to another therapist and having her put you on videotape?

A: No.

Q: You remember going to a doctor's office and talking to the doctor about, let me back up. Do you remember Ms. Renee ever coming to your house and taking you to go see, and when I'm talking about Ms. Renee, that's a police officer, right?

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[42] See R. 5353 (repeated leading questions); R. 5354 (objecting to leading questions); id (re judge admonishing State to avoid leading questions). Indeed, the leading questions went directly to the identification of the defendant and the merits of the case:

Q: After this happened to you did it injure you, did you bleed? Not the orange juice, when you were raped.

A: Yes.

Q: Did you bleed?

A: Yes. . . .

Q: When you said Patrick, he left your room, is that what you said?

A: Yes.

R. 5360.

Do you remember Ms. Renee, she was one of the police officers on your case?

A: No

Q: Do you remember Ms. Florida?[43]

A: Yes.

Q: Do you remember Ms. Kelly?

A: No.

R. 5365-66. Indeed, Ms. Hammond was not "available" to be cross-examined on any of her prior statements:

Q: Okay, do you remember going with any policeman to a doctor's office to talk about what happened to you?

A: no.

Q: . . Do you remember when Patrick first went to jail?

A: no.

R. 5267.

Q: Lavelle, Do you remember the first time that you met with the D.A.'s office on this case?

A: No.

Q: Okay, you met with them before today, right?

A: Yes.

Q: Okay and did you meet with them around the tine that you gave the interview to Ms. Amalee?

The time that you made that videotape with Ms. Amalee, did you meet with the DA's office around that time?

A: Uhm I don't

Q: Its not these D.A.'s but anybody else from the DA's office? . . .

A: I don't remember.

R. 5269. When defense counsel attempted to show Ms. Hammond a card she had written to Mr. Kennedy, again she invoked her lack of memory:

Q: Lavelle, I'm going to ask you if you recognize this? I'm going to ask you to open it up and look at it and see if you recognize that. Alright, for the record you're shaking your head. You don't recognize this card?

A. No

R. 5370. This Court has made clear that "a witness may actually be present in the courtroom, and yet be considered unavailable. The critical factor emerging from these cases in making the determination of whether to apply the exception is not the unavailability of the witness himself, but the unavailability of his testimony." *State v. Nall*, 439 So. 2d 420, 423-424 (La. 1983) citing McCormick, Evidence (2nd Ed. 1972).

In *Nall*, this Court observed that there was some "disagreement among jurisdictions" concerning whether a witness who testifies to a lack of memory should be considered "available" or "unavailable". The Court, on behalf of the prosecution, in that case, held that the loss of memory effectively rendered the witness unavailable:

> Mrs. Kimball gave former testimony to establish the defendant's participation in the killing of her husband and her efforts to cover up her lover's involvement. Now at this second trial and after her plea of guilty to the conspiracy, she could no longer remember or recall what had happened at the time of the murder. Thus her loss of memory effectively prevented the state from presenting to the jury evidence of the defendant's

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[43] Ms. Florida was in the courtroom and had accompanied Ms. Hammond from the District Attorney's Office to the witness stand. R. 5267. It would have been remarkable for Ms. Hammond not to remember her.

statements to her concerning the murder.

State v. Nall, 439 So. 2d 420, 423-424 (La. 1983). This decision is consistent with the definition of the legislature, in La. C. E. Art. 804, discussed above.

This Court has observed the practical and constitutional issues that arise when child-witnesses are called as witnesses. See *Folse v. Folse*, 98-1971 (La. 06/29/99); 738 So. 2d 1040, 1049 citing Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 560 n.192 (1988). The article by Professor Graham, specifically addresses the issue of availability as well as the constitutionality of a statute similar to the one at issue here. Concerning availability, Professor Graham observed:

> AVAILABILITY OF DECLARANT 1. Testifying Witness
> To be a testifying witness under availability analysis, a witness must actually testify at trial concerning the witnessed event. If a witness claims not to recall, asserts a privilege, or is unable or unwilling to testify, the witness is in fact unavailable and considered nontestifying.

Id., at 539; see also id at 554 ("In determining unavailability, the important factor is the availability of the declarant's testimony, not the declarant's physical presence in court. . . .A child witness may also be unavailable if, placed in unfamiliar court surroundings, the child forgets what happened. ") *citing State v. Myatt*, 647 P.2d 836, 841 (Ka. 1985) ("The child may be unable to testify at trial due to fading memory, retraction of earlier statements due to guilt or fear, tender age, or inability to appreciate the proceedings in which he or she is a participant."); see also FED. R. EVID. 804(a)(2), (3) (defining "unavailable" to include persistent refusal to testify and lack of memory). Indeed, in criticizing a statute that is analogous to the one at issue here, Professor Graham noted that a child's inability to "remember the details of the events" would render cross-examination meaningless. *See Id* at 601, n. 337 citing *Long v. State*, 694 S.W.2d 185, 193 (Tex. Ct. App. 1985), *aff'd*, 56 U.S.L.W. 2031, 2031 (Tex. Crim. App. July 1, 1987) (No. 867-85) (en banc) (noting that "[c]ross-examination of a three-year-old child eight months after the videotape was made cannot serve as a constitutionally adequate substitute for cross-examination contemporaneous with statements presented for consideration by the jury").

B. *La.R.S. 15:440.4 Unconstitutionally Deprived Mr. Kennedy of the Right to Confront Lavelle Hamond As Well As The Right To Counsel And to Be Present*

La.R.S. 15:440 unconstitutionally deprived Mr. Kennedy of the right to confront Lavelle Hamond as well as the right to counsel and to be present[44] The videotaped statement of Lavelle Hammond was plain hearsay, i.e. a "statement other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." La. C.E. 801 (C). The only basis for the admission of this hearsay was the codification of La.R.S 15: 440.3 which provides "the

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[44] La. R.S. 15: 440.5 provides in pertinent part:

> A) The videotape of an oral statement of the protected person made before the proceeding begins may be admissible into evidence if: (1) No attorney for either party was present when the statement was made; (2) The recording is both visual and oral and is recorded on film or videotape or by other electronic means; (3The recording is accurate, has not been altered, and reflects what the witness or victim said; (4) The statement was not made in response to questioning calculated to lead the protected person to make a particular statement; (5) Every voice on the recording is identified; (6) The person conducting or supervising the interview of the protected person in the recording is present at the proceeding and available to testify or be cross-examined by either party; (7) The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and (8) The protected person is available to testify.

La. R. S. 15:440.5.

videotape authorized by this Subpart is hereby admissible in evidence as an exception to the hearsay rule." Commentators have recognized that La. R.S. 15:440.3 is subject to constitutional challenge under *Kentucky v. Stincer,* where it is used by the State – as it was in this instance – to secure a deposition of a critical witness for use at trial:

> In *Stincer,* the confrontation claim arose out of an in-chambers competency examination of two child witnesses from which the defendant had been excluded, though he was represented by counsel. . . . Said Mr. Justice Blackmun for the majority, the appropriate test for a Confrontation Clause violation is not whether the challenged procedure is a "critical stage" of the criminal proceedings but "whether the defendant's presence at the proceeding would have contributed to the defendant's opportunity to defend himself against the charges." In adopting this case-by-case, functional approach, Mr. Justice Blackmun identified four important factors in the application of this test to the challenged in-chambers procedure: (1) all questions and answers given in the challenged procedure could have been easily repeated in the defendant's presence at trial; (2) the two child witnesses thereafter did appear and testify in open court; (3) they were then subject to a full and complete cross-examination on the competency issue; and (4) *the challenged procedure did not involve substantive testimony about the alleged offense.*
>
> The Court's special emphasis on the final, fourth factor presents the most troublesome hurdle for a constitutional defense of statement videotaping statues. As Mr. Justice Blackmun appeared to have been warning in the opinion's conclusion:
>
> > Thus, although a competency hearing in which a witness is asked to discuss upcoming, substantive testimony might bear a substantial relationship to a defendant's opportunity better to defend himself at trial, that kind of inquiry is not before us in this case.
>
> Clearly the Louisiana statute envisions that a child will give a complete account of the substance of the criminal charges which will bring it squarely within the constitutional determination reserved in *Stincer.* The statute will withstand constitutional scrutiny *if and only* if the combination of its particular features are sufficient to overcome the denial of the right of the defendant and his counsel to be present during the taping session.

Id at 1291 quoting *Kentucky v. Stincer,* 482 U.S. 730, 746 (1987). The commentators, moreover, recognized that the Louisiana statute suffers from constitutional infirmities:

> The creation of a new explicit exception to a state's hearsay rule raises rather serious questions of the compatibility of the new exception with an accused defendant's right of confrontation under the Sixth and Fourteenth Amendments.

47 La. L. Rev. 1255, 1289. Indeed, the commentators indicated that the statute would only withstand constitutional scrutiny where the deposition was obtained in "proximity" to the offense (pre-appointment of counsel) and given the "neutrality"of the deposition; it is clear in this case however that the videotape was made 20 months after the incident,well after the indictment of Mr. Kennedy on the charged offense, and was done purely for the purposes of use at trial.

1. *Crawford* Makes Clear that the VideoTaped Testimonial is inadmissible

Crawford v. Washington, 541 U.S. 36 (2004) makes clear that the admission of "testimonial" statement violates the Sixth Amendment.[45] In *Crawford,* the United States Supreme Court held that the historical bent of the Sixth Amendment required exclusion of depositions taken outside the presence of the defendant:

> Early state decisions shed light upon the original understanding of the common-law right. *State v. Webb,* 2 N. C. 103 (1794) (per curiam), decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: "[i]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.,* at 104.

Crawford v. Washington, 541 U.S. 36, 49 (2004).

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[45] Prior to *Crawford v. Washington,* in *Idaho v. Wright,* the United States Supreme Court addressed the admissibility of statements made by a child accusing the defendant of sexual improprieties, admitted under an Idaho exception to the hearsay rule. *Idaho v. Wright,* 497 U.S. 805, 816-823 (1990). The Supreme Court rejected the "exception to the hearsay rule" as a violation of the Sixth Amendment. *Id.* at 816-818.

In analyzing the meaning of the Sixth Amendment, the Court observed that "history supports two inferences about the meaning of the Sixth Amendment," the first of which is plainly relevant here:

> First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused. . . . The Sixth Amendment must be interpreted with this focus in mind.
>
> Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." . . . Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. . . . The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused--in other words, those who "bear testimony." . . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Crawford v. Washington, 541 U.S. 36, 49-53 (2004). As the Court made clear:

> Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse--a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Id. at 53.[46] While the exigencies of videotape obviously did not exist at the time of the adoption of the Sixth Amendment, it appears clear that the founders of our constitution would have frowned upon the introduction of out of court, unsworn affidavits, based upon a legislative adoption of an exception to the hearsay rule – especially one established to ensure the conviction of a

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[46] The Court detailed the various types of statements that must be excluded under this formulation:

> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois,* 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition--for example, ex parte testimony at a preliminary hearing.
>
> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not sworn testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, e.g., Campbell, 30 S.C.L., at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, Pleas of the Crown, at 52. Yet Hawkins and others went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor. See supra, at ____, 158 L.Ed. 2d, at 189. . . . These sources--especially Raleigh's trial--refute the Chief Justice's assertion, post, at ____, 158 L. Ed. 2d, at 204-205 (opinion concurring in judgment), that the right of confrontation was not particularly concerned with unsworn testimonial statements. But even if, as he claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. We find it implausible that a provision which concededly condemned trial by sworn ex parte affidavit thought trial by unsworn ex parte affidavit perfectly OK. (The claim that unsworn testimony was self-regulating because jurors would disbelieve it, cf. post, at ____, n 1, 158 L. Ed. 2d, at 204, is belied by the very existence of a general bar on unsworn testimony.) . . . That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. See 1 Stephen, Criminal Law of England, at 221; Langbein, Prosecuting Crime in the Renaissance, at 34-45. England did not have a professional police force until the 19th century, see 1 Stephen, supra, at 194-200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.
>
> In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.

Crawford v. Washington, 541 U.S. 36, 49-53 (2004).

particularly unpopular type of defendant. The founders of the constitution were well-familiar with the witch-trials of Salem,[47] along with the allegations of treason or debauchery; and it was to prevent the rule of tyranny of fear that the Sixth Amendment was promulgated.

Since *Crawford*, a number of courts have indicated that child interviews in a sexual abuse investigation are testimonial. *See State v. Bobadilla*, 690 N.W.2d 345, 349 (Minn. Ct. App. 2004) (finding, post-*Crawford*, that because "the interview was conducted for [the] purpose of developing a case against [the defendant], . . . the answers elicited were testimonial in nature"); *People ex rel. R.A.S*, 111 P.3d 487 (Colo. App. 2004) (finding that a child's statements were testimonial under *Crawford* in the context of age-appropriate questioning by an investigating officer); *People v. Vigil*, 104 P.3d 258 (Colo. App. 2004) (finding the fact that the interview was conducted by an investigator trained to interview children did not alter the court's finding that a child's interview was an interrogation under Crawford); *State v. Mack*, 101 P.3d 349, 352 (Or. 2004) (rejecting State's argument that child's statements during an interview with a social worker were not testimonial under *Crawford*, based on the finding that the social worker "was acting as an agent for the police . . ."); *People v. T.T. (In re T.T.)*, 815 N.E.2d 789, 801(Ill. App. Ct. 2004) (finding post-*Crawford* that "where [a social worker] works at the behest of and in tandem with the State's Attorney with the intent and purpose of assisting in the prosecutorial effort, [the social worker] functions as an agent of the prosecution").

Perhaps the most erudite explication of *Crawford* to statutes similar to the one at issue was provided by Maryland's highest court. In *State v. Snowden*, the defendant challenged the admission of hearsay statements of child-accusers who were present in Court and available to testify. The Court first observed that the statements taken by the social worker were testimonial in nature and as such ran afoul of the confrontation clause:

> Because Wakeel was performing her responsibilities in response and at the behest of law enforcement, she became, for Confrontation Clause analysis, an agent of the police department. . . .

State v. Snowden, 867 A.2d 314, 326-329 (Md. 2005).[48] The Court then found that the introduction of their prior statements constituted reversible error, regardless of their availability to testify. State v. Snowden, 867 A.2d at 330-333. Because of the defense's plain inability to cross-examine Lavelle Hammond – and her own basic inability to detail the facts of the offense whilst

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[47] Even in those witch trials, which remain three hundred years later a stain on the integrity of the judicial system, children were not allowed to merely endorse the propriety of a prior unsworn ex parte statement but were required to provide explicit detail of the sorcery. See *Long v. State*, 742 S.W.2d 302, 307 (Tex. Crim. App. 1987) ("at the Salem witch trials in 1692 the numerous defendants did not enjoy the presumption of innocence, they obviously were not entitled to counsel and jury verdicts were only advisory. It is rather interesting to note, however, that all of the possessed children were required to come into court and in the presence of the defendant witch detail the sorcery.") *citing* Marion Starkley, *The Devil in Massachusetts* (New York, A. A. Knopf: 1949).

[48] The Court observed that there might be some circumstances, under *Crawford*, in which the statements to a social worker would be admissible, but that these were not those circumstances:

> By resolving that Wakeel's testimony was admitted wrongly in Snowden's trial, we do not render useless Maryland's tender years statute. The statutory framework certainly contemplates other circumstances in which a child's non-testimonial statements could be supplied constitutionally by a health or social work professional. See *People v. Geno*, 261 Mich. App. 624, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (finding nontestimonial under Crawford a child's statement to the executive director of a children's center where director was not a government employee and child volunteered incriminating information). As one amicus notes, the tender years statute is limited to those medical, psychological, social work, and school-related professions whose primary role, in the context of children, is to promote safety, education, and healthy development. Md. Code (2001), § 11-304(c) of the Criminal Procedure Article. Statements made to a school principal conducting a casual chat with a student, for example, do not present necessarily the same potential constitutional abuses as when a child's statement is made to a health or social work professional that is working in tandem with law enforcement in furtherance of an ongoing and formal criminal investigation. We leave to another day the question of whether such noninvestigatory statements would be admissible in light of *Crawford*.

Snowden at 330-331. See also fn 35 detailing the role of Ms. Gordon in securing these statements.

on the stand save endorsing the videotape and the prosecution's leading statement that she was raped, it can in no way be maintained that the defense was able to cross-examine or confront her in a manner demanded by the Constitution.

2. A Number of Other State Courts have Held Analogous Statutes Unconstitutional

Even before *Crawford,* there was much discussion in the lower courts and the academic articles concerning whether similar statutes were unconstitutional as written or applied *See e.g. State v. R.C.*, 494 So. 2d 1350 (La. App. 2 Cir. 1986) (application of statute was unconstitutional where the victim took the stand and refused to answer questions on cross-examination); *State v. Abbott,* 29497 (La. App. 2nd Cir. June 18 1997), 697 So. 2d 636 (finding statute constitutional but observing the problem that arises when "the cumulative power of out-of-court statements" is used to "booster in-court testimony."); see also Lucy S. McGough and Mark L. Hornsby *Reflections upon Louisiana's Child Witness Videotaping Statute: Utility and Constitutionality in the Wake of Stincer.* 47 La. L. Rev. 1255 (1987) (praising the child-protective components of the statute but alerting to the constitutional issues at play).

Whether the statute is unconstitutional on its face, it was used in this case in manner that prevented Mr. Kennedy from cross-examining Ms. Hammond in a constitutionally relevant manner; moreover, the deposition of Ms. Hammond outside Mr. Kennedy's presence constitutes an additional violation of Mr. Kennedy's Sixth and Fourteenth Amendment rights. See *Kentucky v. Stincer,* 482 U.S. 730 (1987) (observing that defendant's presence at a earlier examination of the complainant was only necessary if complainant discussed facts of the case); see *id* at 741 ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially a "functional" right designed to promote reliability in the truth-finding functions of a criminal trial. The cases that have arisen under the Confrontation Clause reflect the application of this functional right.").

In this case, as discussed above the centerpiece of the State's case consisted of Ms. Hammond appearing on the witness stand, answering several leading questions from the prosecutor, and then endorsing the videotape. She then was unable to answer almost all of defense counsel's questions leaving the prospects of cross-examination a nullity. But for the specter of her crying on the witness stand, and her agreement with the State's assertion that Patrick Kennedy raped her, the videotape was the crucial testimony introduced at trial – and Mr. Kennedy was prevented from cross-examining her at the time the videotape was made (by the statute), and again at trial (by her "loss of memory").

In *State v. R.C.*, 494 So. 2d 1350 (La. App. 2 Cir. 1986), the lower court held the application of the statute unconstitutional under similar circumstances:

> In plain terms, requirement (8) addresses only availability, but it must be read in connection with subsection (B) to convey the full panoply of rights that would satisfy the constitution. This means a right of effective cross-examination. See *Davis v. Alaska,* supra; *Pointer v. Texas,* 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965); *State v. Hillard,* 398 So. 2d 1057 (La. 1981), on remand 421 So. 2d 220 (La. 1982).
>
> By "effective cross-examination" we mean questioning that addresses the facts that give rise to the alleged offense and testimony that is responsive to the questioning, regardless of whether the testimony benefits the defense. *Mere physical presence is not sufficient under the instant circumstances where the tape was made without the benefit of cross-examination. This eliminates the main indicium of reliability, and places the witness in a position to incriminate the defendant with impunity. The statute recognizes that when the other factors are relaxed, the right of confrontation must be carefully guarded.*
>
> We have not been asked to rule on the constitutionality of this statutory scheme. It is not without difficulty because it so severely compromises the defendant's constitutional rights. We need not reach the issue,

however, because the requirements of the statute were not met in the trial court and the trial judge correctly ruled. *The witness was not available for effective cross-examination. Although she took the stand, answered general questions on direct and a few questions on cross, she refused to talk about the alleged offense. Cross-examination can not be effective when it is not permitted to cover the facts of the alleged offense.*

State v. R.C., 494 So. 2d 1350, 1355-1356 (La. App. 2nd Cir. 1986), *writ denied*, 516 So. 2d 128 (La. 1987).

A number of other courts, moreover, have held similar statutes unconstitutional. [49] For instance, in Texas the Court of Criminal Appeals held a similar statute unconstitutional observing:

> The statutes most comparable to Art. 38.071 § 2, supra are those in Louisiana and Kentucky.[50] Because of procedural defects Louisiana courts have yet to confront the confrontation issue directly, see: *State v. Guidroz*, 498 So.2d 108 (La. Ct. App. 5th Cir. 1986); *State v. Interest of R.C.*, Jr., 494 So.2d 1350 (La. Ct. App. 2nd Cir. 1986). . . .
>
> Based on our previous observations and authorities and for the reasons stated, we find that Art. 38.071, § 2, supra is both facially and as it was applied to the appellant an unconstitutional deprivation of his right of confrontation under the Sixth and Fourteenth Amendments to the United States Constitution.

Long v. State, 742 S.W.2d 302, 322-324 (Tex. Crim. App. 1987), *overruled on other grounds, Briggs v. State*, 789 S.W.2d 918 (Tex. Crim. App. 1990) (refusing to reverse conviction where application of statute did not harm the defendant as it allowed defendant to be convicted of lesser offense).

The court, in *Long*, explained that, while the "legislative activity that produced Art. 38.071, . . was, as we have recognized, well intended," that the statute:

> essentially aimed at reconciling opposites: the innocence of youth stained by experience of age. Although it is not an impossible task it is one that is made difficult by the concerns we must by necessity have for the rights of people accused of crimes, no matter how vile and repulsive the alleged offense. This area of the law is dominated by emotion, which is understandable in light of the interests society wants to protect -- abused children. But irrespective of the interests to be protected of greater concern should be the adherence to our constitutional rights. We cannot ever permit emotion-charged issues to erode our fundamental liberties. To do so would produce emotionally pragmatic deviations from established standards and that will inevitably and

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[49] Several courts have found the statute unconstitutional on alternate grounds. For instance, the Arizona court of appeals found the statute unconstitutional as a violation of separation of powers. See *State v. Taylor*, 2 P.3d 674, 678 (Ariz. Ct. App. 1999) (finding the statute unconstitutional as a violation of the separation of powers observing "Other jurisdictions have held virtually identical statutes or statutes with a similar purpose unconstitutional as an infringement on the judiciary's powers.") citing *State v. Zimmerman*, 829 P.2d 861 (Idaho 1992); *Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990); *Gaines v. Commonwealth*, 728 S.W.2d 525 (Ky. 1987); *Hall v. State*, 539 So. 2d 1338 (Miss. 1989). The Court in *Taylor* also noted that a number of other states had held the statute unconstitutional as a violation of a defendant's confrontation rights. See *id* at n.4 citing, inter alia, *State v. Apilando*, 900 P.2d 135 (Haw. 1995); *State v. Pilkey*, 776 S.W.2d 943 (Tenn. 1989); *State v. Schaal*, 806 S.W.2d 659 (Mo. 1991); *Briggs v. State*, 789 S.W.2d 918 (Tex. Crim. App. 1990) (not facially unconstitutional but application of statute may, in some cases, unconstitutionally violate confrontation rights).

[50] The Court, in *Long*, noted a number of videotape statutes that have been upheld – observing that the saving grace of those statutes were not in the Texas or Louisiana statutes:

> Noting, among other things, that their statute "requires face-to-face confrontation between the victim, the defendant and his attorney at the time the deposition is taken, and provides the opportunity for cross-examination of the victim by the defendant," *McGuire v. State*, 706 S.W.2d 360 (Ark. 1986), the Arkansas Supreme Court understandably declared that state's videotape statute constitutional.
>
> The Supreme Court of South Carolina also ruled that their videotape statute was constitutional. However, the South Carolina statute they reviewed, S.C. Code Ann. § 16-3-1530(6) (1985), was restricted to specific cases and special witnesses, i.e., children, the elderly and handicapped people. It requires a motion and court order. Further, the defendant must be present at the deposition, but out of the victim's vision, and cross-examination is permitted by the defendant's attorney contemporaneous with the statement. *State v. Cooper*, 353 S.E.2d 451 (S.C. 1987).
>
> In *State v. Sheppard*, 484 A.2d 1330 (N.J. 1984), the court granted the State's motion for permission to videotape a child witness' testimony prior to the trial. In their excellent opinion the Superior Court reviewed cases from other states and emphasized that the means they were authorizing required that "the defendant as well as the judge, the jury, and the [trial] spectators, will see and hear her [the child] clearly." Id. at 1343. And, most significantly, "[adequate] opportunity for cross-examination will be provided." Id.
>
> Similar court decisions are found in *State v. Vigil*, 711 P.2d 28 (N.M. 1985); *People v. Johnson*, 146 497 N.E.2d 308 (Ill App. 1986); *State v. Melendez*, 661 P.2d 654 (Az. 1982).

State v. Long, supra at 322-323.

ultimately result in a complete erosion of those rights that make us a free society.

Id. at 323-324.

Other jurisdictions have also held virtually identical statutes unconstitutional as a violation of a defendant's confrontation rights. *See State v. Apilando,* 900 P.2d 135 (Haw. 1995); *State v. Pilkey,* 776 S.W.2d 943 (Tenn. 1989). In *State v. Apilando,* the Hawaii Supreme Court addressed an indistinguishable statute,[51] under almost exactly the same circumstances – namely the victim was called to the stand, answered a number of questions by the State but was unable to answer questions posed by the defense due to lack of memory.

> The dispositive issue in this appeal is whether compliance with HRE 616(b), under the circumstances of this case, nevertheless violated Apilando's constitutional right of confrontation. The prosecution, relying on Green, argues that producing the complainant at trial, following the presentation of the videotape evidence, afforded Apilando "full and effective cross-examination" of the complainant-declarant at trial, and thus, his right of confrontation was preserved. Based on our reading of *Green*, we believe that the prosecution's reliance on that case is misplaced . . .
>
> In the present case, the videotaped interview was offered under fundamentally different circumstances than those present in *Green*. . . . The tape was not offered as a prior inconsistent statement to impeach her testimony nor was it offered to restore her credibility on rebuttal.

