IN THE

SUPREME COURT

STATE OF LOUISIANA

NO. 05-KA-1981

STATE OF LOUISIANA,
Appellee

Versus

PATRICK KENNEDY,
Appellant

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, NO. 98-1425 DIVISION "O", HON. ROSS LADART, JUDGE PRESIDING

CAPITAL CASE

BRIEF OF THE STATE OF LOUISIANA, APPELLEE

PAUL D. CONNICK, JR.
DISTRICT ATTORNEY
24th JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

JULIET CLARK, BAR NO. 23451
TERRY M. BOUDREAUX
ASSISTANT DISTRICT ATTORNEYS
200 DERBIGNY STREET
GRETNA, LOUISIANA 70053
(504) 368-1020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTORY AUTHORITIES

IN THE

SUPREME COURT

STATE OF LOUISIANA

NO. 05-KA-1981

STATE OF LOUISIANA,
Respondent

Versus

PATRICK KENNEDY,
Applicant

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, NO. 98-1425 DIVISION "O", HON. ROSS LADART, JUDGE PRESIDING

CAPITAL CASE

STATEMENT OF THE CASE

On May 7, 1998, the defendant, Patrick Kennedy, was charged by bill of indictment with the aggravated rape of a female juvenile under the age of twelve years, a violation of La. R.S. 14:42(D).[1] (R. 1, p. 83). The defendant was arraigned and entered a plea of not guilty on May 7, 1998. (R. 1, p. 3). On November 12, 1999, the trial court heard and denied the defendant's motions to suppress the statements and evidence. (R. 1, p. 19).

Jury selection began on August 8, 2003. (R. 1, p. 55). Death qualification of prospective jurors was completed on August 13, 2003, and court was recessed for the evening. (R. 1, pp. 60-61). On August 14, 2003, final jury selection began, and was completed on August 15, 2003. (R. 1, p. 62-64). On August 15, 2003, opening statements were given by the state and defense. (R. 1, p. 64; R. 18, pp.4407-4429). On August 25, 2003, after listening to the closing arguments of the attorneys and the instructions of the trial court, the jury retired to deliberate, returning with a verdict of guilty as charged. (R. Vol. 1, p. 79-80; R. 24, pp. 5831-5910).

On August 26, 2003, the penalty phase in this matter was conducted and the jury returned a verdict of death. (R. 1, p. 81-82). The jury found as aggravating circumstances that: 1) the offender was engaged in the perpetration of an aggravated rape, and 2) that the victim was under the age of twelve years. (R. Vol. 1, p. 808). On October 2, 2003, the trial court denied the defendant's *Motion for New Trial/ Arrest of Judgment.* The defendant waived sentencing delays and the trial court sentenced him to death in accordance with the verdict of the jury. (R. 3, p. 662; R. 25, p. 6065, 6068).

This direct appeal follows pursuant to La. Const. Art. 5, Sect. 5(D)(2).

---

[1] In accordance with La. R.S. 46:1844, in order to protect the identity of the victim, who is a minor victim of a sexual offense, her name, and the name of her mother will be referred to by the use of initials

STATEMENT OF THE FACTS

A. Guilt Phase

On March 2, 1998, at approximately 6:15 a.m., Alvin Arguello arrived at his office to find a message from the defendant, Patrick Kennedy, on his answering machine. (R. 19, p. 4736-4737). Arguello was the chief dispatcher for the A. Arpet Moving Company, and Kennedy was one of the company's main drivers who picked up household goods on "in town" routes. *Id.* The defendant's message stated that he would not be in to work that morning. *Id.* Mr. Arguello had already begun to readjust the schedule to account for the fact that the defendant would not be working, when the defendant made a second telephone call to the office, which Arguello received between approximately 6:30 and 7:30 am. (R. 19, p. 4737-4739). The defendant told Mr. Arguello, a female relative "became a young lady" that morning, and asked him if he knew how to get blood out of a white carpet. *Id.* [2] Mr. Arguello, who was familiar with the defendant's voice after speaking with him on an almost daily basis for several years, testified that Mr. Kennedy sounded a little anxious and nervous on the phone. (R. 19, p. 4738). Mr. Arguello was certain he received Mr. Kennedy's second call before 7:30 a.m. (R. 19, p. 4739). Mr. Arguello provided this information to police when he was questioned by them on March 4-5, 1998. (R. 19, p. 4739-4740). On cross examination, he stated he received a third phone call from Mr. Kennedy some time later that morning. (R. 19, p. 4651-4752).

Rodney Madere, the owner of B&B Carpet Cleaning, received a call from Patrick Kennedy at 7:37 a.m. on March 2, 1998. (R. 18, pp. 4472, 4474, 4479). The defendant asked to have some carpets cleaned. *Id.* He stated that it was an urgent job, to be done right away, explaining that there were bloodstains on the carpet. *Id.* Mr. Madere identified a photograph of his caller I.D. box logging the call, and reflecting the call was from "P.Kennedy." (R. 18, pp. 4473-74, 4479, State's Exhibit 1). The information displayed on the caller I.D. box further reflected that the call was received at 7:37 on 3:02. (State's Exhibit 1). Mr. Madere told Mr. Kennedy they could not start the job before 9:00 in the morning. (R. 18, p. 4474).

Prior to 8:00 a.m. that morning, Mr. Madere called his employee, Lester Theriot, and instructed him to report to the house located on Bellaire Drive. (R. 19, p. 4680). After taking his son to school, Mr. Theriot went to the house on Bellaire Drive but could not go inside because police and an ambulance were in front of it. *Id.* Madere rescheduled the job, but the company never cleaned the carpets. (R. 18, p. 4481). Instead, Madere called the Sheriff's Office to report the call he received from Patrick Kennedy after learning from the news that carpet was being removed from the residence for testing. (R. 18, pp. 4479, 4481).

On March 2, 2002, Patrick Kennedy called 911 to report the rape of his eight year old step-daughter, L.H. (R. Vol. 1, p. 4492-4495, Exhibits S-2, S-3, S-4). Sgt. Billy Lewis ,the custodian of records for the Communications Division of the Jefferson Parish Sheriff's Office (JPSO), identified a transcript of the 911 tape, a copy of the 911 tape and a printout of the incident. *Id.* The 911 tape was played for the jury. *Id.*

---

[2] Mr. Arguello was uncertain whether the defendant told him that the young lady was his daughter or his niece. (R. 19, pp. 4737-4739).

The 911 tape was played for the jury. The defendant advised the operator that his daughter was in the garage while he was getting his son ready for school. He exited the residence upon hearing loud screaming, and discovered her lying in the side yard between their house and the empty house next door. She told him that two boys grabbed her, pushed her down, pulled her over there, and raped her. The operator asked him where the perpetrators were white males or black males. The defendant responded, "Ms. May, was they black or white? She said they was black boys." The operator asked him if the victim knew the perpetrators and whether they were young boys. The defendant then stated that when he heard the victim screaming, he looked out. He said one of them "be walking through this neighborhood all the time", describing him as an eighteen year old, wearing a black shirt and blue jeans, riding a ten speed bicycle. The defendant said they went up Bellaire towards Wal-Mart on the bicycle. (Exhibits S-2, S-3).

The first person to arrive at 2224 Bellaire Drive in response to the 911 call was Deputy Burgess, an employee of the Jefferson Parish Sheriff's Office (JPSO). (R. 18, p. 4497). Deputy Burgess was in the Woodmere area, at the intersection of Post Drive and Alex Korman Boulevard, when he received of the report of the instant offense at approximately 9:20 - 9:30 a.m. (R. 18, p. 4498). The dispatched address was so close to his location that Deputy Burgess thought he was going to "catch a rape in progress." (R. 18, p. 4498-4499). Deputy Burgess did not observe anyone in the vicinity of Bellaire Drive and Post Drive when he received the dispatch or as he responded to it. (R. 18, p. 4500). Although he could see all the way down Post Drive to Oakmere Boulevard from his position on Post Drive alongside the Wal-Mart parking area, he did not see anyone riding a bicycle. *Id.*

Deputy Burgess slammed on his brakes in front of the residence, exited the car, and ran behind the house, where he found a dog sleeping in a dog house. (R. 18, p. 4499). Thinking he was at the wrong address, he retraced his steps between the houses, and observed a circular display of blood in the grass. (R. 18, p. 4501). Believing he had located the crime scene, he went to the front of the house, where he had previously noticed that the garage door was open. (R. 18, p. 4501-4502). Inside the garage, he observed a straight thin line of blood drops on the concrete. (R. 18, p. 4507). Hearing noises coming from inside the house, he drew his gun and started yelling "police, who's here, anybody in the house?" (R. 18, p. 4502-4503). Patrick Kennedy, who was talking on the phone, confirmed that he had reported the rape. (R. 18, pp. 4503, 4517). Deputy Burgess had to order the defendant to put down the phone in order to get a description of the perpetrators, which he relayed to officers en route to the residence. (R. 18, p. 4503).

Inside the house, Deputy Burgess did not observe any more blood until they reached the steps, which had a blood trail going up them. (R. 18, p. 4507). Kennedy led him to a bedroom where L.H. was lying sideways across a bed, on her back, on top of a blanket. (R. 18, p. 4504). She was wearing a T-shirt, but nothing on the lower part of her body except a towel. (R. 19, p. 4526). Kennedy removed the towel to show Deputy Burgess that the victim was injured. (R. 19, p. 4527). Deputy Burgess saw blood on the blanket, and a substance he initially believed to be chunks of tissue, but later learned was coagulated blood. *Id.* The L.H. could only respond to questions with one or two word answers. (R. 19, p. 4504-4505). Deputy Burgess had to ask Kennedy to allow the L.H. to respond to his

questions instead of answering them for her. *Id.* L.H. told him she was in the garage with her brother selling Girl Scout cookies when two subjects appeared. (R. 19, p. 4528). One of them grabbed her and took her around the back. *Id.* The defendant told Deputy Burgess that he carried the victim upstairs from the backyard, holding her like an infant, without getting any blood on his person. (R. 18, p. 4510).

While EMS was with the victim, Deputy Burgess attempted to speak with the victim's young brother, but could not understand him. (R. 19, p. 4529). On hands and knees, Deputy Burgess unsuccessfully tried to find a blood trail in the grass linking the bloody area to the garage. (R. 18, pp. 4510-4511). Although the grass had not been recently cut, and his weight depressed the grass, the grass in the bloody location was not lying down or flattened. *Id.* Apart from the blood, there was no indication that a struggle had taken place there. *Id.*

Deputy Burgess encountered the defendant wiping his hands with a towel that had blood on it, and questioned him as follows:

> I said where did you come from with that? He said I was just cleaning up the bathroom. I said there's blood in the bathroom and he goes yeah, I took her in there to clean her up, wipe all the blood off of her. I put her in the bathtub. I backed up about two steps and regained my composure. It didn't dawn on me that somebody would do that - -

(R. 18, p. 4508). Deputy Burgess identified photographs depicting the interior and exterior of the residence as it appeared when he responded to the sense. (R. 18, p. 4512-4516; S-5-20). Less than a minute elapsed from the time he received the initial call until he arrived on the scene, and he saw the victim within two to three minutes after his arrival. (R. 19, p. 4537).

EMS Field Supervisor Stephen Brown responded to the complaint . (R. 19, p. 4539). The call was dispatched at 9:20a.m., and he responded to it at 9:21 a.m.. (R. 19, p. 4540). It took him approximately six minutes to get to the scene. Id.. There, Mr. Brown encountered Deputy Burgess, who advised him that a bleeding female juvenile was upstairs in the residence. *Id.* Mr. Brown retrieved a trauma box, before entering the house. (R. 19, p. 4541). Inside, Mr. Brown did not see any blood until he reached the top of the stairs, where he observed blood droplets on a small landing. (R. 19, p. 4541-4542). He located L.H. in a bedroom, lying on the bed. *Id.* A black male who had his back to Mr. Brown, said that he was wiping the blood down to see where it was coming from. *Id.* Mr. Brown told him to stop. (R. 19, p. 4543). Mr. Brown testified that if someone is bleeding, continuously wiping down the blood will just make the bleeding continue. *Id.* Also, he felt that the man was disturbing the crime scene by washing any evidence off of her body. *Id.* The man, who had a water-filled basin with a towel in it, stood up. *Id.*

L.H. was lying across the foot of the bed with her buttocks and vaginal area on a cargo blanket, wearing a Pocahontas t-shirt, with black short pants around her ankles. (R. 19, p. 4543-4544). She had an oozing discharge of blood from her vaginal area. *Id.* He placed folded abdominal pads in the crease of her legs over her vagina. *Id.* The stepfather removed the basin from the room, but returned when Mr. Brown tried to question the victim about what happened to determine what medical procedures might be necessary . (R. 19, p. 4545). The defendant intervened and tried to answer the questions himself. *Id.*

In front of the victim, the defendant told Brown that L.H. was downstairs with her brother, "fooling with" some cookies, when someone came into the garage, asked her for a price, and pulled her into the backyard next door. (R. 19, p. 4545-4546). The defendant said that his son came upstairs and told him that something was happening. *Id.* When the defendant went downstairs he saw a subject leave the yard next door, get on a bike and ride down the street. *Id.* In the backyard he found L.H., put her on a blanket, and brought her inside. *Id.* Then he put her in the tub to see if he could tell where the bleeding was coming from, before moving her to the blanket in her room. *Id.*

Detective Brian O'Cull, and employee of the St. Tammany Sheriff's Office, was employed by JPSO at the time of this incident. (R. 19, pp. 4574-4578). He took a voluntary taped statement from Patrick Kennedy at his residence on March 2, 1998. *Id.* The defendant was not a suspect at that time, and he was interviewed at his dining room table. (R. 19, p. 4578). The recording was played for the jury. (R. 19, p. 4581; S-22).

The defendant told Det. O'Cull that he was inside getting his son ready, while L.H. was in the garage with the door up. He had previously called the school to report that L.H. was staying home because she was sick. Kennedy went upstairs. He heard the dog barking, but didn't pay attention. After his son came to tell him L.H. was screaming for him, he looked around the house for her. His son told him that she was in the grass. Exiting the residence, he found L.H. lying with her shorts half-way off in a puddle of blood. She was screaming and hollering. He grabbed a work blanket, picked her up on it and brought her into the house, where he sat her in the tub and let water run on her while he called 911. L.H. told him two people were involved, but he only saw one person ride off on a bicycle. Kennedy said that L.H.'s panties and shorts were lying beside her, and that he grabbed them when he grabbed her. He said that L.H. told him that the boys asked her about Girl Scout cookies, then one of them grabbed her and pulled her to the back. Another boy was behind her on the bike. She said the boys had previously asked about cutting the yard. Mr. Kennedy described the bicycle as a blue ten speed with the handle bars turned up. Kennedy said that he saw it behind the empty house next door on previous occasions. (S-22 and 23).

Det. Mike Hullihan and Lt. Maggie Snow went to Children's Hospital to ask the defendant if he would be come to the Detective Bureau to provide additional information about the incident. (R. 19, p. 4596). He agreed. *Id.* At the Detective Bureau, Det. Hullihan was asked to seat the defendant in his office. (R. 19, p. 4597). Det. Hullihan did not personally intend to take a formal statement from the defendant, and believed the purpose of the interview was simply to go over the incident again. (R. 19, pp. 4597-4599; S-24). However, he advised the defendant of his rights, and executed a waiver of rights form, which the defendant signed, indicating that he understood his rights and wished to waive them. *Id.* While Det. Hullihan waited with Mr. Kennedy for someone to come and take his statement, Mr. Kennedy talked to him about the incident. (R. 19, p. 4599).

Kennedy told Hullihan his wife left for work at 5:30 that morning. (R. 19, p. 4599). Later, he fixed breakfast for L.H.. *Id.* While he was cleaning upstairs, his L.H. vomited in the bathroom. (R. 19, p. 4599-4600). His son helped her clean up, and she went back downstairs. (R. 19, p. 4600). After she vomited again, he gave her orange juice and Tylenol. *Id.* Kennedy said that after he did some laundry, he went back upstairs. *Id* His son wanted to

stay home with L.H., so the defendant called the school to say both children were staying home. *Id.* His son came upstairs and said that L.H. was sick and lying in the back yard. (R. 19, p. 4600-4601). He went downstairs, exited the garage and went around the parked vehicle, at which time he saw a black male ride by on a bicycle. (R. 19, p. 4601). He was watched as the black male rode to Post Street and turned left. *Id.* The defendant said that the black male had a fade haircut and a gold earing in his left ear. (R. 19, p. 4601-4602). He was wearing blue jeans and a black t-shirt, and weighed about 250-270 pounds. (R. 19, p. 4602). The defendant went to L.H., who was lying on her back wearing only her shirt. (R. 19, p. 4601). She was screaming and crying when he left the garage, and her panties and shorts were lying on the ground next to her. *Id.* He told Det. Hullihan that he retrieved a moving blanket from the garage and used it to carry the victim into the house. (R. 19 p. 4602). He picked up her clothes and called 911 while carrying her upstairs to put her in the bathtub to clean her. *Id.*

Det. Hullihan took the defendant to several locations in an effort to locate a bicycle similar to the one he described. (R. 19, p. 4603). At K-Mart, the defendant told Det. Hullihan that the light blue cap on a laundry detergent bottle in a store display was the same color as the bicycle he saw. (R. 19, p. 4603-4604). He then pointed at a bicycle on display, identifying it as the type of bicycle he saw. (R. 19, p. 4605). A photograph of this bicycle was displayed to the jury as S- 26. *Id.* Det. Hullihan was surprised by the defendant's selection of this bicycle, because he was aware of the description the previously provided by the defendant. (R. 19, p. 4614-4615).

On March 2, 1998, Det. Florida Bradstreet was instructed to proceed to Children's Hospital to meet with L.H., who was called by the nickname, Ms. Mae. (R. 19, p. 4617). L.H. tried to provide her with some information at that time, however L.H. was lying on a stretcher in a great deal of pain. (R. 19, p. 4618).

Det. Bradstreet took a voluntary taped statement from the defendant on March 3, 1998. (R. 19, pp. 4618-4619). The defendant agreed to cooperate with the investigation, and was interviewed in connection with officers' discovery of a bicycle belonging to Devon Oatis, behind an apartment on Longleaf Lane in Harvey. (R. 19, pp. 4618-4619, 4627; S- 27, 28). This bicycle, was found lying on its side in high weeds, and it was dusty, rusty, dirty, and damp. (R. 19, pp. 4638-4639). The bicycle chain was rusted, and the rear tire was flat. (R. 19, p. 4639). Det. Bradstreet identified six photographs of the bicycle found behind the apartment on Longleaf Lane. (R. 19, p. 4624-4625, 4639; S-29-34). The defendant's taped statement was played for the jury. (R. 19, pp. 4620, 4622; S- 27, 28).

In this statement, the defendant positively identified the bicycle shown to him at the Detective Bureau as the one on which he saw the subject ride away from his house on March 2, 1998. He told detectives that this bicycle was behind the house on Sunday evening. The bicycle he saw was not a ten speed as had previously stated, but was a regular bicycle similar to a ten speed. He described the bicycle's rider as a husky individual of 260 to 280 pounds. Comparing the individual to himself, the defendant stated that he weighed over three hundred pounds. Although the bicycle's rider was husky the defendant stated that the individual had broad shoulders and did not have "fat hanging." He said that he only saw one person, but L.H. told him that two people were involved and the other person might have jumped the back fence. (S- 27, 28).

Later, Det. Bradstreet took a verbal statement from L.H., who told her that the suspect was eighteen to nineteen years old with a muscular build, low fade haircut, and a gold earring in his left ear. (R. 19, pp. 4631-4632). He was brown skinned, and wore a black shirt and blue jeans. *Id.* L.H. told Det. Bradstreet that he came into the garage and asked her to come outside, then knocked her down and drug her into the side yard. (R. 19, p. 4633-4634). He rode away on a bicycle. *Id.* Det. Bradstreet testified that she spoke with L.H. on March 3, 1998, and that she also took a taped statement from her on March 4, 1998. (R. 19, p. 4634).

On March 4, 1998, Sgt. Darryl Monie took a verbal statement from the defendant at the Criminal Investigations Bureau in Harvey. (R. 19, p. 4643-4645). Prior to taking the statement, Sgt. Monie read the defendant his rights from a waiver of rights form which was introduced as S-35. *Id.* The defendant signed the form indicating that he understood his rights and wished to waive them. *Id.*. The defendant told Sgt. Monie that he knew police had learned that he asked his supervisor how to get blood out of the carpet. (R. 19, p. 4651). He said that he left a message for Mr. Arguello at approximately 5:15 a.m. on March 2, 1998, stating that he was back in New Orleans and was available to work. (R. 19, p. 4646). His supervisor paged him while the police were at his residence, and he returned the call to tell him he could not work because his little girl had become a young lady and she was being taken to the hospital. (R. 19, p. 4646). The defendant claimed that it was during this conversation that he asked Mr. Arguello how to remove blood from the carpet. (R. 19, p. 4647). He stated that he returned another page from Mr. Arguello after he arrived at the hospital, and finally advised Mr. Arguello that his daughter had been sexually assaulted. (R. 19, p. 4647). The defendant attempted to locate the calls on his beeper, and identified a page he received at 12:55 p.m. as the page he received at Children's Hospital. (R. 19, p. 4647). The defendant stated that the earlier calls had apparently been "dumped." *Id.* The defendant told Sgt. Monie that he knew he was trying to elicit a confession, but he would not go to jail for this crime. (R. 19, p. 4652).

Sgt. Charles Durel of the JPSO Crime Laboratory took photographs and made sketches of the crime scene. (R. 19, p. 4713). Sgt. Durel identified S-36, S-37, and S-38 as sketches he made of the second floor of the defendant's residence, the first floor of the defendant's residence, and of the residence itself in relation to the residence next door, respectively. (R. 19, p. 4715). On the sketches, Sgt. Durel used the letter "A" to indicate locations where there was a presumptive positive test result for the presence of blood, and the letter "B" to indicate areas where there was a positive reaction to a luminol test which would indicate the possible presence of blood for later testing. (R. 19, p. 4716).[3] He also identified photographs taken to document the results of the luminol testing. (R. 19, p. 4718-4720; State's exhibits 39-41, and 45-47). In some photographs, the areas which luminesced were marked with small pieces of paper as the camera flash, in some instances, could interfere with the ability to record the glow of the luminol reaction. *Id.*

---

[3] State's Exhibit 36 and 37 reflect that there were positive presumptive results on tests for the presence of blood in carpeted areas of the victim's bedroom, upstairs hallway and hall bathroom, as well as areas of the stairs and garage. These exhibits reflect that a positive reaction to luminol was noted in areas of the master bedroom and master bath. (S-36, 37).

On March 2, 1998, Shyvette Bell drove to Bellaire Drive after hearing the victim had been raped, but was unable to reach the house where L.H. lived because the police had blocked off the street. (R. Vol. 19, p. 4725). At the hospital later that day, she was not able to see the victim because she was in surgery. (R. Vol. 19, p. 4725). The following day, she, her cousin and her aunt went to the hospital to visit the victim. After a disagreement erupted between the family and Mr. Kennedy, the victim cried and asked Ms. Bell and her companions not to leave. (R. 19, p. 4726-4727).

Detective Sgt. Kelly Jones of the JPSO Personal Violence Division arrived on the scene at 2224 Bellaire Drive about ten minutes after being contacted by the Patrol Division. (R. 19, p. 4766). L.H. was no longer present at the residence, but Deputy Burgess, Lt. Campbell, a crime scene technician, and the defendant were there. (R. 19, p. 4767). Sgt. Jones was apprised of the situation by the officers present. *Id.* At the time, she did not believe that the actual crime scene was located inside of the house. (R. 20, p. 4774). She gave instructions for officers to begin canvassing the neighborhood, and assigned Det. O'Cull to interview Patrick Kennedy. (R. 19, pp. 4767-4768).

Sgt. Jones began to process the crime scene with a technician. (R. 20, pp. 4767-4768). Sgt. Jones identified photographs of the outside area located between 2224 and 2228 Bellaire Drive. (R. 20, pp. 4770-4771). There was a dog in the rear yard of 2224 Bellaire Drive, but it was not barking. R. 20, p. 4773). In an area closer to 2228 Bellaire Drive she observed a location in the grass which appeared to contain blood and a substance which she believed was either tissue or coagulated blood. (R. 20, p. 4769). She noticed that the grass was not disturbed, and that there was no sign the grass had been "smushed" or trampled. (R. 20, p. 4769). She attempted to locate any blood-like substance leading away from bloody location to establish a trail from the rear yard toward the street and driveway, but could not. (R. 20,pp. 4769-4770).

Entering 2224 Bellaire Drive through the open garage door, she observed approximately four or five very small drops of what appeared to be blood on the concrete floor just inside the garage. (R. 20, p. 4772). Items in the garage were neatly stacked and shelved, including numerous boxes of girl scout cookies which were on top of a table. (R. 20, pp. 4773-4774). From the garage, Sgt. Jones entered the residence, where she did not observe any more blood until she located several random small drops of blood leading upstairs. (R. 20, p. 4774). Once upstairs, she proceeded to the southeast bedroom of the residence, where the victim was located prior to being taken from the scene by the ambulance. (R. 20, p. 4775).

Sgt. Jones identified S-16 through S-18 as photographs depicting the victim's bedroom as it appeared on March 2, 1998, including the items which were observed on the victim's bed. (R. 20, pp. 4775-4776). She identified items which she collected from the victim's bed and bedroom while processing the scene, including the utility blanket or quilt which the victim was lying upon (S- 127), the Pocahontas t-shirt the victim was wearing (S-141), a pair of black shorts and underpants (S- 144, 150), and a blood stained towel (S- 153). (R. 20, pp. 4820,4828, 4834-4835, 4857).

After processing the scene, Sgt. Jones went to Children's Hospital to speak to L.H., who was in a treatment room, lying on a bed, awaiting surgery. (R. 20, pp. 4776-4777). The defendant was seated next to her, and her mother was standing in the room. (R. 20, p. 4777). L.H. was in pain, but was able to respond to questions. *Id.* Asked if she could describe the perpetrator, L.H. described a black male, eighteen to nineteen years old, of medium build, with muscular arms. *Id.* At that point, Patrick Kennedy prompted the child, saying, "Ms. Mae, didn't you say he had an earring in his ear?" *Id.* L.H. responded, "yeah, he had an earring in his ear." *Id.* L.H. told Sgt. Jones that the subject wore the earring in his left ear. When Sgt. Jones asked the victim if she had seen the subject before, Patrick Kennedy responded for her, stating that she said it was the same person she had seen cutting grass in the neighborhood. *Id.* Sgt. Jones wanted to get a description from the child without other people interjecting information. *Id.* For this reason, and because she wanted more information about people who cut grass in the neighborhood, she asked the defendant and the victim's mother to step in the hallway to speak with them. *Id.* Within minutes she learned the victim was being taken to surgery. R. 20, p. 4778). Sgt. Jones identified S- 149 as a box containing various samples which were collected from the victim by physicians when she was examined and treated at Children's Hospital. (R. 20, p. 4835).

On the afternoon of March 2, 1998, Sgt. Jones returned to the residence, where Patrick Kennedy signed a consent form authorizing a search of his residence. (R. 20, p. 4876). Sgt. Jones testified that she, Lt. Pernia and Det. Thurman reviewed the residence and the exterior of the residence, but did not physically search it or collect any evidence at that time. (R. 20, p. 4876). At this time, Sgt. Jones was unaware of the information which would later be provided by Alvin Arguello and Rodney Madere, which would change the focus of the investigation. (R. 22, p. 5328).

Approximately thirty officers continued to conduct a door to door canvas of the neighborhood, while others patrolled the area, checking nearby canal banks and wooded areas looking for anyone who fit the description previously provided, and for a blue English racer-type ten speed bicycle with handlebars that curved like ram's horns. (R. 20, p. 4779-4780).

On March 3, 1998, deputies located a bicycle in the rear yard of an apartment located at 3725 Longleaf Lane. (R. 20, pp. 4781, 4881). It was a standard style bicycle with tire wells covering large tires, straight handlebars, and no gears. *Id.* It appeared to be a girl's bicycle. *Id.* It was found lying partially in the grass, with flat tires on which the rubber was beginning to rot. *Id.* There were numerous spider webs on the bicycle, and it appeared to have been lying in the same spot for quite some time, as the grass under the back tire was indented and dead. *Id.* According to Sgt. Jones, a sixteen year-old male named Devon Oatis lived at the address where the bicycle was located. (R. 20, p. 4782). Sgt. Jones testified that Oatis was approximately six feet-one inch tall and two hundred-seventy to two hundred-eighty pounds, with the appearance of being very fat. *Id.* She identified a photograph of Oatis, which was introduced into evidence as S-53. *Id.*

On March 3rd and 4th, 1998, Sgt. Jones interviewed Oatis with his mother at the Detective Bureau. He told her he was in school that morning, but she learned that he had been expelled the previous November. (R. 22, pp. 5321-

5323). Then he told her that he had been readmitted in January but she determined that was not true either. *Id.* When she confronted him with this information, she learned that the Oatis told his mother he had been readmitted to school. *Id.* Every morning, she dropped him of at school, then he went home and waited for her to return. *Id.* She determined that he was not in school on March 2, 1998. *Id.* Although Oatis initially gave her information about his whereabouts which was learned to be false, he did not fit the physical description provided by Patrick Kennedy, which was of an individual with muscular arms without "fat hanging over." (R. 20. pp. 4786, 4908). The bicycle located behind Oatis' residence was not operational, and did not match the description initially provided by the defendant, although he subsequently identified it on March 2, 1998. (R. 20, p. 4786).

Another individual police considered and ultimately rejected as a suspect was Robert Rimmer, who reportedly told classmates at his school that he committed this crime. (R. 20, p. 4784). Standing approximately five foot three to four inches tall and weighing approximately one hundred thirty pounds, Rimmer did not match any of the descriptions provided by the defendant. (R. 20, p. 4785). Sgt. Gray Thurman confirmed that Rimmer was in school the entire day of the incident, after speaking with the principal of his school, a coach, and a teacher's assistant. (R. 19, p. 4696). The teacher's assistant, Linda Gilmore testified that students at the Jefferson Community School have been expelled from the public school system, and are not left alone at any time. R. pp. 4682-4683). After home room, Ms. Gilmore was with Mr. Rimmer in the eight grade class until 2:10 p.m. (R. 19, p. 4683).

On March 4, 1998, Sgt. Jones obtained a search warrant to collect physical evidence from the defendant's body, and a search warrant for the residence at 2224 Bellaire Drive (R. 20, p. 4788). When this warrant was executed on March 5, 1998, officers took photographs and collected items which were identified by Sgt. Jones and introduced into evidence. Evidence collected from the persons of the defendant and the victim's mother were identified as part of S-142 in globo. (R. 20, pp. 4829-4832). A pink floral comforter which was on the victim's bed on March 2, 1998, but was located with the reverse side exposed on her brother's bed, was introduced as S-138. (R. 20, pp. 4826-4827). Three sanitary napkins were seized during the execution of this search warrants and introduced as S-146-148. (R. 20, pp. 4835-4836). Pink twin flat and fitted sheets and pillow cases which were on the victim's bed on March 2, 1998 were located and recovered on March 5, 1998 and introduced as S-140. (R. 20 , p. 4827). Luminol was used in the garage and on the stairs to detect the presence of blood. (R. 20, p. 4790).