State v. Apilando, 900 P.2d 135, 142-141 (Haw. 1995). The Hawaii Supreme Court observed that even though the witness took the stand and attempted to answer questions, there was no real cross-examination of the videotaped statement:

> even if the declarant could be cross-examined, such belated cross-examination "is not cross-examination at all because the passage of time destroys the defendant's opportunity to subject the [out-of-court] statement to an immediate challenge to determine its truthfulness and credibility." Comment, The New Illinois Videotape Statute in Child Sexual Abuse Cases: Reconciling the Defendant's Constitutional Rights with the State's Interest in Prosecuting Offenders, 22 J. Marshall L. Rev. 331, 353 (1988). "The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot."

Id. at 139, citing *State v. Saporen,* 285 N.W. 898, 901 (Minn.,1939).

Similarly, the Tennessee Supreme Court rejected the use of videotaped statement in the prosecution's case-in-chief, where the defendant had no opportunity to cross-examine the witness at the time the statement was taken. *State v. Pilkey,* 776 S.W.2d 943 (Tenn. 1989), *cert. denied,* 494 U.S. 1032, 1046 (1990). In *Pilkey,* a child protective services worker had conducted a videotaped interview of the child-victim approximately one month after the child allegedly had been sexually abused, which was played for the jury at the time of trial. The child was available for cross-examination but was not called. The court found the statute unconstitutional regardless of whether "'the opposing party' is allowed to 'cross-examine' the child," *id.* at 948, holding that to "permit a videotape procured outside the defendant's presence to be used as evidence in chief by the prosecution . . . impermissibly infringes upon the confrontation rights of the accused." *Id.* at 951. The Court , recognizing that the "crucial difference . .. between the out-of-court statement in *Green* and the out-of-court video-taped statement in the case at bar is that

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[51] Under the Hawaii Rules of Evidence, the introduction of videotaped statements of a child victim of sexual assault is permitted, provided that the following safeguards were met:

> 1. No attorney of either party was present when the statement was made; 2. The recording is both visual and aural and recorded on film or videotape or by other electronic means; 3. The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and unaltered; 4. The statement was not made in response to questioning calculated to lead the child to make a particular statement; 5. Every voice on the recording and every person present at the interview is identified; 6. The person conducting the interview of the child in the recording is present at the proceeding and available to testify for or be cross-examined by either party and every other person present at the interview is available to testify; 7. The defendant or the attorney for the defendant is afforded discovery of the recording before it is offered into evidence; and 8. The child is present to testify.

H.R.E. 616(b).

in *Green* the statement was a prior *inconsistent* statement." observed that there is a significant difference where the State uses a prior consistent deposition taken outside of the presence of the defense, to bolster the credibility of the witness' statement :

> "The main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness' "false testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth." That danger, however, disappears when the witness has changed his testimony so that, far from "hardening," his prior statement has softened to the point where he now repudiates it."
>
> The danger identified by the Supreme Court is precisely the danger presented by the delayed cross-examination authorized by the challenged statute. It is quite possible that the videotaping and the trial will take place months apart. During that time, the child undoubtedly will have contact with the prosecutor and relatives who, consciously or unconsciously, may influence the child. We are convinced that the statute, by prohibiting contemporaneous cross-examination, unnecessarily and impermissibly infringes on an accused's right of confrontation.

Pilkey, 776 S.W.2d at 950 (quoting *People v. Bastien,* 133 Ill. Dec. 459, 465 (Ill. 1989) quoting *Green.*

In *Bastien,* the Illinois Supreme Court, held that its child shield statute – that is analogous to the Louisiana statute – violated the defendant's right of confrontation. The court explained:

> The defendant's inability, under the statute, to cross-examine the witness *contemporaneously* with the witness' direct testimony denies defendant his right to confront his accuser. *The opportunity to cross-examine the witness at trial, which may take place months after the videotaping, is not an adequate safeguard of the right to confrontation.* The State may be able to introduce its evidence twice, first by showing the videotape, and again when the child is called to testify. Finally, the statute does not specify upon what basis the State's motion to utilize the statute may be granted. . .
> Under the terms of the statute, the child witness must be available to testify and to submit to cross-examination at trial; thus, "there is little justification for relying on the weaker version" -- the videotaped statement. . . . "Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. . . ."

People v. Bastien, 133 Ill. Dec. 459, 465 (Ill. 1989) *quoting Perry v. Leeke,* 488 U.S. 272 (1989), citing *inter alia Commonwealth v. Bergstrom* 524 N.E.2d 366 (Mass. 1988).

3. The Application of the Statute in this Case Enhances the Risk of Wrongful Covniction

Ths application of the statute in this case enhances the risk of a wrongful conviction and deprived Mr. Kennedy of a fair trial. While commentators McGough and Hornsby observed the salutary benefits of the statute for the child, they also acknowledged:

> The two principal reliability risks inherent in all testimony are memory-fade and pre-trial suggestibility. The question then arises whether a child witness is especially prone to memory-fade and concomitantly more vulnerable to suggestibility than an adult witness.

Lucy S. McGough and Mark L. Hornsby *Reflections upon Louisiana's Child Witness Videotaping Statute: Utility and Constitutionality in the Wake of Stincer.* 47 La. L. Rev. 1255, 1258 (1987). Of particular relevance to this case, the authors noted that the statements made closest to the offense are more apt to be reliable than those made much later – such as the accusations against Mr. Kennedy.[52] Moreover, the authors noted that conclusive data confirmed that children display an "especial proneness to suggestibility in a laboratory setting in which testing of observation is an expected occurrence and questioning is conducted

[52] See *id.* at 1258-59 ("Findings that children's "long term" memory is weaker than adults' are enormously significant when coupled with the delays inherent in most felony prosecutions. Some memory loss ordinarily occurs after an interval of only one week in both adults and children, and such losses are more acute in children. While data testing children's memory over the span of months or even years does not exist, it seems plausible to project that lengthy delays before trial testimony is exacted create a serious reliability risk in a child's ultimate in-court account.").

by an impartial examiner" and that "surely they are even more vulnerable to suggestion in a helter-skelter real world when unexpectedly victimized by an adult." *Id* at 1260-1261. The application of the statute resulted in an unfair trial, because Mr. Kennedy was deprived the right to fully confront and cross-examine his accuser. The Court has recognized "that cross-examination is the 'greatest legal engine ever invented for the discovery of truth.'" *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *California v. Green*, 399 U.S. 149, 158 (1970), quoting 5 J. Wigmore, Evidence § 1367, p. 29 (3d ed. 1940). However, the vitality of that right was severely compromised when the State was allowed to introduce "unsworn" "ex parte" "depositions" to secure Mr. Kennedy's conviction and death sentence.

C. Testimony of Carolyn Kennedy concerning Ms. Hammond's accusations was blatant hearsay

The State attempted to bolster the testimony of Lavelle Hammond with hearsay evidence secured from her mother Carolyn Kennedy.

> A. One night she was in her room crying, crying like I had never seen her cry before. And I went in, I think I removed her from her room and let her came to sleep in my room to talk to her, to see what exactly was wrong with her - -
>
> Mr. Armato: Excuse me, Your Honor, and I hate to interrupt you. I don't mean to keep doing this.
>
> The Court: You have an objection?
>
> Mr. Armato: I do.
>
> The Court: Approach.
>
> [BEGIN BENCH CONFERENCE SOTTO VOCE.]
>
> Mr. Armato: Objection, Your Honor, it's all hearsay. It's not first report, first report happened years before that.

R. 5376. The State made the novel claim that the testimony was admissible because "this is the first reporting to her mother and the girl testified under oath on the stand the first person she ever told that Patrick Kennedy did this to her was her mother." R. 5377. The defense pointed out that the tape actually indicated that the first person she told was the police detective and the social workers. Nevertheless, the trial court sustained the objection and allowed the hearsay to come in:

> Q - I'm sorry, Ms. Hammond. You were telling us that you saw her in the room and she was crying?
>
> A. Right and her and my son shared a room. So I took her out the room to talk to her and let her sleep with me that night and *she told me that Patrick had did that to her* and I asked her why didn't she say anything. *She said because she was scared and she just couldn't hold it anymore that Patrick Kennedy had raped her.*
>
> Q. Okay, now up until when she told you this, did you all talk about the incident, the rape? I
>
> A. Never, never.

R. 5377-5378. This was nothing but rampant hearsay used to bolster the weak and non-descriptive testimony of Lavelle Hammond, and the videotape in which she agreed that Mr. Kennedy was involved.

In closing, the State returned to this evidence with force:

> December of ' 99 . *And what was important about that ladies and gentlemen is her Mother said that she had never seen her daughter cry like that before.* Tell her that she didn't want her mother to feel bad. She wanted her mother to get on with her life and that she couldn't hold it in anymore, anymore. And she had to tell her mother. Can you imagine that little girl keeping that bottled up inside of her. Think about that. She didn't want to disclose that to her mother. She didn't want to hurt her mother; but she couldn't hold it anymore, she had to tell her. And her mother took her out of the room with her brother and brought her in the other room *where she told her mother what he did to her.*

R. 5838. The State can hardly claim that this hearsay evidence was irrelevant to its case or harmless, when the prosecutor's

closing made such a strong campaign based upon it. Moreover, it can hardly be said in a straight-faced fashion that the discussion between Carolyn Kennedy and Lavelle Hammond was an "initial report." While La. C.E. Art. 801 (D) (1) (d) authorizes a prior consistent statement of a witness if it is "one of initial complaint of sexually assaultive behavior," the statement in this instance came twenty months after Ms. Hammond made her initial complaint of sexually assaultive behavior.[53]

V. THE TRIAL COURT IMPROPERLY PRECLUDED MR. KENNEDY FROM LITIGATING A MENTAL RETARDATION DEFENSE TO THE JURY (Assignment 17- 22)

Prior to trial, a defense psychologist tested Mr. Kennedy's I.Q. and received a valid and ultimately uncontested score of 70. R. 2283. Counsel moved to bar the State from seeking the death penalty based upon the United States Supreme Court' prohibition on the execution of mentally retarded defendants in *Atkins v. Virginia,* 536 U.S. 304 (2002),. R. 595-597. Because the case arose prior to the enactment of Art.icle 905.5, the court appointed a sanity commission to assess Mr. Kennedy's retardation per this Court's decision in *State v. Williams,* 2001-1650 (La. 11/01/02); 831 So. 2d 835.[54]

At the initial interviews of Mr. Kennedy by the sanity commission members, Mr. Kennedy was reluctant to acknowledge mental difficulties and insisted that he was "normal." The sanity commissioners were ultimately able to conduct their evaluations and determined that the I.Q. score taken by the defense psychologist was valid. R. 2429 ("So I did think it was a valid administration of the test by a competent Clinician."). The commissioners nonetheless concluded that Mr. Kennedy was not mentally retarded asserting: 1) that an IQ score of 70 was not *below* two standard deviations of the norm; 2) that there was no evidence of adaptive deficits in two or more life-skills areas; and 3) that despite evidence that Mr. Kennedy was in special education, did not pass 9th grade, and did poorly on standardized testing, there was insufficient evidence that onset of low-IQ occurred prior to the age of 18. *See* R. 2386, State 1, 6/27/2003. The district court adopted the commissioners' determination.[55]

Contemporaneous to the proceedings on Mr. Kennedy's mental retardation, the State moved to prohibit counsel from presenting this defense to the jury. R. 679-681. Only after the hearing and after the district court ruled that Mr. Kennedy was not mentally retarded did the district court indicate that it would prospectively apply Article 905.5:

> The Court is aware that that Act provides. that the issue of mental retardation is to be determined by a Jury. Obviously it is not the law at this moment. I've made that determination. . . . the Court is also aware that it says in that Act that if the Defendant fails to cooperate with Experts - such as Drs. Hannie and Griffin in this case - in their efforts to determine whether or not he's mentally retarded, then he shall have lost his right to have the Jury determine that issue. Be warned now that if the Act in fact takes effect on August the 15th which date occurs either during or immediately before the sentencing phase or the penalty phase of the Trial, my Ruling will be unchanged. Because apparently he's exempted himself by his conduct.

R. 2438-2439. The defense objected to the trial court's ruling. *Id.*

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[53] The Court also allowed the State to introduce other hearsay evidence. For instance, at R. 5564, the Court allowed Dr. Lee to testify to findings of Deborah Messina over defense objection. Dr. Messina authored the significant exculpatory report. The State did not subpoena her, and objected to a recess to allow the defense to secure her presence. Use of hearsay through Dr. Lee allowed the State to proceed with the inculpatory evidence without risking the exculpatory testimony of Dr. Messina.

[54] The defense also filed a *Motion to Stay Proceedings Pending Legislative Action Regarding Determination of Mental Retardation in Capital Defendants,* R. 581-583, which the trial court denied.

[55] For the reasons discussed herein, appellant asserts as error the trial court's denial of his motion to bar the death penalty based upon Mr. Kennedy's mental retardation. The trial court's ruling was fraught with error, including but not limited to the holding that an I.Q. score of 70 precluded a diagnosis of mental retardation. See R. 2437.

At the penalty phase, the State stipulated to the introduction of the report indicating that Mr. Kennedy had a 70 I.Q.; however, the defense request for an instruction that "individuals with mental retardation may not be executed" was denied.

A. The District Court Erroneously Applied a Statutory Sanction for "Non-compliance" Based upon Mr. Kennedy's Alleged Conduct at Interviews That Were Held Prior to the Enactment of the Statute.

Putting aside, for a moment, the question of whether a defendant's repeated insistence that he is "not mentally retarded" constitutes non-compliance with a forensic evaluation, *see* Section B below, and, putting aside for a moment the question of whether it would be constitutional to exclude an entire defense based upon apparent partial non-compliance with forensic investigation into a defendant's mental retardation, *see* Section C below, the district court in this case applied a sanction that was not even codified at the time of the evaluation – and a sanction that neither Mr. Kennedy nor his counsel was informed would be applied at the time of the interviews.

Mr. Kennedy was interviewed by two court-appointed doctors, Dr. Thomas Hannie and Dr. Phillip Griffin. Each doctor apparently informed Mr. Kennedy that he had the right to be silent under *Estelle v. Smith*, 451 U.S. 454 (1981).[56] Never was Mr. Kennedy – or his counsel – informed that there would be this draconian non-reversible sanctions for "non-compliance."

The prospective application of the statute was particularly unjust in this instance as the district court decided to apply the statute prospectively where it was detrimental to the defendant but not when it protected against the wrongful execution of a mentally retarded defendant. When defense counsel sought the protections advanced in the pending legislation–including the protection of a jury trial–the district court made clear that the defense was not entitled to such a protection because the statute was not yet in effect:

The Court:	I understand that. But you're referring to something that is not law.
MS. DAPONTE:	Correct.
The Court:	And won't become law until August 15th, if my reckoning is correct.

R. 2379.[57] Nevertheless, the trial court applied the sanctions included in the law that was not then in effect.

B. The Trial Court's Ruling that Mr. Kennedy was Non-Cooperative was Incorrect

The trial court's ruling that Mr. Kennedy was non-cooperative was incorrect. At the initial interviews, Mr. Kennedy was polite but asserted that he did not want to participate in the evaluation. Dr. Hannie testified that "the third time I was eventually able to get in to see him, and he did cooperate with an interview." R. 2387. Dr. Hannie observed that Mr. Kennedy was "very nice." R. 2389. Dr. Hannie learned that he had "earned the GED from Jefferson Parish Vo-Tech subsequently. He had been in Special Education in Junior High. He dropped out of school because he did not like going to school; and he was working. He failed the Ninth Grade. He was suspended from school for fighting." R. 2387-2388.

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[56] See e.g. R. 2389 ("I at that point attempted to explain to him the understanding that I have of the current law as it applies to confidentiality. When I'm doing evaluations for competency, we have what we call the *Estelle* Warning, after the *Estelle* Case and after the *Breaux* Case; which deal with what the material can and can't be used to address. And I told him, to the best of my knowledge that that's what it was. He had no problem with that. He seemed to fully understand what I was saying."). There is no indication in the record that Dr. Hannie did not appropriately warn Mr. Kennedy, per *Estelle*, that anything he said could later be used against him, and that he had the right against self-incrimination.

[57] Penalty phase of the proceedings began on August 26, 2003.

Dr. Griffin explained that Mr. Kennedy spoke freely with him after he presented the court order authorizing the interview.

Q: Did he just voluntarily talk to you, or did he require you to show some kind of identification?

A Yes; he wanted me to show the Court Order allowing me to talk to him.

R. 2418. In contrast to the district court's accusation that Mr. Kennedy was "non-compliant," Mr. Kennedy was merely resistant to being labeled mentally retarded:

> He explained that he was not retarded as a child, and that he totally disagreed with the test. So he was tested before, he was caught off guard and he was too old to play with blocks. He was upset because of the questions that were asked of him. He was upset because when he was asked to do Math, he has to add it up on paper. And he noted that he had done work with money, and he had operated cash registers.

R. 2391. Indeed Dr. Griffin similarly explained: "He does not like to be considered mentally retarded. He seems to be a proud person, and he resents that." R. 2417.

Ultimately, before ruling that Mr. Kennedy was non-compliant, the district court even observed that the experts were able to conduct their examination and were not frustrated by the defense in any manner:

> I have no reason to believe that their work was in any way frustrated by anything done by Defense Counsel; quite the contrary. I think Defense Counsel has complied with all of the Court's Orders in assisting the Experts in providing them with names and information wherever possible.

R. 2434. Indeed, the district court acknowledged that the experts believed that the "the test [] administered as being valid; the protocols were followed." R. 2436.[58]

C. *The Exclusion of An Atkins-Bar on the Imposition of the Death Penalty based upon Mr. Kennedy's Purported Lack of Complete Compliance violated the Fifth, Sixth, Eighth Amendment And Fourteenth Amendments*

To the extent that premature or prospective reliance on Article 905.5.1 (G) was permissible under the unique circumstances of this case, the application of the statute violates the Louisiana Constitution's prohibition on cruel, unusual or excessive punishment, and creates the unacceptable risk that individuals with mental retardation will be executed in violation of the Eighth Amendment, by precluding the mental retardation defense entirely and the removal of the issue from the jury's consideration, based upon a judicial finding that the defendant did not "fully cooperate" with the State's examination of him.[59] The application of the statute creates the unnecessary and unconstitutional risk that people with mental retardation will be executed in violation of the Eighth Amendment. *Cf. Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) (holding Eighth Amendment requires a

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[58] The lack of compliance identified by the district court appears to have included Mr. Kennedy's resistance to testing performed by his own defense expert:

> The Experts indicate that Mr. Kennedy was not, shall we say, composed, fully compliant or cooperative on the day that he was administered the examination by Dr. Zimmerman. Nevertheless, Dr. Griffin regards the test as administered as being valid; the protocols were followed.

R. 2436-2437.

[59] Section (G) currently reads as follows:

> If the defendant making a claim of mental retardation fails to comply with any order issued pursuant to Paragraph D of this Article, or refuses to submit to or fully cooperate in any examination by experts for the state pursuant to either Paragraph D or F of this Article, upon motion by the district attorney, the court shall neither conduct a pretrial hearing concerning the issue of mental retardation nor instruct the jury of the prohibition of executing mentally retarded defendants.

La. C.Cr.P. art. 905.5.1(G).

"greater degree of accuracy and fact finding than would be true in a non-capital case.").[60] The application of the statute also violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, along with the state analogs, by holding against a defendant his refusal to communicate with State actors, and by depriving the defendant of a full and fair defense to the charges at hand.

1. People with Mental Retardation Are Less Likely to Understand How to "Fully Cooperate" with State Ordered Mental Exams, and Are Thus At A Higher Risk of Wrongful Execution in Violation of the Eighth Amendment.

In *Atkins*, the Court premised its prohibition against the execution of individuals with mental retardation on the observation that the impairments associated with mental retardation as well "can jeopardize the reliability and fairness of capital proceedings" and result in "a special risk of wrongful execution. *Atkins*, 536 U.S. at 306-07, 320-21. The Court observed that imposing the death penalty was too fraught with danger, as mentally retarded defendants may be "less able to give meaningful assistance to their counsel." *Atkins*, 536 U.S. at 320-321. Section G of Article 905.5.1 unconstitutionally permits complete issue preclusion, based upon a finding of lack of complete cooperation – a lack of cooperation that is predicted in *Atkins* itself.

A defendant cannot "waive" or "default" his or her Eighth Amendment right not to be executed as a person with mental retardation by denying that he is mentally retarded; once mental retardation has been credibly raised in a case, the Eighth Amendment requires that it be resolved in conformity with the societal values that sit behind the Eighth Amendment. *See, e.g., Rogers v. State*, 575 S.E.2d 879 (Ga. 2003) (holding that the mental retardation issue was not subject to the defendant's attempted waiver and that the U.S. Constitution requires adjudication of the defendant's mental retardation claim once it has been put at issue); *Commonwealth v. McKenna*, 476 Pa. 428, 441 (1978) (holding that defendant sentenced to death cannot waive his Eighth Amendment challenge to an unconstitutional death penalty statute, noting that "[t]he waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue of the propriety of allowing the State to conduct an illegal execution of a citizen.").[61]

Individuals with mental retardation may, due to shame and other social ramifications – as Mr. Kennedy did in this case – deny that they have mental retardation and attempt to mask, or hide their disability.[62] When presented with a task that they are unable to accomplish, individuals with mental retardation may resist an instruction to attempt it rather than fail; excluding from the breadth of *Atkins* those individuals who are not competent enough to fully cooperate, turns the principle behind the protection

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[60] The facial constitutionality of the statute is presently before the Court in *State v. Turner*, 2005-KD-2425 (Oral Argument Conducted May 17, 2006). Regardless of that decision, the statute *as applied* in this case raises significant constitutional questions.

[61] Even if waiver of such a right were permissible, it would be impossible for an individual whose mental capacity has been put in doubt to knowingly, intelligently and voluntarily waive his right to this determination. Note that a refusal to take part in an examination may well be evidence of mental retardation and lack of competency. *See Lenhard v. Wolff*, 444 U.S. 807, 812, n.2 (1979) (Marshall dissenting, joined by Brennan) (finding questionable the defendant's competency to waive his pursuit of his appeals of a death sentence, noting in particular the defendant's desire that his death occur swiftly).

[62] For a thorough discussion of the ways in which people with mental retardation struggle to mask their disability, see Robert B. Edgerton, *The Cloak of Competence*, University of California Press, Berkeley, Ca., 1993. See also Bruce Frumkin, Ph.D., ABPP, *A Primer to Cope with Expert Testimony*, National Legal Aid & Defender Association Cornerstone, Fall 2003 ("Intellectually impaired individuals may try to mask their cognitive limitations.").

upside down.[63]

2. Preclusion of Litigation and Consideration of Mental Retardation Violates the Sixth Amendment

Mr. Kennedy was deprived the Sixth Amendment right to present a defense, to compulsory process and to a jury determination concerning the viability of this exemption from the death penalty. *See* U.S. Const. amend. 6; La. Const. Art. 1 Sec. 16; *Chambers v. Mississippi*, 410 U.S. 284 (1973); *State v. Van Winkle*, 658 So. 2d 198, 201 (La. 1995); *State v. Washington*, 386 So. 2d 1368, 1373 (La. 1980). The preclusion of an entire defense based on the defendant's perceived lack of cooperation has no precedent in Louisiana law. Indeed, it is *contrary* to the law as determined by the United States Fifth Circuit, which held in *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981) that the Sixth Amendment "forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." *See also United States v. Perez*, 648 F.2d 219, 222-223 (5th Cir. 1981) (holding it violates the Sixth Amendment to exclude defense expert's testimony due to a delay in turning over the witness's statement to the State, citing *Davis*); *United States v. Gonzalez*, 164 F.3d 1285 (10th Cir. 1999) (concluding that exclusion of a witness's statement as a result of discovery violations was too severe a sanction; remanding to the district court for consideration of less severe sanctions); *Ronson v. Commissioner of Correction of the State of New York*, 604 F.2d 176, 179 (2d Cir. 1979) ("the decision to preclude totally the defense of insanity violated petitioner's Sixth Amendment rights."). *Cf Taylor v. Illinois,* 484 U.S. 400, 409 (1988) (recognizing that the Sixth amendment right to present evidence may be "offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness").

At the minimum, other courts agree that the exclusion of an entire class of evidence and/or an entire line of defense based upon perceived lack of cooperation in an evaluation violates the Sixth Amendment.[64] Rather, when cooperation is lacking to a significant extent, courts utilize a series of less invasive sanctions. One such possible sanction is permitting the State to comment on the lack of full cooperation. See *Estelle v. Smith*, 451 U.S. at 458, n. 11, *citing Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir.-OLD 1979) ("The state might, of course, be permitted to comment on the defendant's refusal to be examined by a psychiatrist.").

3. Compelling A Defendant's "Full" Cooperation in a Mental Retardation Exam Violates the Fifth Amendment

The compulsion to co-operate violated the Fifth Amendment of the United States Constitution. The statute employed in this case compels "full" cooperation in violation of the Fifth Amendment, as a defendant who asserts the privilege against self-incrimination will be denied the protection offered by the statute. U.S. Const. Amend. V; see also La. Const. Art. 1 ' 13. It is

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[63] The ABA CRIMINAL JUSTICE STANDARDS specifically address possible consequences of a defendant's failure to cooperate in evaluations of his or her mental condition at the time of the offense. Suggested consequences include the exclusion of specific testimony or instruction to the jury. ABA STANDARDS FOR CRIMINAL JUSTICE 7-3.4(c) (2d ed., 1980) (adopted August 7, 1984). Under the ABA STANDARDS, in instances in which the defendant or defense witnesses do not cooperate with evaluations, the State is free to request limited sanctions, and also to expose to the jury the fact of the lack of cooperation.