On March 7, 1998, Sgt. Jones obtained another search warrant to look for the presence of blood or other relevant materials. *Id.* During the execution of this return, deputies took photographs, and collected several items which were identified by Sgt. Jones and introduced into evidence. A one gallon jug container labeled "SEC Steam Low Foam Extraction Cleaner" seized from the garage was introduced as S-121. (R. 20, p. 4791, 4814). A pink pail which contained two towels was seized from the hallway bathroom sink. (R. 20, pp. 4791, 4814, 4822, 4857-4858, and 4916). The pail was introduced as S- 122, and the towels as S- 131 and S-155. *Id.* Sgt. Jones identified S- 109-118 as additional photographs taken during the execution of the search warrants. (R. 20, pp. 4801-4803). An additional warrant was obtained on March 8, 1998 to allow deputies to finish collecting evidence. (R. 20, p. 4793).

Sgt. Jones identified photographs taken of the master bedroom from different angles. (R. 20, pp. 4799,4863; S42- S44, and S-60). A cutting of the master bedroom carpet taken from in front of a chair near the window, as depicted in photographs of that room, was introduced as S- 120. (R. 20, pp. 4791, 4812-4813). Another carpet cutting from an area of the master bedroom which glowed after being sprayed with luminol was introduced as State's exhibit 129. Sgt. Jones identified photographs of the master bedroom taken before and after the use of luminol, and before and after the removal of the carpeting which reacted to the luminol. (R. 20, pp. 4863-4866; S-45,S- 48,S- 60,S- 62, and S-68).

Additionally, the carpet and carpet pad in the victim's room were seized because they glowed indicating the presence of blood after being sprayed with luminol. (R. 20, p. 4792). A piece of carpet removed from L.H.'s bedroom was introduced as State's exhibit 119. (R. 20, p. 4812). Another piece of carpet seized from L.H.'s bedroom after luminol testing indicated the presence of blood was introduced as State's exhibit 145 (chain 62). (R. 20, p. 4834). The padding removed from the location at the foot of the victim's bed was identified by Sgt. Jones and introduced as S-124. (R. 20, p. 4815). Sgt. Jones identified S-39, S-40, S-59, S-61, S-63, and S-66 as photographs depicting the area of carpeting at the foot of the victim's bed, its appearance after it was sprayed with luminol, and the appearance of the sub floor following the removal of the carpet and padding. (R. 20, pp. 4792, 4798, and 4864). Sgt. Jones testified that an a stain was observed on the subfloor following the removal of the carpet and padding. (R. 20, p. 4798).

Sgt. Jones obtained a final search warrant on March 16, 1998. During the execution of previous warrants, deputies had located areas where luminol indicated the presence of blood although no blood was visible on the carpets. (R. 20, p. 4794). During the execution of this warrant, the remaining carpet was removed for testing. *Id.*

On cross examination, Sgt. Jones testified that she looked at the top of the victim's mattress during the execution of the March 5, 1998 warrant, but did not see anything of any apparent evidentiary value. (R. 20, p. 4926). On March 7, 1998, she turned the mattress over and observed a stain on the mattress which tested presumptively positive for the presence of blood. (R. 20, p. 4927). In her report, Sgt. Jones indicated that this suggested to her that the mattress might have been turned over. (R. 22, p. 5319). The pillow-top portion of the mattress was subsequently removed for testing on March 8, 1998. (R. 20, pp. 4928, 5318). Sgt. Jones reviewed the chain of custody and testified that this item would have been sent to the lab for testing. (R. 20, p. 4929).[4] When testimony resumed following a hearing on the defendant's motion for mistrial, Sgt. Jones identified the mattress pad, which was introduced as joint exhibit-1, and agreed that it was referenced as number 66 on the JPSO chain of custody form. (R. 20, p. 5318).

---

[4] The pillow-top portion of the mattress, subsequently referred to as a mattress pad or mattress cover, was introduced by stipulation as Joint exhibit 1. R. 20, p. 4949- It was the subject of an evidentiary hearing held out of the presence of the jury on the defendant's for mistrial as discussed further herein with regard to the defendant's second claim.

Sgt. Jones stated that the defendant was shown a photograph lineup containing a picture of Devon Oatis and that he tentatively identified him as the person who rode away on the bicycle. (R. 22, pp. 5323-5324). He was shown a photograph lineup which included the photograph of Devon Oatis in profile, and said it was similar. *Id.* Sgt. Jones reiterated on redirect that neither Devon Oatis, nor the bicycle found behind the apartment where he lived, fit the original description provided by the defendant. R. 22, pp. 5325-5328). She also testified that on March 2, 1998, there was no blood apparent on the carpet in the child's room. (R. 22, p. 5331).

L.H., who was eight years old at the time of this incident, testified that she was nearing her fourteenth birthday at the time of the trial. Something that happened to her in 1998. (R. 22, p. 5336-5337). After testified that she woke up one morning and Patrick was on top of her, the L.H. was unable to continue, and the trial court ordered a five minute recess. *Id.* When the proceedings resumed, L.H. testified that she went to see Amalee Gordon and talked to her. (R. 22, p. 5342). She acknowledged that she had the opportunity to review some of the tape and that she had no reason to doubt that it was made on December 16, 1999. *Id.* The original videotape recording of the interview was introduced for the record as S-176A. *Id.* An edited version of this videotape, which was introduced as S-176B, was played for the jury. (R. 22, p. 5342-5344).[5]

On the videotape, L.H. told Amalee Gordon that she was raped by Patrick Kennedy. She woke up and he was on top of her. Her shorts were and underwear were off of her when she woke up. She thought he took them off. All of his clothes were off and his private part was going up and down between her legs. He covered her eyes with his hands while he raped her in her bed. Her private part was bleeding when he finished. She fainted. He called the police and told her he would make up a story. The ambulance came and she woke up. People asked her questions. L.H. drew a picture of herself the bed and the defendant. She told Ms. Gordon that she told the people in the ambulance her birthday and answered their questions. She remembered telling Ms. Kellie and Ms. Rene. She did not remember what the defendant told her to say.

After the videotape was played, the court took a brief recess. When the proceedings resumed, the victim testified that she was much younger when the videotape was made, and it was recorded almost a year and a half after the incident. (R. 22, p. 5353). After it happened, she said that "two black boys" had raped her. (R. 22, p. 5355). She testified that this was not true, and that she was not outside when this happened, nor was she downstairs or in the garage. (R. 22, pp. 5355-5356). Patrick told her to say that. (R. 22, p. 5356). On the day she was raped, her mother went to work leaving her at home with her brother and the defendant. (R. 22, p. 5359). Afterwards, Patrick got up, and left her room. At some point, he returned to her room and gave her a cup of orange juice with pills chopped up in it. (R. 22, pp. 5359-5360). She testified that she bled when she was raped. (R. 22, p. 5360). The first time Patrick left her room, she could not tell where he was, but later she heard him on the phone telling his boss that he couldn't come in to work because his daughter had become a lady. (R. 22, p. 5361).

---

[5] The defendant had no objection to the tape and stipulated to its admissibility. (R. 22, 5342-5343).

L.H. testified that she began throwing up and was taken into the hall bathroom by the defendant. (R. 22, p. 5361). She was unable to recall how she got back into her bedroom, but she did remember the police coming to the residence. (R. 22, p. 5361). She did not remember if she talked to the police when she was in her room. (R. 22, p. 5361-5362). She remembered being taken to the hospital in an ambulance and talking to doctors at the hospital. *Id.* The doctors gave her medicine that put her to sleep. (R. 22, pp. 5362-5363). She testified that everything she stated on the December 1999 videotape was true, that the defendant raped her, and that it happened in her room. (R. 22, pp. 5363).

L.H. had to leave her mother and brother and live with Margarene Williams for awhile. (R. 22, p. 5367-5368). Although she was allowed to visit her mother, this arrangement was upsetting for both of them. (R. 22, p. 5368). L.H. said her mother was the first person she told that Patrick raped. *Id.* She told her mother right before she made the videotape with Ms. Gordon. *Id.*

The victim's mother, C.H., was married to Patrick Kennedy in 1998. (R. 22, p. 5372). After the victim was raped, she allowed L.H. to talk to the defendant on the phone because no one had shown her any evidence that the defendant was the perpetrator of the crime. *Id.* L.H. was temporarily taken from her custody because of this contact with the defendant, but was returned to her custody in June of 1998 (R. 22, p. 5373). After the incident, L.H. had nightmares and couldn't use the bathroom properly. (R. 22, p. 5374).

The victim finally told C.H. who actually raped her. (R. 22, p. 5376). One evening the victim was in the room she shared with her younger brother, crying as her mother had never seen her cry before. (R. 22, p. 5376, 5378). C.H. allowed the victim to come and sleep in her room, where the victim told her that Patrick was the one who raped her. (R. 22, p. 5378). L.H. said that she had been scared, but she couldn't hold it in anymore. *Id.* C.H. denied that anyone had pressured her or her daughter to say that the defendant was the perpetrator. *Id.* After her daughter told her that the defendant had raped her, she did not speak to the defendant anymore or allow her daughter to speak to him. *Id.*

On cross examination, C.H. testified that she recalled meeting Mr. Armato and that he had spoken to her daughter, but she did not recall when this had happened. (R. 22, p. 5379). She could not recall the details of their conversation or what they talked about, but she remembered his face. (R. 22, p. 5380). When L.H. was in the hospital, she told her mother that someone other than the defendant raped her, however once L.H. left the hospital she did not want to discuss the incident. (R. 22, p. 5381). C.H. denied telling people that she was afraid that L.H. would be taken from her if she did not change her story. (R. 22, p. 5386). The police never told her to change her story, and she did not recall talking to Kathy or Manuel Holmes about the case. (R. 22, p. 5387). She specifically denied telling Kathy Holmes that police wanted L.H. to change her story. (R. 22, p. 5386).

Dr. Scott Benton, an employee of Children's Hospital, testified as an expert in the field of pediatric forensic medicine. (R. 22, p. 5451). Emergency rooms, child protection agencies, and the police refer children who are suspected of being abused to him for examination and evaluation. (R. 22, p. 5453). Dr. Benton identified L.H.'s

medical records. (R. 22, p. 5455). When L.H. arrived at Children's Hospital, she was initially evaluated in the emergency room by Dr. Kumar and members of Dr. Benton's team. (R. 22, p. 5457). Her predominate complaint was noted to be a vaginal injury which couldn't be completely classified at that time, but was accompanied by profuse vaginal bleeding. (R. 22, p. 5457). A pediatric surgeon was called in, and the victim was prepared for surgery. (R. 22, p. 5458).

Dr. Benton testified that genital injuries are generally assessed through a process of cleaning off the blood, identifying the injuries, and tying off, or cauterizing any blood vessels until all the different planes of tissue are treated. *Id.* He identified three exhibits which were introduced as S-179, S-180, and S-181. (R. 22, p. 5465). These exhibits contain photographs of the victim in this case which Dr. Benton made from the Children's Hospital record. *Id.* He testified that these photographs would aid him in explaining the injuries L.H. sustained in the rape to the jury. (R. 22, p. 5466). S-180 is a series of two photographs taken with a colposcope. (R. 22, p. 5467-5468). These photographs were taken in the operating room on March 2, 1998, and are what was seen on initial examination. *Id.* Dr. Benton identified the various structures of the female anatomy depicted, testifying that the vaginal opening is harder to distinguish in the photograph because blood is blocking the field of view. The perineal body is torn all the way from the posterior fourchette, where the vagina normally ends, all the way to the anus. (R. 22, p. 5470). He characterized this as a class three perineal laceration. *Id.* The next laceration tore through the left wall of the vagina and went underneath the cervix, basically separating the cervix from the back of the vagina, and causing the victim's rectum to protrude into her vagina. (R. 22, p. 5471).

Dr. Benton evaluated L.H. on March 4, 1998, two days after the surgical repair of her injuries. (R. 22, p. 5468). He testified that children heal very rapidly, and the colposcopic photograph taken on this date shows a fairly good looking result two days after surgery. (R. 22, p. 5471; S-181). State's exhibit 179 was taken two weeks after surgery and shows an almost normal result, with some absorbable sutures still visible. He testified that the victim's hymen was functional, though a remaining injury might never heal. (R. 22, p. 5472). When this incident happened, Dr. Benton had been in practice for approximately four years, and this was the most serious injury he had observed as the result of a sexual assault. (R. 22, p. 5473).

On cross examination, Dr. Benton testified that when he interviewed L.H. two days after the incident, she was initially mute. Then, looking scared, she related that after two boys asked her the price of the cookies, one of them raped her while the other watched. (R. 22, p. 5476-5478). He testified that the medical records contain information indicating that when L.H. was in the hospital, she told one of her relatives that the defendant was the perpetrator. (R. 22, p. 5480).

JPSO Crime Laboratory employee Christine Kogos, an expert in the field of serology, testified that she examined the victim's rape kit, but was unable to find seminal fluid on the vaginal, anal, or oral swabs. (R. 22, p. 5485-5487). She did not find any spermatazoa on the vaginal slides either. However, there was a lot of blood on the slides, which could make it more difficult to detect spermatozoa or seminal fluid. (R. 22, p. 5490).

In March of 1998, Dr. Henry Lee was the Director of the Connecticut State Police Forensic Laboratory, an accredited criminalistics laboratory within that State. (R. 23, p. 5571). . Dr. Lee testified that Sheriff Harry Lee called him on the phone and asked him to examine evidence and view photographs in connection with the investigation of the instant case. (R. 23, p. 5571). Dr. Lee identified a copy of a laboratory report which was issued on May 4, 1998, and admitted into evidence as S-186. (R. 23, p. 5572-5573). Eighteen pieces of pieces of evidence were submitted, of which Dr. Lee personally examined twelve. *Id.* Attached to the May 4, 1998 report were photographs furnished by JPSO for review, as well as photographs Dr. Lee took of the submitted evidence. *Id.* Dr. Lee testified as an expert in the fields of serology, DNA, crime scene analysis and reconstruction, and general criminalistics. (R. 23, pp. 5569-5570).

Dr. Lee testified that several pieces of evidence were examined for blood, semen, body fluids, or trace evidence. (R. 23, p. 5574). These items included S- 120, S-141, S-144, S-150, and S-127. When blood is initially deposited, it is red in color and has serum and cells which form a mass. (R. 23, p. 5580). When it dries, a reddish brown color remains as it absorbs into the fabric. *Id.* To remove blood from an item, there has to be some form of liquid dilution such as washing or cleaning. *Id.* Before a blood stain has been cleaned or removed, the pattern of deposit is visible and can be interpreted. (R. 23, pp. 5618-5619). After cleaning, it might only be visible as a discolored area under a special light source, at which point it would not be possible to determine the original pattern of deposit or amount of blood deposited. *Id.*

When an item is examined in the lab, it is first photographed, and then examined under the special light source for areas of discoloration not visible under regular light. (R. 23, pp. 5576-5578). Using a special Q-tip, the area is swabbed and a chemical reagent is used to determine if blood is present. *Id.* Areas where the test result is positive are then cut out for further testing. *Id.* This procedure was followed with respect to the first item submitted, State's Exhibit 120, the piece of carpet from the master bedroom.[6] As the stain on this carpet was only visible as an area of discoloration under a special light source, someone had cleaned it. (R. 23, p. 5580). After two chemical tests indicated the presence of blood on this item, pieces were cut out and forwarded to the DNA unit to do a PCR test. (R. 23, pp. 5577-5578).

The victim's shorts, introduced as S-144, were examined. (R. 23, p. 5580-5583). There was a blood stained area on the shorts, some portions of which were removed for DNA analysis. *Id.* This stain was not consistent with a medium velocity spatter, but was more consistent with a contact transfer. *Id.* Tests were negative for the presence of semen. *Id.* The shorts were examined inch by inch for the presence of grass, grass stain, or soil.*Id.* Dr. Lee testified that if someone were dragged through grass or mud, one would generally see damage to the surface of the fabric, and soil or grass stain embedded in the fabric under microscopic examination, but none were found. *Id.*

---

[6] This item was also Sheriff's Chain of Custody # 67, and was referenced by the Connecticut laboratory as #0001 on the report of May 4, 1998. (R. 23, pp. 5574, 5576; S-186).

The victim's Pocahontas T-shirt (S-141) and panties (S-150) were also examined. (R. 23, pp. 5584-5585). Microscopic examination of these items failed to reveal the presence of soil or grass stains. *Id.* A small area on the front of the T-shirt and a large area in the back were positive for blood, and were consistent with a contract-transfer type of stain. *Id.* A blood stain in the form of three linear patterns was present on the back of the victim's panties, suggestive of finger marks, possibly from a bloody hand. *Id.* Dr. Lee testified that these stains were consistent with a contract transfer. *Id.*

The quilt or blanket (S-127) the victim was found lying upon was flattened out and examined on both sides. (R. 23, pp. 5585-5589). Blood was only located in the inner top quadrant, with a small amount having soaked through to be deposited on the undersurface. *Id.* Dr. Lee testified that the transfer stains on the quilt included a heavier stain deposited on top of a lighter stain in two contact transfers. *Id.* No running pattern was present to suggest that the quilt was in a vertical position, in which case flowing blood would have followed gravity to run down the quilt to hit the floor or carpet. *Id.* Small fragments of wood chips were located on the quilt as were some hairs and fibers. *Id.* This item was tested for the presence of semen, but no acid phosphatase was found. *Id.* However, there was a circular transfer stain about six and half inches in diameter indicating something was placed on top of the quilt. (R. 23, pp. 5589-5590). Dr. Lee testified that scientists working for him examined a one gallon plastic jug labeled ES-Steam, low foam extraction cleaner (JPSO Chain # 61), which was submitted for analysis and determined it to be consistent with cleaning solution. (R. 23, pp. 5589-5590). These scientists also determined that the stain on the quilt was consistent with the cleaning solution. *Id.*

Dr. Lee also viewed photographs of the alleged crime scene, including photographs introduced as Exhibits S-10 and S-11. (R. 23, p. 5590). He observed a blood-like stain which appears to be a relatively small stain in comparison to another item in the photograph. (R. 23, pp. 5592-5593). He testified that the stain was still in liquid form, sitting on top of the grass, and did not absorb into the soil surface. *Id.* Some of the liquid observed was basically consistent with vertical, low velocity dripping, other liquid was consistent with contact transfer. *Id.* Dr. Lee did not observe any damage of the grass, broken grass, impressed grass pattern, disturbance of the soil or large smear, which he testified would be the usual indicators of a struggle. (R. 23, p. 5595).

Dr. Michael Adamowicz, an employee of the Department of Public Safety Forensic Science Laboratory, and an expert in the field of forensic DNA analysis, testified that he analyzed swatches of materials which were forwarded to him by Supervising Criminalist Deborah Messina at the direction of Dr. Lee. (R. 23, pp. 5639-5641). Dr. Adamowicz was asked to perform a standard battery of DNA analysis upon several items, including three cuttings of a mattress. He identified Exhibit S-187, dated July 22, 1998 as a report that he submitted in connection with this case. *Id.* Dr. Adamowicz testified that he obtained no results with respect to the mattress cuttings. (R. 23, pp. 5643-5644). He was able to determine that human DNA was present, but the PCR process used to amplify the extracted DNA did not generate any amplified DNA. (R. 23, pp. 5664-5665, 5668). For this reason he was unable to perform

the tests necessary to compare the DNA to anything else. *Id.* In 1998, Dr. Adamowicz was performing the DQA1 PCR and polymarker tests. Most laboratories now use STR, or Short Tandem Repeat Testing. (R. 23, pp. 5665-5667).

Dr. Adamowicz generated another report dated April 23, 1998, reflecting the results of DNA testing he performed on the following items: a known sample of the victim's blood; two carpet cuttings (#01LB1 and #01LB2)[7]; three cuttings from sanitary napkins (#05LB1, #06LB1, and #07LB1); three quilt cuttings (#011LB1, #011LB2, and #011LB4); one carpet cutting (#012LB1); and two towel cuttings (#18LB1 and #18LB2). (R. 23, pp. 5648-5649). The victim's profile for the DQA1 PCR test matched the profile generated from two carpet samples (#01LB1 and #01 LB2), one sanitary napkin cutting (#06LB1), one quilt cutting (#011LB1), and two towel cuttings (#18LB1 and #18LB2). (R. 23, pp. 5650-5651). The DQA1 PCR test did not generate any result for the other items. *Id.*

The polymarker test revealed the victim's profile for this test matched the profile generated for two carpet cuttings (#01LB1 and #01LB2), one quilt cutting (#011LB1), and one towel cutting (#18LB1). (R. 23, pp. 5652-5655). There were inconclusive results with respect to two sanitary napkin cuttings (#05LB1 and #07LB1). *Id.* There was no result for the test on two quilt cuttings (#11LB2 and #11LB4) and one carpet cutting (#12LB1). *Id.* [8] With regard to the towel cutting identified as #18LB2, the test revealed a mixture of genetic material from more than one person was present. *Id.*. Finally, this test excluded the victim as the donor of the genetic material found on the sanitary napkin cutting identified as 6LB1. *Id.*

On redirect, Dr. Adamowicz testified that factors which can cause degradation of a sample include exposure to ultraviolet light, extreme heat, and microbial action. (R. 23, p. 5672). Additionally, fungus, mold, and bacteria will eat cellular constituents including DNA. *Id.* Chemicals, bleach, strong oxidants and harsh acids will break DNA. *Id.* Dr. Adamowicz testified that cleaning solutions can degrade DNA depending upon the chemicals used, noting that bleach is used to sterilize laboratory work areas. *Id.*

Forensic DNA analyst Carolyn Van Winkle was called to testify by the defendant. (R. 23, p. 5709). She performed DNA testing on the mattress pad introduced as J-1. (R. 23, p. 5709). She tested swatches she removed from the same stains that were tested by the Connecticut Laboratory. (R. 23, pp 5712-5714). The DNA was somewhat degraded. (R. 23, p. 5720). Using Short Tandem Repeat (STR) testing, she determined that the victim's DNA did not match the blood on the mattress. (R. 23, pp. 5713-5714). She testified that the DQA1 and polymarker tests performed by Dr. Adamowicz are not as sensitive as the STR test. (R. 23, p. 5719).

The defendant called several employees of JPSO to testify regarding the fact that the mattress pad, Joint Exhibit1, was returned to Connecticut after the laboratory there initially failed to test it. Colonel Walter Gorman testified that he wrote a memo which was introduced as Defense exhibit 11, requesting that this evidence be re-

---

[7] The item of evidence submitted to the Connecticut laboratory and referenced as item #1 was State's exhibit 120, the piece of carpet from the master bedroom as noted in footnote 6, above.

[8] Dr. Adamowicz was able to determine that human DNA was present in carpet cutting 12LB1. He testified that the amount of DNA present could be too small and/or degraded for the test to work.

submitted to the laboratory for testing. (R. 24, p. 5773-5774). He did not personally make the subsequent request to the laboratory to retest the item, and until last week during the trial, did not learn that it had been retested. (R. 24, pp. 5779-5780).

Milton Dureau, Jr., Director of the JPSO Crime Laboratory, testified that he wrote a cover letter introduced as Defense exhibit 12, which was sent to Dr. Lee along with the items submitted for retesting. (R. 24, pp. 5782-5785). He did not receive results of any testing, and subsequently had to obtain the return of these items from the Connecticut laboratory in order to send them to the defense laboratory. (R. 24, pp. 5785-5786).

Chief Richard Rodriguez received Colonel Gorman's memorandum, and was aware that the evidence was returned to Connecticut. (R. 24, pp. 5787-5788). Chief Rodriguez testified that some years before trial, he learned that tests could not confirm whose blood was on the mattress, however he never received a report reflecting this information. (R. 24, pp. 5789-5790).

Sgt. Kelly Jones testified that she never received any information regarding the retesting of the mattress. (R. 24, pp. 5792-5793). Additionally, she testified that while two photographic lineups containing pictures of Devon Oatis were shown to the defendant, no lineup was shown to L.H. (R. 24, p. 5794).

Kimberly Parnell White testified that in March of 1998, she lived at 3729 Longleaf Lane, Apartment "A" in Marrero. (R. 24, p. 5797). Police knocked on her door asking about a bicycle. *Id.* She said that she had seen "a young man who was supposed to be in school" riding the bicycle during the weekend, and that he left it in her backyard on Sunday. (R. 24, p. 5799). She viewed photographs introduced as marked as Defense exhibits 13-16, and stated that she recognized a broken handle grip which had scratched her car when the young man riding the bicycle leaned it on her car. (R. 24, pp. 5798-5801). She stated that he had to pump the tires every time he rode on the bicycle. (R. 24, p. 5800). On cross examination she testified that the bicycle was only left in her yard once, that several people used the bicycle, and that she never saw anyone putting dust or cobwebs on the bicycle. (R. 24, p. 5802).

Ronnie Montgomery, a private investigator hired by the defendant, testified that his efforts to locate Devon Oatis were unsuccessful. (R. 24, pp. 5804-5805).

Catherine Holmes testified that her husband has always been friends with the defendant, and that she became friends with the defendant when he was in their wedding. (R. 24, pp. 5808-5809). She was only friends with C.H. because of her relationship with the defendant. (R. 24, p. 5813). She knew that L.H. went into foster care and was later returned to her mother. (R. 24, pp. 5811-5812). On one occasion C.H. advised her that she told L.H. that it was okay for her to say that her daddy did it, after "they" told her to do so. (R. 24, pp. 5812-5813).

Bob Tucker, a private investigator employed by Mr. Armato, testified that he interviewed C.H. on two occasions in person and spoke to her on the phone on other occasions to set up meetings. (R. 24, p. 5818). In October of 1999, L.H. told him that she was attacked by a young man on a bicycle, and specifically denied that her stepfather

had raped her. (R. 24, p. 5820). C.H. expressed fears that L.H. would be taken from her. (R. 24, p. 5820). He testified that Mr. Armato accompanied him to the October 1999 meeting. (R. 24, p. 5821).

The defense played videotapes of statements L.H. made to Barbara McDermott soon after the incident wherein she alleged that someone other than the defendant raped her. (D-7, D-8).

The parties stipulated that L.H. was returned to her mother on June 22, 1998. (R. 24, p. 5828).

B. Penalty Phase

During the penalty phase hearing in this matter, the State elicited testimony from S.L. that the defendant had intercourse with her on three occasions when she was approximately eight or nine years old. (R. 24, p. 5929).[9] At this time, the defendant was married to her cousin, Cheryl Sims, and they were her godparents. *Id.* She was staying with them for the summer when these incidents occurred. *Id.* On the last occasion, the defendant checked her out of school, brought her home and had intercourse with her. (R. 24, p. 5930). She testified that afterwards

> . . .it was more like I had like a cut, a scratch or something down there.

(R. 24, p. 5930). The defendant told her to tell her cousin that she had injured herself at school. *Id.*

S.L. testified she stayed at their house for awhile after this incident, but later went home for the weekend and never came back. *Id.* A few years later, after she told someone at school who contacted her mother. (R. 24, p. 5931). She did not pursue charges against the defendant because of the influences of family members who convinced her that she would hurt her cousin if she did. (R. 24, pp. 5931-5932).

The defendant called several family members and associates to testify on his behalf.

The defendant's cousin, Tyronne Kennedy, testified that he and the defendant were mostly raised by their grandmother. (R. 24, p. 5938). He testified to the positive influence she was in their lives, and to experiences he and the defendant shared growing up as children together. (R. 24, pp. .5938-5945). He testified that when she died, the defendant supported the family emotionally. R. 24, pp. 5943-5945). He said that when the defendant's brother was on drugs and stole things from the family, the defendant attempted to retrieve the items. (R. 24, p. 5946-5947). Also, he testified that the defendant played a big role in forming a community choir, and that he would organize the members and decide what vocal parts they should sing. (R. 24, p. 5949). He testified that the defendant had a good voice and was frequently asked to sing, or to lead the choir. (R. 24, p. 5950-5951).

Tyronne Kennedy also testified that the defendant started several of his own businesses. (R.24, p. 5954). He managed a whole sale business the defendant started which at one time employed fifty people. *Id.* Tyronne Kennedy said that the defendant was very successful at having his own business, and that he went out and solicited contracts from other companies. *Id.*

Manuel Holmes testified that he and the defendant were cousins and friends who grew up together. (R. 24, p. 5959). He testified that the defendant learned to cook from his grandmother, and that he once invited the whole

---

[9] In accordance with La. R.S. 46:1844, in order to protect the identity of the victim, who is a minor victim of a sexual offense, her name, and the name of her mother will be referred to by the use of initials

neighborhood to a party and cooked all the food. (R. 24, p. 5962). He also said that the defendant sang at weddings and funerals. (R. 24, p. 5962-5963).

Ronald Singleton, testified that he was an investment broker and the pastor of the Pilgrim Baptist Church in Empire, Louisiana. (R. 24, p. 5967). He testified that the defendant is a gifted and talented singer with the ability to reach and move people. *Id.* The defendant used to speak "expressions" in front of the church, and he was very clear and concise. (R. 24, p. 5970). He testified that the defendant led a lot of the songs in the male chorus. *Id.*

Terry Gullage, pastor of the Greater Mount Calvary Missionary Baptist Church in Marrero, testified that in 1979, he organized a group of ten singers into what would eventually become the Avondale Community Choir. (R. 24, pp. 5972-5973). The defendant was one of the earliest members of this group, which eventually grew to approximately 150 singers. (R. 24, p. 5973). He testified that the defendant sang with this choir for all but a two year period from 1979 until 1991, and that he was instrumental in helping the choir find the first musician to play for the group. *Id.* The defendant also assisted the group by providing transportation to events for some of its members. (R. 24, p. 5975).

It was stipulated by the parties that if Dr. Zimmerman were called to testify, he would qualify as an expert in the field of forensic psychology, and would testify that he administered the Wechsler Adult Intelligence Test III to the defendant. He would testify that the defendant had a verbal IQ of 73 at the fourth percentile, a performance IQ of 72 at the third percentile, and a full scale IQ of 70, at the second percentile. He would also submit a report detailing his findings. (R. 24, pp. 5985-5986).

Michael Porter testified that he and the defendant were cousins who grew up together. (R. 24, p. 5989). He testified that their grandmother was central to their lives. (R. 24, p. 5991). He testified that the defendant was a very good cook when he was as young as eleven or twelve years old, having learned from his grandmother. *Id.* He testified that the defendant once cooked for fifteen or sixteen people at a family reunion. (R. 24, p. 5992). At one time, the defendant worked for Popeye's Restaurant. (R.24, p. 5992).

Mr. Porter testified that he was a Platoon Sergeant who had previously been stationed in Iraq. He stated as follows:

> . . .I would love to have Patrick on my team, because Patrick is very knowledgeable. And the young soldiers that's underneath me, he would able - Patrick would be able to strengthen their weak areas and improve on their strong areas.

(R. 24, p. 5995). Defense counsel asked, "You give him a job; can he get it done?" Mr. Porter replied, "Yes. Without a doubt he would get it done before, in a timely manner." *Id.*

Finally, seventy-seven year old Alma Williams testified that she met the defendant and his mother when he was nine years old. (R. 24, p. 5997-5998). The defendant's mother had financial problems, and as a child the defendant would do odd jobs and run errands to earn money to give to her. (R. 24, p. 5999). He also cleaned, cooked, and did housework while his mother worked. (R. 24, p. 6000). Ms. Williams testified that she was the person who

took the defendant to get his driver's license and he passed the test. (R. 24, p. 6000). She testified that the defendant was like one of her grandchildren. (R. 24, p. 6002).

ARGUMENT

I. THE DEATH PENALTY IS NOT UNCONSTITUTIONAL FOR THE AGGRAVATED RAPE OF A CHILD UNDER 12 YEARS AND THE LEGISLATURE HAS NARROWED THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

In his first claim, the defendant contends that the death penalty is an excessive punishment for the aggravated rape of a child under twelve, and that it is susceptible of being applied arbitrarily and capriciously. This Court rejected these claims in *State v. Wilson*, 96-1392 (La. 12/13/96), 685 So.2d 1063. *cert. denied sub nom., Bethley v. Louisiana,* 520, U.S. 1259, 117 S.Ct. 2425, 138 L.Ed. 2d 188 (1997). The State asserts that the continuing validity of this Court's decision in *Wilson* requires the denial of the defendant's claims.