[64] For instance, lack of "full cooperation" in an insanity evaluation does not result in the preclusion of the insanity defense, nor does it remove the issue from the purview of the jury, in Louisiana or elsewhere. *Cf Ronson v. Commissioner of Correc. of the State of N.Y.*, 604 F.2d 176 (2nd Cir. 1979) (overruling preclusion of insanity defense by trial court due to lack of notice of defense, finding that such a preclusion violated the defendant's Sixth Amendment rights).

beyond dispute that the State was required to advise Mr. Kennedy of his rights under *Miranda*. See *Estelle v. Smith*, 451 U.S. 454, 468-469 (1981). While the evaluation in *Estelle* went to future dangerousness, whereas in this case it is relevant to mental retardation, the need for Fifth Amendment protection exists nonetheless:

> During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] [person] acting solely in his interest." Id., at 469. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.
>
> The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," . . . and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." . . . We agree with the Court of Appeals that respondent's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase.

Estelle v. Smith, 451 U.S. at 467-468. Again, a clear corollary is that a defendant cannot be punished for invoking his Fifth Amendment at that sanity evaluation, *cf Doyle v. Ohio*, 426 U.S. 610 (1976) and the decision in *Estelle* makes clear what should happen if the defendant does invoke his Fifth Amendment rights:

> If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, but the State must make its case on future dangerousness in some other way.

Estelle v. Smith, at 468-469. Just as *Estelle* warned, Mr. Kennedy's assertion of his Fifth Amendment rights cannot be used against him. The State cannot condition the availability of Eighth Amendment protections on the waiver of Fifth Amendment rights. *See French v. District Court*, 384 P.2d 268, 270 (Colo. 1963) (" The statute which prescribes the procedures to be followed upon the entry of a plea of not guilty by reason of insanity cannot operate to destroy the constitutional safeguards against self-incrimination."). The district court's decision unconstitutionally conditioned the defendant's invocation of the Eighth Amendment prohibition on the execution of mentally retarded individuals on the defendant's relinquishment of his Fifth Amendment right to remain silent; the invocation of one right does not constitute a waiver of another.[65] The application of the statute in this case fundamentally denied the defendant the right to a reliable sentencing procedure, a faire trial, and due process of law.

VI. THE TRIAL COURT ERRONEOUSLY PROHIBITED THE DEFENSE FROM INTRODUCING EVIDENCE CONCERNING MR. KENNEDY'S LOW IQ AND MENTAL DISABILITY AT THE CULPABILITY PHASE (Assignment 23-25)

Prior to trial, the defense moved to allow guilt phase testimony of limited intellectual functioning. R. 78. The trial court denied the motion. The issue is presently before the United States Supreme Court in *Clark v. Arizona*, 05-5966 (cert granted 12/05/2005) ("(2) Whether Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the State's evidence on the element of mens rea violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?").

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[65] The prohibition against the execution of mentally retarded defendants is not susceptible to ordinary waiver. The Eighth Amendment's prohibition against the execution of mentally retarded defendants is not susceptible to ordinary waiver. *State v. Jett*, 419 So. 2d 844, 851 (La.1982) ("There is a well founded legislative policy against a person accomplishing such judicial suicide").The public itself has an interest in preventing individuals with mental retardation from being executed, and as such the ordinary adversarial rules of waiver do not apply.

Evidence of limited intellectual functioning was critical to understand Mr. Kennedy's conduct between the time of the rape and the phone-call to 911, and to explain or contextualize his statements to the police in the days after the offense. This evidence was not admitted to present a defense of "diminished capacity" and would have been irrelevant for that purpose as there is no specific intent requirement in the charge at issue.

A. Evidence concerning Mr. Kennedy's Mental Deficiencies was relevant to the reliability of his statement.

Evidence concerning Mr. Kennedy's mental deficiency was fundamental to the assessment of the reliability of his statement. Research has shown that people with the cognitive deficiencies similar to Mr. Kennedy encounter problems in the criminal justice system caused by their disability which impact the reliability of their statements.[66] Without evidence showing how Mr. Kennedy impairments effected his thinking, a jury could not understand that Mr. Kennedy's statement that he had–for instance–a degree in psychology was not correct, or to understand the significance of its falsity. Resolution of this issue is clearly governed by the United States' Supreme Court ruling in *Crane v. Kentucky*, 476 U.S. 683 (1986) .

In *Crane,* Justice O'Connor, in a unanimous decision of the Supreme Court explained how the trial court's finding of voluntariness was distinct and unrelated to the jury's weighing of the evidence:

> [T]he requirement that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the confession's reliability during the course of the trial. . . .A defendant has been as free since Jackson as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness.

Crane v. Kentucky, at 688, quoting *Lego v. Twomey,* 404 U.S. 477 (1972), and *Jackson v. Denno,* 378 U.S. 368 (1964). While in Crane the defendant had confessed, in this case Mr. Kennedy had insisted on his innocence; nevertheless, the State attempted to use those statements by claiming that the details established Mr. Kennedy's guilt. As such, the defense was entitled to present evidence that explained the statement or rebutted the State's claim:

> We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. . . . That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing.

Crane v. Kentucky, supra, at 689-691. Moreover, under Louisiana law, a defendant has the clear right to present evidence to the jury concerning the conditions surrounding a statement despite an adverse ruling on a motion to suppress. La.C.Cr.P. 703 (G) (ruling adverse to defendant prior to trial does not prevent the defendant from introducing evidence during the trial concerning the circumstances surrounding the making of the confession or statement). A trial court's decision to preclude evidence concerning the defendant's mental status at the time of the interrogation is clear error. *State v. Van Winkle,* 94-0947 (La.

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[66] People with mental deficiencies encounter unique problems when involved in the criminal justice system including:

Failing to have their disability identified by authorities because the individual is attempting to hide mental retardation;

Giving incriminating, but inaccurate "confessions," because the individual wants to please or is confused or misled by inappropriately used investigative techniques; . . .

Waiving rights unknowingly in the face of required warnings such as Miranda; [and]

Being victimized by the criminal justice system because their testimony is not deemed credible

Association for Retarded Citizens, *Access to Justice and Fair Treatment,* Pos. St.#20, www.thearc.org/posits/justice.html.

06/30/95), 658 So. 2d 198.[67] Mr. Kennedy's low IQ and mental difficulties are clearly relevant to the jury's assessment of the reliability of his assertions.[68]

B. Evidence of Mr. Kennedy's mental state was relevant to the State's claim concerning the "time-frame" and other conduct

Assuming, *arguendo*, the vitality of the State's claim that the "time-frame" of phone-calls and conduc prior to the 911 call were critical evidence that supported the conviction and death sentence, evidence of Mr. Kennedy's diminished intelligence was relevant to rebut or explain that claim.

A criminal defendant has the constitutional right to contest the State's case and present a defense. *Washington v. Texas*, 388 U.S. 14 (1967); *State v. Gremillion*, 542 So. 2d 1074 (La. 1989); *State v. Vigee*, 518 So. 2d 501(La. 1989). A defendant is similarly entitled to confront and cross examine all of the State's witnesses. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *State v. Mosby*, 595 So. 2d 1135 (La. 1992). As this Court most recently said: "It is difficult to imagine rights more inextricably linked to our concept of a fair trial." *State v. Van Winkle*, 94-0947 (La. 06/30/95), 658 So. 2d 198, 202.

Here, the State alleged that this time-frame "kills" Mr. Kennedy. But this is so, only if believed when viewed in the light of how a well balanced, normally intelligent person reacts to the discovery of his bleeding daughter. If believed, the conduct alleged by the State reflects the actions of a defendant who had either 1) a guilty conscious (the effort to clean the residence prior to calling the police) or 2) incredibly unsophisticated judgment. Because the trial court did not permit the defense to introduce evidence of Mr. Kennedy's mental limitations, the jury was left with only the first option.

VII. PASSION AND PREJUDICE INFLAMED THE JURY WHEN IT WAS FORCED TO ENDURE WATCHING LAVELLE HAMMOND CRY FOR LONG PERIODS OF TIME, AND THE TRIAL COURT ERRED IN SUSTAINING THE PROSECUTOR'S OBJECTION TO THE COURT'S PROPOSED INSTRUCTIONS TO THE JURY TO CONFINE ITS ATTENTION TO THE EVIDENCE (Assignment 26)

The most damning evidence presented to the jury had nothing to do with the offense itself, but was the mere drama of watching a young woman sit at the witness stand for almost thirty minutes, while she cried and sobbed uncontrollably. The district court erred when it denied the defense's motion for a mistrial and when it acceded to the demand of the State: to refrain from instructing the jury to confine its attention to the evidence.

Ms. Hammond was brought to the stand by the State, and left for five minutes in front of the jury crying, before the second prosecutor appeared and began questioning. Defense counsel described the situation:

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[67] Even prior to the enactment of Article 703(G) this Court recognized the fundamental importance of allowing a defendant to present all relevant conditions surrounding a confession. *State v. Hammler*, 312 So. 2d 306, 310 (La. 1975) ("The jury is the arbiter of what weight or effect shall be given to a confession, and therefore, the jury must have before it all the circumstances under which the confession was made."); *State v. Lovett*, 345 So. 2d 1139, 1142 (La. 1977) (defendant entitled to present evidence concerning weight to be given to the statement); see also *State v. Loyd*, 459 So. 2d 498, 508 (La. 1984) ("Of course, once a confession is introduced at trial the jury is entitled to determine the weight it should be given.").

[68] See *State v. Lewis*, 412 So. 2d 1353, 1355 (La. 1982) ("moderate mental retardation and low intelligence *do not of themselves* vitiate the ability to knowingly and intelligently waive constitutional rights and make a free and voluntary confession." *citing State v. Anderson*, 379 So.2d 735 (La.1980)). Indeed the State has the burden of proving beyond a reasonable doubt that a mental defect or condition did not preclude the voluntary and knowing giving of a confession. *State v. Lewis*, 412 So. 2d 1353 (La. 1982) ("[T]he State had the burden of proving that the defendant's mental defect did not preclude him from giving a free and voluntary confession with a knowledgeable and intelligent waiver of his rights. *State v. Coleman*, 369 So.2d 1286 (La.1979)"). Other courts have also made clear that exclusion of this type of evidence is improper. *Holloman v. Commonwealth*, 37 S.W.3d 764, 767 (Ky. 2001) (finding constitutional violation when the trial court excluded evidence showing that appellant's mental retardation may have affected the credibility of his confession).

> before she began testifying, I would note, and I don't know if it's already been noted for the record, or it has or hasn't, but I would just note for the record that she was brought in and left for five minutes on the witness stand without any support from the District Attorney's Office. I guess before the District Attorney's Office was ready to begin questioning

R. 5348. While it is unclear why Ms. Hammond brought into the court , the trial court castigated the prosecution for creating this display of emotion. Still the trial court denied the defense request for a mistrial.

The State proceeded to start a series of questions of Ms. Hammond, after the third of which she burst again into tears, forcing a recess. R. 5336-5337. The defense again unsuccessfully requested a mistrial again based upon the continued dramatic interplay and emotional outburst.

Thereafter the prosecution played a tape recording of Ms. Hammond's prior statement. R. 5344. At the end of the tape, the trial court acknowledged "[o]bviously this is an emotional moment in this trial and I'm saying this to counsel for both sides as well as everybody in the spectator's seats, alright." R. 5344. As counsel noted after the playing of the tape:

> The record needs to reflect that during the entire twenty-three or twenty-four minute tape, the victim was on the witness stand crying. I am certainly not impugning, I'm not suggesting anything other than it was prejudicial.

R. 5346. In response to the defense motion for a mistrial, and the repeated emotional outbursts that occurred, the trial court indicated that it would instruct the jury that

> I'm going to instruct this jury on the record to disregard anything they've seen on the witness stand in terms of, if they saw any emotional displays or outbursts, okay, and confine their attention to the evidence presented and nothing more.

R. 5351-5352. While the defense requested a mistrial, it maintained that at the very least such an instruction was necessary. The State objected to the instruction. R. 5352. The defense again asked for the instruction. R. 5352. At the State's behest, the trial court refused to give the instruction. R. 5353.

In a variety of circumstances, appellate courts have reversed convictions where emotion has tainted the legitimacy of the proceedings – even where instructions to ignore the emotional outbursts were given by the court. For instance in *State v. Stewart,* the South Carolina Supreme Court reversed the conviction even though the trial court had repeatedly instructed the jury to attend to the facts and not the emotional outbursts at issue:

> The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution. While this right does not require a "perfect" trial, the very heart of a "fair trial" embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment. . . .
>
> It is the duty of the trial judge to see that the integrity of his court is not obstructed by any person or persons whatsoever.

State v. Stewart, 295 S.E.2d 627, 630-631 (S.C. 1982). Similarly, in *Glenn v. State,* the Georgia Supreme Court reversed a conviction and death sentence where the trial court failed to instruct the jury to ignore the weeping of the victim's widow, where jury was exposed to 5-15 minutes of crying:

> It is contended that no effort of any kind was made by the court to eradicate the injury done to the defendant by this conduct on the part of the widow of the deceased, the court giving no instructions that the conduct was improper, and that the jury should disregard the conduct, and the court giving no rebuke to Mrs. Haddad; and that such conduct was prejudicial to the defendant for the following reasons: it was such as to arouse in the jury sympathy for the widow and revengeful feeling toward the defendant, to arouse in the jury a feeling of hatred toward the defendant, and to inject into the trial feelings and emotions from which the jury should have been free in order to calmly and dispassionately decide the issues. No counter-showing was made by the State as to this ground of the motion for new trial.

Glenn v. State, 52 S.E.2d 319 (Ga. 1949)(reversing conviction and sentence); see also *Rodriguez v. State,* 433 So.2d 1273, 1276 (Fla. App. 1983) (reversing conviction where the victim's widow shouted epithets and interspersed her testimony with impassioned statements evidencing hostility); *Price v. State* 254 S.E.2d 512, 513-514 (Ga. App. 1979) (reversing conviction where defendant's request for mistrial or remedial action were denied where emotional outbursts plagued proceedings); *Walker v. State*, 208 S.E.2d 350 (Ga. App. 1974) (finding an abuse of discretion when the trial court failed to ensure solemnity of courtroom and allowed emotional displays in the courtroom); *State v. Gevrez,* 148 P.2d 829, 832- 833 (Az. 1944) (reversing conviction where relative wept bitterly during the trial).

In this case, whether on purpose or out of incompetence – the prosecution placed Lavelle Hammond before the jury for five minutes, crying, while it simply left the court room. If this visual display of emotion was not sufficient, it then played a videotape for twenty-three minutes to the jury during which time Ms. Hammond cried intensely. It not only vigorously contested defense counsel's motion for mistrial, it then successfully objected to an instruction that the trial court had offered to give, directing the jury to refrain from being influenced by emotion. There can be no question but that such an instruction was necessary; and that the refusal to give such an instruction was reversible error. Moreover, the lack of an instruction explicitly allowed the State to take advantage of the spectacle it had made in closing argument where it argued for a conviction:

> We've shown you by evidence. When that little girl came in here to testify and started to cry, and couldn't even look at him.

R. 5837.

> You saw Lavelle in the courtroom; how hard it was for her to come here; you can only imagine, she's telling you what happened to her. She can't go to her Dad because he is a monster. Only you can protect her.

R. 5883.

> Y'all saw Lavelle. You heard Lavelle. . . .

R. 5884. The defense unsuccessfully objected and moved for a mistrial. R. 5885.

The trial court's decision not to give an instruction–at the State's behest–allowed the prosecution to argue that Lavelle Hammond's tears justified a conviction–but tears are not evidence of guilt or innocence but rather a cry for an emotion-based decision. For over one hundred years in Louisiana, it has been incumbent upon the trial court to instruct the jury to confine itself to the facts at hand:

> The error in this ruling is manifest, and it could hardly have failed to prejudice the accused in the minds of the jurors; and prejudicial error in the ruling of the trial judge is reversible error.
>
> . . . "There is ample authority in support of the doctrine that it is reversible error for the trial judge to fail, of his own motion, to give such instructions as will efface from the minds of the jurors [that which is] unauthorized and prejudicial, and there are many cases in which it has been held that the wrong done is not remedied even by such instructions.

State v. Williams, 40 So. 531, 533 (La. 1906) citing *State v. Thompson,* 30 So. 897 (La. 1901) (instruction necessary to remind jury to ignore prejudicial statements that were not evidence); *State v. Blackman,* 32 So. 334 (La. 1902)("Where the party who is injured by the wrong calls for the intervention of the court, upon objections, it will not do for the court to remain silent, leaving the matter of misconduct with the offending party and the jury.. . . Had the judge, in the case at bar, on objection made interfered, and either then, or later in his charge, instructed the jury . . . to give no heed to it, and otherwise instructed them as to their rights

and duties with regard to the character of verdict the law authorized them to return, we would hold that this saved the error of the prosecuting officer from vitiating the verdict.").

VIII. PROSECUTORIAL MISCONDUCT VITIATES THE VALIDITY OF THE GUILT AND PENALTY PHASE DETERMINATIONS (Assignments 27-30)

The prosecution secured a guilty verdict and a death sentence through misconduct.

A. Culpability phase argument was rife with misconduct

The culpability phase argument was rife with misconduct. The prosecution began by encouraging the jury to vote to convict in order to protect Lavelle Hammond. At the core of its guilt phase argument, the prosecution interspersed a plebescite argument with a victim impact claim:

> Only you can protect her... This defendant took the childhood from an eight-year old, and took her places she should never be. And she will live with that for the rest of her life.

R. 5883. The defense's objection and request for a mistrial on this ground was denied. R. 5885.

Whether this type of argument could have been admissible at the penalty phase is questionable, but it is clearly improper here. *See, e.g., State v. Prejean*, 379 So. 2d 240, 244 (La. 1980) (victim impact evidence of "the number of the [widow's] children was irrelevant" at culpability phase). Argument that a jury must convict a defendant in order to protect a victim or the community is highly improper. *State v. Sugar*, 408 So.2d 1329 (La. 1982) (holding that prosecutors should not turn closing argument into a plebiscite on crime by making overt references to community sentiment.); *State v. Hayes*, 364 So.2d 923 (La. 1978); *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir. 1985); *Hunter v. State*, 684 So.2d 625 (Miss. 1996) (prosecutor improperly asked jury during closing to "send a message" with its verdict).

The prosecution's argument also treaded upon Mr. Kennedy's presumption of innocence and his decision not to testify. While the prosecution acknowledged that "they don't have to put on any evidence whatsoever, and you can't hold that against him," it maintained that the reason the defense had failed to present a tape recording of Lavelle Hammond was because it was unhelpful:

> I suggest you didn't hear a tape recorder. . . . But I suggest you didn't hear that tape recorder because you would have heard the pressure that was being put on that child at that time.

R. 5881. The prosecution also made indirect comments on Mr. Kennedy's failure to testify. R. 5878. The trial court denied the objection[69] and the defense request for a mistrial. R. 5885.[70]

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[69] The defense objected:

> I want to put the following objections on the record to Mr. Pacieras rebuttal argument. First, is that he's the one who is telling that his daughter became a young lady. I believe that's the comment on the defendant's failure to take the witness stand. Mr. Paciera corrected himself and said, telling people, but I believe he made that comment and I would object and move for a mistrial.

R. 5885.

[70] As this Court made clear twenty-five years ago:

> In the United States almost universal legislation decrees, in varying phraseology, that no inference may be drawn from the failure of the accused to testify. *8 Wigmore on Evidence § 2272 (McNaughton rev. 1961).* And in Louisiana the history of the principle that it is error for the State's attorney to refer *directly or indirectly* to the failure of the accused to testify in his own defense is fully set forth in *State v. Bentley*, 54 So. 2d 137 (La. 1951). . . .
>
> A defendant is granted constitutional protection against self incrimination, which means that he cannot be compelled to give

The defense also objected to the prosecutor calling Mr. Kennedy a "monster":

Ms. Da Ponte: And I believe we object to the prosecutor calling Mr. Kennedy a monster And I would move for a Mistrial.

The Court: Motion for a Mistrial is denied.

R. 5886.[71] The defense also objected to the prosecutor's argument that it "tak[es] a man to do this. I believe its prejudicial and prohibited by case law and I object." The court said "I don't see any relief. It's denied." R. 5842.

B. The State Improperly Elicited Evidence Regarding the Comparison of this Offense to other offenses.

At issue in the culpability phase of the trial in this case was not the "severity" of the offense, but rather whether Mr. Kennedy or – as Lavelle Hammond initially reported – two young men committed the rape. Nevertheless, the State introduced the highly prejudicial testimony of Dr. Benton, that this was the worst offense:

BY MR. PACIERA: Doctor, I believe in your report you indicated, or I had a comment as to the severity of this injury that she received, as compared to any other that you had seen in the course of your career up until that point, - -

MR. ARMATO: Objection, Your Honor. May I approach?

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

MR. ARMATO: He's about to say that's the worst injury he's seen in four years, and don't see the relevance of that at all, I object to the relevance.

MR. PACIERA: And it is what the victim suffered, I think it's relevant for that reason. Secondly, it's relevant so that we can argue about why she would lie or not lie, that this has happened to her by somebody who is a care giver.

THE COURT: I'm going to allow it. . . .

MR. ARMATO: Note my objection.

(END OF CONFERENCE)

BY MR. PACIERA: Doctor, before we were interrupted, I think I had asked you about the severity, how you would classify this injury that Lavelle sustained.

A. In my experience?

Q. In your experience.

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evidence against himself . . . These rights would be hollow indeed if the silence they protect was allowed to be used against the accused by the State's attorney.

State v. Johnson, 345 So. 2d 14 (La. 1977). This principle has been upheld over and over again. *See State v. Mitchell*, 00-1399 (La. 02/21/01); 779 So. 2d 698 *citing State v. Fullilove*, 389 So. 2d 1282, 1283 (La. 1980); *Griffin v. California*, 380 U.S. 609 (1965). See also *Fossick v. State*, 453 S.E.2d 899 (S.C. 1995)(granting post-conviction relief on basis of prosecutor's improper comments on petitioner's lack of remorse, despite lack of contemporaneous objection).

[71] At the outset of the penalty phase arguments, the defense specifically objected again to the comments of the prosecutor in deriding Mr. Kennedy as an animal and monster, and specifically requested that the State refrain from such comments in the penalty phase. The prosecutors argued that they were entitled and that it was necessary to deride Mr. Kennedy as an animal and a monster:

Mr. Rowan: I believe the Court has referred to Ginger Berrigan's book, in which it says what you can and cannot say. And I believe one of those areas was, animal was included as being permissible. I do recall that in the Trial, where you pulled it out and showed us.

Mr. Paciera: That much I remember; some comment on animal, monster.

Mr. Rowan: I couldn't call him a scum-bag, along those lines; but I do recall the other ones.

The Court: As to the term animal, are there any that you remember?

Mr. Rowan: Yes; that's an animal. I mean, I do remember you reading it.

The Court: Tell me the words that were used.

Mr. Rowan: Wasn't it monster.

Mr. Armato: They called him an animal and a monster, if I'm not mistaken.

The Court: Those are the two statements that you feel you have to reach.

Mr. Rowan: Judge, whatever; no problem.

R. 6004-5.

A. At the time I had been in practice for approximately four years, and that was the most serious injury that I had seen as a result of a sexual assault.

R. 5472-5473.

The State had already tried to qualify Dr. Benton as an expert in the "treatment of pediatric sexual abuse" so that he could "discuss delayed reporting, fabrication" and the trial court firmly (and appropriately) rejected the request to qualify Dr. Benton in that manner. The trial court also granted the defense objection to testimony concerning the whether the victim was telling the truth or not:

> I will not allow this witness as a, pardon me, as an expert in pediatric forensic medicine to testify on the believability or credibility of this witness relative to her statements. I will not allow him to do that and that is my ruling.

R. 5435. Nevertheless, the trial court allowed the State to introduce Dr. Benton's characterization of the wounds as "the worst ever" to "so that we can argue about why she would lie or not lie," and to establish that her testimony was reliable. This is exactly what the trial court had prohibited, and that is prohibited by this Court's jurisprudence. See *State v. Chauvin,* 2002 KH 1188 (La. 05/20/03); 846 So. 2d 697, 707-708 (Finding that State cannot introduce testimony of trauma to bolster credibility of witness); *State v. Foret,* 628 So. 2d 1116 (La. 1993) (concluding that evidence of Child Sexual Abuse Accommodation Syndrome (CSAAS) is of highly questionable scientific validity and fails to pass the *Daubert* threshold test of reliability, and is inadmissible to establish that child is testifying truthfully in a criminal prosecution).

C. *At the Penalty Phase The State Committed Egregious Misconduct By Arguing to the Jury that Lavelle Hammond and Schwanda Logan Wanted Patrick Kennedy Dead.*

In plain violation of black letter law, the prosecution argued over defense objection that Lavelle Hammond and Schwanda Logan wanted Mr. Kennedy dead:

> I'm going to tell y'all something and then I'm going to sit down. You want to know what Levelle Hammond wants, or what she thinks. You want to know what Schwanda Logan was trying to tell you. Why does Patrick Kennedy deserve to die. . . . *Lavelle Hammond is asking you, asking you to set up a time and place when he dies.* . . . To turn out the lights.

R. 6023 - 6024. The defense immediately objected, and moved for a mistrial:

> It's testifying, and it's just so highly prejudicial and outside of the evidence and is not appropriate argument. I move for a Mistrial

R. 6024. The motion was denied. And the prosecutor went straight back to making the argument:

> Tell Lavelle Hammond we're turning out the light. You can go to sleep baby, because we're going to make sure - we're going to make sure that you sleep. We're going to make sure; turn out the light and rest easy.

R. 6025. This type of argument is flatly prohibited by this Court and the United States Supreme Court. Invoking the desires of the victims' family members was flatly prohibited by *Booth v. Maryland,* 482 U.S. 496 (1987), and upheld by the Supreme Court in *Payne v. Tennessee,* 501 U.S. 808 (1991). The ruling has been made abundantly clear by this Court's ruling in *State v. Bernard:*

> Evidence of the victim's survivors' opinions about the crime and the murderer is clearly irrelevant to any issue in a capital sentencing hearing. . . . [I]t is difficult to see how the victim's survivors' subjective opinions about the heinousness of the murder or the evil nature of the murderer's character can ever be relevant to the sentencing decision, especially after the prosecutor has presented all available objective evidence bearing on the circumstances of the offense and the character and propensities of the offender.

State v. Bernard, 608 So.2d 966 (La. 1992); compare *State v. Harris,* 01-2730 (La. 01/19/05); 892 So. 2d 1238, 1257 (observing that though comments concerning the desire of the victims' family in capital murder prosecution were error, *lack of a contemporaneous objection* indicated that defense counsel did not deem particular comments in that case oppressive).

Significantly, there had been no evidence that these were in fact the views of the victims' family members – indeed when the State performed the Uniform Capital Sentence Report seeking the views of the Lavelle Hammond and her mother on the propriety of executing Mr. Kennedy, the family apparently refused to meet with the investigators. See UCSR, Investigation at pg 12-13.[72]

D. The Prosecution Introduced Arbitrary Factors Into the Penalty Phase When It Asked the Jury To Consider Victim Impact Evidence about other unrelated offenses

The prosecution began its case for death by suggesting that the jury impose death based upon the impact that the alleged rape of Schwanda Logan had on her:

> Even after she came forward three to four years later; she's going to tell you ' the pressure that was put on her, about upsetting the marriage that her Godmother had; about how she still thinks about it until this day. How it's effected her and how she raises her children. . .

R. 5921. When the defense objected to the introduction of victim impact evidence concerning victims of unrelated offenses,[73] the State claimed that Ms. Logan had the right to tell the jury how she was impacted by the rape:

> *I believe that this woman has a right to tell this Jury how this has effected her;* the amount of pressure that she went through when she filed these charged; what she's gone through to her life; and she's had to feel in shame for not being able to bring these charges forward. It goes to what she's going to testify to. *She has a right to tell this Jury.* And I don't believe that there's anything under law that keep her from telling - . . .

R. 5921-5922. Defense counsel's objection was overruled. R. 5922.[74]

At the time of the offense, La.C.Cr.P. art. 905.2 provided: "The sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the impact that the death of the victim has had on the family members." La.C.Cr.P. art. 905.2 (1998).[75] While the amended statute appears to authorize the admission of victim impact

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[72] The UCSR Capital Sentence Review Investigation Report provides:

> I visited the home of Carolyn Hammond, the victim's mother, with whom the victim resides. Mrs. Hammond was not home but I left my business card with Lavell Hammond and asked to have her mother contact me as soon as possible. When I failed to get a response, I contacted Nancy Michele, a victim's advocate employed with the Jefferson Parish District Attorney's Office. She said that Carolyn Hammond had contacted her after receiving my business card. . . I requested the assistance of Michele and the prosecuting attorney, Donald A. Rowan to explain to Carolyn Hammond the nature of my investigation and the importance of her and or her daughter's statements.. Michele said she would contact Carolyn Hammond and get back with me as soon as possible. After receiving no response from Michele, I called the victim advocate to inquire of her progress with Hammond. She said that Hammond had agreed to speak with me as long as the interview was conducted at Michele's office. I agreed to these conditions and again waited for the meeting to be arranged. After further follow-up with Michele, I learned that Hammond requested "some time' before having to recall the incident again so soon. . . . It was agreed that we could allow a few more weeks before obtaining her statements.
>
> I contacted Michele again, and the meeting was arranged for December 2, 2003, but Carolyn Hammond did not show up. After this missed meeting, Michele said that Hammond failed to return her telephone calls, and avoided answering her telephone when Michele called.

Id at 12-13.

[73] The defense objected:

> I am objecting to the Prosecution' s remarks in his Opening. And I'm going to object to any attempt to put in the case into the past on Schwanda Logan. That is not what the facts are about. The facts are about the victim; the facts of the crime on the victim in the case. And the effect of the crime against Schwanda Logan is not - [relevant].

R. 5921.

[74] While the State ultimately failed to introduce the evidence concerning the impact of the alleged offense on Logan, its comments to the jury were left uncorrected, and the jury – despite defense objection to the contrary (see R. 5935) was never instructed to ignore the allegations. See R. 6003-6004 (where State argued against instruction on the *relevance* of the Logan evidence because "[B]asically what you would be telling them is that anything that Schwanda Logan may have related from the stand indirectly was wrong.").

[75] The statute currently provides:

> The sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates. The victim or his family members, friends, and associates may decline the right to testify but, after testifying for the State, shall be subject to cross-examination.

La.C.Cr.P. art. 905.2 (emphasis added).

evidence in aggravated rape cases, it still limits the focus of the sentencing phase to "the [singular] crime" at issue, and does not open the door to the views of victims, etc., of other unrelated offenses. Clearly this article limited victim impact evidence to the impact of the death of the victim on family members, and did not authorize the prosecution to introduce evidence of, inter alia, the impact of prior offenses on other unrelated victims and their families. See *State v. Gomez,* 00-0566 (La. 1/17/01), 778 So.2d 549. Other courts have similarly limited victim impact evidence to the capital charge at issue. *People v. Hope,* 702 N.E.2d 1282 (Ill. 1998) (improper to admit victim impact evidence from prior convictions). Indeed, as this Court recently made clear, testimony concerning the impact of other crimes on victims unrelated to the homicide:

> is not sanctioned by La.C.Cr.P. art. 905.2(A) because it does not "inform[] the sentencing authority about the specific harm caused by the crime in question . . . necessary to determine the proper punishment for a first degree murder," Payne v. Tennessee, 501 U.S. 808, 825 (1991), and does not relate to the defendant's character and propensities, as otherwise revealed by his actions in committing those crimes for which he has been convicted.

State v. Jacobs, 03-KK-3349 (La. 6/25/2004), 880 So. 2d 1, *citing People v. Dunlap,* 975 P.2d 723, 745 (Colo. 1999)("Evidence regarding the impact of a capital defendant's prior crimes on the victims of those crimes . . . is not admissible because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced."), *cert. denied,* 528 U.S. 893 (1999).

IX. THE TRIAL COURT IMPROPERLY INTRODUCED EVIDENCE OF AN UN-ADJUDICATED PRIOR OFFENSE UNDERMINING MR. KENNEDY'S RIGHT TO A FAIR SENTENCING HEARING AND A RELIABLE DETERMINATION OF SENTENCE (Assignment 32- 35)

The entirety of the prosecutor's case in support of death at the penalty phase was the allegation by Shawanda Simms Logan that Mr. Kennedy had "intercourse"[76] with her when she was eight or nine. R. 5929.

At the *Prieur*[77] hearing, Shwanda Sims Logawanda testified that Mr. Kennedy molested her on three occasions, and that on one of those occasions he may have penetrated her as well. She said it happened three times the year "the world's fair was going on" R. 1179.[78] At the pre-trial hearing, Ms. Logan testified that she could not clearly remember the second time. R. 1181. She testified that the third time "was like the beginning of summer until school started, you know, like in the Summer. So I don't really know about how long." R. 1183-1184. While Ms. Logan stated that she ultimately (four years later) went to the police on the matter, she acknowledged that she never went to Court. R. 1187. She testified that she never went to the doctor when it occurred, R. 1190, and never told Mr. Kennedy or his wife. R. 1199. When asked to describe the incident, Ms. Logan testified "It's hard to describe . . . it was years ago." R. 1198.

At trial, Ms. Logan testified that Mr. Kennedy had "intercourse" with her inappropriately three times: "The first time it was more like touching and that's basically it." R. 5930. She distinctly did not report sexual penetration. She made no mention at all concerning the circumstances of the second apparent touching. She described the third and final instance:

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[76] It is unclear whether the term "intercourse" referred to penetration or not.

[77] Initially the evidence was admitted as *Prieur* evidence, and the defense was successful in excluding it for that purpose. The State then indicated that it would introduce the evidence as Jackson evidence at the penalty phase, and the trial court "re-determined" the admissibility of the evidence. See R. 1513. The defense objected to its admission at that time. *Id.*

[78] The World's Fair occurred in New Orleans in 1984.

A: The last time. I remember one time when he checked me out of school. I remember that one clearly, when he had checked me out of school. And then he brought me back home and had intercourse with me, and then brought me by my cousin and told me to tell her that I had injured myself at school.

Q: After you had intercourse with him, did you notice if you were bleeding or not?

A: That particular time it was more like I had like a cut, a scratch or something down there.

R. 5930. Ms. Logan acknowledged that she "didn't tell anyone until a couple of years later." R. 5934.

A. These Allegations of Prior Rape and Molestation Were Too Remote to Admit.

These allegations of rape and prior molestation were too remote to admit. Pretermitting the propriety of the trial court's ruling that there was "clear and convincing" evidence supporting the admission of evidence concerning a rape that was 1) not reported until 4 years after it allegedly occurred, and 2) where no documentary evidence supported the verification of the offense,[79] the bare remoteness of the offense warranted its exclusion.

The defense vigorously objected to the admission of the evidence, and painstakingly detailed the difficulty of responding to a rape that was over 16 years old at the time of trial. In *State v. Jackson,* this Court made clear that remoteness of a prior offense limited the defendant's ability to rebut or contest charges:

> Recognizing that remoteness of the conduct may also bear on relevance, we further limit the criminal conduct on which the prosecutor may introduce evidence to that conduct for which the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for the first degree murder for which he is being tried.

State v. Jackson, 608 So. 2d 949, 955-956 (La. 1992). In this case, Mr. Kennedy was forced to attempt to rebut or explain charges of which he appears to have not been made aware -- until at least fourteen years after they allegedly occurred. Not only was Mr. Kennedy never charged with these other offenses, but it appears that they may have been dismissed without any effort to interview him on the charges.

As indicated, the defense made a herculean effort to locate an initial report concerning the incident, or the tape-recording of a prior statement by Ms. Logan, and was unsuccessful in doing so. Colonel Gorman testified that a tape of Shwanda Logan, along with reports of her allegations should not have been destroyed. R. 1331 ("There was documentation that Shawanda Simmns had reported apparently a rape in March of 1988. That documentation is in the internal records of the personal violence section. They checked the records with the main record section of the Sheriff's Office, but was unable to find any records there pertaining to any reports."). [80]

It is clear that the charges concerning the two incidents where no penetration is even alleged that the charge of molestation or attempted rape had prescribed. See La. R. S. 15:572 (West 1984). See also *Stogner v. California,* 539 U.S. 607, 609 (2003) ("California has brought a criminal prosecution after expiration of the time periods set forth in previously applicable statutes of limitations. California has done so under the authority of a new law that (1) permits resurrection of otherwise

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[79] Appellant also suggests that if this Court were to deem it conceivable to introduce evidence concerning an alleged rape that occurred in 1984, that Ms. Logan's lack of recall concerning the details of the offense and the lack of evidentiary support in documents and otherwise for her claim, suggests that the trial court erred in finding clear and convincing evidence to support the accusation.

[80] It is unclear to appellant counsel whether this document even contains a reference to the alleged perpetrator of the rape. Ultimately, Colonel Gorman testified that there was a policy in place at the time of the alleged report of the rape to videotape the complainant, and that he could not locate such a videotape. R. 1355. Colonel Gorman also testified that should an investigation have occurred a report would be generated concerning such a report.

time-barred criminal prosecutions, and (2) was itself enacted after pre-existing limitations periods had expired. We conclude that the Constitution's Ex Post Facto Clause, Art. I, § 10, cl. 1, bars application of this new law to the present case.").

It also appears that there is a strong argument that prosecution of Mr. Kennedy for aggravated rape of Shwanda Logan had also prescribed. At the time of Louisiana's "World's Fair" in 1984, the potential punishment for said offense was life imprisonment. See La. R.S. 14:42 (Supp. 1984) which provides in pertinent part: "[w]hoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence." Similarly, at the time of that alleged offense, only crimes punishable by death had no time limitation for prosecution. See Francis C. Sullivan, *Developments in the Law, 1983-84: A Faculty Symposium: Criminal Trial Procedure,* 45 La. L. Rev. 263, 269 (Nov. 1984) ("The Legislature amended article 571 to provide that there shall be no time limit upon the commencement of a prosecution for crimes punishable by life imprisonment or by death. As amended by 1984 La. Acts, No. 926, § 1 Code of Criminal Procedure article 571 now reads: "There is no time limitation upon the institution of prosecution for any crime for which the punishment may be death *or life imprisonment.*").[81]

Ultimately, in this case, the State introduced evidence that would have prescribed but for the *post hoc* emendation of the statute to extend the time limitation to non-capital offenses. Such an emendation violates the ex post facto clause of the state and federal constitutions, and indeed the United States Supreme Court has made that clear:

> A Constitution that permits such an extension, by allowing legislatures to pick and choose when to act retroactively, risks both "arbitrary and potentially vindictive legislation," and erosion of the separation of powers. . . .
>
> . . . Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. . . . And that judgment typically rests, in large part, upon evidentiary concerns--for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable. . . . Indeed, this Court once described statutes of limitations as creating "a presumption which renders proof unnecessary." . . .
>
> Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient. And, in that sense, the new law would "violate" previous evidence-related legal rules by authorizing the courts to "'receiv[e] evidence . . . which the courts of justice would not [previously have] admit[ted]'" as sufficient proof of a crime."

Stogner v. California, 539 U.S. 607, 611-616 (2003) (internal citations omitted).

Because Mr. Kennedy could not be–at the time of the instant offense in 1998–prosecuted for the 1984 aggravated rape of Ms. Logan, the introduction of the facts of the offense in his 2003 capital trial as evidence supporting a death sentence was improper, and introduced arbitrary factors into the sentencing proceedings.

B. There was not clear and convincing evidence that the Jackson offense occurred.

There was not clear and convincing evidence that the prior rape or molestation occurred.[82] While the offense was said

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[81] To the extent the State argues that the aggravated rape occurred after the law had been changed, the State plainly bore the burden to establish timeliness of the prosecution. La. C. Cr. P. art. 577 (". . . when the issue is raised, the state has the burden of proving the facts necessary to show that the prosecution was timely instituted.").

[82] Moreover, to the extent that Mr. Kennedy was sentenced to death based upon findings that were not "beyond a reasonable doubt" the death sentence violates *Ring v. Arizona,* 536 U.S. 584 (2002).

to have occurred in 1984, Ms. Logan waited four years after the alleged offense to even come forward and detail an allegation against Mr. Kennedy. Mr. Kennedy was never arrested on the charge of rape or molestation. At the time of the alleged rape, the Jefferson Parish Sheriff's Office had a mandatory policy of bringing charges in any credible instance of child molestation, and neither the victim nor her family could truncate an investigation. R.1439. As the defense argued:

> The testimony of Col. Gorman was that there is a complaint, that complaint is backed up. There will be an arrest unless somebody decides not to make that arrest and that somebody, as Col. Gorrnan testified, is not the child. The child cannot say I don't want this person arrested.

R. 1439. The lack of an arrest plainly establishes that the police believed that there was not even probable cause, much less clear and convincing evidence to support Ms. Logan's claim. See *id.* ("He was never even arrested for it. There was not even probable cause at the time. And clear and convincing evidence is a standard much higher than probable cause.").

C. *The Destruction of Relevant Evidence rendered Mr. Kennedy unable to rebut or challenge the Jackson Evidence*

Without the report, the defense made clear that it had no way of presenting evidence concerning why the matter was dismissed without charges having brought, or to impeach Ms. Logan's version of events. Indeed defense counsel broadly explained the relevance of the needed documents:

> There is exculpatory evidence somewhere and that is why I have filed a motion for the State to produce or disclose evidence exculpatory to the defendant under Brady and Kyles. The testimony of Col. Gorman was that there is a complaint, that complaint is backed up. There will be an arrest unless somebody decides not to make that arrest and that somebody, as Col. Gorman testified, is not the child. The child cannot say I don't want this person arrested. So, that something exculpatory happened between the time the complaint was made and the time it was abandoned because Patrick Kennedy was never arrested for this crime and he was never charged with it. And this is an aggravated rape of an eight year old. Even in 1988 that crime carried I a mandatory life sentence. There ' is exculpatory evidence . . . Without that evidence I have not been able to cross-examine Shawanda Sims effectively. We don't, we could not do that at the Prieur hearing. And I'm going to ask for the opportunity to do that at a Jackson hearing to have the evidence, the exculpatory evidence that we know is there, otherwise there would have been an arrest. I'm asking for the opportunity to have that evidence and cross-examine Ms. Sims with that evidence for the Court to determine whether there is now clear and convincing evidence, which is what Jackson requires, clear and convincing evidence that Patrick Kennedy committed that crime against Shawanda Sims Logan.

R. 1439. Without the reports, Mr. Kennedy was in no position to rebut or explain the allegations against him – rendering the admission of Ms. Logan's testimony an error of constitutional magnitude. *Gardner v. Florida,* 430 U.S. 349, 362 (1977) (holding it a denial of due process for the sentencer in a capital case to consider information that the defendant "had no opportunity to deny or explain."); *Gonzalez v. United States,* 348 U.S. 407, 413 (1955) (holding that a litigator cannot "present his case effectively" unless he is "cognizant of all the facts before the [decisionmaker].").

X. THE INTRODUCTION OF GRUESOME PHOTOGRAPHS VIOLATED MR. KENNEDY'S PRESUMPTION OF INNOCENCE AND RIGHT TO A FAIR TRIAL (Assignment of Error 36)

The introduction of gruesome photographs inflamed the passions of the jury and destroyed Mr. Kennedy's presumption of innocence. The trial court agreed that the photographs in this case were gruesome. Indeed some were apparently so horrifically detailed that the forensic expert in charge of them would not release them without a court order, concerned about the graphic nature of them. The defense moved pre-trial, R. 624, to exclude prejudicial photographs, stipulating:

> No argument can be made that the pictures are probative as to the issue of whether Lavell Hammond was

> raped, since the testimony of Dr. Scott Benton will establish that fact, as well as graphically detailing Lavelle Hammond's injuries s a result of the rape, obviating the need for gruesome and disturbing photographs. In such situations, the Louisiana Supreme Court has stated that "where the State has already made out its case and the photographs are . . . not 'substantially necessary to show material facts or conditions' the probability is high that the probative value 'of these pictures will be outweighed by their prejudicial effect." State v. Scott, 337 So. 2d 1087, 1089 (La. 1976).

At the hearing on the motion to exclude the evidence, the defense elicited evidence from Dr. Benton that he could describe the extent of the injuries without the photographs, and indeed that a degree in anatomy was necessary to actually understand the significance of the details in the graphic photographs:

> What I'm explaining to Your Honor is that this Doctor can explain to the Jury the injuries and what these gruesome photographs depict, which is worst. And that these photographs - particularly One, Two and Three - are best used by someone with a background in anatomy; that this Doctor can describe, as he did very eloquently in his Report - the extent of the injuries, without showing these photographs, which everyone - even at the bench - look at it and said I don't even know what they are. And they obviously depict what they depict, Your Honor.

R. 2523. Over defense objection, the trial court authorized their admission. R. 2525. This was plain error as the photographs had incredible prejudicial impact and little probative value – i.e. they said nothing about whether the jury should believe the statement made by Lavelle Hammond for the first eighteen months after the rape or the statement she made at trial.

The error in this case was compounded when, recognizing the prejudicial nature of the photographs, the trial court – however – was adamant that the photographs not be manipulated:

> The Court: No enlargements, no blowups, no nothing; that's it.

R. 2525. The trial court was quite clear:

> The Court: Five by seven.
>
> Mr. Rowan: Yes, sir. Nothing blown up, no.
>
> The Court: **No eight by tens, but five by sevens.**
>
> Mr. Rowan: **Five by seven.**

R. 2525. However, when the case came to trial several weeks later, the prosecution sought to introduce more photographs, and larger ones than had been identified at the hearing. Defense counsel objected:

> I am told that they are the exact same images that were subject to the hearing that we had as to the admissibility of these photographs, but I'm seeing that they are blown up quite - - quite a bit larger than the photographs that were presented at the hearing as to the admissibility of these, and I would object to that. You see, these photographs are being used instead of the ones that were actually used at the hearing, because they are much larger.

R. 5459. Although – in the presence of Dr. Benton – the State had agreed to use 5 X7 photographs pre-trial, in the midst of trial it now argued: "Well, the jury does need to be able to see it, Judge, I mean. We're talking about three photographs that are 8 x 10." R. 5460.[83]

Moreover, while defense counsel was told they were the "exact same images", it became clear that that was not true as well. Indeed the trial court was the first to observe that the State had blown up one image considerably. See R. 5461 ("There

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[83] Mr Paciera then backtracked and stated that only exhibit number 181, was larger than a 5 x 7. See R. 5465. It appears from the exhibits lodged at the Court that at least two, and possibly a third, photographs were 8 x 10.

are too many"). Thereafter, the State conceded that it had manipulated the photographs:

> I asked Doctor Benton if he needed this as a blow-up, these pictures, he said, - - especially since he was the one that introduced the photographs.

R. 5462. While the prosecution had initially informed the defense that these were the exact same photographs, simply blown up, when called to the fore on the issue, the prosecution stated:

> You' re not really talking about much difference, other than the new ones are - - they're not much - - and I don't think that they are a great deal larger than some of the ones that we already had. We're only talking about three photographs, so he can explain the injuries that this girl suffered.

R. 5643.[84] "[P]hotographs should be excluded where their logical relevancy will unquestionably be overwhelmed by the inherently prejudicial nature of the particular picture; and photographs which are calculated to arouse the sympathies or prejudices of the jury are properly excluded if they are entirely irrelevant or not substantially necessary to show material facts or conditions." *State v. Morris*, 157 So.2d 728, 731 (La. 1963). Although the admission of gruesome photographs is not reversible error unless it is clear that their probative value is substantially outweighed by their prejudicial effect, La.C.E. Art. 403; *see, e.g., State v. Broaden*, 680 So.2d 349, 364 (La. 2001), here, the photographs had no probative weight since the defense stipulated that Lavelle Hammond was raped, and Dr. Benton testified that he could explain the injuries without the photographs.

XI. THE TRIAL COURT ERRONEOUSLY ALLOWED THE STATE TO ELICIT "EXPERT" TESTIMONY ON GRASS DISCOLORATION AND STAINS OVER DEFENSE OBJECTION, WITH NO DAUBERT HEARING IN VIOLATION OF MR. KENNEDY'S RIGHT TO A FAIR TRIAL (Assignment 37)

There was no *Daubert*[85] hearing on the admissibility of expert testimony o the rate of grass blade brake-age or discoloration. The trial court has a "gate-keeper" obligation to exclude junk science, and failed to perform that obligation when it allowed the State to elicit testimony that grass-fracture rapes established that Lavelle Hammond was not raped outside on the grass. In *State v. Robinson,* this Court observed – with respect to gunshot residue –

> In *State v. Foret,* this Court held that where a trial court is considering the admissibility of proposed expert testimony, the trial court must first make "'a preliminary assessment' 'of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue.'" *State v. Foret,* 628 So. 2d 1116, 1122 (La. 1993) (quoting *Daubert,* 509 U.S. at 592-93). The trial court must also determine whether the expert is proposing to testify to (1) "scientific, technical, or other specialized knowledge" that (2) "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Foret,* 628 So. 2d 1116, 1121; (citing La. C.E. art 702). The ultimate goal of the trial court under this new standard is to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Id. at 1122 (citing Daubert, 509 U.S. at 589).

State v. Robinson, 2002 KA 1869 (La. 4/14/04); 874 So. 2d 66, 76. While gunshot residue might have a scientific pedigree, grass blade brake-age rates in Louisiana "winter" certainly does not. In this case, the State elicited – over the objection of the defense – testimony from Dr. Henry Lee, that there was no "large smear or broken grass, disturbance of the soil. Usually, those are the

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[84] In an argument that is simply incomprehensible to undersigned counsel, the State argued that it should be allowed to introduce the gruesome photographs that had not been subject of the pre-trial hearing and that exceeded the trial court's previous limitation because the trial court had precluded the State from introducing unreliable psychiatric evidence on the delayed reporting of sexual abuse:

> You've already told us that we can't have him explain about delayed reporting, but at least I'd like the jury to understand the severity of the injuries that she sustained, so that we can explain that much to them.

R. 5643. The argument appears to be that because the Court excluded one area of unreliable and prejudicial evidence, it should remit and allow admission of another.

[85] See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579(1993).

indicator, say a struggle." R. 5595. The defense objected based upon surprise nature of the testimony, its reliability and the State's failure to provide a report detailing such a funding prior to trial. See R. 5591. The trial court instead of performing its gate-keeper function, left the defense to ineffectually resolve the matter on cross-examination. In so doing, the trial court abdicated its gate-keeper role.