A. The death penalty is not an excessive punishment for the rape of a child under the age of twelve.

The legislature alone determines what are punishable as crimes and the proscribed penalties. *State v. Dorthey,* 623 So.2d 1276, 1278 (La.1993); *State v. Woljar,* 477 So.2d 80, 81-81 (La.1985). Additionally, legislative enactments are presumed constitutional under both federal and state constitutions. *Gregg v. Georgia,* 428 U.S. 153, 175, 96 S.Ct. 2909, 2926, 49 L.Ed.2d 859 (1976). The party challenging the constitutionality of a statute bears a heavy burden in proving that statute to be unconstitutional. *Id.*

Excessive punishments are forbidden by the Eighth Amendment to the United States Constitution, and Article I, § 20 of the Louisiana Constitution of 1974. A punishment is 'excessive' and unconstitutional if it: (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); citing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Furthermore, these judgments must be informed by objective factors reflecting society's attitudes. *Id.*

The *Coker* plurality discussed the rape of an adult female as a serious crime, finding that rape is "highly reprehensible, both in a moral sense and its almost total contempt for the personal integrity and autonomy of the female victim. Short of homicide, it is the ultimate violation of self." *Coker*, 433 U.S. at 592, 97 S.Ct. at 2869. This Court found in *Wilson,* that the legislature had concluded that rape is a much more detestable crime when the victim is a child. *Wilson*, 685 So.2d at 1066.

Of significance, this Court noted that children are a class of people needing special protection, and that they are particularly vulnerable since they are neither mature enough nor capable of defending themselves. In amending La. R.S. 14:42©), the legislature "recognized the degradation and devastation of child rape, and the permeation of harm resulting to victims of rape in this age category. The damage a child suffers as a result of rape is devastating to the child as well as the community." *Wilson*, 685 So.2d at 1067. A child who is raped "suffers physically as well

as emotionally and mentally, especially since the overwhelming majority of offenders are family members." *Id.* at 1070.

1. The death penalty is not excessive for the rape of a child in light of contemporary societal standards of decency.

In *Wilson*, this Court found that the Louisiana legislature's decision to authorize the death penalty for the rape of a child under twelve was evidence of society's attitudes, as legislators are representatives of society. *Id.* at 1067. At the time of this Court's decision in *Wilson*, Louisiana was the only state with a law presently in effect providing for the death penalty for the rape of a child less than twelve.[10] However, this Court did not deem that fact to be determinative of the issue.

The *Coker* plurality had pointed out that following the decision in *Furman v. Georgia*, 408 U.S.238, 383, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), three states, Florida, Mississippi, and Tennessee, enacted statutes authorizing the death penalty in rape cases where the victim was a child and the offender an adult. *Coker*, 408 U.S. at 595, 97 S.Ct. at 2867-2868. In *Wilson,* this Court stated that even though these statutes were subsequently invalidated, the simple fact of their enactment might suggest the beginning of a trend "and public opinion favoring such penalties - an evolution of a standard to deal with this heinous crime." *Wilson*, 685 So.2d at 1068.

The State submits that there is now ample evidence of such a trend, as three states have since joined Louisiana in determining that the death penalty is an appropriate penalty in certain circumstances for the commission of a non-homicide sex offense involving children: Montana, Oklahoma, and South Carolina.[11] Furthermore, it is noteworthy

---

[10] This Court noted that Florida and Mississippi had statutes providing for the death penalty in the case of a rape of a child under the age of twelve, but these laws had been held unconstitutional. *Wilson*, supra at 1068. The Florida Supreme Court found the analysis in *Coker* controlling and held that "the sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault." *Buford v. State*, 403 So.2d 943 (1981), *cert. denied,* 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982). However, the State would note that Fla. Stat. Ann. §794.011 continues to provide that "[a] person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of , a person less than 12 years of age commits a capital felony, punishable as provided in ss. 775.082 and 921.141."

The Mississippi Supreme Court found that a sentence of death could not be imposed for the rape of a child under twelve because the sentencing guidelines then in effect required a finding that the defendant actually killed, attempted to kill, intended that a killing take place, or contemplated lethal force be employed. *Leatherwood v. State*, 548 So.2d 389 (Miss. 1989).

[11] As stated above three other states have enacted statutes authorizing the death penalty for non-homicide sexual assaults where the victims are children of specified ages:

> (1) Montana, authorizing the death penalty for the crime of sexual intercourse without consent where the victim is less than sixteen and the offender is 3 or more years older than the victim, "[i]f the offender was previously convicted of an offense under this section or of an offense under the laws of another state or the United States that if committed in this state would be an offense under this section and if the offender inflected serious bodily injury upon a person in the course of committing each offense" MCA 45-5-503 ;
>
> (2) Oklahoma, "Notwithstanding any other provision of law, any parent or other person convicted of forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under fourteen (14) years of age subsequent to a previous conviction for any offense of forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under (14) years of age shall be punished by death or imprisonment for life without parole", 2006 Okla. Sess. Law Serv. Ch. 326 (S.B. 1800)(West), amending 10 O.S. 2001, Section 7115 as amended by Section 7, Chapter 455, O.S.L. 2002(10 O.S. Supp. 2005,

that Oklahoma and South Carolina enacted such laws only this year. Therefore, there are currently four states with effective laws authorizing the death penalty under certain circumstances, for the non-homicide rape of a child under twelve. There are five states, if Florida, which retains such a statute, is included. [12] When it is considered that Oklahoma and South Carolina enacted their statutes in 2006, doubling the number of states with effective statutes, that trend is more dramatic.

As this Court stated in *Williams*, "[t]he needs and standards of society change, and these changes are a result of experience and knowledge." *Williams*, 685 So.2d at 1069. Moreover, statutes applied in one state can be carefully watched by other states so that the experience of the first state becomes available to all other states. *Id.*, citing *Coker*, *supra* at 616, 97 S.Ct. at 2878.[13] The State submits that the trend in this respect is clear, and that the death penalty is not excessive for the non-homicide rape of a child under twelve by prevailing community standards.

2. <u>The death penalty is not a disproportionate punishment for the rape of a child when death does not result.</u>

The Supreme Court has held that the death penalty is an excessive penalty for a robber who does not take a human life. *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). However, the rape of a child is deplorable and a "grievous affront to humanity." *Wilson*, 685 So.2d at 1069. As discussed above, the rape of a child under the age of twelve is an especially heinous offense with long-lasting and devastating effects on both the child and society. It is the ultimate violation of someone who is entitled to special protection. A child rapist seeks his prey from amongst the most vulnerable members of society.

Considering these factors, this Court did not err in concluding that:

> . . .given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years.

State v. Williams, 96-1392 (La. 12/13/96), 685 So.2d 1063, 1070.

Section 7115); and,

(3) South Carolina, an "actor [who] engages in sexual battery with a victim who is less than eleven years of age" is guilty of criminal sexual conduct with a minor in the first degree, and must be punished by death or life imprisonment if "previously . . . convicted of . . .first degree criminal sexual conduct with a minor who is less than eleven years of age, and the current and prior offense involved sexual or anal intercourse by a person or intrusion by an object." 2006 S.C. Acts 342 (S.B. 1267), amending 1976 Code Ann. § 16-3-655, as last amended by Act 94 of 2005.

[12] Florida's statute was held to be unconstitutional in *Buford v. State*, 403 So.2d 943 (1981), *cert. denied,* 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982).

[13] Given the significant resources which are invested in the prosecution, defense, and trial of capital cases, it is especially evident that other jurisdictions would be closely monitoring these statutes in determining their own course of action.

3. The imposition of the death penalty for the rape of a child under twelve serves a legitimate state interest.

Retribution and deterrence are legitimate goals of punishment which are served by the imposition of the death penalty for the rape of a child under twelve years of age. This Court found in *Williams* that the death penalty for rape of a child less than twelve years old would be a deterrent to the commission of that crime. *State v. Williams*, 96-1392 (La. 12/13/96), 685 So.2d 1063, 1073.

Of significance, the defendant's assertions that the death penalty encourages worse crimes is illogical. It presumes that a rapist would kill his victim in an attempt to avoid the death penalty for rape, thereby exposing himself to the death penalty for first degree murder. The basis of the defendant's argument is the assumption that the death penalty is not a deterrent to any crime at all.

Additionally, this Court previously rejected the defendant's argument that the death penalty would only increase the hardship and guilt feelings of child victims if they are aware that their testimony may lead to the execution of the accused. In *Williams*, the defendant contended that "no child wants to be responsible for the death of a family member." 685 So.2d at 1073. This Court noted that the defendant failed to understand that the child is an innocent victim who is not the one responsible. *Id.* The legislature has determined the penalty, and the defendant subjects himself to it by his actions.

Finally, the State submits that the defendant has failed to establish that permitting the death penalty for the rape of a child under twelve will increase the likelihood of wrongful convictions or executions. Of significance, the bare possibility that an innocent person could be executed has not served as a basis for abolishing the death penalty for murder. It also cannot be said that the penalty for a crime serves to increase the likelihood of conviction or acquittal on the underlying charge. The defendant's reliance on *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242. 153 L.Ed.2d 335 (2002) in this respect is additionally misplaced.

In *Atkins,* the Court found that the reduced capacity of mentally retarded offenders provides a second justification for categorically making them ineligible for the death penalty, due to the enhanced risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 320, 122 S.Ct. at 2251, citing *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973. The risk was enhanced by the lesser ability of such persons to assist counsel and to make a persuasive showing of mitigating factors. The defendant has neither argued nor alleged that rapists in the aggregate have personal characteristics which cause them to face a special risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

4. That portion of La. R.S. 14:42 that permits a death sentence for the rape of a child under twelve does not violate Article I, § 20 of the Louisiana Constitution

Art. I, § 20 of the Louisiana Constitution of 1974 provides in pertinent part as follows as follows:

> **§ 20. Right to Humane Treatment**
>
> Section 20. No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment.

The provisions of Art. I, § 20, expand in several instances the precepts that had evolved from the United States Supreme Court's interpretation of the Cruel and Unusual Punishments Clause of the Eighth Amendment. *State v. Perry*, 91-1324 (10/19/92) 610 So.2d 746. In *Perry*, this Court stated:

> The most significant example of expansion is the deliberate inclusion of a prohibition against "excessive punishment, which has been interpreted to add a protection of individual liberty surpassing that provided by the Eighth Amendment. Because of this provision, a person is protected not only from punishment that is cruel, excessive or unusual per se or as applied to particular categories of crimes or classes of offenders, but also from any excessive feature of a particular sentence produced by an abuse of the sentencer's discretion, even though the sentence is otherwise within constitutional limits. *State v. Telsee*, 425 So.2d 1251 (La. 1983); *State* v. *Sepulvado*, 367 So.2d 72 (La. 1979).
>
> The enhancement of the safeguards in several particulars and the convention history in general indicate that Article I, § 20 affords no less, and in some respects more, protection than that available to individuals under the Cruel and Unusual Punishments Clause of the Eighth Amendment at the time of the adoption of our state constitution. Accordingly, this court has considered the United States Supreme Court opinions and other jurisprudence preexisting the adoption of the 1974 Louisiana Constitution as the threshold, but not the determinant, of the right to humane treatment declared by Art. I, § 20. See *State v. Sepulvado*, supra, at 746-66; [citation omitted].

State v. Perry, 610 So.2d at 762.

In *State v. Stetson*, this Court reviewed the concurring opinions of the Justices in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and other jurisprudence and derived four generalized criteria for assessing the Constitutional validity of punishments: the punishment must not be degrading to the dignity of human beings; arbitrarily inflicted; unacceptable to contemporary society; or (4) excessive, i.e., disproportionate to the crime or failing to serve a penal purpose more effectively than a less severe punishment. *State v. Perry,* 610 So.2d at 762.

The State submits that in the instant case, the death penalty as applied to the rape of a child under twelve is not cruel and unusual punishment as proscribed by the provisions of La. Const. Art. I, § 20. The punishment imposed is no so severe as to be degrading, nor is it arbitrarily inflicted or unacceptable to contemporary society, disproportionate to the crime or failing to serve a penal purpose more effectively than a less severe punishment. The rape of a child under twelve is a heinous crime. The victims of this crime are among the most vulnerable members of society. It is a depraved act, with has a serious, long term effect upon the victim and society. It is a crime which merits the most severe punishment.

B. <u>The death penalty is not susceptible of being applied arbitrarily and capriciously for this offense.</u>

The defendant contends that the capital sentencing scheme fails to appropriately channel the sentencing discretion of the jury. He states that the provisions of La. C.Cr.P. art. 905.4 are intended to guide the jury's discretion in sentencing offenders convicted of first degree murder, and are inapplicable to convictions obtained pursuant to La. R.S. 14:42. As such, he contends that the aggravating factors set forth in La. C.Cr.P. art. 905.4 fail to genuinely

narrow the class of child rapists eligible for the death penalty. The State submits that these claims have no merit, and that the death penalty is not susceptible of being applied arbitrarily or capriciously with respect to this offense.

In order to avoid arbitrary and capricious imposition of the death penalty, the sentencing jury's discretion must be suitably directed and limited. *Gregg v. Georgia*, 428 U.S. 153, 189, 92 S.Ct. 2909, 2932-2933, 49 L.Ed. 2d 859 (1976). The capital sentencing scheme must narrow the class of persons eligible for the death penalty. The narrowing can be done in one of two ways: (1) the legislature may itself narrow the definition of capital offenses, or (2) the legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. *State v. Williams*, 96-1392 (La. 12/13/96), 685 So.2d 1063, 1070-1071, citing *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Louisiana has chosen the first method. The legislature has narrowly defined the offenses which are punished by death, therefore the "narrowing function" is performed by the jury at the guilt phase when if finds the defendant guilty of the aggravated rape of a child under the age of twelve.

Therefore, the Supreme Court found in *Lowenfield*, as follows:

> The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.

Lowenfield, supra, at 246, 108 S.Ct. at 246. While the scheme narrowed the class of eligible offenders at the guilt phase, the sentencing phase allowed for the consideration of mitigating circumstances and discretion. *Id.* The Supreme Court stated that "[t]he Constitution requires no more."

Of significance, this Court in *Williams* found that the class of offenders was sufficiently narrowed by 14:42©) as it was limited to those who rape a child under the age of twelve, stating "[t]herefore not every rapist will be subject to the death penalty, just as every murderer is not subject to the death penalty." *State v. Williams*, 685 So.2d at 1072.

As the provisions of La. C.Cr.P. art. 905.4 form no part of the Constitutionally required narrowing process, the State submits that the defendant's claim that they fail to channel the jury's discretion and further narrow the class of offenders has no merit. Moreover, the fact that the aggravating circumstances found by the jury during the sentencing hearing duplicated elements of the crime is irrelevant as stated above. *Lowefield*, supra, at 246, 108 S.Ct. at 246.[14]

While the provisions of La. C.Cr.P. art. 905.4 were originally enacted to apply to first degree murder, the State submits that the defendant has failed to establish that they are unconstitutional as applied to the aggravated rape of a child under twelve years of age.

---

[14] The jury found the following aggravating circumstances were proven beyond a reasonable doubt:

(1) The offender was engaged in the perpetration of aggravated rape. (La. C.Cr.P. art. 905.4 A(1)).

(2) The victim was under the age of twelve years. (La. C.Cr.P. art. 905.4 A(10)).

II. THE DEFENDANT'S CLAIM THAT HE WAS DENIED A FAIR TRIAL BY THE DELAYED DISCLOSURE OF FAVORABLE EVIDENCE HAS NO MERIT. (Assignments 4-7).

The defendant contends that his conviction must be reversed due to the alleged delayed disclosure of favorable evidence. Specifically, the defendant contends that the prosecution delayed in disclosing evidence regarding the inconclusive result of a DNA test performed on a bloodstain on the victim's mattress, videotaped statements L.H. made to Barbara McDermott in March of 1998, and phone records from the defendant's residence. The defendant contends that he would have proceeded to trial prior to December 1999, when the victim revealed to her mother and authorities that the defendant was the person who raped her, had this information been disclosed sooner. The defendant also contends that the disclosure during trial in this matter of the inconclusive DNA test result should have served as a basis for the trial court granting a mistrial or allowing the Defense to reopen its opening statement.

In *Brady v. Maryland*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Favorable evidence includes both exculpatory evidence and evidence that impeaches the testimony of a witness whose credibility or reliability may determine guilt or innocence. *In re Jordan*, 04-2397 (La. 6/29/05), 913 So.2d 775, 782, *citing Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Evidence is material only if there is a reasonable probability that the results of the proceeding would have been different if the evidence had been disclosed to the defense. A "reasonable probability" is that which is sufficient to undermine confidence in the outcome of the trial. In determining materiality, a reviewing court must ascertain "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting a verdict worthy of confidence.

The United States Supreme Court has explained that "[t]here are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *State v. Louviere*, 00-2085 (La. 9/4/02), 833 So.2d 885, 896 *cert. denied*, 540 U.S. 828, 124 S.Ct. 56, 157 L.Ed.2d 52 (2003).

In *Kyles v. Whitley*, the United States Supreme Court made clear that materiality is not determined item by item but by the cumulation of the suppressed evidence. Thus, even if each item by itself would not warrant a new trial, the accumulation may.

Late disclosure as well as non-disclosure of evidence favorable to the defendant requires reversal if it has significantly impacted the defendant's opportunity to present the material effectively in its case and compromised the fundamental fairness of the trial. *State v. Kemp*, 00-2228 pp. 7-9 (La. 10/15/02), 828 So.2d 540, 545-546. The impact on the defense of the late disclosure "must be evaluated in the context of the entire record." *Kemp*, 00-2228 at p. 7, 828 So.2d at 545.

Additionally, La.Code Crim. Proc. art. 775 requires a mistrial on motion of the defense when "prejudicial conduct inside or outside the courtroom makes it impossible for the defendant to receive a fair trial." Mistrial is a drastic remedy, and the determination of whether prejudice has resulted lies in the sound discretion of the trial judge. *State v. Sanders,* 93-0001, pp. 20-21 (La.11/30/94), 648 So.2d 1272, 1288-89; *State v. Smith,* 430 So.2d 31, 44 (La.1983).

A. Defendant was not prejudiced by the disclosure during trial of the Connecticut laboratory's reports dated June 23, 1998 and July 22, 1998, nor did the trial court err in denying the defendant's motions for mistrial, recess, or to reopen opening statements on this basis. (Claims II A-1, B, C).

The defendant claims that he was prejudiced by the late disclosure of a report from the Connecticut State Police Forensic Laboratory which, he contends, "indicated that DNA testing excluded Mr. Kennedy and Ms. Hammond as the source of the blood found on the mattress pad in Ms. Hammond's room. (Appellant's brief, p. 19). However, the defendant has mis-stated the results of the testing performed by the Connecticut laboratory, which did not exclude the defendant and/or victim as the source of the blood on the mattress pad, but instead indicated that criminalists were unable to make any comparisons with regard to DNA extracted from the cuttings due to "insufficient amplification product." (Report of July 22, 1998, State's Exhibit 187). The State submits that the disclosure of this report during the trial in this matter did not prejudice the defendant, nor did the trial court err in denying the defendant's motions for mistrial, recess, or to reopen its opening statement.

On the morning of Wednesday, August 20, 2003, prosecutors disclosed reports from the Connecticut State Police Forensic Laboratory dated June 23, 1998 and July 22, 1998.[15] The June 23, 1998 report, which was signed by Deborah Messina and Joy Reho, reflects that reddish-brown stains on "Item #04", a large cutting from the top portion of a mattress, gave a positive result with a chemical screening test for blood, and that samples from these stains were forwarded to the Forensic Biology Section for further analysis. (Admitted as Joint exhibit 5 and Defense exhibit 10). The July 22, 1998 report reflects that three cuttings from item #04 were examined by criminalists Michael Adamowicz, Ph.D. and Carl Ladd, Ph.D as follows: #0004-LB3, #0004-LB4, #0004-LB5. DNA was extracted from these items and purified according to standard laboratory profiles. The quality and quantity of DNA obtained from each sample was analyzed by standard protocols, and that "[i]nsufficient amplification product was detected for items # 004-LB3, #004-LB4, #004-LB5 . . . therefore no comparisons could be made."[16]

Essentially, DNA extracted from the mattress cuttings had to be amplified in order to from Dr. Adamowicz to run further tests which would allow him to compare the DNA extracted from the cuttings to the victim's and

---

[15] On August 19, 2003, defense attorneys moved for a mistrial indicating that they had viewed joint exhibit 176 for the first time and observed indications that the Connecticut laboratory had removed cuttings from it. (R. 20, p. 4952). The following morning, prosecutors received these two reports by fax after contacting the Connecticut laboratory and asking personnel to review records to determine whether all reports had been received. (R. 21, pp. 5024-5026).

[16] Dr. Michael Adamowicz, testified during trial that sometimes the tests do not work, and this can result from an insufficient amount of DNA, or a too damaged or degraded sample.

defendant's known DNA. (R. 23, p. 5665). After testing indicated that the PCR process failed to create any amplified DNA, Dr. Adamowicz was unable to run further tests to compare the genetic material present in the stains to anyone's DNA. (R. 23, p. 5665). Thus, these reports neither confirmed that the blood stains located by Det. Jones on the underside of the victim's mattress were connected to the crime, nor established that they were not connected to it. This inconclusive result was presented to the jury through the testimony of Dr. Adamowicz, and the jury was informed that the defendant received these reports during the trial in this matter. (R. 23, p. 5699).

Of significance, the defendant did not rely to his detriment on the State's perceived failure to test the mattress pad, but instead obtained independent testing of this item by Carolyn Van Winkle, a forensic DNA analyst employed by the Tarrant County Medical Examiner Laboratory. (R. 23, p. 5701). Ms. Van Winkle's test results excluded the victim as the source of the blood stains on the mattress pad. (R. 23, p. 5713). During an evidentiary hearing on the defendant's motion for mistrial, held out of the presence of the jury, Ms. Van Winkle testified that she reviewed the two supplemental reports from the Connecticut State Police Crime Laboratory on August 20, 2003. (R. 21, p. 5199-5200). She testified that these reports were not inconsistent with the results of her tests, and in no way affected her opinion regarding the results of her test. (R. 21, p. 5199-5200). She explained during trial that the Short Tandem Repeat (STR) test that she performed upon the stains in 2001 was more sensitive than the DQA1 and polymarker tests performed by Dr. Adamowicz in 1998. (R. 23, pp. 5712-5713, pp. 5719-5720).[17]

As the defendant was not prejudiced in his ability to present the results of the State's testing, which neither inculpated nor exculpated him, the defendant's claim has no merit. Nor did the trial court err in denying the defendant's motion for mistrial on this basis, as the late disclosure of these reports did not make it impossible for the defendant to receive a fair trial. La. C.Cr.P. art. 775.

Likewise, there is no merit to the defendant's claim that the trial court erred in denying his requests for alternative remedies. The trial court properly denied the defendant's motion for recess to obtain the presence of Ms. Messina. Contrary to the defendant's assertions, Ms. Messina was not the author of an exculpatory report, as her June 23, 1998 report simply indicated that the tests indicated a positive reaction for the presence of blood on the mattress pad. (Joint exhibit 5, Defense exhibit 10). The State would note that the defendant was well aware of this fact, as his expert witness examined the stains and testified to extracting DNA from the same.[18]

With regard to the defendant's motion to re-open his opening statement following the presentation of the State's case, the defendant argued that he should be allowed to advise the jury that his original assertion that the State had not bothered to test the mattress was incorrect. Instead, the State neglected to follow up on the testing and to

---

[17] State witnesses Dr. Lee and Dr. Adamowicz agreed that the PCR process used by the Connecticut laboratory in 1998 was not as sensitive as the STR test used by Ms. Van Winkle in 2001. (R. 23, pp. 5578, 5666).

[18] The defendant's expert witness was also aware that swatches had been removed from certain stains on the mattress pad prior to the time she received it, as she made an effort to test the same stains. (R. 23, pp. 5711-5712).

provide that information to the defense. (R. 23, p. 5678). The State submits that the defendant has failed to establish that he was prejudiced in this respect. Prior to the commencement of the defendant's case, the trial court read an instruction to the jury advising it in part as follows:

> In his opening statement, the attorney for the defendant familiarized you with his analysis of the State's evidence or lack of evidence and what conclusions he believes may be drawn from the evidence or lack thereof.. Specifically, in his opening statement, counsel for defendant advised you that the State had not scientifically tested the mattress pad, Joint Exhibit No. 1. However, after the opening statements and during the course of the trial, attorneys for the State produced for the first time evidence that the mattress pad had, in fact, been tested.

(R. 23, p. 5699). This instruction informed the jury, which had already heard testimony from Dr. Adamowicz that he was unable to compare DNA extracted from the mattress cuttings to the samples taken from the victim and defendant because of the failure of the PCR process to create the amplified DNA necessary for further testing, that this information was not disclosed to the defendant until after the trial commenced.

B. <u>The defendant was not prejudiced by the disclosure in April of 2000 of the actual videotaped statements made by the victim to Barbara McDermott in March of 1998, over three years prior to the trial in this matter.</u>

The defendant contends that he was prejudiced by the late disclosure of an exculpatory videotaped statement which the victim made to Barbara McDermott in March of 1998. This claim has no merit. On August 28, 1998, counsel for the defendant signed a list of discovery which had been turned over to the defense which included the following:

> 21. Transcript of taped statements of [L.H.] to Barbara McDermott.

(R. 1, p. 149). On February 1, 2000, counsel for the defendant signed a supplemental notice acknowledging receipt of a 60 page transcription of the victim's March 7, 1998 interview with Ms. McDermott. (R. 1, p. 214). On May 26, 2000, the defendant filed a motion seeking production of a videotape taken of an interview with L.H. which was the subject of a hearing conducted on November 10, 1998. (R.1, p. 243). Attached to this motion is a partial transcript of the November 10, 1998 hearing, in which the parties discussed whether the defendant should be provided with a videotape pursuant to La. R.S. 15:440.5. *Id.* In that transcript, the prosecutor advised that she had previously prepared and provided defense counsel with complete transcripts of the videotape in question. *Id.* The State submits that the videotapes discussed by the parties on November 10, 1998 are clearly those of the victim's March interviews with Ms. McDermott, based upon the references to the privacy of the victim, La. R.S. 15:440.5, and the transcriptions previously provided by the State.

Though there was subsequently some confusion about the existence of videotaped interviews with Ms. McDermott, it is evident that the defendant was provided with transcripts of the same as early as August 28, 1998 and February 1, 2000. Thus, the defendant was aware of the contents of said interviews well before he received the actual videotapes of the same.

Moreover, the record reflects that defense counsel acknowledged on April 19, 2001, that she had received the requested videotapes one day after a hearing previously held on the motion for production of the same. (R. 6, pp.

1476-1478). As the hearing on the defendant's motion to produce was held on May 31, 2000, it appears that defense counsel received the videotapes one day after that date. (R. 1, p. 25). As trial in this matter was not held until August of 2003, it appears that the defendant received the requested videotapes more than three years prior to the trial in this matter.

Finally, the State would note that the record does not reflect, nor does the defendant allege that the timing of the disclosure of the transcripts or actual videotapes significantly impacted his opportunity to present the material effectively in its case or compromised the fundamental fairness of the defendant's trial. The defendant played these videotaped interviews during the presentation of its case and they were introduced them into evidence as Defense exhibits 7 and 8. (R. 23, pp. 5756-5759).

C. The defendant was not prejudiced by the disclosure of sixty-three pages of subpoenas and returns for telephone records on February 1, 2000, three and one-half years before the trial in this matter.

The defendant concedes in brief that he received the defendant's phone records on February 1, 2000, three and one-half years before the trial in this matter. (Appellant's Brief, p. 20). In fact, the record in this matter reflects that counsel received sixty-three pages of subpoenas and returns for telephone records on that date. (R. 1, p. 214). The defendant has attached thirteen pages of subpoenas and returns to his brief in this matter.

Of significance, though the defendant argues that the State delayed in disclosing the phone records of his residence, the defendant has failed to argue or allege that the timing of the disclosure of this information significantly impacted the defendant's opportunity to present the material effectively in its case or compromised the fundamental fairness of the trial. Instead, the record reflects that trial counsel had sufficient time (approximately three and one-half years) in which to evaluate the significance of all of the material provided to him and to determine whether to present the material in its case. That counsel did not introduce any of these records into evidence during the trial in this matter would seem to indicate that after a review of all of the disclosed records and subpoenas, counsel determined this material was not significant. Thus, the State submits that the defendant has failed to demonstrate that he was prejudiced by the timing of the disclosure of this material.

D. Contention that the defendant was prejudiced by the delay because he would have proceeded to trial before the victim recanted her allegations that an unknown black male raped her and identified the defendant as her attacker.

The defendant contends in each instance that if the cited material had been disclosed to him earlier in these proceedings, he would have filed a motion for speedy trial and proceeded to trial prior to the victim's recantation of her initial account of the incident in December of 1999. The State submits that this claim is purely speculative, as it presumes that the defendant knew that the victim would recant her earlier account of the incident and when she would do so. The State would also note that the defendant's claim would also appear to be rebutted by the fact that he signed a discovery request indicating that he received a transcript of the victim's interviews with Ms. McDermott as early as August of 1998.

His claim is contradicted by the fact that various defense motions were filed and/or pending throughout this period. The defendant's motions to suppress statements and evidence were not heard until November 12, 1999, the date on which they were denied by the trial court. Motions the defendant filed on October 29, 1998 pertaining to the penalty phase of the trial remained pending until April 7, 2000 and May 31, 2000. (R. 1, pp. 22, 25, 154-155, 156-157).

As stated above, late disclosure of evidence favorable to the defendant requires reversal if it has significantly impacted the defendant's opportunity to present the material effectively in its case and compromised the fundamental fairness of the trial. *State v. Kemp*, 00-2228 pp. 7-9 (La. 10/15/02), 828 So.2d 540, 545-546. The defendant has failed to demonstrate or to allege that the timing of the disclosure of the complained of items and information significantly impacted his opportunity to present the material effectively in his case or compromised the fundamental fairness of the trial. Thus, the State submits that the defendant is not entitled to the reversal of his conviction in this case.

III. CLAIM THAT THE TRIAL COURT FAILED TO ASSESS THE COMPETENCY OF L.H. (Assignments 8-11)

In his third claim, the defendant contends that the trial court erred in denying his *Motion to Assess Witness' Competency to Testify* filed on July 14, 2003. (R. 3, p. 626). In his motion, the defendant sought a pre-trial hearing for the purpose of assessing L.H.'s competency to testify as a witness at the trial in this matter, claiming that the December 16, 1999 videotaped interview of the victim revealed that her recollection of specific details of the incident was impaired. (R. 3, p. 627). The defendant also contends in brief that a pretrial determination of the victim's competency was a prerequisite to the admission at trial of the December 16, 1999 videotaped statement, and that the trial court should have considered whether the victim's statements were the result of leading questions, or improper suggestions.