In closing arguments, the State hammered home on the lack of grass brake-age arguing that Lavelle Hammond's initial statement to the police was false because Dr. Lee had found no blades of broken grass:

> I'll tell you; lets get to what's important. What did Dr. Lee tell you about this, the spot where that was. What did he tell you. Think back. Think back very long and hard about this. He said to you that he examined this area where they were brought to the police officers; indicated that's where he found his daughter and all those other things. Indicated to him that when he examined this, none of the blades of grass are broken. None of the area is disturbed. . . . its so easy to pull grass up in winter time.[86] That's what's important. What did he tell you. He told you that in his opinion that nothing happened here.

R. 5835. Allowing an expert to testify about the rate and significance of broken blades of grass violates the principles laid out in *Daubert* and constitutes quintessential junk science.

XII. DISCRIMINATION IN SELECTION OF GRAND JURY FOREPERSON REQUIRES REVERSAL OF THE CONVICTION AND DEATH SENTENCE (Assignment 38-41)

Discrimination in the selection of the grand jury foreperson requires reversal of the conviction. See *Campbell v. Louisiana,* 523 U.S. 392 (1998); *State v. Langley,* 95-1489 (La. 04/03/02), 813 So. 2d 356. Appellant filed a motion to quash the indictment based upon racial and gender discrimination. R. 403-507. The trial court found a *prima facie* case of discrimination but refused to quash the indictment based upon its assessment of the State's rebuttal evidence. R. 2122. On writs, the Court of Appeal held that the State's rebuttal evidence was deficient as a matter of law, but refrained from quashing the indictment based upon its view that there was not a prima facie case of discrimination. See. *State v. Kennedy,* 2002-214 (La.App. 5 Cir. 06/26/02); 823 So. 2d 411.[87] Facing the exact same prima facie record of discrimination in another Jefferson Parish case this Court ruled:

> Writ granted in part; otherwise denied. In the event the state elects not to re-indict the defendant by a grand jury selected according to La.C.Cr.P. art. 413(B), as amended by 2001 La. Acts, No. 281, the case is remanded to the trial court for it to conduct a full evidentiary hearing on the issue of discrimination in the selection of grand jury forepersons in Jefferson parish in light of this Court's recent decision in *State v. Langley*, 95-1489 (La. 4/3/02), 813 So. 2d 356, 2002 WL 497042.

State v. Jacobs, 2002-2087 (La. 08/30/02); 823 So. 2d 942.[88] In *State v. Jacobs*, the State chose to re-indict.

Appellant's prima facie case of discrimination was not only the same as that in *Jacobs,* but as strong as the evidence presented in *State v. Langley.* It would be ironic if Ricky Langley, a white male charged with capital murder received the benefit of the Court's prohibition on discrimination on the basis of race or gender, while Patrick Kennedy, an African-American man

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[86] Whether March is considered winter in Jefferson Parish, Louisiana, is a question that may well have been beyond the expertise of the expert from Connecticut.

[87] This Court denied supervisory writs. *State v. Kennedy*, 2002-2088 (La. 01/24/03); 836 So. 2d 43 (Johnson J. dissenting).

[88] In *Jacobs*, the only evidence introduced by the defendant was – with the State's agreement – the record of the *prima facie* case of discrimination introduced in *Kennedy's* case. The only difference between the *Jacobs* case and the *Kennedy* case was that in *Jacobs*, the district court had found no *prima facie* case of discrimination so the State had not been required to present any rebuttal evidence.

charged with aggravated rape, did not. See *State v. Langley, supra.* It is further ironic that Lawrence Jacobs, who simply presented the transcript from the *Kennedy* hearing on the Motion to Quash, received relief whereas Mr. Kennedy did not.

The trial court's ultimate basis for finding no race or gender discrimination was predicated on the State's rebuttal evidence which comprised solely the testimony of the Honorable Marion Edwards, who was a prosecutor at the time of the selection process, and his assessment of the reputability of Judge Allen Green who selected a white male foreperson in this case.[89] The Court of Appeals found this evidence to be insufficient as a matter of law to rebut a prima facie case of discrimination. Nevertheless, this is the indictment upon which the prosecution of this case is based.

A. *The Evidence Presented By the State to Rebut A Claim of Discrimination was Constitutionally Insufficient.*

The trial court found a prima facie case of discrimination. The evidence presented by the State to rebut the prima facie case of discrimination was constitutionally insufficient. In response to the trial court's ruling that the defense had presented a prima facie case of discrimination, the State called Judge Marion Edwards. Judge Edwards had been a prosecutor during the relevant period of time.[90] Judge Edwards indicated that when he was a prosecutor, he used to help select forepersons by seeking a show of hands from volunteers, and by"includ[ing] in the potential forepersons to be interviewed, *anyone that just sort of look to me like they would be comfortable organizing a Grand Jury and capable of it.*" R. 2129.

While Judge Edwards testified that the selection of a grand jury foreperson was the district court – and not the prosecutor's – responsibility, R. 2130, at best all he could do was testify that he did not believe that the appointing judge was animated by racism. R. 2130-2131.

Whether in assessing *Batson* claims, Title VII discrimination claims, claims under 42 U.S.C. 1983, or in assessing claims of discrimination in the selection of grand jury forepersons, the Court has consistently held that protestations of good faith are not sufficient:

> This [Batson] warning was meant to refute the notion that prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. What it means by a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. See *Hernandez,* supra, at 359; cf. *Burdine,* supra, at 255 ("The explanation provided must be legally sufficient to justify a judgment for the defendant").

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[89] Their were repeated comments by the State and the Court concerning the fact that the appointing judge, Judge Green, was himself an African-American male. See R. 2007-2008 ("The reason was articulated by Your Honor on this very bench, when you said that you would be interested in finding out how we would go about proving that Judge Alan Green discriminated in the selection of the Grand Jury Foreman in this case."); R. 2009 ("For the record, the Judge who made that selection, as I am informed by the Defense, was Judge Alan Green; a Black Judge."). See also R. 2142 ("In this particular case, Francis Celino, who was a white male, was picked by Judge Allen Green, who was an African American). Whatever the merits of an argument that the selection process was not infected by discrimination in this case because the selector of the white foreperson was an African-American judge, there appear to be dwindling grounds to support the integrity of that judge's deliberative process. See e.g. Michelle Krupa and Manuel Torres, *Defendant admits to bribing judge Ex-bail bonds worker cuts deal in court probe,* The Times Picayune, Friday, June 10, 2005. Videotape of Judge Green accepting envelopes of cash reflected what might be called disrespectful attitudes towards women and the office in which he served.

[90] He testified:

> We would receive a list of potential Grand Jurors in the District Attorney's Office. Those potential Jurors would be contacted by phone, and a brief interview would be conducted with them. I would review that list. The day that the Jury was supposed to be selected, I would appear in Court with the list that I had previously referred to. And at that time the Judge, with me present, would select a Foreperson and eleven members of the Grand Jury

R. 2125.

Purkett v. Elem, 514 U.S. 765, 769 (1995); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (Title VII).

It is clear that the case-law concerning race discrimination in the selection of petit jurors is applicable to the challenge concerning race discrimination in the selection of grand jurors in this case. Indeed, when *Batson* plainly held a prosecutor may not "rebut the defendant's case merely by denying that he had a discriminatory motive or '[affirming] [his] good faith in making individual selections,'" *Batson v. Kentucky*, 476 U.S. 79, 98 (1986), the Court was specifically quoting a prior Louisiana grand jury case. See *id* citing *Alexander v. Louisiana*, 405 U.S., at 632. In *Alexander* the Court held that the State's effort to rebut the claim of discrimination with evidence similar to that which was used in this case, was legally insufficient:

> The State has not carried this burden in this case; it has not adequately explained the elimination of Negroes during the process of selecting the grand jury that indicted petitioner. As in *Whitus v. Georgia*, supra, the clerk of the court, who was also a member of the jury commission, testified that no consideration was given to race during the selection procedure. App. 34. The Court has squarely held, however, that *affirmations of good faith* in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.

Alexander v. Louisiana, 405 U.S. 625, 632 (1972). In this case, the only evidence the State presented concerning the selection process was the testimony of Marion Edwards, who testified that self-selected hand-raising and affirmations of good faith were the method for selecting grand jury forepersons.[91]

B. *Once The State Presented Evidence, the Question of Whether The Defense Made Out A Prima Facie Case of Discrimination is Moot.*

In this case, the State presented evidence at the second stage of the discrimination analysis. The law is clear, once the State presented evidence, the question of whether the defense made out a prima facie case of discrimination was moot:

> . . . the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. This departure from the normal course of proceeding need not concern us. We explained in the context of employment discrimination litigation under Title VII of the Civil Rights Act of 1964 that "where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). The same principle applies under Batson. Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.

Hernandez v. New York, 500 U.S. 352, 359 (1991).

Although *Batson* addressed allegations that a prosecutor's discriminatory use of peremptory challenges in selecting a petit jury violated equal protection, the Court noted that "the basic principles prohibiting exclusion of persons from participation in jury service on account of their race 'are essentially the same for grand juries and for petit juries'." *Batson v. Kentucky*, 476 U.S. at 84 n.3 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 626 n.3 (1972)). Indeed, recently, this Court has applied this observation to defendants as well as prosecutors:

> Once the explanations were offered and the trial court ruled on the ultimate issue, the preliminary issue of whether a prima facie showing was made is moot.

State v. Scott, 04-1312 (La. 01/19/2006), 921 So. 2d 904 citing *State v. Dunn*, 2001-1635 (La. 11/01/02); 831 So. 2d 862. In this case, regardless of the strength of the *prima facie* case of discrimination (discussed below) the only question at issue is whether

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[91] The Court of Appeal noted that as a matter of law, the testimony of Judge Edwards – who was not involved in the selection of the foreperson in this case, as insufficient.

the State's response was sufficient as a matter of law – which it was not.

C. *The Trial Court Correctly Found A Prima Facie Case of Discrimination*

The trial court correctly found a prima facie case of discrimination. As an initial matter, it is important to note that deference is due the trial court's determination in this regard. The finding of a *prima facie* case of discrimination is a mixed question of fact and law. *Rideau v. Whitley*, 237 F.3d 472, 486 (5th Cir. 2001). This Court, therefore, owes substantial deference to the trial court's finding and application of the facts, since the trial court had the benefit of a full explanation by the witnesses. *United States v. O'Keefe*, 128 F.3d 885 (5th Cir. 1997); *State v. Juniors,03-2425* (La. 06/29/2005), 915 So. 2d 291, 322-323 (reviewing trial court's finding regarding a prima facie case of discrimination for an "abuse of discretion.").

Here, the trial court correctly found that appellant had proved each of the three prongs of discrimination. "First, the excluded citizens were part of a 'cognizable group.' Second, that the degree of under-representation was significant over a period of time. And finally, that the selection process was susceptible to abuse." *State v. Langley*, 813 So.2d at 363, *quoting Castaneda v. Partida*, 430 U.S. 482, 494, 97 S. Ct. 1272, 1280, 51 L. Ed. 2d 498 (1977); *Johnson v. Puckett*, 929 F.2d 1067, 1071-72 (5th Cir. 1991); *see also Guice v. Fortenberry*, 661 F.2d 496 (5th Cir. 1981), *citing* M. Hamburg, Statistical Analysis for Decision Making 690, Table A-1 (2d ed. 1977). [92]

1. Women and African-Americans were significantly under-represented

Appellant presented a significant case of discrimination establishing that the probability that women are not the victims of discrimination when the foreperson is by a male judge in Jefferson Parish is roughly 1-in-70,000; in other words, she is twice as likely to killed by a bolt of lightening. See R. 2096-2097.[93]

At the evidentiary hearing on Mr. Kennedy's *Motion to Quash the Indictment* held on January 14, 2002, Mr. Kennedy presented comprehensive statistical evidence, with the help of Professor Joel Devine, the same expert who testified in the *Langley* case decided by this Court. The figures presented by Mr. Kennedy to the trial court were stronger than those in *Langley*. Here, Dr. Devine testified the probability "that males Judges would pick only five women, when 52.5% of the population is women, out of thirty-three choices, is approximately one in 69,970." R. 2096-2097. Dr. Devine testified that a woman was almost twice as likely to die from lightening, then be selected grand jury foreperson by a male judge. R. 2099. Even including the female judges, Dr. Devine testified that a woman was only likely to be selected foreperson 1-in-1,226. This was roughly comparable to the statistics in *Langley*.

The defense also presented evidence of race discrimination, including evidence that two African Americans were appointed grand jury forepersons in over thirty-three grand juries. See D-3, 12/14/2002. Based upon comparison with the pool

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[92] There is no debate that African-Americans and women make up cognizable groups. Nor is there any question that the system then in place was susceptible to abuse. *See Campbell v. Louisiana*, 523 U.S. 392 (1998).

[93] Mr. Kennedy also presented evidence that the probability that an African-American person will be allowed to take the role of foreperson in Jefferson Parish was less than 50% the probability that a white person will be invited to exercise this vital right of citizenship.

of registered voters, Dr. Devine found that the chances of only two African Americans being selected was 0.00826 or 1-in-121.[94]

In *Langley*, the Court found a *prima facie* case of discrimination where:

> Specifically, African-Americans comprised 21.6% to 22.9% of the pool of grand jurors randomly selected from the venire but only 6.1% to 7% of the grand jury forepersons selected by the judge from the venire, amounting to an absolute disparity ranging from 15.5% to 15.9%. With respect to women who made up 52.4% of the pool of actual grand jurors randomly selected from the venire, only 27.9% of the women were forepersons selected by the judge from the venire, thereby resulting in an absolute disparity of 25.4%. These absolute disparities were sufficient statistically to establish the degree of under-representation from which the district court could find that the defendant had established a prima facie case of intentional discrimination.

State v. Langley, 813 So. 2d at 371-372 citing *Castaneda v. Partida*, 430 U.S. at 495-96, 97 S. Ct. at 1280-1281 (*prima facie* case shown where Mexican-Americans comprised 79.1% of the county's population but only 39% of those called for grand jury service)(absolute disparity of 40.1%); *Turner v. Fouche*, *supra* (blacks comprised 60% of the general population but 37% of the grand jury lists)(absolute disparity of 23%); *Whitus v. Georgia*, 385 U.S. 545 (1967)(blacks comprised 27.1% of the tax digest but only 9.1% of the grand jury venire) (absolute disparity of 18%); *Jones v. Georgia*, 389 U.S. 24 (1967)(19.7% of blacks on tax lists but only 5% of grand jury lists)(absolute disparity of 14.7%).

LANGLEY - KENNEDY COMPARISON

	Race (black)	Gender (women)
Langley General Population	21.6 - 22.9%	52.4%
Kennedy General Population	17.63 - 22.9%	51 -51.2%
Langley Forepersons	3/43 (.069)	12 /43 (27%)
Kennedy Forepersons	2/36 (.055)[95]	9/36 (25%)
Langley odds of non-discrimination	1 in 392	1 in 1502
Kennedy odds of non-discrimination	1-in-121	1-in-1226

The numbers in this case are roughly comparable to the numbers in *Langley*, where the district court and this Court found discrimination. Using binomial distribution, rather than merely assessing comparative and absolute differences,[96] Dr. Devine found ample evidence of discrimination. Applying the correct figures[97] to the proper analysis establishes that the under-

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[94] Dr. Devine noted that while the registered voter population was 15.6% African-Americans, that only 9.9% of the general venire over the proceeding fifteen years was African-American.

[95] The defense offered to proceed further with investigation and presentation of evidence, and produce statistics concerning the same number of grand jury selections as were adduced in *Langley*, however the district court rejected that offer.

[96] As he testified then–and as this Court explicitly found–there are much more precise methods of going about assessing the meaning of the figures that were before the lower court:

> Dr. Devine referred to the statistical methodology as binomial distribution. Binomial distributions have long been associated with jury discrimination issues.

Langley, at 362, n.9; *see also State v. Givens*, 99-K-3518 (La. 01/17/2001), 813 So. 2d 418.

[97] Just as in *Langley*, the defense presented evidence of –

> 1) the census data for Jefferson Parish – wherein whites (over time) ranged from 82.3% to 77.1% of the population, and African-Americans made up 17.6% to 22.9% of the population; men made up 48% of the population and women made 52% of the population;
>
> 2) average voter registration population in Jefferson Parish, which was 85% white and 15% black; 45.8% of the registered voters were men; 54.2% of the population was women; and
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> 3) the race and gender of the randomly selected grand jurors from 1988 to 1996, reflecting 87.7% white, 12.3% black, 50.4% male and 49.6% female.

representation of African-Americans and women could not have occurred by chance.

2. The Under-Representation Occurred over A Significant Period

The defense presented evidence that the under-representation occurred a significant period of time, presenting evidence of race and gender discrimination going back twenty years. The State argued,(and the Court of Appeal agreed) that the trial court should only look at ten years of selections to determine whether discrimination existed. The State made precisely the same circular argument in *Langley*, and this Court rejected it. See also *Langley*, 813 So.2d at 363, quoting *Castaneda*, 430 U.S. at 494 (requiring poof of discrimination over a "significant over a period of time.")

Without looking at a significant period of time, it is impossible to determine whether the facts presented reflect coincidence or a statistical improbability sufficient to raise a *prima facie* case of discrimination For this reason, every significant issue on this issue has looked to longer than ten years.[98] In *Langley*, for instance, this Court looked at an approximately **twenty-two** year period. *Langley*, 813 So.2d at 360.[99] The seminal United States Supreme Court cases have repeatedly addressed periods longer than ten years. *Hernandez v. Texas*, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866 (1954) ("The State of Texas stipulated that 'for the last **twenty-five** years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.'"); *Norris v. Alabama,* 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935) (indicating that a significant period of time was more than **twenty** years); see also *Johnson v. Puckett,* at 1072 (**twenty** year period of substantial under-representation).

In *Johnson v. Puckett*, the State of Mississippi attempted to defend a vast history of discrimination by suggesting that the relevant period of time did not involve 33 selections as the defense had suggested but rather eight years. The state court held that it was appropriate to look at this short period because there had been "improvements" in the selection process.[100] The federal Court of Appeals rejected the notion out of hand:

> The significant period of time for purposes of determining a federal constitutional violation is not limited, as the Mississippi Supreme Court held, to the period after passage of the Mississippi Jury Selection Act, which was a state mandate directing a non-discriminatory random selection process for grand and petit jurors. The Panola County court could not erase its earlier failure to adhere to federal constitutional requirements merely by following state law -- and thus complying with both federal and state requirements -- for five years. Nor is it relevant that the Jury Selection Act is indicative of "great strides" in Mississippi in eradicating racial discrimination in the selection of juries, as the Mississippi Supreme Court contends. *As we have previously observed with regard to similar statutory reforms in Louisiana,* to accept the rationale of the Mississippi Supreme Court would be to hold that Johnson has failed to state a prima facie case "simply because [Mississippi] has eliminated one admittedly discriminatory step in its foreman-selection process."

Id. at 1072 (emphasis added).

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[98] Of course, since the focus here is on the number of decisions made, the exception to this would be a huge metropolitan jurisdiction where many grand juries were seated simultaneously. Thus, if ten forepersons were picked for ten grand juries every six months, it would be possible to secure a significant number in less than twenty years. However, such an analysis does not apply to Jefferson Parish, nor any other jurisdiction in Louisiana.

[99] "The relevant time period to be examined was identified as the twenty-two-year period commencing March 27, 1972, and running through June 23, 1994. . . . During that period, 49 grand juries were impaneled. . . ." *Id.*

[100] *Johnson v. State*, 404 So.2d 553, 555 (Miss. 1981) (the state court had upheld the conviction as "A black was appointed foreman of the grand jury at the next succeeding term after the appellant was tried and convicted; and, we feel reasonably sure that this will not be a problem in that county in the future.").

In *Guice v. Fortenberry*, the State attempted to make the exact same argument as was made below–narrowing the focus of view to a minimal number of selections, and then claiming that the defense had not shown purposeful discrimination over a significant period of time. 722 F.2d 276 (5th Cir. 1984). In *Guice*, the testimony established that Judge Adams (after the relevant indictment) had proudly been the first judge to appoint an African-American foreperson. Moreover, Judge Adams testified that changes in the law gave him an greater opportunity to select African-Americans after 1976. The State then suggested that based upon this there was no significant period of discrimination by the appointing judges. The Court of Appeals for the Fifth Circuit rejected these arguments. *Id.* at 279-280.

The lower appellate court on writs attempted to revitalize the State's case by holding that the appropriate period to analyze was the "ten year period" prior to the indictment because of a "significant improvement in system." *See Kennedy* at 419. However, it was inappropriate to merely posit a change of heart in the selection process by gerrymandering the figures. The State could have presented evidence *in rebuttal* that judges had become aware of the problem with discrimination in 1988 and had moved to an acceptable objectively designed or random selection process thereafter as a result. However it could not limit the focus to a small number of years and then claim that the defense has not shown discrimination over a significant period of time.[101]

3. Even Under A Shorter Period, There is Evidence of Underrepresentation

Even using the State's inappropriately narrow interpretation of the data presented, Judge LaDart still appropriately found that Mr. Kennedy had presented a *prima facie* case of discrimination in the selection of Grand Jury Forepersons. [102] Dr. Devine testified that the evidence of gender discrimination – when the sex of the judge is taken into account – namely that male judges overwhelmingly select male grand jury forepersons. Dr. Devine testified that the chance of women being excluded randomly by male judges was less than one in sixty nine thousand. In this case, of course, the male foreperson was picked by a male judge, so that the probability that the white male foreperson was *not* selected based on gender in this case is half the probability that a random person will be struck dead by lightening. R. 2020.

XIII. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO QUASH THE INDICTMENT BASED UPON THE EXCLUSION OF PROSPECTIVE JURORS WHOSE RIGHTS OF CITIZENSHIP HAD BEEN RESTORED, AND THE EXEMPTION OF JURORS WHERE AN EXEMPTION NO LONGER EXISTED

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[101] There is good reason–amply illustrated by this case–why an appellate court may not merely reshuffle the facts considered by the trial court. Here, the Fifth Circuit either misunderstood the record to reach the conclusion that a *prima facie* case did not exist:

> During the 10-year time period considered by the trial court, there were 19 grand juries empaneled and 19 grand jury forepersons by the judges of the 24th Judicial District Court of Jefferson Parish. Ten forepersons were white males; six were white females; one was a black female; and *two* were black males.

State v. Kennedy, 2002-214 (La.App. 5 Cir. 06/26/02); *823 So. 2d 411, 414.* Unfortunately, the lower court of appeal on writs used the wrong facts, as well as the wrong legal analysis, when it suggested that there were two black males in the 19 grand juries. In so describing the facts, the Fifth Circuit erroneously considered one grand jury that was selected *after* Mr. Kennedy's – the foreperson, Mr. Dormio, was a black male.

[102] A *prima facie* case of discrimination is normally made out by a probability of 0.05, or 1-in-20. See, e.g., *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 424 (7th 2001) ("Two standard deviations is normally enough to show that it is extremely unlikely (that is, there is less than a 5% probability) that the disparity is due to chance, giving rise to a reasonable inference that the hiring was not race-neutral; the more standard deviations away, the less likely the factor in question played no role in the decisionmaking process."); *EEOC v. Joint Apprenticeship Committee*, 186 F.3d 110, 120 (2d Cir. 1998) ("statistical analysis yielding level of significance at or below .05 is suspect, and a disparity of 2 standard deviation units establishes threshold level of statistical significance"); *Engineering Contractors Association v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997) ("Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.") (citations omitted); see also D. Baldus & J. Cole, *Statistical Proof of Discrimination §§ 9.02, 9.03* (1980).

(Assignments 42-44)

Prior to trial the defense moved to quash the indictment based upon the denial of full rights of citizenship to those who had served their sentence, and the improper exemption of other qualified jurors. R. 408. The trial court denied the motion. R. 1959. Writs to this Court were unsuccessful. In this case it was uncontradicted that individuals who had been convicted of felony offenses but served their completed sentence were excluded from the jury venire. R. 1937, 1956-57.

A. The State Conceded That The Right To Serve on A Jury Is A Critical Right of Citizenship,

Article I, Section 20 of the Louisiana Constitution makes clear that "full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense." There can be no doubt that the right to sit on a jury is a fundamental right of citizenship. As the court held in *United States v. Maines*, 20 F.3d 1102 (10th Cir. 1994):

> The Fifth and Sixth Circuits have deemed three civil rights to be fundamental in this context: (1) the right to vote; (2) the right to seek and hold public office; and (3) *the right to serve on a jury*. We agree that these three rights are the fundamental civil rights in this context.

Id. at 1104 (emphasis supplied) (*citing United States v. Thomas*, 991 F.2d 206, 214 (5th Cir.); *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir.1990); *see also United States v. Gomez*, 911 F.2d 219, 221 (9th Cir.1990) (finding that the right to vote and the right to serve on a jury are important civil rights); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("the broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a *phase of civic responsibility.*") (emphasis supplied).

Ultimately, the State itself conceded that the right to serve on a jury was a critical component of citizenship:

> The Court: Do you also agree that a right to serve, of eligibility to serve on a jury, be it petit or Grand, falls within the gambit of rights that attend full citizenship?
>
> Mr. Kennedy: Yes, Judge.

R. 1955.[103]

B. The Defense Presented Ample Evidence That Individuals Who Had Previously Completed Their Sentence Were Excluded from Jury Service.

On October 5, 2001, the defense presented ample evidence that individuals who had completed their sentence were excluded from jury service. The staff from the Jefferson Parish Clerk of Court testified that prior conviction of a felony was a disqualification, and that summons were not sent to disqualified citizens. R. 1942; R. 1943 (indicating that jurors who are convicted felons are given a "04" disqualification code, and "we simply put the disqualification in the computer."). The defense also elicited a list of individuals who were excluded as felons. See R. 1948, D.2.

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[103] In *Powers v. Ohio*, 499 U.S. 400 (1991), the Court explained that the removal of an entire class of individuals from jury service would constitute a denial of the right and responsibility of citizenship:

> When a particular group has been singled out in this fashion, its members have been treated differently, and have suffered the deprivation of a right and responsibility of citizenship.

Id. at 423. *See also Neal v. Delaware*, 103 U.S. 370, 386 (1881) (jury service is included in rights, privileges, and responsibilities of citizenship); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (same); *United States v. Cassidy*, 899 F.2d 543, 546-49 & nn. 9, 11 (6th Cir. 1990)(rights to citizenship "include the right to vote, the right to seek and hold public office and the right to sit on a jury.") citing *United States v. Dahms*, 938 F.2d 131, 133 (9th Cir. 1991); *United States v. Thomas*, 991 F.2d 206, 214 (5th Cir. 1993) (indicating that there were "three civil rights considered key by the Ninth and Sixth Circuits -- the rights to vote, hold public office, and serve on a jury."). Indeed, this Court's own rules identify jury service as a right of citizenship, declaring in no uncertain terms that "all qualified citizens shall have the opportunity to be considered for jury service in the district courts of Louisiana. . . . " La. S. Ct. R. 25, § 1.

The district court accepted this evidence but denied the motion to quash opining

> In any event, the Constitution provides that the Legislature may provide additional qualifications in order to be able to serve on a jury. Certainly at least as far as a Petit Jury is concerned. And I find no distinction or difference between a Petit Jury and a Grand Jury in the context of this Motion. We know what the Legislature did; they gave us Article 401.5. And it automatically excludes those who have been convicted or under indictment for which a pardon has not been granted. Your Motion is denied.

R. 1959. See *id* (noting objection).

Art. V, § 33 provides in pertinent part: "(A) Qualifications. A citizen of the state who has reached the age of majority is eligible to serve as a juror within the parish in which he is domiciled. *The legislature may provide additional qualifications.*" But suggesting that these qualifications could include grounds that violate other provisions in the constitution is untenable; this is comparable to suggesting that the legislature could truncate the prohibition on race, gender or age discrimination in Article I Section 3, by setting qualifications for jury service that specifically excluded classes of people by race, age or gender.[104]

XIV. THE TRIAL COURT MADE A SERIES OF RULINGS ON CHALLENGES FOR CAUSE TO JURORS THAT UNDERMINED MR. KENNEDY'S RIGHT TO A FAIR AND IMPARTIAL JUROR (Assignment 45-58(

The Sixth Amendment, incorporated through the Fourteenth Amendment, guarantees a defendant the right to a fair and impartial jury. U.S. Const. Amend. VI; U.S. Const. Amend. XIV. The trial court's rulings on a series of challenges for cause infringed upon Mr. Kennedy's right to a fair and impartial jury.[105]

A. The trial court erroneously granted the State's challenge to a number of jurors who exhibited non-disqualifying opposition to the death penalty

The trial court improperly granted the State's challenges to jurors who only had general or no objections to the death

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[104] But see *State v. Jacobs*, 04-1219 (La. App. 5 Cir. 05/31/05); 904 So. 2d 82, 91("Restoration of full rights of citizenship upon release from federal or state supervision under Article I, § 20 does not restore a convict's right to sit on a jury.") citing *State v. Selmon*, 343 So. 2d 720, 721-722 (La. 1977); *State v. Haynes*, 514 So. 2d [Pg 13] 1206, 1211 (La. App. 2 Cir. 1987). While the Court of Appeal, in *State v. Jacobs*, cited *State v. Selmon* for the proposition that Article I, § 20 did not restore a convict's right to sit on a jury, *Selmon* actually dealt with the use of a prior conviction to enhance a future sentence and specifically made clear that it was not dealing with the rights of citizenship:

> [T]he provision does not contemplate that the status of innocence be restored; only that those rights a citizen may exercise shall be available once supervision following conviction has ceased. Furthermore, only rights which were taken away by the conviction may logically be "restored." A person, prior to his conviction, does not have a "right" to prevent the use of convictions to enhance punishment for later offenses; the section does not admit of a construction that the restoration of the rights of citizenship precludes the operation of the habitual offender statute.
>
> The constitutional debates on this section support the conclusion that the habitual offender laws were not rendered unconstitutional by the adoption of this provision. As originally proposed the section provided that "full rights" be restored. However, this original wording precipitated debates on whether the broad language would affect the applicability of multiple offender laws. Hargrave, L., The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 64 (1974). The debates reveal that the ultimate language, "rights of citizenship," was adopted to make it clear that the drafters' intent was to restore the customary rights a citizen may exercise (the rights to vote, work, hold public office, etc.) and not to automatically erase the fact of the conviction. Verbatim Transcripts of the Constitutional Convention of 1973, Vol. XIV, 44th day, pp. 44-45, 57-58, 60-61 (hereinafter cited as Verb. Tr.).

State v. Selmon, at 721-722. The Constitutional Convention included the right to serve on juries as one of those rights.

[105] The trial court's deference to the State was demonstrably problematic as neither appeared familiar with the prevailing jurisprudence at issue. Indeed when the defense attempted to challenge one juror for cause based upon her substantial impairment towards life, see *State v. Miller*, *infra*, the trial court interceded:

> The Court: Y'all have to help me with this. Again I believe that what they have to do is demonstrate clearly immediately following the verdict whether or not they would automatically vote one way or the other..

R. 3253. When defense counsel objected and noted that the issue was governed by the *Witt* case, the State responded:

> The State: . . . But, I do believe that we can ask the questions of the type that are being asked. I have not read that case, Judge, so I can't, I don't know what it says.

Id.

penalty. The law does not sanction the removal of jurors simply because they express opposition to the death penalty.[106] In *Adams v. Texas*, the Court reversed the conviction because the court excluded jurors "who stated that they would be "affected" by the possibility of the death penalty, but *who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally.*" 448 U.S. 38 (1980)

The law simply does not sanction the removal of all jurors who express opposition to the death penalty. "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital case." *Lockhart v. McCree*, 476 U.S. 162 (1986). "Absent a clear showing that the juror would be unable to follow the court's instructions and obey the juror's oath, that juror's feelings regarding the death penalty do not constitute grounds for a challenge and the granting of such a challenge is reversible error." *Fuselier v. State*, 468 So.2d 45, 55 (Miss. 1985) (citing *Wainwright v. Witt*, 469 U.S. 412 (1985)).[107]

The limitations on exclusions are narrowly codified in the statutory provisions established by Louisiana law: the State must establish *both* prongs of a bifurcated test in order to warrant a successful challenge for cause. The first prong requires that: "The juror tendered in a capital case . . . has conscientious scruples against the infliction of capital punishment." La. C. Cr. P. art. 798 (2). Most of the jurors erroneously excluded for cause in this case indicated (if anything) mere generic queasiness about imposing a death sentence, rather than the conscientious scruples required by the statute. Moreover, none of these jurors fulfilled the second prong by making it known:

> (a) That he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him;
>
> (b) That his attitude toward the death penalty would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath; or
>
> (c) That his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt.

La. C. Cr. P. art. 798 (2).

Other court have also applied the same standard recognizing that "mere personal opposition to capital punishment does not render incompetent a juror who nevertheless states under oath that he or she is temporarily willing to set aside his or her own beliefs in deference to the rule of law." *Hansen v. State*, 592 So.2d 114, 128 (Miss. 1991).[108] Here, a series of jurors indicated

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[106] *Witherspoon v. Illinois*, 391 U.S. 510, 519-20 (1968) (footnote omitted) ("A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror."); *Lockhart v. McCree*, 476 U.S. 162 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Adams v. Texas*, 448 U.S. 38 (1980) (So long as a venireperson can abide by the court's instructions, "[h]e need not himself favor the penalty under any circumstances.").

[107] Similarly, the Arizona Supreme Court faced a similar issue, finding it structural error requiring the reversal of the culpability and penalty phase verdicts, where the trial court removed jurors for cause based merely upon their views against the death penalty announced in their juror questionnaires. *State v. Anderson*, 4 P.3d 369, 377-379 (Ariz. 2000) ("Error in jury selection on *Witherspoon* and similar issues is considered structural; "the remedy for a juror wrongfully excluded is potent." . . . Thus, excluding for cause prospective jurors who may have had only general objections to the death penalty and denying oral voir dire that might rehabilitate, in violation of the Arizona Rules of Criminal Procedure, constitute structural error.").

[108] Accord *Burns v. Estelle*, 626 F.2d 396, 397-98 (5th Cir. 1980) (en banc) (reversible for trial court to excuse for cause juror who "stated she did not believe in the death penalty," but never indicated she could not "lay her personal views aside" and "follow the court's instructions"); *Jarrell v. State*, 413 S.E.2d 710, 712 (Ga. 1992) ("The voir dire testimony ... established no more than that the juror had some 'qualms' about imposing a sentence she supported in principle and, before hearing any evidence, leaned toward a life sentence. Her testimony does not support a finding that she was disqualified and her excusal is reversible error"); *People v. Seuffer*, 582 N.E.2d 71 (Ill. 1991) (death sentence vacated where trial court erred in excluding for cause prospective juror who stated that he had feelings against death penalty but could be fair and follow the law); *Hernandez v. State*, 757 S.W.2d 744, 754 (Tex.Cr.App. 1988) (prospective juror improperly excused for cause from jury based on response that he opposed "imposition" of death penalty).

(at most) an inclination for life rather than a substantial impairment. In *State v. Miller*, this Court reviewed a series of cases where the defense challenge for cause failed because the defendant failed to establish a substantial impairment in "the juror's willingness or ability to follow the law as instructed by the judge or to adhere to his or her oath as a juror." *State v. Miller*, 99-0192 (La. 09/06/00), 776 So. 2d 396. Crucially, this Court noted that "this is the same standard applied in challenges by the State based on the juror's bias against the death penalty." *Id.* at 25, n. 15. What was most significant about *State v. Miller*, is it made clear that the proponent of the challenge bore the responsibility to establish the grounds for the exclusion of the juror. See *id.* at 400 ("The party seeking to exclude the juror has the burden to demonstrate, through questioning, that the juror lacks impartiality."). Indeed in a number of the instances below, the jurors did not even express benign opposition to the death penalty, let alone significant disapprobation for the punishment.

1. Juror Dwayne Lange was improperly removed for cause on the State's challenge where he simply explained that the death penalty was "warranted" in "certain instances" and "not warranted" in others.

Juror Dwayne Lange was an African-American venire member who did not have conscientious scruples against the death penalty. While on his questionnaire he picked "d" and "e" indicating opposition to the death penalty, when he testified it was clear that he was not excludable for cause:

MR. ROWAN: Okay, Mr. Lange. Mr. Lange, you have an opinion in regards to the death penalty?

MR. LANGE: Not exactly. I feel that the choice could be made one way or the other where depending on the brutality of the crime. . . . on questionnaire picked d and e opposed to the death penalty.

R. 3397 -3398. The State proceeded to question him:

MR. ROWAN: It's just something that you feel in certain instances is warranted and not warranted?
MR. LANGE: Right, day in and day out, right, I feel that way. But, when it comes down to giving my duty to make the choice I could make it.

MR. ROWAN: And that means that after hearing all the facts in this case you could seriously consider both choices?

MR. LANGE: Yes, sir.

MR. ROWAN: Make a determination based on that?

MR. LANGE: Yes, sir.

R. 3399. Based upon these assurances, the State conceded that he was not removable for cause and did not challenge him. See R. 3460. Thereafter, a second prosecutor attempted to establish a grounds to challenge Mr. Lange for cause, responding to Mr. Lange's indication that he had read or heard about the case. Mr. Lange made clear that it would not impact his deliberations:

MR. PACIERA: Do you think that you're in a different position in this case, because of what you read and heard, than you would be if it was a case where you had never heard anything about anything, or read anything about it, or talked to anybody in the neighborhood about it?

MR. LANGE: No.

R. 4285. While Mr. Lange indicated that he had some knowledge of the case he made clear that he would give Mr. Kennedy the "presumption of innocence" and hold the State to proving its case "beyond a reasonable doubt." R. 4227. Nevertheless, the State challenged him for cause:

It's because of the totality of the way he answered the questions, the way he started off talking about the knowledge that he has, about his feeling that the defense has something to prove.

R. 4228. The defense objected that "Once the circumstances were explained to him, he understood his job, and he felt that he could do it." *Id.* The trial court granted the challenge for cause over the defense objection. R. 4228.

While the State's explanation might have been a basis for supporting a peremptory strike when called to explain the racial neutrality of a strike (but see *State v. Harris*, 2001-0408 (La. 06/21/02); 820 So. 2d 471, 476 (disallowing peremptory strike where one of State's explanations was confusion about the difference between civil and criminal standards because any "such confusion, if in fact harbored by Brown, would have helped the State, as Brown may have held the State to a lesser standard of proof.")) – it clearly does not announce a bias or inability to follow the law. Moreover, because "feeling that the defense has something to prove" would clearly militate in favor of the State, it seems likely that the explanation was simply a proxy for either 1) Mr. Lange's race or 2) Mr. Lange's initial non-disqualifying disapprobation for the death penalty. Granting the challenge for cause was error.

2. Juror Venkata Subramanian was removed for cause because he disagreed with the benefits of the death penalty, even though he made clear that he could impose it.

Juror Subramanian was removed for cause because he disagreed with the benefits of the death penalty, even though he indicated that he could impose it. Mr. Subramaniam initially indicated that he believed the death penalty was "expensive," "not a good deterrent," and "uncivil." R. 2921. While he initially indicated that he thought it a "disproportionate punishment, for rape, albeit a minor's rape" when asked whether he "can't consider a death penalty in a rape" Mr. Subramaniam responded:

> I would try to follow the law, I would listen to the Judge's instructions. But, I would use a standard well above the reasonable doubt standard because death penalty is also irrevocable, in that if somebody were to change their testimony at a later time we can't bring the man back to life. And like what happens in Illinois if there is some DNA evidence or something to prove otherwise, we would not be able to change the penalty, we would not be able to change the outcome.

R. 2922. While the State followed this observation with the comment "I presume you would hold the State to a higher standard," Mr. Subramaniam responded that he would "hold the state to a higher standard for at least the penalty phase." When the State asked whether it would have to prove its case in the penalty phase "beyond all doubt," Mr. Subramaniam provided:

> Not beyond all doubt, as I said, I'll try to follow the law as the Judge instructs me to. But, it would be very difficult for me to just stick to beyond a reasonable doubt, I would expect it to be something higher. I can't seem to put it exactly where it should be. But, it's probably not beyond all doubt, but definitely beyond, well beyond reasonable doubt. So, the burden on you would be substantially higher.

R. 2922-2923. In Louisiana, this Court has been painfully clear that there is no particular standard for determining whether death or life should be imposed. *State v. Higgins*, 03-1980 (La. 04/01/2005); 898 So. 2d 1219, 1238 ("a defendant does not begin the penalty phase of a capital case with a presumption that either a death or a life sentence is the proper punishment. . . .Louisiana law does not provide any standard for a juror to weigh mitigating circumstances against aggravating circumstances, but rather simply requires the finding of an enumerated aggravating circumstance by the jury to impose the death penalty and also requires that each juror consider any mitigating circumstances presented, if any, by the defense before deciding to recommend a sentence of death.") citing *State v. Lucky*, 96-1687,(La. 4/13/99), 755 So. 2d 845, 850. (La. 2005). As this Court recognized in *State v. Howard*, 98-0064 (La. 04/23/99), 751 So. 2d 783, 794-95, the mere fact that a juror is "inclined" in one direction does not demonstrate that he or she cannot follow the law and does not warrant a challenge for cause. When the State tried to secure an admission from the juror that he was substantially impaired, Mr. Subramanian made clear that it might only do so "if death

penalty is very important to you, yes." R. 2923. Mr. Subramaniam simply made clear that his views would only impact the death determination, not the culpability determination:

> At the penalty phase I would hold the State to a higher standard in that I would, if there is any doubt at all I would be very careful in giving out the death penalty in the sense I've not shut the door on either the death penalty or life in prison. But, I'm very close to shutting the door on death penalty, in that the State would have to demonstrate more than a reasonable doubt, but not all doubt. I don't think I can be clearer, it's a spectrum, it's somewhere in between reasonable doubt and all doubt.

R. 2967. He indicated that at penalty, he would not "automatically exclude either one." R. 2970. When the State challenged Mr. Subramaniam for cause, the defense, after an apparent review of its notes objected, reminded the Court that "he will not hold them to a higher standard in proving the aggravating circumstances. What he said was he would [consider] lingering doubt as to the guilt and weigh his decision and that is absolutely one hundred percent allowed by case law.".R. 2977. The court noted the objection and sustained the State's challenge. *Id.*

The State failed to meet its burden to prove that the juror's views about the death penalty would impair his ability to make a fair determination at the culpability phase, or that he would automatically vote against the imposition of capital punishment without regard to any evidence before him. Given that in Louisiana there is no standard for determining when a death-eligible defendant must be sentenced to death, Mr. Subramaniam's indication that he would be inclined to vote for life after considering all the evidence does not constitute a grounds for his removal for cause.

B. The trial court erroneously granted the State's Challenge for Cause to Jurors who would impose a death sentence for murder, but who had substantial doubts about imposing the death penalty for aggravated rape.

The trial court erroneously granted the State's Challenge for Cause to Jurors who would impose a death sentence for murder, but who had substantial doubts about imposing the death penalty for aggravated rape. Under the theory adopted by the State and trial court in this case, the legislature could enact a bill to impose the death penalty for any reprehensible or injurious conduct, and any citizen who opposed such a punishment would be deemed unfit to serve on a jury – the State would then ask this Court and the United States Supreme Court to view the jury's imposition of a death sentence as the voice of the community in assessing whether the evolving standards of decency permits the execution of an offender for such an offense. See *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (Scalia J. dissenting) ("Our opinions have also recognized that data concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, "'is a significant and reliable index of contemporary values,'") citing *Coker v. Georgia*, 433 U.S. 584, 596 (1977). How insulated would the circularity of this assessment be, if only juries such as this one that believed in executing defendants for aggravated rape were tolerated?

1. The removal of Mr. Henry Butler who Favored the Death Penalty for Murder Was Improper

The State improperly challenged Mr. Henry Butler for cause even though he was in favor of the death penalty for murder: "I'm in favor for murder the death penalty for murder." R. 2825. The prosecution, then asked Mr. Butler about his views on the death penalty "for rape." Mr. Butler made clear that he could impose the death penalty for murder but acknowledged that "I think it would be hard for me to sentence somebody to death for rape." R. 2825-2826. While Mr. Butler felt differently about the death penalty for rape, he still made clear that he would impose it under specific circumstances (including those circumstances alleged

by the State in this case) where it was "a multiple rape." R. 2828; see also 2829 ("I said no unless maybe the person did multiple rapes."). In response to the prosecution's final questions, Mr. Butler indicated that he would not consider imposing a death penalty unless the defendant was a "serial rapist," and the defense was unable to rehabilitate him from his position that he was "generally not in favor of the death penalty for rape." R. 2873.[109]

2. Darlene Howell was excused because she thought the death penalty should be reserved for cases involving a murder.

Darlene Howell was excused because she thought the death penalty should be reserved for cases involving a murder. See R. 2761 ("Actually, before today I was always for the death penalty."); R 2762 ("I don't believe a death penalty should go with a rape at all, period. If it was a death due from a rape, yes.").

3. The trial court erred in granting the challenge for cause to Juror Scheid.

The record suggests that defense counsel challenged Juror Scheid for cause. See R. 2895. However, a review of the voir dire of Mr. Scheid suggests that this would have been an odd, if not patently ineffective challenge for defense counsel to make. Mr. Scheid testified that he had "no problems with the death penalty in a general sense, a murder case" but could not "impose it on a rape case." R. 2841; see also R. 2842. Indeed, he indicated that he would "effectively" "rule out the death penalty in a rape case."R. 2843. On defense questioning, Mr. Scheid confirmed that he did not oppose the death penalty generally but that he would not impose a death sentence where the victim was alive to testify. R. 2881 ("Again, it would be very difficult for me to consider death in a case like this. I mean, the fundamental thing to me is the victim is still alive.").

Had the record reflected that the State challenged Mr. Scheid for cause, it would have been error for the trial court to exclude him. See Section B, *infra*. It is simply unexplainable why defense counsel would exercise a challenge on such a juror, where the victim in this case was plainly alive to testify about it.[110] Putting aside the validity of defense counsel's challenge to jurors who generally oppose the death penalty – see La. C. Cr. P. Art 798 ("It is good cause for challenge on the part of the state *but not on the part of the defendant* that . . . (2) the juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment. . . ") – it appears to undersigned counsel that the court reporter may have mis-identified the speaker at issue. Regardless, the district court has an independent obligation to ensure that the jury impaneled is fair and impartial, and the removal of this juror – as well as other similar jurors – frustrates that responsibility.

C. *The Trial Court Granted the State's Challenge for "Hardship" to A Significant Number of Minority Venire Members.*

The State challenged a significant number of African-American venire members for hardship. See e.g. R. 2585 (defense

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[109] The record reflects that the defense challenged Mr. Butler for cause. Not only would this be an odd challenge for the defense to make, presenting significant questions concerning either the accuracy of the transcript or the efficacy of defense counsel, but under the Louisiana Code of Criminal Procedure a juror's opposition to the death penalty would not be grounds for the defense to challenge them for cause. La. Cr.C. .P. art. 798 ("It is good for challenge on the part of the state, but on the part of the defendant . . .").

[110] Similarly, the transcript suggests that defense counsel made the odd challenges for cause to prospective juror Margie Clark, who "doesn't believe in the death penalty because of her Catholic beliefs." See R. 2735, 2845, and the challenge on R. 2895, and to prospective juror Hanh Nguyen who made clear that he could not impose the death penalty without a murder, see R. 2846, but was nevertheless allegedly challenged for cause by the defense.

objecting to the challenge for cause to Veniremen Dorsey because "she never stated she was not able to make it through the evidence. Which amounts to a departure for being able to serve in this community. And I would also like the record to reflect that she's a Black female."); R. 2591 (defense objects to challenge for cause to venireman Parkman who has arthritis and diabetes, noting the State is removing African-American jurors with hardship challenges);R. 2 603 (defense objecting to challenge of venireman Martinez, observing that prospective juror had the same back condition as defense counsel); R. 2619 (defense challenge is noted to the State's removal of venireman Manson, arguing "I don't think that forgetting things on occasion is significant for a challenge for cause."); R. 2620 (defense unsuccessfully objects to the removal of venireman Peyton who needs to go to the bathroom frequently).

D. The Trial Court Granted the State's Challenges to Jurors for Cause Based upon Age.

The trial court also appeared to improperly excuse individuals based upon their young age. Henri Lespinasse was excused by the court because he was only 18 years old. R. 3078. Similarly, Jasmine Jones appears to have been excluded based upon her tender years. When filling out the questionnaires, Ms. Jones indicated that she would "probably lean more towards the life sentence than the death penalty." R. 3018-3019. However, she ultimately made clear that she would keep an open mind and consider both penalties. See R. 3038 -3039. ("I would have an open mind to both sides.").

The district court confirmed that Jasmine Jones was rehabilitated. R. 3041 ("The Court: She seems to have been rehabilitated."). Thereafter, Ms. Jones noted that she was just 18, and indicated her remaining concern that she felt that she was not emotionally mature enough to sit as a juror. R. 3044-3045. The trial court, then, on the State's motion, removed Ms. Jones over defense counsel's objection. *Id.* In Louisiana, the Constitution prohibits discrimination against a person based upon age. See La. Const. art. I, § 3. La. C. Cr. P. art. 401 provides that individuals who are 18 years old are competent to serve.[111]

E. The Trial Court Erroneously Denied Defense Challenges for Cause, Forcing the Defense to Prematurely Exhaust Peremptory Strikes And Seat An Odious and Obnoxious Juror

The trial court erroneously denied a defense challenge for cause forcing the defense to prematurely exhaust peremptory challenges, and resulted in the sitting of other odious and obnoxious jurors. The denial of a cause challenge forcing a defendant to use a peremptory strike is structural error. See *State v. Jacobs*, 99-1659 (06/29/01), 789 So.2d 1280, *State v. Maxie*, 93-2158 (La.05 /22/95), 653 So.2d 526, *State v. Divers*, 94-0756 (La. 09/05/96), 681 So.2d 320). In this case, despite some confusion in the record, it appears that the defense exhausted his peremptory challenges, and as such prejudice is presumed. See *Jacobs, supra.* The minutes reflect that the defense used eleven peremptory strikes.[112] While the minutes indicate that the State

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[111] Action that discriminates on the basis of "age" are examined under a heightened standard of review which requires the proponent to establish that the classification is not arbitrary, capricious, or unreasonable because it substantially furthers an appropriate governmental objective. *See e.g. Pierce v. Lafourche Parish Council*, 99-2854 (La. 5/16/00), 762 So. 2d 608, 611-612; *Manuel v. State*, 95-2189 (La. 7/2/96), 692 So. 2d 320, 339 (on rehearing) (upholding the minimum drinking age at a level higher than age of majority because it substantially furthered an appropriate governmental purpose of improving highway safety).

[112] See R. 62, minutes 8/14/2003 (noting peremptory strikes against "Shelly Badeaux - Challenged by the Defense, peremptory" [D1]; "Alphonse Williams - Challenged by the Defense, peremptory" [D2]; "Robert Allemore - Challenged by the Defense, peremptory" [D3]; "James Finney - Challenged by the Defense, peremptory" [D4]; "David Ryan - Challenged by the Defense, peremptory" [D5]; "Patricia Flynn - Challenged by the Defense, peremptory" [D6]; "Melissa Asfour - Challenged by the Defense, peremptory" [D7]; "Frank Pellagal - Challenged by the Defense, peremptory" [D8]; "Mari Marcus - Challenged by the Defense, peremptory" [D9].) See also R. 63 (noting peremptory strikes against "Susan Guidry - Challenged by the Defense, peremptory" [D10]; "Valerie Sachitano - Challenged by the Defense, peremptory" [D11].).

peremptorily struck Clotilde Sheehan, the transcript makes clear that this juror was struck by the defense and not the State. R. 4187 ("Mr. Aarmato[Defense counsel]: We're going to go back and cut the first juror, Ms. Sheehan."); R. 4188 (same).