As an initial matter, the State submits that the trial court did not err in denying the defendant's motion for a pre-trial hearing to assess L.H.'s competency as there is no requirement in the law that the trial court conduct a separate, pretrial hearing to determine the competency of witnesses who are expected to testify at trial. Nor did the trial court abuse its discretion in determining that the victim had previously demonstrated her competency during her testimony at a pretrial motion hearing held three years earlier on April 7, 2000.[19]

Every person of proper understanding is competent to be a witness except as otherwise provided by legislation. LSA-C.Evid. art. 601. The question of the competency of a person to be a witness is determined by the trial judge. La. C.E. art. 104. Understanding, not age, is the test of whether a person shall be sworn as a witness. *State v. Foy*, 439 So.2d 433, 435 (La. 1983). The determination by the trial court that a child is competent to testify as a witness is based not only upon the child's answers to questions testing his understanding, but also upon the child's overall demeanor on the witness stand. *State v. Humphrey*,412 So.2d 507, 516 (La. 1982). The determination as to

---

[19] The trial court offered counsel the opportunity to establish that some circumstance arising between April 7, 2000 and July 17, 2003 should cause the court concern regarding the victim's competency, but defense counsel conceded she nothing to present on this issue. (R. 10, p. 2470).

whether a child has sufficient understanding to testify is entitled to great weight because the trial court has the advantage of seeing and hearing the witness. Therefore, the trial court is vested with wide discretion in determining the competency of child witnesses; and, on appeal, its ruling is entitled to great weight and will not be disturbed in the absence of abuse of discretion. *State v. Foy*, 439 So.2d at 435.

On July 17, 2003, the trial court found that the victim had previously demonstrated her competency when she testified before the trial court on April 7, 2000, stating as follows:

> Alright. In reviewing the transcript given by [L.H.] on April 7, year 2000, and in reviewing the applicable law, I'm not inclined to grant the Defendant's Motion. The Defendant in this case asks me to test the competency of [L.H.]. She is thirteen years of age as we speak, if my calculations are correct. She was eight years of age when the rape allegedly occurred, for which the Defendant is charged. Your Motion asks that the events- argues rather that the events which she is being asked to recall occurred at an age in which her competency to testify surely would have been at issue, and that her reported memory of those events is vague and spotty, casting doubt on her credibility as a witness. And I think that's a quote almost verbatim from your motion.
>
> It is the Court's appreciation that understanding, not age is the test of whether a person is competent to be sworn as a witness. And that the key determination to be made in determining the competency of a witness is whether - in this case [L.H.] was able to discern the difference between truth and falsehood. In other words, competency is not the same as testing a witness' memory or lack thereof in my judgment is clearly an issue of credibility for the Jury to decide.
>
> If you're asking me to test whether or not [L.H.] was competent at age eight, I certainly decline to make that determination. Because I don't have and couldn't have the benefit of knowing how she would have responded to questioning five years ago.
>
> I have a transcript. And the transcript made for interesting reading. And I don't mean that in the 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. And I note and made a list of the following questions put to her by Mr. Armato. Question; "[L.H.], do you always tell the truth?" Answer; "No." Question; "Mr. Bates asked you whether you knew the difference between what the truth is and what a lie is; do you?" Answer; "Yes." Question; "Why don't you tell us what the truth is and what a lie is." Answer; "A lie is when somebody believes something and they don't tell what they did to you." Question; "When somebody does something and when they don't tell what they actually did to you?" Answer; "When somebody do something and they don't tell what they actually did." Question; "Allright. They tell something different than what they actually did?" Answer; "Yes." Question; "Okay. What is the truth when somebody does something." "They tell what they did."
>
> I found it also interesting that no one, that is no one from the State nor the Defense, and the Court for that matter, put the issue of competency before the Court at that particular time. We just proceeded right on through testimony, assuming that the young lady was competent to testify.
>
> I think that the Defense established clearly in my mind that she knew the difference between a truth and a falsehood. And what sort of underscored that point in my mind was that she readily admitted that she didn't always tell the truth; of which I'm sure the Defense found interesting. Perhaps not as interesting for the State.
>
> She had a sound understanding of these concepts. Unless you can show me today some circumstances that have manifested themselves between that testimony in April of 2000 and today that would cause me to concern myself about her competency to testify - unless you can do that today, your Motion is denied.

(R. Vol. 10, p. 2467 -2470).

The State submits that the trial court did not abuse its discretion in determining that the victim demonstrated that she was competent to be a witness when, at the age of ten, she testified at the pre-trial hearing of April 7, 2000, for the reasons stated by the trial court. Contrary to the defendant's assertions, neither L.H.'s inability to recall meeting the defense attorney on a prior occasion, nor the fact that she did not know whether Det. Sgt. Kelly Jones was a therapist or a police officer, demonstrates a lack of competence. (R. 5, p. 1230, ll 18, 30; p. 1229, l. 21-28). Significantly, at the time that L.H. testified at the trial in this matter, she was approaching her fourteenth birthday. (R. Vol. 22, p. 5336).

To the extent that the defendant now contends that the trial court had an obligation to assess whether L.H. had been coached or her testimony tainted by suggestive questioning in determining the L.H.'s competency, the State would note that the defendant's motion for pre-trial determination of competency did not allege that L.H. was incompetent as a witness due to coaching or suggestive questioning. (R. 3, p. 626-627; R. 10, p. 2465-2466). Instead, the motion claimed that L.H. had demonstrated an inability to recall certain details regarding the rape. *Id.*

With regard to the defendant's claim he should have been allowed the opportunity to test the victim's competency and/or availability as a witness prior to the admission at trial of the December 16, 1999 videotaped statement, the State submits that the defendant waived any claim regarding the admissibility of the videotaped statement when he stipulated to the admissibility of the same. La. C.Cr.P. art. 841.(R. 11, p. 2544-55). Thus, the State submits that this assignment of error has no merit.

IV. ALLEGATION THAT THE ADMISSION OF HEARSAY VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES (Assignments 12-17)

In this assignment of error, the defendant contends that the trial court erred in admitting State's exhibit 176-B, a videotaped statement which L.H. provided to Omalee Gordon on December 16, 1999. The defendant contends that L.H. was unavailable as a witness in violation of the provisions of La. R.S. 15:440.5(8) and that the statutes providing for the electronic recording of protected persons set forth in La. R.S. 15:440.1, et seq., are unconstitutional. The defendant also contends that the trial court erred in admitting the testimony of the victim's mother pursuant to the provisions of La. C.E. art. 801(D)(1)(d). The State submits that the defendant's claims must be denied.

A. <u>The defendant failed to preserve any claim relating to the admissibility of the December 16, 1999 Videotaped Statement or to the Constitutionality of La. R.S. 15:440.1, et seq.</u>

On July 18, 2003, the State filed a written notice informing the defendant of its intention to introduce at trial in this matter the December 16, 1999 videotaped statement the victim provided to Omalee Gordon, pursuant to La. R.S. 15:440.5. (R. Vol. 3, p. 687). On Wednesday. July 23, 2003, counsel for defendant stated that she had viewed this videotape, and stipulated that it met the criteria set forth in La. R.S. 15:440.5. (R. Vol. 11, p. 2545). On August 5, 2003, the defendant filed a *Motion to Require the State of Louisiana to Redact Videotape*, asking that the State be ordered to redact portions of the videotape including statements about other crimes allegedly committed by the defendant. (R. Vol. 3, p. 740).

During the trial in this matter, out of the presence of the jury, the State announced that its next exhibit would be the videotaped statement which the victim made to Ms. Gordon. (R. Vol. 22, p. 5338-5339). At that time, the State and defendant stipulated that the tape met the conditions for admissibility set forth in La. R.S. 15:440.5, and that it had been edited as requested by the defendant, and agreed that the jury would only be informed that the tape had been edited to comply with the rules of evidence. (R. Vol. 22, p. 5339-5340). After the jury returned, during the testimony of L.H. on direct examination, the State offered, filed and introduced the videotape into evidence without objection, as follows:

> MR. PACIERA:
> Your Honor, at this time, the State would offer, file and introduce into evidence as State's Exhibit No. 176, A and B. The original tape by Amalee Gordon and the cut tape that was made to satisfy the Rules of Evidence. And further would offer the stipulation that it meets all the requirements provided for in the Code that we have discussed previously off the record.
>
> MS. daPONTE:
> We would agree with that stipulation, Your Honor, and we have no objection to the tape.

(R. Vol. 22, pp. 5342-5343). The tape was played for the jury without objection. *Id.* Counsel for the defendant cross-examined the victim. (R. 22, pp. 5363-5370). Counsel did not allege that L.H. was unavailable as a witness, nor did counsel attempt to withdraw the stipulation to the admissibility of the videotape following cross examination of L.H. *Id.*

On appeal, the defendant contends that the trial court erred in admitting the videotape into evidence on the ground that it violated the defendant's Sixth Amendment right to confront and cross examine witnesses. However, the defendant failed to preserve this claim for appellate review, as defense counsel stipulated to the admissibility of the videotape and advised the court that the defense had no objection to the admission of the videotape into evidence. La. C.Cr.P. art. 841. (R. Vol. 22, p. 5343).

Likewise, the State submits that the defendant has failed to preserve for appellate review his claim that La. R.S. 15:440.5, which provides for the admissibility of such videotaped statements, is unconstitutional. La. C.Cr.P. art. 841. The defendant did not challenge the constitutionality of La. R.S. 15:440.1, et seq. in the trial court, and stipulated to the admissibility of the evidence governed by the same.

In a footnote, the defendant contends that the constitutionality of La. R.S. 15:440.1, et seq., may be addressed by this Court as error patent. (Appellant's Brief, p. 28, fn. 37. In support of his claim, the defendant cites *State v. Hookfin,* 596 So.2d 536 (La. 1992), wherein this Court stated it has

> . . .consistently held that the facial constitutionality 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, which is subject to appellate review under LSA-C.Cr.P. art. 920, 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.

However, the defendant's conviction is based upon La. R.S. 14:42, not La. R.S. 15:440.1, et seq. Therefore, the State

submits that the defendant's claim is not subject to error patent review.

The defendant also contends that to the extent that this Court determines that he waived any error with respect to the admission of the videotape, such waiver should be reviewed on appeal as ineffective assistance of counsel. A claim of ineffective assistance of counsel generally is more properly raised in an application for post-conviction relief than on appeal. *State v. Hamilton,* 92-2639 (La.7/1/97), 699 So.2d 29, *cert. denied,* 522 U.S. 1124, 118 S.Ct. 1070 (1998). In post-conviction proceedings, the district judge can conduct a full evidentiary hearing on the matter. However, when the record contains evidence sufficient to decide the issue, the appellate court may consider the issue in the interests of judicial economy. *See, e.g., State v. Ratcliff,* 416 So.2d 528 (La.1982). In the present case, the State submits that the defendant has failed to establish a sufficient basis to deviate from the normal practice of relegating such issues to post-conviction proceedings.

Assuming *arguendo*, that this Court determines that the record contains sufficient evidence to decide whether trial counsel's stipulation to the admissibility of the December 16, 1999 videotape and failure to challenge the constitutionality of La. R.S. 15:4440.1 et. seq. constitute ineffective assistance of counsel, the State submits that the record supports the conclusion that counsel stipulated to the admissibility of the December 16, 1999 videotape as a matter of trial strategy.

Of significance, defense counsel argued in opening and closing statements that the jury should compare L.H.'s December 16, 1999 videotaped statement to Omalee Gordon, with her previous statements including her March 7, 1998 videotaped statement to Barbara McDermott, which was introduced as defense exhibit seven. (R. 18, p. 4421-24; R. 24, p. 5849-51). It was the defendant's contention that L.H. identified the defendant as the perpetrator of this offense under pressure from other individuals. *Id.* Counsel for the defendant contended that evidence of that pressure was present in the March 7, 1998 videotape. *Id.* The defendant also argued to the jury that it should compare the amount of detail given in the March 7, 1998 videotape, wherein the victim related that she was raped outside of her residence by one young man on a bicycle while another young man watched, with the amount of detail she provided in the December 16, 1999 videotaped statement, in determining the credibility of L.H.'s testimony that she was raped by the defendant. *Id.* Thus, the record reflects that counsel did not object to the December 16, 1999 videotaped statement as a matter of trial strategy.

B. <u>The trial court did not err in admitting the testimony of C.H.</u>

La. C.E. art. 801(D)(1)(d) provides that a prior statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement, and that statement is:

> . . .(d) Consistent with the declarant's testimony and is one of initial complaint of sexually assaultive behavior.

In the instant case, the defendant contends that the testimony of C. H. describing the circumstances under which L.H. first told her that Patrick Kennedy had raped her, was not an initial complaint of sexually assaultive behavior. The State submits that this claim has no merit. L.H. testified at trial that she first reported the fact that she

had been raped by the defendant to her mother in 1999. Therefore, she first reported a complaint of the defendant's sexually assaultive behavior to her mother in 1999.

The defendant contends that L.H. first reported that she had been raped over a year earlier. Presumably, the defendant would have it that he was in fact the first person to whom the victim made a report of sexually assaultive behavior, as he advised the 911 operator that L.H. told him she had been sexually assaulted by two young men. The victim testified that the defendant told her what to say. Moreover, the State's witnesses testified that during questioning by officers on the scene and at the hospital, the defendant either answered for the eight year old victim, or was present while she parroted the version of the story first related by him to the 911 operator. At the time the victim made a videotaped statement to Barbara McDermott on March 7, 1998, the defendant was not yet in custody. Testimony indicates that he did not turn himself in until March 10, 1998. Thereafter, the victim's mother, C.H., allowed the victim to have contact with the defendant for a period of time. The State submits that it is illogical to read La. C.E. art. 801(D)(1)(b) in such a manner as to allow a rapist to manufacture a "first report" of a sexual assault to himself and exclude the testimony of the first person to whom the victim reports his sexually assaultive behavior on the theory that the fact of an assault was previously reported.

Finally, the State submits that in the event that the testimony was erroneously admitted, any error in this respect was harmless as the testimony was cumulative of that offered by the victim. Moreover, the evidence against the defendant was overwhelming as discussed with respect to the denial of the defendant's motion for new trial below.

V. THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY OF THE PROHIBITION OF EXECUTING MENTALLY RETARDED OFFENDERS. (Assignments 17-22).

In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed. 2d 335 (2002), the United States Supreme Court held that executing mentally retarded offenders is excessive under the Eighth Amendment. *Atkins*, 536 U.S. at 321, 122 S.Ct. at 2252. However, while extending Eighth Amendment protection to the mentally retarded, the Supreme Court left to the States the task of developing appropriate ways to enforce the constitutional restriction. *Id.*, 536 U.S. at 317, 122 S.Ct. at 2250.

In the interval between the decision of the United States Supreme Court in *Atkins*, and the enactment of La. C.Cr.P. art. 905.5.1, this Court set forth interim guidelines for evidentiary hearings to determine mental retardation in *State v. Williams*, 01-1635 (La. 11/1/02), 831 So.2d 835. In *Williams*, this Court instructed trial courts to treat the issue procedurally as they would pre-trial competency hearings for which statutory criteria already existed. *Id.*, 01-1650 at p. 29, 831 So.2d at 858. In adapting this procedure for determination of mental retardation as a bar to a sentence of death, this Court noted:

> The code . . .provides for a contradictory hearing, with LSA-C.Cr.P. art. 647 stating:
>
> > The issue of the defendant's mental capacity to proceed [or in this case, the issue of whether or not the defendant is mentally retarded under applicable standards] shall be determined by the court in a contradictory hearing. The report of the sanity commission is admissible in evidence at the hearing, and members of the sanity commission may be called as witnesses by the court, the defense,

> or the district attorney. Regardless of who calls them as witnesses, the members of the commission are subject to cross-examination by the defense, by the district attorney, and by the court. Other evidence pertaining to the defendant's mental capacity to proceed may be introduced at the hearing by the defense and by the district attorney.

Williams, 01-1650 at p. 30, 831 So.2d at 859.

In the absence of a legislative mandate, this Court determined that the definition set forth in LSA-R.S. 28:381 would be acceptable under the Supreme Court's mandate in *Atkins*. *Williams*, 831 So.2d at 854. According to the definition in LSA-R.S. 28:381, a diagnosis of mental retardation has three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage, i.e., by the age of 22 years. *Id.* The defendant would be required to prove his status by a preponderance of the evidence. *Id.* at 860.

In the next legislative session following the rendering of *Atkins*, the Louisiana Legislature enacted 2003 La. Acts 698, codified at La. Code Crim. Proc. Art. 905.5.1. This article, with an effective date of August 15, 2003, sets forth procedures to be used in the event a capital defendant raises a claim of mental retardation.