1. The trial court erroneously denied the defense (and State) cause challenge to Bernice Augusta.

The trial court erroneously denied a defense cause challenge to Bernice Augustus. As in *State v. Jacobs*, *supra*, both the State and the defense concurred that Ms. Augustus should be removed for cause; nevertheless the district court denied the defense challenge and she was allowed to sit on the jury. Ms. Augustus indicated that the death penalty was the only appropriate punishment for rape:

MR. ROWEN:	You're for the death penalty?
MS. AUGUSTUS:	Yes.
MR. ROWEN:	But, being that you're for it, do you still feel that that would impair you from considering a life sentence?
MS. AUGUSTUS:	Life, no.

R. 3219. When the defense attempted to follow up with Ms. Augustus comments, she initially indicated that it would depend on the evidence, R. 3249, but then clarified her comments:

MS. AUGUSTUS:	I may consider the death penalty, wait, let me rephrase this. Yes, I would give him the death penalty.
MS. daPONTE:	When you say you would give him the death penalty - -
MS. AUGUSTUS:	Vote for it.

R. 3250.

When the defense attempted to determine whether she could "only consider the death penalty in that situation," Ms Augustus said "yes." R. 3253. When the defense asked whether she would "not be able to consider a life sentence in that situation," the court interrupted suggesting that this was not an appropriate question: "y'all have to help me with this. Again I believe that what they have to do is demonstrate clearly immediately following the verdict whether or not she would automatically vote one way or the other." R. 3253. The defense objected to this description, citing the United States Supreme Court's jurisprudence in *Witt. Id.* The State responded "I do believe that we can ask the questions of the type that are being asked. *I have not read that case, Judge, so I can't, I don't know what it says.*" R. 3253-4.

After a lengthy interruption, the defense proceeded to complete the questioning of Ms. Augustus, who had hardened in her views about the offense of aggravated rape of a child, but was considering whether a death sentence might be "too easy." Ms. Augustus' explanation that she might consider life, was not an expression of her willingness to consider mitigating circumstances or leniency, but based on her desire for a harsher penalty. When the defense challenged her for cause, the State joined in acknowledging:

Mr. Paciera:	it seemed to me the last thing she said was she'd only believe that a life sentence appropriate because death is not good enough.

R. 3269. The fact that she might hate Mr. Kennedy so much, that she'd find that death was not a harsh enough punishment did not reflect that Ms. Augustus was willing to truly consider the facts before her and follow the law. The trial court's denial of the challenge for cause was based upon his finding that "the punch questions really weren't put to her to my satisfaction, I'm denying

your challenge." *Id.* The trial court's ruling resulted in an obnoxious juror sitting on Mr. Kennedy's trial – one who may well have sentenced Mr. Kennedy to death based upon the fact that there *were* mitigating circumstances warranting a lesser punishment.

2. The trial court erroneously denied the defense cause challenge to Juror Asfour

Juror Asfour's general favor for the death penalty was colored by her disclosure that she knew someone who was molested as a child. R. 2919. She indicated that "it would be very difficult for me if I imagined the worse scenario possible that could have happened for me to consider life imprisonment." R. 2958.

F. The Trial Court Frustrated Mr. Kennedy's Right to Full and Fair Voir Dire.

The State repeatedly objected to questions that were relevant to Mr. Kennedy's decision whether to challenge jurors for cause. See e.g. R. 2891 (defense is not permitted, at R. 2891, to ask about the effect of another rape). See also R. 2986 (State noting objections to questions concerning attitudes towards death penalty); *id.* (defense indicating that it was frustrated from asking "Would you be more likely to vote for the death penalty if you heard about some horrible injuries. The question today is would that exclude you from being able to consider a life sentence. We are certainly able, not able, we have the right to ask how they feel about what would make them more likely than not. But, it has nothing to do with whether they can sit."); R. 2990-2992 (discussing unrecorded bench conferences where defense was limited in asking questions).

While the defense initially accepts the limitation of voir dire during the death qualification process, on the predicate that it will be allowed to return to those issues during general voir dire,[113] when the defense returned to matters concerning the jurors non-excludable views on the death penalty, the trial court sustained the State's objections. See R. 3785-3786 (sustaining the State's objection, the court observed: "It is my belief that while your client is guaranteed a full right to voir dire, the Constitution doesn't give him an unlimited right to voir dire. And I think you're beginning to be repetitive. And if I permit you to continue with her or any other person who has grandchildren I think that you what you would wind up with is a commitment or pre-judgment and that's not what this process is about. That's my ruling, those are my reasons."). Given the specific guarantee of the right to "full voir dire examination of prospective jurors and to challenge jurors peremptorily," the trial court's ruling had an especially deleterious impact on appellant's constitutional rights. See Art. I, Sec. 17, La. Const. 1974; see also *State v. Hall*, 616 So. 2d 664 (La. 1993) ("[A]lthough the trial judge is vested with discretion to limit the voir dire examination, he must afford wide latitude to counsel in the conduct of voir dire examination to effectuate the accused's right to full voir dire. . . . After a review of the record of the entire voir dire examination, we find that the trial judge failed to temper the exercise of his discretion by giving the "wide latitude" to counsel for defendant in his examination of prospective jurors, as required by our cases.").

XV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL, GIVEN THAT THE WEIGHT OF THE EVIDENCE WAS AGAINST A CONVICTION AND DEATH SENTENCE (Assignment 59)

The trial court erred in denying appellant's motion for a new trial, given that the weight of the evidence was against a

[113] See R. 2900 ("MR. ARMATO: I think you've been limiting me from what I thought we were doing or from what I thought we were able to do. So, if you're going to allow us later in general voir dire to ask questions about the death penalty, then we're okay.").

conviction and death sentence. After the jury imposed a sentence, the court set the Motion for New Trial for October 21, 2003. For reasons not reflected in the record, the hearing was moved up to October 2, 2003. On that date, the defense appeared, and filed a Motion for New Trial. New counsel requested additional time to complete an investigation in order to litigate the matter. The trial court denied the request for additional time, and thereafter the motion for new trial.

In this case, due to the discrepancies in the evidence, the verdict at both stages "fell short of serving the ends of justice."[114] Indeed, for each piece of compelling inculpatory testimony there exists equally compelling exculpatory evidence:

- While the State introduced the December 19, 1999, videotape statement of Lavelle Hammond accusing Mr. Kennedy of rape – two separate videotapes, one done by state actors shortly after the offense and one done by the defense in October of 1999, detailed Ms. Hammond's flat out denial concerning Mr. Kennedy's involvement.
- While Carolyn Kennedy testified that she had not been encouraged to identify her husband Patrick Kennedy as the perpetrator, the testimony of Catherine Holmes indicated that social services had told Carolyn Kennedy that she had to tell her daughter "that it was okay for her to say that her Daddy did it." R. 5812. OCS records on file in this court make clear that two of the goals that were pre-requisites to Mrs. Kennedy's re-unification with her daughter involved 1) changing her view on the evidence and 2) communicating this information to her daughter.
- While the State claimed that the time-line on the phone-calls testified made by Mr. Kennedy to Alvin Argueello and Rodney Mader "killed" him, the subpoena return on Mr. Kennedy's phone records does not reflect that those calls were ever made, and the computer records from rug cleaners suggested that the request for cleaning came one day before the offense.
- While the State claimed that Lavelle Hammond was raped on her bed, and that evidence of blood drops outside on the grass were "planted", the DNA from blood on Ms. Hammond's mattress did not match Ms. Hammond or Mr. Kennedy suggesting that Ms. Hammond's later claim that she was raped in her bed was incorrect..
- In the face of this tepid evidence of guilt, the dense elicited evidence that the Jefferson Parish Sheriff's Office identified a African-American teenager named Devon Otis, who road a bike generally matching the description of the one used in the offense, and discovered a tee-shirt in the woods in the environs of the rape that apparently belonged to Devon Otis, and found that Devon Otis lied to the police about his whereabouts – claiming a false alibi – on the date of the offense.

Quite bluntly, for every bit of positive evidence against Mr. Kennedy there was similar evidence undermining the confidence in the conviction and death sentence. The interests of justice required the district court to quantitatively and qualitatively assess the evidence. Indeed, the United States Supreme Court has recognized that decisions concerning the weight of the evidence are constitutionally significant. See *Tibbs v. Florida*, 457 U.S. 31, 39 (1982).[115] See also Douglas, Foreword, J.

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[114] In *State v. Watts*, this Court – in addressing a motion for new trial based upon newly discovered evidence – explained the basis for granting a new trial on other grounds:

> It is appropriate for the trial court to act as a juror for other grounds related to a motion for new trial, but not if newly discovered evidence is the ground on which the motion is based. The State conceded this point at oral argument. Trial courts are to use the thirteenth-juror standard when the asserted ground in the motion for new trial is not newly discovered evidence, but is another ground stated in Article 851, such as a verdict being contrary to the law and the evidence or the court being of the opinion that the ends of justice would best be served by granting a new trial. See *State v. King*, 96-1303, p. 4 (La.App. 3 Cir. 4/2/97), 692 So. 2d 1296, 1299.
>
> A trial judge who sits as a thirteenth juror is asking what the jury has actually done. Was the verdict contrary to the law? Was the verdict contrary to the evidence? Does the verdict fall short of serving the best interests of justice? This inquiry focuses on the result in that if the answer to one or more of these questions is "yes," then the result should not stand.

State v. Watts, 2000-0602 (La. 01/14/03); 835 So. 2d 441, 449.

[115] In *Tibbs v. Florida*, 457 U.S. 31, 39 (1982), the Supreme Court recognized that in certain circumstances the evidence may be just sufficient to overcome a motion for a peremptory instruction, but insufficient to allow any confidence in the outcome of the trial. Under the rule of *Tibbs*, a court may hold that, while the evidence may be sufficient as a matter of law to meet the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), it is a sufficiently close case to require a retrial:

> the evidence presented as to the appellant's guilt is of such a weak nature as to create a serious question as to whether or not the state sufficiently established the guilt of the appellant. We feel, therefore, that another jury should be allowed to pass upon the guilt or innocence of the appellant.

Shore v. State, 287 So. 2d 766, 768 (Miss. 1974). *See also State v. Jean Louis*, 683 So. 2d 1355 (La. 3rd Cir. 1996) ("While we have found

Frank & B. Frank, Not Guilty 12 (1957) ("[W]e believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.' Yet the sad truth is that a cog in the machine often slips: memories fail; . . . those whose wield the power of life and death itself--the police officer, the witness, the prosecutor, the juror, and even the judge--become overzealous in their concern that criminals be brought to justice.").

XVI. THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS AND EVIDENCE(Assignments (Assignments 60-62)

The trial court improperly denied the defendant's motion to suppress statements and evidence, in violation of the 4th, 5th, 6th, and 14th Amendments to the United States Constitution, and the analogous state constitutional provisions.

A. The trial court erroneously denied appellant's Motion to Suppress Statements

The State secured a conviction by claiming that Mr. Kennedy's statements to the police were false and contradictory. See R. 5869 ("lets look a little bit further at his story); *id.* ("If you were listening closely, you heard at least three different places . . .it changed"); R. 5875 (what else tells you that the Defendant's story is absurd"); R. 5876 (describing defendant's "story" as "ridiculous"). The statements were used by the prosecution in an effort to claim that Mr. Kennedy had guilty knowledge.

At least four of the statements were taken without *Miranda* warnings. While Mr. Kennedy was initially not a suspect, once the police were informed on March 2, 1998, that a member of the victim's family was alleging that Mr. Kennedy perpetrated the rape, *Miranda* warnings were clearly in order. The defense moved to suppress statements and evidence prior to trial. See R. 105-109. On November 12, 1999, the trial court held hearings on the motions, ultimately denying the defense motion to suppress. On the eve of trial, August 15, 2003, the State gave notice of its intent to introduce six statements made by the defendant to establish guilt. See R. 771.[116]

The testimony established that there were no *Miranda* warnings prior to the first statement. R. 965. The second statement taken – and the first recorded statement – was also taken without *Miranda* warnings:

> Q: Detective, so I understand, if I understand correctly, at that time that you took this statement on March 2, 1998 at 10:OO AM, 10:18 AM you did not Mirandize Patrick Kennedy prior to taking the statement?
>
> A. No, sir..

R. 981. See also Exhibit 1, 11/12/1999. Prior to the third *unrecorded* statement to Detective Mike Hullihan, Mr. Kennedy was given *Miranda* warnings, off of a form indicating that he was a suspect. See R. 994-995; see Exhibit 2, 11/12/1999. By this time the State was well aware that Mr. Kennedy was accused – at least by one member of his family – as the perpetrator. R.998. Mr. Kennedy was thereafter interviewed by Detective Darren Monie. R. 1004. This interview was apparently also *unrecorded,* though

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the evidence sufficient to support a conviction, we must now evaluate the trial court's denial of a new trial under the thirteenth juror standard. This standard is especially appropriate in a case such as the one sub judice, where the evidence and arguments asserted by defendant are based more on evidentiary weight than sufficiency of the evidence. A reversal on this ground, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.").

[116] See *id,* giving notice of intent to introduce "Statements Made by the Defendant made by the defendant to (1) Dep. Burgess,(2) Det. Brian O'Cull, (3) Steve Brown at Bellaire Home, on March 2, 1998 (4) Det. Mike Hullihan, (5) Det. Florida Bradstreet, (6) Sgt. Darren Monie on the Dates of March 2, 1998, March 3, 1998 and March 4, 1998, Given at 725 Maple Ave., Harvey, La 70058."

a rights form was apparently completed at this time. See Exhibit 3, 11/12/1999.

Some hours later, at 10:30 p.m. Sergeant Jones interrogated Mr. Kennedy, taking a tape recorded statement from Mr. Kennedy. No rights were provided prior to this fourth interrogation. See R. 1018 (Q: Did you personally or did any of the other two detectives or the lieutenant institute a rights of arrestee form or waiver of rights of arrestee form for this particular statement? A: No."). Exhibit 10. The next morning, Mr. Kennedy was apparently interrogated on a fifth occasion with a polygraph. The State presented no evidence indicating that Mr. Kennedy was informed of his *Miranda* rights during that interrogation. Finally at 6:45 p.m. on March 4, 1998, Mr. Kennedy was interviewed on a sixth occasion. This time, he was informed of his rights. R. 1047. It was clear from the testimony at the hearing that the polygraph had been used to encourage Mr. Kennedy to talk. See R. R. 1048("It was my understanding that he was upset because he had failed the polygraph exam."). *Miranda* makes clear that Mr. Kennedy should have been given warnings prior to, at least, the fourth and fifth interrogation:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. . . . *The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.*

Miranda v. Arizona, 384 U.S. 436, 444-445 (1966). Indeed, the United States Supreme Court recently made clear that these varying interviews at which rights are given, and not given, is an interrogation technique that is constitutionally impermissible:

> [I]t is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. . . . What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. . . . when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."

Missouri v. Seibert, 124 S. Ct. 2601, 2610-2611 (2004).[117] Here, Mr. Kennedy was likely misled and deprived of the knowledge essential to a knowing waiver of rights.

B. The Trial Court Erred in Denying the Defense Motion to Suppress Evidence

The defense moved to suppress evidence based upon the State's seizure of evidence, including a blanket, a white t-shirt, black shorts, panties and a towel, without a warrant. The defense argued that the initial seizure of this evidence was improper as it was done after the victim had left for the hospital, where there was no longer any exigent circumstance justifying the State's presence in the location. See e.g. R.1068.[118] The trial court denied the motion, noting the defense objection. R. 1070. The trial court erred by endorsing the police action taken without a warrant. The United States Supreme Court has recently re-affirmed:

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[117] As *Seibert* made clear:

> it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

Id. at 2611.

[118] It is significant to note that the State's subsequent successful efforts and ability to secure four search warrants, and its ability to secure the subsequent consent of the defendant to search the location, were all fruits of the poisonous tree. See *Wong Sun v. United States,* 371 U.S. 471 (1963); *State v. Scott,* 389 So.2d 1285 (La. 1980).

> the law's general partiality toward "police action taken under a warrant [as against] searches and seizures without one,"; "the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers,"

Georgia v. Randolph, 126 S. Ct. 1515, 1525 (2006) citing *United States v. Ventresca*, 380 U.S. 102, 107 (1965).

XVII. THE TRIAL COURT ERRONEOUSLY OVERRULED DEFENSE OBJECTIONS TO A NUMBER OF IMPROPER INSTRUCTIONS IN VIOLATION OF MR. KENNEDY'S RIGHTS GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION (Assignment 63-66)

The defense objected to a number of the trial court's proposed instructions, that reduced the prosecution's burden of proof and suggested that the court expected the jury to return a guilty verdict. The trial court overruled the objections and refused to give the instructions suggested by the defense.

A. The Trial Court Erroneously Instructed the Jury Not to Go Beyond the Evidence To Acquit, in Violation of this Court's jurisprudence in State v. McDaniel.

The defense specifically objected to the trial court's instruction to the jury "not to go beyond the evidence to seek doubt." The trial court instructed the jury as it had proposed to do:

> You are prohibited by law and your oath from going beyond the evidence to seek for doubts upon which to acquit the defendant **but** you must confine yourselves strictly to a dispassionate consideration of the testimony given upon the trial. You must not resort to extraneous facts or circumstances in reaching your verdict.

R. 790, 5898. The defense lodged an objection to the proposed instruction noting that it reduced the reasonable doubt standard and in a one sided manner only prohibited the jury from going outside the evidence to acquit – failing to prohibit the jury from going outside the evidence to convict. See R. 765. This Court has specifically held that such a charge violates the Louisiana definition of reasonable doubt, and where analogous charge[119] was given adamantly reversed the conviction:

> . . . [T]he charge was clearly wrong by which the trial court prohibited the jury from "going beyond the evidence to seek for doubts upon which to acquit the defendant" and admonished it to confine itself to "consideration of the evidence presented upon the trial." La.C.Cr.P. art. 804(A)(2) states that reasonable doubt may arise from the lack of evidence in the case.

State v. McDaniel, 410 So. 2d 754, 755-756 (La. 1982) citing *State v. Mack,* 403 So.2d 8, 11 (La.1981).

B. The Trial Court's Reasonable Doubt Definition improperly contained an Articulation Requirement in Violation of this Court's decision in State v. Smith

The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof "beyond a reasonable doubt." See U.S. Const. Amend. V, XIV; *In re Winship,* 397 U.S. 358, 364 (1970) ("[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."); *Cage v. Louisiana,* 498 U.S. 39 (1990) (*per curiam*); State v. Smith, 600 So. 2d 1319 (La. 1992) (reversing

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[119] The charge in *McDaniel* was almost exactly the same as the charge given here. Only the term "but" bolded above is different. There, the district court instructed the jury:

> you are prohibited by law and your oath from going beyond the evidence to seek for doubts upon which to acquit the defendant. You must confine yourselves strictly to a dispassionate consideration of the evidence presented upon the trial. You must not resort to extraneous facts or circumstances in reaching your verdict."

State v. McDaniel, 410 So. 2d 754, 756 (La. 1982).

conviction and sentence where instruction included impermissible articulation requirement). Here, the trial court repeatedly narrowed the definition of reasonable doubt by instructing the jurors that reasonable doubt was: "Reasonable doubt is based on reason and common sense and is present when, after you have carefully considered all of the evidence, *you cannot say that you are firmly convinced of the truth of the charge.*" See R. 788. This constitutes an articulation requirement in violation of *State v. Smith*, 600 So. 2d. at 1327. Since well before *Cage*, courts have been condemning instructions that require a juror to articulate reasons for their doubt.[120] Here, the defense objected to this component of the instruction, but the trial court gave it anyway.

C. The Trial Court's Instruction on Counting Witnesses Assumed the Sufficiency of the State's Proof.

Over defense objection, the trial court instructed the jury: "The test is not which side brings the greater number of witnesses before you, or presents the greater quantity of evidence, but rather, *which* witnesses and which evidence appeals to your minds as being sufficient to sustain the State's burden of proof." See R. 766 , 5901. The question before the jury is not "*which* witnesses" "sustain the State's burden of proof" but rather "*whether* the State's witnesses sustain its burden of proof." The trial court's instruction impermissibly soften's the State's obligation by presuming that the State will carry its burden of proof.

XVIII. THE TRIAL COURT IMPROPERLY DENIED THE DEFENSE REQUEST FOR SPECIFIC INSTRUCTIONS ON MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH And FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION O(Assignment 67)

The trial court is required to instruct the jury as to the law applicable to the case. *State v. Garrison*, 400 So.2d 874 (La.1981). *See also State v. Johnson*, 438 So.2d 1091 (La.1983). The defendant has a right to submit special written charges to the jury and "[a] requested special charge *shall be given by the court* if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent." La.C.Cr.P. Art. 807; *see State v. Shilling*, 440 So.2d 110 (La.1983). Where the State seeks to impose the ultimate punishment, the court has a special obligation to ensure that mitigating circumstances are fully considered. In this case, the court erroneously denied seven legally correct special charges requested in writing by the defense, which required no modification and were not included in the instructions.

A number of the proposed penalty phase instructions dealt explicitly with the issue concerning whether a jury was required to return a death sentence under Louisiana law. See R. 812 (concerning proposed mitigating instruction no. 1, indicating that a life sentence could be given for any reason) ;[121] see also R. 813 (concerning proposed mitigating instruction no. 2, indicating

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[120] In *Humphries v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997), the Fifth Circuit recognized that "[e]ven before Cage was announced, a reasonable doubt instruction that required articulation of a good reason was of dubious constitutionality . . ."

[121] The first proposed penalty phase instruction was:

> A mitigating circumstance is any factor that should be considered in favor of a sentence less than death. Justice requires consideration of more that just the bare facts of the crime. Therefore, mitigating circumstances may arise form any fact connected with the circumstances of the offense or the offender-the defendant's background, his experience, his character, his family, or any other facet of his life-that you believe or feel weighs against a sentence of death.

R. 812. This is a basic, fundamental tenet of United States Supreme Court jurisprudence: "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), *quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). *See also Skipper v. South Carolina*, 476 U.S. 1, 4 (1986).

that a death sentence was never mandatory).[122] These instructions are bed-rock principles of capital jurisprudence. The failure to so instruct was error of constitutional magnitude. The defense also asked the court to instruct the that they were required to consider mitigating evidence individually, and that the defendant did not have the burden to prove the mitigating circumstance beyond a reasonable doubt R. 814, Proposed instruction no. 3.; see also R. 815, Proposed instruction no. 4 ("... [E]ven if all other eleven jurors find that a certain mitigating factor does not exist, or that no mitigation exists, if you believe that mitigation does exist you must find that it does and consider it in your deliberations."). These instructions plainly carry out the mandate of *Mills v. Maryland*, 486 U.S. 367 (1988). In *Mills*, the Supreme Court reversed the conviction because it concluded: "Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." *Mills v. Maryland*, 486 U.S. at 384.

The district court also refused to instruct the jury that the defendant's decision not to testify at the penalty phase could not be held against him.[123] *See e.g. State v. Hamilton*, 92-1919 (La. 09/05/96); 681 So. 2d 1217, 1225(applying La. C. Cr. P. art. 770(3)'s prohibition on comments concerning lack of testimony by the defendant to the penalty phase, but finding comments in that case indirect and non-exclusive); see also La. C. Cr.P. art. 905.2 (A) ("The defendant may testify in his own behalf.").

Finally, the district court erroneously refused to instruct the jury that, in accordance with *Atkins v. Virginia*, a person with mental retardation could not be subject to a death sentence. See R. 818. The denial of this instruction constituted independent error, in addition to the error discussed above in Section V.

XIX. THE JURY NEVER DETERMINED BEYOND A REASONABLE DOUBT THAT DEATH WAS THE APPROPRIATE PUNISHMENT (Assignment 68)

Louisiana's death penalty scheme authorizes the jury to impose the death penalty based upon the "preponderance of evidence," or less. While the State is required to prove the existence of an aggravating circumstance beyond a reasonable doubt, there is no requirement that death penalty be proven justified beyond a reasonable doubt. In Louisiana the jury must make two separate fact-based determinations in the penalty phase in order for the defendant to be sentenced to death. First, the jury must find that the State has proven at least one statutorily-enumerated aggravating circumstance beyond a reasonable doubt. Second,

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[122] The second proposed penalty phase instruction was:

> There is nothing in the law which ever requires a jury to impose a sentence of death, and even if you find that the aggravating circumstances outweigh the mitigating circumstances, or if you find no mitigating circumstances worthy of consideration, or if no mitigating circumstances are presented at all, you must still consider life in prison without parole as a possible sentence. A verdict of life imprisonment requires no basis in evidence, and may be imposed for any reason or no reason at all.

R. 813. This is the law in Louisiana. See e.g. *State v. Higgins*, 03-1980 (La. 04/01/2005); 898 So. 2d 1219, 1238 ("Louisiana law does not provide any standard for a juror to weigh mitigating circumstances against aggravating circumstances.").

[123] The defendant's fifth proposed jury instruction, included a correct provision of law on which the jury was otherwise not instructed:

> Just as the defendant was not required to testify in the guilt portion of the trial, the defendant is also not required to testify at his sentencing hearing. You are to draw no inference whatsoever from the fact that the defendant did not testify in this portion of the trial, and this fact may not be considered in any way in determining what sentence the defendant should receive.

R .816

the jury then must consider all the mitigating factors and decide whether the defendant deserves the death penalty, *i.e.*, whether the defendant is 'deathworthy.' *See, e.g., State v. Miller,* 99-0192 (La. 9/6/00), 776 So.2d 396. The jury's role in capital sentencing in Louisiana is so important that the decision to impose a death sentence can *only* be made by a jury – Louisiana's constitutional and statutory law preclude a capital defendant from waiving his right to jury sentencing and proceeding before a judge. *See* La. Const. Art. I, § 17 ("Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury."); La.C. Cr. P. art. 557 (permitting capital defendant to plead guilty only if State agrees to imposition of life sentence or if case proceeds to sentencing hearing before jury); La.C. Cr. P. art. 905.1 (requiring death sentencing hearing to proceed before jury). Under Louisiana's sentencing scheme, if a jury unanimously finds the existence of three aggravating circumstances, but cannot unanimously determine that death is the appropriate sentence, then the defendant may not be sentenced to death.[124] Because a jury's determination that death is the appropriate punishment is an essential element of the death sentencing process in Louisiana, *Ring* requires that the jury, and not a reviewing court, make the ultimate determination to impose a death sentence. *Ring v. Arizona,* 536 U.S. 584 (2002);[125] *State v. Rizzo,* 833 A.2d 363 (Conn. 2003) (requiring the jury to find beyond a reasonable doubt that death was the appropriate punishment). See also *Kansas v. Marsh*, 04-1170 (re-argued 4/25/2006) (concerning whether a statutory scheme that authorized the death penalty when the aggravating factors were in "equipoise" violated the Sixth or Eighth Amendment); and see Kansas v. Marsh, 04-1170, *Brief of the States of Arizona, Alabama, Colorado, Georgia, Idaho,* ***Louisiana,*** *Mississippi, Montana, Nevada, South Carolina, South Dakota, Tennessee, Texas, Virginia and Washington as Amici Curiae in Support of Petitioner* 2004 U.S. Briefs 1170, 2 (U.S. S. Ct. Briefs 2005) (noting " if the Kansas Supreme Court's approach were followed by this Court, it would cast serious doubt upon capital sentencing procedure in numerous States--including . . . LA. CODE CRIM. PROC. ANN. art. 905.3 . . . . Indeed, if the Court agrees with the lower court's conclusion that the Eighth Amendment forbids the death penalty when those factors are in "equipoise," the very existence of that requirement will likely require "non-weighing" States to change their capital sentencing schemes to require such weighing."). In Kansas, the jury was required to find *beyond a reasonable doubt* that the mitigators did not outweigh the aggravators, before a death sentence could be imposed; in contrast, in Louisiana, the jury can impose a death sentence after finding by a preponderance of the evidence that death is the appropriate punishment. This violates both the Sixth Amendment's beyond a reasonable doubt guarantee, as well as the Eighth Amendment's requirement that juries be guided in their sentencing determination.

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[124] *See* La. C. Cr. P. art. 905.3 ("A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists, *and* after consideration of any mitigating circumstance determines that the sentence of death shall be imposed") (emphasis added); La. C. Cr. P. art. 905.6 ("A sentence of death shall be imposed only upon a unanimous determination of the jury"); La. C. Cr. P. art. 905.8 ("If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without the benefit of probation, parole or suspension of sentence.").

[125] As Justice Scalia wrote in concurring in *Ring*:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- *must be found by the jury* beyond a reasonable doubt.

Ring, 536 U.S. at 47, Scalia, J. *concurring* (emphasis added).

XX. CUMULATIVE ERROR WARRANTS REVERSAL OF APPELLANT'S CONVICTION AND SENTENCE (Assignment 1-69)

This Court is obliged to "conduct an independent review of the entire record, regardless of contemporaneous objection, to determine whether the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factors." *State v. Burrell,* 561 So. 2d 692, 699 (La. 1990). Lest counsel has missed something in the brief filed in this case, Mr. Kennedy asks that this Court conduct its own review of the record for error. In every assignment of error, briefed or unbriefed, counsel asserts that the error violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the analogous provisions of the state constitution, as well as international law. Moreover, even if this Court determines that a single error addressed above is not sufficient to mandate reversal, cumulated errors surely require it. Relief should be forthcoming due to the errors in this case, whether considered singly or cumulatively. The cumulative effect of error warrants reversal. *State v. Senegal,* 316 So. 2d 124 (La. 1975); *State v. Wright,* 445 So. 2d 1198 (La. 1984); *United States v. Canales,* 744 F.2d 413, 430 (5th Cir. 1984) (holding that "the cumulative effect of several incidents of improper argument or misconduct may require reversal, even though no single one of the incidents, considered alone, would warrant such a result").

CONCLUSION

The question this Court must ultimately confront, is whether the quality of the proceedings below sufficiently reflect the magnitude of the occasion before this Court, and whether the facts reflected in this record could ever be considered sufficiently reliable to justify affirming the conviction and sentence, or whether the combination of error, inexactitude and misconduct has led to an unfair conviction and an arbitrary imposition of the death sentence. Counsel respectfully suggests that this Court should reverse the conviction and death sentence and remand the matter for a new trial, or at least in the alternative to hold the imposition of the death penalty under the unique circumstances of this case unconstitutional.

Respectfully,

Jelpi P. Picou, Jr., La. Bar No. 18746
G. Ben Cohen, La. Bar No. 25370
The Capital Appeals Project
636 Baronne Street
New Orleans, La. 70113
(504) 529-5955

Certificate of Service

I hereby certify that this document was sent by first class mail, postage pre-paid, or delivered by hand, upon Terry Boudreaux, Assistant District Attorney in and for the Parish of Jefferson, Jefferson Parish District Attorney's Office, 5th Floor, Courthouse Annex, 200 Derbigny Street, Gretna, LA, 70053, on this 22nd day of May, 2006.

Jelpi P. Picou, Jr.

APPENDIX A

STATE OF LOUISIANA

TWENTY-FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE

PARISH OF JEFFERSON

MOTION FOR THE ISSUANCE OF
SUBPOENA DUCES TECUM PURSUANT TO CODE OF
CRIMINAL PROCEDURE ARTICLE 66

NOW INTO COURT, THROUGH THE UNDERSIGNED ASSISTANT DISTRICT ATTORNEY, comes the STATE OF LOUISIANA who hereby informs this Honorable Court that:

The JEFFERSON PARISH SHERIFF'S OFFICE , in conjunction with the JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE, have before them a certain criminal matter under investigation, to wit: CRIMINAL INVESTIGATION and that certain records are in the possession of:

BELLSOUTH TELECOMMUNICATION
ADMINISTRATOR SUBPOENA COMPLIANCE
1960 WEST EXCHANGE PLACE
SUITE 165
TUCKER, GEORGIA 30084

There exists reasonable grounds for the issuance of this subpoena, to wit: records are needed to be used as possible evidence in a criminal investigation. The following records are essential to this investigation:

ANY AND ALL INCOMING AND OUTGOING CALLS MADE AND RECEIVED AT 504-328-9699, On MONDAY MARCH 2, 1998, From 12:01 a.m. to 11: 59 p.m.

The JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE is represented in this instance by JOSEPH E. ROBERTS, and the JEFFERSON PARISH SHERIFF'S OFFICE by SERGEANT KELLY JONES. The return of these records should be to JOESPH E. ROBERTS, whose office is located at the CRIMINAL INVESTIGATIONS BUREAU, 725 MAPLE AVENUE, HARVEY, LA., and should be returnable on FRIDAY, the 10th day of APRIL, 1998.

The issuance of the above requested subpoena Duces Tecum is in accordance with, and authorized by Article 66 of the Louisiana Code of Criminal Procedure.

WHEREFORE, the State of Louisiana prays that a Subpoena Duces Tecum for the above described records be issued to

BELLSOUTH TELECOMMUNICATIONS
ADMINISTRATOR SUBPOENA COMPLIANCE
1960 WEST EXCHANGE PLACE
SUITE 165
TUCKER, GEORGIA 30084

Joseph E. Roberts

JOSEPH E. ROBERTS
ASSISTANT DISTRICT ATTORNEY

DME 1 (3 pgs)

ORDER

Considering he foregoing Motion for the Issuance of a Subpoena Duces Tecum pursuant to La.C.Cr.P. Art. 66, filed by the District Attorney and finding that there exists reasonable grounds, therefore:

IT IS ORDERED that:

BELLSOUTH TELECOMMUNICATIONS
ADMINISTRATOR SUBPOENA COMPLIANCE
1960 WEST EXCHANGE PLACE
SUITE 165
TUCKER, GEORGIA 30084

shall deliver unto JOSEPH E. ROBERTS of the JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE located at the CRIMINAL INVESTIGATIONS BUREAU, 725 MAPLE AVENUE, HARVEY,LA., the following:

ANY AND ALL INCOMING AND OUTGOING CALLS MADE AND RECEIVED AT 504-328-9699, ON MONDAY MARCH 2, 1998, From 12:01 a.m. to 11: 59 p.m.

on FRIDAY, the 10th day of APRIL, 1998.

GRETNA, LOUISIANA, THIS 30th day of March, 1998

Darrel Kliff
JUDGE Div. - 24 JDC

SUBPOENA DUCES TECUM

STATE OF LOUISIANA

TWENTY-FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE

PARISH OF JEFFERSON

TO: BELLSOUTH TELECOMMUNICATIONS
ADMINISTRATOR SUBPOENA COMPLIANCE
1960 WEST EXCHANGE PLACE
SUITE 165
TUCKER, GEORGIA 30084

GREETING:

You are hereby commanded in the name of the STATE OF LOUISIANA and of the 24th Judicial District Court for the Parish of Jefferson, to turn over to JOSEPH E. ROBERTS, at the CRIMINAL INVESTIGATIONS BUREAU, 725 MAPLE AVENUE, HARVEY,LA., on FRIDAY, the 10th of APRIL, 1998, the following, to wit:

ANY AND ALL INCOMING AND OUTGOING CALLS MADE AND RECEIVED AT 504-328-9699, On MONDAY, MARCH 2, 1998, from 12:01 a.m., to 11:59 p.m.

And herein fail not under penalty of the law.
Witness the Honorable Jon A. Gegenheimer, Clerk of said 24th Judicial District Court, this 30 day of March, 1998

A. Barrett
Deputy Clerk

Subpoena #: BellSouth #: BST980353522 Page 2
04/01/98 07:31 CALL DETAILS FOR (504) 328-9699

Number	Date	Time	Calling No.	Called No.	Duration	Answered	Carrier	Billed No
#1	03/02/98	05:39	504-588-9217	504-328-9699	1	Yes		
#2	03/02/98	05:43	504-588-1740	504-328-9699	1	Yes		
#3	03/02/98	07:12	504-328-9699	000-411-0000	1	Yes		
#4	03/02/98	08:20	504-328-9699	000-000-0000	1	Yes		
#5	03/02/98	09:19	504-436-7411	504-328-9699	1	Yes		
#6	03/02/98	09:23	504-525-6717	504-328-9699	1	Yes		
#7	03/02/98	13:24	000-000-0000	504-328-9699	0	NO		
#8	03/02/98	23:28	504-436-7411	504-328-9699	5	Yes		

DME 2 (2 pgs)

Tucker, Georgia 30084

Joseph E Roberts

JOSEPH E. ROBERTS
ASSISTANT DISTRICT ATTORNEY

DME 3 (3 pgs)

ORDER

Considering he foregoing Motion for the Issuance of a Subpoena Duces Tecum pursuant to La.C.Cr.P. . Art. 66, filed by the District Attorney and finding that there exists reasonable grounds, therefore:

IT IS ORDERED that:

BellSouth Telecommunications
Administrator-subpoena Compliance
1960 West Exchange Place, Suite 165
Tucker, Georgia 30084

shall deliver unto JOSEPH E. ROBERTS of the JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE located at the CRIMINAL INVESTIGATIONS BUREAU, 725 MAPLE AVENUE, HARVEY,LA., the following:

BILLING STATEMENT FOR 3/2/98, FROM 12:01 A.M. TO 11: 59 A.M., FROM THE TELEPHONE NUMBER 504-328-9699, TO INCLUDE ANY DIRECTORY ASSISTANCE CALLS, OPERATOR ASSISTED CALLS, TRANSFERRED CALLS, CALL BLOCK CALLS, AND 911 CALLS, GENERATED FROM THE ABOVE LISTED TELEPHONE NUMBER.

on FRIDAY, the 3ED day of APRIL, 1998.

GRETNA, LOUISIANA, THIS 26th day of March, 1998

JUDGE

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.

DEPUTY CLERK
24TH. JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA.

SUBPOENA DUCES TECUM

STATE OF LOUISIANA

TWENTY-FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE

PARISH OF JEFFERSON

TO: BellSouth Telecommunications
Administrator-Subpoena Compliance
1960 West Exchange Place, Suite 165
Tucker Georgia 30084

GREETING:

You are hereby commanded in the name of the STATE OF LOUISIANA and of the 24th Judicial District Court for the Parish of Jefferson, to turn over to JOSEPH E. ROBERTS, at the CRIMINAL INVESTIGATIONS BUREAU, 725 MAPLE AVENUE, HARVEY,LA., on FRIDAY, the 3ED of APRIL, 1998, the following, to wit:

Billing statement for the date of 3/2/98, from 12:01 a.m. to 11: 59 a.m. , for the telephone number 504-328-9699, to include any directory assistance, operator assistance, transferred calls, call block calls, or 911 calls generated from the above listed number.

And herein fail not under penalty of the law.
Witness the Honorable Jon A. Gegenheimer, Clerk of said 24th Judicial District Court, this 26th day of March, 1997

Deputy Clerk

Subpoena #: none
04/02/98 07:32

BellSouth #: BST980353737
CALL DETAILS FOR (504) 328-9699

Number	Date	Time	Calling No.	Called No.	Duration	Answered	Carrier	Billed No
#1	03/02/98	07:12	504-328-9699	000-411-0000	1	Yes		
#2	03/02/98	08:20	504-328-9699	000-000-0000	1	Yes		

DME 4 (3 pgs.)

Jefferson Parish District Attorney's Office to provide evidence incriminating to the defendant regarding the times of various calls he claimed to have made and whether in fact those calls were made.

04/03/98 11:52 NO.991 P006

504 328 9699 182 *CSR* *F-NUM* NOW RULCL NP

CENT R00
(NON-PUB) KENNEDY, P
2224 BELLAIRE LN, HARVEY
SA 2224 BELLAIRE LN, HARVEY, LA
DZIP 70058

---BILL
BN1 PATRICK KENNEDY
BA2 2224 BELLAIRE LN
PO HARVEY LA 70058
TAX NNNN
TAR 000,725
PACI XXXX

---S&E

Number Changed 3-12-98

BELLSOUTH

BellSouth Telecommunications, Inc.
Suite 165
1960 West Exchange Place
Tucker, Georgia 30084

THE FOLLOWING TRANSLATION TABLE WILL ASSIST YOU IN INTERPRETING THE INFORMATION ON THE ATTACHED CALL DETAIL SHEETS.

EI: - ERROR INDICATOR - This will be found at the left hand margin and indicates the beginning of a call.

CD: - CONNECT DATE - This is the date of the call. It is written (YMMDD). Example: 71215 is December 15, 1997.

ONPA: - ORIGINATING NPA - This is the area code of the originating telephone number. If this shows all zeros, the area code is the same as the terminating telephone number.

ONL: - ORIGINATING NXX-LINE - This is the originating telephone number (from number).

TNPA: - TERMINATING NPA - This is the area code of the terminating telephone number. If this shows all zeros, the area code is the same as the originating telephone number.

TNL: - TERMINATING NXX-LINE - This is the terminating telephone number (the "to" number).

CTM: - CONNECT TIME - This is the time the call was placed. The time is shown in military time - (HHMMSSS) Example: 1432255 is 2:32 p.m. and 25.5 seconds

ETM: - ELAPSED CONVERSATION TIME - This is the duration of the call - (HHMMSSS). Example: 000002089C is 2 minutes and 8.9 seconds.

ANS: This is the answer indicator which denotes whether or not the call was answered. Example: 0 = answered
1 = unanswered

AA = Good Call AB = Not a Good Call

As information, "C" is shown after each field to denote the end of the field.

```
VIEW 1.7 BROWSE - MB05A24LDS --- REC 0014780 PG 0001825.016 LOCK 00 COL 001 080
COMMAND ===>                                                  L1SY    SCROLL ===> PAGE
EI  : AA  | SCD : 40752C   | CT  : 194C   | ST  : 036C   | SID : 0510001C   | *
*ROT : 032C   | ROI : 0001100C   | CD  : 80302C   | TI  : 00000C   |          *
*STDY: 0200000C   | SOTS: 0C   | ONPA: 504C   | ONL : 3289699C   |          *
*CTM : 0712325C   | ETM : 000000578C   | T296: 11117080031O1C   | SIET: 00240C*
*SF  : 000C   | T276: 2C   | SCRC: 000C   | ANIP: 1C   | T279: 1C   |          *
*MODL: 307C   | T423: 001C   | T016: 00504C   | T017: 3400170C   |          *
*MODL: 055C   | SVCI: 901C   | MII : 3C   | MOLA: 1C   | IBI : 10000C   |     *
*LA  : FF   | RSPM: 2C   | LS  : 111112100C   | T802: 001C   | MODL: 000C   | *
EI  : AA  | SCD : 40752C   | CT  : 194C   | ST  : 036C   | SID : 0510001C   | *
*ROT : 032C   | ROI : 0001100C   | CD  : 80302C   | TI  : 00000C   |          *
*STDY: 0200032C   | SOTS: 0C   | ONPA: 504C   | ONL : 3289699C   |          *
*CTM : 0820025C   | ETM : 000000375C   | T296: 1082513003101C   | SIET: 00240C*
*SF  : 000C   | T276: 2C   | SCRC: 000C   | ANIP: 1C   | T279: 1C   |          *
*MODL: 055C   | SVCI: 901C   | MII : 3C   | MOLA: 1C   | IBI : 10000C   |     *
*LA  : FF   | RSPM: 3C   | LS  : 999999900C   | T802: 001C   | MODL: 000C   | *
EI  : AB  | SCD : 00625C   | CT  : 119C   | ST  : 006C   | SID : 0510100C   | *
*ROT : 032C   | ROI : 0001100C   | CD  : 80301C   | TI  : 00000C   |          *
*STDY: 0200000C   | ANS : 1C   | SOTS: 0C   | OA  : 0C   | SF  : 000C   |     *
*ONPA: FF     | ONL : FF         | OVSI: 1C   | TNPA: 00000C   | TNL : 5289393C
*CTM : 1734348C   | ETM : 000000000C   | PRFX: 02882C   | CCDT: 80301C   |     *
*CTME: 1733331C   | CETM: 000001007C   | CEVS: 001C   | TGN : 30484C   |     *
*ROUT: 0C   | DIAL: FF   | ANID: 2C   |                                        *
```

(1) This call occurred at 07:12 AM on 3-2-98. The call was to 411. The operator gave information on 504-340-0170. The 504-340-0170 was dialed and the customer was charged.

(2) This call to 411 was on 3-2-98 at 8:20 AM. The # requested is unknown because the number was not auto dialed.

DME 5

Date: 03/27/98 E911 Call Management and Reporting System Page 1
Time: 10:42 AM (JEFFERSON PARISH EMERGENCY OPER. CTR)

Call Detail Report
Date: 03/02/98 thru: 03/02/98 Hour: 9 thru: 9 ANI: 504 Unanswer: N

Per Call Basis

CONN TIME	ANSR TIME	XFER TIME	DISC TIME	ANSR SPD	TALK TIME	ANI	TRK	POS	ERROR CODE
08:59:43	08:59:49	09:00:14	09:00:40	6	51	504 341-7008	10	01	00
09:01:45	09:01:51	09:01:57	09:02:10	6	19	504 733-4776	14	04	00
09:00:13	09:00:19	00:00:00	09:02:35	6	136	504 347-2846	11	01	00
09:02:27	09:02:33	00:00:00	09:02:45	6	12	504 348-2216	06	03	00
09:03:01	09:03:07	00:00:00	09:04:41	6	94	504 836-2001	04	06	00
09:05:39	09:05:44	00:00:00	09:06:21	5	37	504 456-8731	13	05	00
09:04:51	09:04:59	00:00:00	09:06:24	8	85	504 832-8160	07	03	00
09:07:59	09:08:06	00:00:00	09:08:49	7	43	504 341-4502	02	05	00
09:10:06	09:10:12	00:00:00	09:10:24	6	12	504 454-9845	12	04	00
09:09:00	09:09:08	00:00:00	09:10:27	8	79	504 885-8637	01	01	00
09:09:53	09:09:59	00:00:00	09:11:13	6	74	504 834-1393	08	04	00
09:12:40	09:12:45	00:00:00	09:13:15	5	30	504 347-7007	05	01	00
09:13:56	09:14:02	00:00:00	09:14:28	6	26	504 828-4708	09	05	00
09:15:10	09:15:15	00:00:00	09:15:21	5	6	504 341-1843	10	06	00
09:15:34	09:15:39	00:00:00	09:15:50	5	11	504 341-1843	11	06	00
09:15:18	09:15:24	00:00:00	09:16:36	6	72	504 885-6100	14	03	00
09:17:31	09:17:37	00:00:00	09:18:05	6	28	504 454-9850	06	03	00
09:17:48	09:17:54	09:19:16	09:19:24	6	90	504 733-8495	04	06	00
09:18:48	09:18:56	00:00:00	09:19:34	8	38	504 347-4252	13	01	00
09:20:13	09:20:19	00:00:00	09:23:59	6	220	504 328-9699	07	06	00
09:23:18	09:23:24	00:00:00	09:24:17	6	53	504 362-4071	12	03	00
09:23:35	09:23:41	00:00:00	09:24:22	6	41	504 885-1234	01	01	00
09:22:47	09:22:52	00:00:00	09:24:43	5	111	504 362-0188	02	05	00
09:25:56	09:26:02	09:26:14	09:26:31	6	29	504 885-8637	08	06	00
09:26:48	09:26:54	00:00:00	09:27:14	6	20	504 348-3335	10	06	00
09:26:23	09:26:29	00:00:00	09:27:37	6	68	504 437-0186	05	04	00
09:27:10	09:27:15	00:00:00	09:28:00	5	45	504 436-6226	11	05	00
09:26:46	09:26:52	09:28:47	09:29:05	6	133	504 393-8136	09	01	00
09:31:07	09:31:12	00:00:00	09:31:35	5	23	504 466-0591	14	08	00
09:31:30	09:31:35	00:00:00	09:32:19	5	44	504 347-8948	06	03	00
09:35:00	09:35:05	00:00:00	09:35:50	5	45	504 733-0296	13	03	00
09:34:21	09:34:26	00:00:00	09:36:09	5	103	504 834-1393	04	03	00
09:35:22	09:35:28	00:00:00	09:36:09	6	41	504 392-2227	07	06	00
09:39:00	09:39:07	00:00:00	09:39:12	7	5	504 669-9178	12	03	00
09:40:52	09:40:58	00:00:00	09:42:27	6	89	504 466-9905	02	03	00
09:41:17	09:41:23	00:00:00	09:43:31	6	128	504 734-1837	08	08	00
09:43:41	09:43:47	00:00:00	09:45:01	6	74	504 340-8847	10	06	00
09:47:45	09:47:51	00:00:00	09:48:59	6	68	504 361-6354	05	06	00
09:48:21	09:48:27	00:00:00	09:49:19	6	52	504 883-5151	11	01	00
09:51:00	09:51:08	00:00:00	09:51:36	8	28	504 347-6814	14	07	00
09:48:40	09:48:46	00:00:00	09:52:49	6	243	504 737-9763	09	08	00
09:52:26	09:52:32	00:00:00	09:54:30	6	118	504 887-2875	06	05	00

BELLSOUTH
TELECOMMUNICATIONS

ATTN: Joseph E. Roberts
Jefferson Parish Sheriff's Ofc
725 Maple Avenue
Harvey, LA 70058

RE: Subpoena #: none
BellSouth #: BST9803S3737
Received: 03/30/98

Date: 04/02/98

Enclosed is our return of information requested in the above described subpoena. If you have any questions concerning this information, please call our office at (800)474-2677 from within the BellSouth nine state region. Outside the BellSouth region, please call (770)492-4560.

Sincerely,

Gene Allman

for Lavonne Westbrooks
BellSouth Subpoena Center
1960 W. Exchange Pl. Ste. 165
Tucker, GA 30084

Apologize for the delay in our response — I had this subpoena attached to another one — Hopefully this information is still helpful. Please call me at 770-492-4568 if you have questions.

AFFIDAVIT

Personally appeared before me, the undersigned Notary Public, Suzette Malcolm Jackson, after being duly confirmed, deposes and states as follows:

1. I am the duly authorized and designated custodian of records for BellSouth Telecommunications and am duly authorized to certify such records.

2. BellSouth Telecommunications was served with a subpoena on 3/30/98, for telephone records described therein. A copy of such subpoena is attached.

3. Circle (a) or (b)

(a) Attached hereto is a true copy of all available records described in such subpoena. Said records were prepared by the personnel of BellSouth Telecommunications in the ordinary course of business.

(b) No records as described in the subpoena are available.

The foregoing is a true and accurate statement based upon records of BellSouth Telecommunications.

Suzette M. Jackson
Custodian of Records
BellSouth Telecommunications

Subscribed to and signed before me this 2nd day of April, 1998.

Eugenie D Pittman
Notary Public

My Commission expires Notary Public, Gwinnett County, Georgia My Commission Expires March 11, 2001