La. C.Cr.P. art. 905.5.1 provides that a defendant claiming to be mentally retarded shall file written notice thereof within the time for filing pretrial motions; and shall provide the state with medical, correctional and other specified reports reviewed by the defense expert in forming his opinion. La. C.Cr.P. art. 905.5.1 (B), (D). Moreover, the State shall have the right to an independent psychological examination of the defendant. La. C.Cr.P. art. 905.5.1 (F). If the defendant refuses to submit to or fully cooperate in the examination by experts for the State, upon motion of the State, the trial court shall not instruct the jury of the prohibition of executing mentally retarded defendants. La. C.Cr.P. art. 905.5.1(G).

Significantly, it requires the defendant to prove the allegation to the jury during the capital sentencing hearing by a preponderance of the evidence, unless the parties agree to commit the determination to the judge, in which case the issue may be tried pretrial. La. C.Cr.P. art. 905.5.1©).

Finally, La. C.Cr.P. art. 905.5.1 (H) (1) defines mental retardation as a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, the onset of which must occur before eighteen years of age.

In this instant case, this issue arose prior to the effective date of La. C.Cr. P. Art. 905.5.1. On April 30, 2003, the defendant filed a *Motion to Preclude the State from Seeking the Death Penalty Due to Defendant's Mental Retardation.* (R. 3, pp. 595-596). Specifically, the defendant sought the appointment of a panel to determine whether the defendant was mentally retarded, citing this Court's decision in *State v. Williams*, 01-1650 (La. 11/1/02) 831 So.2d 835. *Id.* On May 1, 2003, Dr. Zimmerman testified in support of the defendant's motion. (R. 10, p. 2273).

Dr. Zimmerman, was accepted by the trial court as an expert in the field of forensic psychology, and testified he administered the Wechsler Adult Intelligence Scale Test, Third Edition, to the defendant, and concluded that the

defendant had a verbal IQ of 73, a performance IQ of 72, and a full scale IQ of 70. (R. 10, pp. 2273, 2277, 2283). Dr. Zimmerman testified that the full scale IQ of 70 had a possible variance of five points higher or lower, was within the mild mental retardation range. (R. 10, p. 2287).

While Dr. Zimmerman testified that the defendant was "probably" mildly mentally retarded based upon his IQ score, he did not have enough data to render an opinion as to whether the defendant experienced limitations in adaptive skills. (R. 10, p. 2289-90)[20] Thus, Dr. Zimmerman did not offer any testimony opining that the defendant was in fact mentally retarded as defined in LSA-28:381.

Based upon the testimony of Dr. Zimmerman, the trial court found reasonable grounds to issue an order appointing a commission for the purpose of assessing whether the defendant was mentally retarded in accordance with this Court's decision in *Williams*. (R. 3, pp. 600-601; R. 10, pp. 2323-24).

On June 27, 2003, the trial court held a pretrial hearing to determine whether the defendant was mentally retarded in accordance with *Williams*.[21] Prior to the hearing, defense counsel advised the judge that the pending legislative enactment of procedures to enforce the prohibition against the execution of mentally retarded defendants, which would likely be in effect at the time of trial, would commit the determination of mental retardation to the jury, but would also provide that the State and defendant could agree to commit the determination to the trial court alone. (R. 10, p. 2378). The defense noted that it was not agreeing to commit the determination to the court alone, should the amendment be effective at the time of trial. (R. 10, p. 2379).

Dr. Thomas Hannie, Jr., testified as an expert in the field of clinical psychology, a field which includes mental retardation. (R. 10, p. 2383). Dr. Hannie testified that he reviewed the defendant's available school records, jail records and health records from the Correctional facility. (R. 10, p. 2384). He interviewed the defendant and one of the correctional officers. *Id.* He also reviewed Dr. Zimmerman's records. (R. 10, p. 2386).

Dr. Hannie also made three trips to the jail to speak with the defendant. (R. 10, p. 2387). The defendant refused to be interviewed on the first two occasions, although his attorney was present on the second occasion. (R. 10, p. 2387). On the third occasion, the defendant submitted to an interview, but refused to cooperate with any form of testing. (R. 10, p. 2387). The defendant refused to answer Dr. Hannie's questions if he even looked at reading

---

[20] While Dr. Zimmerman testified that records indicating the defendant performed poorly in school could indicate a "possible" deficiency in one area of adaptive functioning, he did not have sufficient data to determine why the defendant made bad grades and thus could not offer an opinion as to this factor. (R. 10, p. 2289). He agreed that there is a difference between being mentally retarded and learning disabled, that the records indicated that the defendant made acceptable grades at times, and that the defendant's period of poor grades generally corresponded with indications of frequent absences from school. (R 10, p. 2301-2302).

[21] On this same date, June 27, 2003, the Governor approved 2003 La. Acts 698, creating La. C.Cr.P. art. 905.5.1.

material, saying that it looked like he was administering a test. (R. 10, p. 2387).[22] There were ". . .many, many question he wouldn't answer." (R. 10, p. 2395).

Dr. Hannie reviewed the diagnostic interview and history taken by Dr. Zimmerman, which indicated that the defendant attended eleventh grade at age seventeen at John Martin School, and subsequently earned a GED from Jefferson Parish Vo-Tech. (R. 10, p. 2388). Dr. Hannie testified that there was no indication of mental retardation or lack of ability in the defendant's education records. (R. 10, p. 2388). However, there were indications of problems with discipline, behavior, and poor attendance which Dr. Hannie "took to be the problem for his difficulty in school." (R. 10, p. 2388).

Dr. Hannie found the defendant was exceptionally neat and nicely groomed. (R. 10, p. 2393). He was oriented to time and place. *Id.* His speech flowed well and he used large words appropriately and with good grammar. *Id.* His mood was depressed and angry. *Id.* He appeared to be of average intelligence during the interview. (R. 10, p. 2394).

Dr. Hannie testified that the Barona Premorbid Estimate of Intellectual Function is a technique which uses demographic variables such a age, race, section of the country and life experience to predict a person's IQ. (R. 10, p. 2394).[23] Assuming the defendant only completed the ninth grade, he would have an estimated full scale IQ of 96, well above the cutoff for marginal mental retardation. (R. 10, p. 2394). If it were assumed that the defendant had obtained his GED as he stated, it would result in a projected full scale IQ of 101. *Id.* According to Dr. Hannie, contentiousness may have caused him to score as low as he did on the test administered by Dr. Zimmerman. (R. 10, p. 2406).

No evidence of functional limitations in any of the measured areas was found by Dr. Hannie. (R. 10, p. 2406). Dr. Hannie testified as follows:

> In looking at him though, there is no indication that he can't take care of himself; he's lived on his own. In jail he presents neatly and cleanly. He takes care of the Pod. He's helpful to others. He cooks, at least according to him. His understanding and use of language were found to be average or above. He's articulate and knowledgeable about important issues. He expressed himself extremely well, using words correctly in complex sentences. He stated that at one time he functioned as

---

[22] Dr. Hannie testified as follows:

> When I looked at further material and asked questions, he wouldn't answer. He said because I was administering a test, and he refused to take that test. And that was very aware, because I could have administered a test, you know, without formally doing there. A test can be administered in that fashion. I co[u]ld have improvised. But he was not - he was alert and aware enough and knowledgeable enough to know that I might have done that; and he wasn't going to cooperate and allow that to happen either. He insisted he was not mental retarded.

(R. 10, p. 2392).

[23] The Barona Premorbid Estimate of Intellectual Functioning is used primarily in neuro-psychological work with brain damaged patients to estimate their IQ prior to the brain damage. (R. 10, p. 2412). Dr. Hannie testified that this technique is used to provide a rough estimate of IQ based upon demographic variables such as race, area of the country, education, and level of work functioning. The estimate derived using this technique has a large error factor. It is not a test, and the technique is not approved for the diagnoses of mental retardation. However, "[i]t was doing the best I could do in the absence of cooperation." (R. 10, pp. 2412-2413).

> a Social Worker helping the mentally retarded; which required paperwork. With respect to learning; apparently he had done a very good job of mastering the environment that he found himself in. Mobility wasn't a problem; especially considering him going on the road driving [a] truck cross Country, reading and using a map to get where he needed to go. Self-direction wasn't a problem. And no indication of any limitations on that area. And he took the initiative on several occasions to start and run his own business.
>
> I saw no reason to believe that he had difficulty in his capacity for independent living. He's lived on his own; bought homes, cooked, et cetera.

(R. 10, p. 2406-2407).[24] Dr. Hannie found the IQ result obtained by the Dr. Zimmerman to be at the bottom of the borderline range of intelligence, not in the next lower category of mild mental retardation, as it was not **more than** two standard deviations below the mean. (R. 10, p. 2408).

Next, Dr. Griffin testified as an expert in the field of clinical psychology. (R. 10, p. 2416). The defendant initially refused to see him, but changed his mind after receiving a message sent by Dr. Griffin. (R. 10, p. 2417). Dr. Griffin testified that he reviewed the Wechsler III test performed by Dr. Zimmerman. (R. 10, p. 2422). Dr. Griffin testified that the resulting full-scale IQ score of 70 obtained by Dr. Zimmerman is not greater than two standard deviations below the mean, which would be 69. (R. 10, p. 2422-23). The score of 70 is at the bottom of the borderline range, just above the mild mental retardation range, and just below the low average range of intellectual functioning. (R. 10, p. 2422).

With regard to the "standard error of measurement", Dr. Griffin explained that this is something that pertains to estimated scores in populations and to several different scores. (R. 10, p. 2425-2426). Thus, the defendant's IQ was not lower than the 70 obtained by Dr. Zimmerman, but could be higher if he wasn't totally cooperative during that test. (R. 10, p. 2427). Based upon his conversation with the defendant and review of the documents provided, Dr. Griffin saw no evidence that the defendant was deficient in any of the adaptive skills areas. (R. 10, p. 2423).

At the conclusion of this testimony, the trial court found that based upon the testimony of the court appointed experts and their report, and upon the limited testimony and testing performed by Dr. Zimmerman, the defendant had not demonstrated by a preponderance of the evidence that he is mentally retarded. (R. 10, p. 2433). The trial court additionally found that the defendant failed to cooperate with the doctors in their efforts to determine whether he was mentally retarded, noting that the pending act previously referenced by counsel for the defendant, would penalize such non-cooperation if in fact took effect either during or immediately before the penalty phase of this trial. (R. 10, pp. 2438-2349).

---

[24] Dr. Hannie testified that the defendant was a "Podman" in the parish jail, being responsible for an area of the jail and the people in it. Dr. Hannie interviewed Sgt. Sullowd, who told him that the defendant was a very capable Podman, who communicates well. Sgt. Sullowd told Dr. Hannie that the defendant ". . .knows how to write just the right things to get what he wants done, done." (R. 10, p. 2403). Dr. Hannie reviewed a file at the jail containing requests or complaints submitted by the defendant in his own handwriting, and read one of the letters into the record noting that, "This is absolutely not the work of a mentally retarded individual." (R. 10, pp. 2403-2404).

On June 27, 2004, the trial court issued a written judgment determining that Patrick Kennedy was not mentally retarded for the purposes of determining eligibility for capital punishment, but that the jury would have the opportunity to consider the defendant's alleged mental retardation in mitigation. (R. 3, p. 619-620).

On July 16, 2003, the State filed the *State's Motion to Deny any Jury Instructions Regarding Prohibition of Executing Mentally Retarded Defendants.* (R. 3, p. 679-680). Noting that the defendant refused to cooperate in testing by the court appointed doctors, the State requested the trial court to refuse to instruct the jury on the prohibition against the execution of mentally retarded defendants in accordance with section "G" of House Bill 1017 (2003 Acts 698) should it be applicable at the time of the defendant's trial. *Id.* The trial court granted the State's motion. (R. 10, p. 2462). Counsel for the defendant noted that she had not yet requested such an instruction, but noted her objection. (R. 10, p. 2462). The State moved to adopt the report and testimony of the two experts as its own, which motion was granted by the trial court. (R. 10, p. 2463-65).

Trial in this matter commenced with death qualification of the prospective jurors on August 8, 2003. On August 15, 2003, the date on which jury selection was completed and opening statements were presented in the guilt phase of the defendant's trial, 2003 La. Acts 698, codified at La. Code Crim. Proc. Art. 905.5.1 became effective. On August 26, 2003, the defendant filed a motion for a special jury instruction advising the jury that, "[n]o person who is mentally retarded shall be subjected to a sentence of death." (R. 4, p. 818). [25]

During the penalty phase, it was stipulated that if Dr. Zimmerman were called to testify, he would be qualified as an expert in forensic psychology, and would testify that he administered the Wechsler Adult Intelligence Test III to the defendant. (R. 24, p. 5985). Dr. Zimmerman would testify that: the defendant had a verbal IQ of 73, which is in the fourth percentile; a performance IQ of 72, which is in the third percentile; and a full scale IQ of 70, which is in the second percentile. (R. 24, p. 5985). Of significance, the defendant did not call any witnesses in the penalty phase to offer an opinion that the defendant was mentally retarded. [26]

A. <u>If La. C.Cr.P. art. 905.5.1 was inapplicable to the defendant's trial, which had commenced prior to its effective date, the trial court correctly determined that the defendant was not mentally retarded for the purpose of applying the *Atkins* bar. *State v. Williams*, 01-1635 (La. 11/1/02), 831 So.2d 835.</u>

Of significance, La. C.Cr.P. art. 905.5.1 became effective on August 15, 2003, during the trial in this matter, which commenced on August 11, 2003 with the death qualification of the prospective jurors. The State submits that La. C.Cr.P. art. 905.5.1 is a procedural law, prescribing methods for enforcing substantive laws, and relating to the

---

[25] The transcript does not include the trial court's ruling on the defendant's motion for special penalty phase instructions, or any argument offered in support thereof. It does appear from the record that these instructions may have been considered and denied by the trial court in chambers during the penalty phase, as counsel for the defendant noted an objection on the record to the denial of the same following a recess in the proceedings. (R. 24, pp. 5983-5984).

[26] Of significance, the testimony of the defendant's penalty phase witnesses barred any conclusion that the defendant was mentally retarded. As discussed in the statement of the facts above, these witnesses testified that he was successful in having his own business, that he was knowledgeable, that he was a good cook , and a skilled singer. There was testimony that he led the male chorus, and determined what vocal parts persons should sing in the choir.

form of the proceeding or the operation of the laws. The general principal is that changes in criminal procedure apply to trials conducted subsequent to the date of the procedural amendments. *State v. Martin,* 351 So.2d 92 (La. 10/10/77). In *Martin*, this Court stated that a practical reason for the principle "is to provide for uniform procedures for trials conducted after the effective date of the procedural amendments. *Id.*

The provisions of La. C.Cr.P. art. 905.5.1 would appear necessarily to apply only to trials commenced after its effective date. Of significance, La. C.Cr.P. art. 905.5.1 contains provisions requiring the defendant to provide pretrial notification of his claim that he is mentally retarded, and setting forth provisions requiring pretrial discovery, and other requirements. These requirements could only apply to cases still in a pretrial posture on the effective date of the statute.

Assuming that La. C.Cr.P. art. 905.5.1 was not applicable to the trial of the defendant's case, the State submits that the trial court properly determined that the defendant did not establish that he was mentally retarded by a preponderance of the evidence pursuant to the procedure set forth by this Court in *State v. Williams*, 01-1635 (La. 11/1/02), 831 So.2d 835, as is discussed above.

Of significance, the defendant's expert was unable to offer an opinion as to whether the defendant exhibited impairments in adaptive skills, and did not testify that the defendant was mentally retarded as defined in LSA-R.S. 28-381. Dr. Zimmerman testified only that the defendant was probably mildly mentally retarded based solely upon a full scale IQ of 70.

Drs. Hannie and Griffin disagreed with Dr. Zimmerman's characterization of the defendant's IQ as within the mild mental retardation range. Moreover in their conversations and meetings with him they found no evidence of impairments in his adaptive skills. Dr. Hannie testified that the defendant used large words appropriately and with good grammar in his speech. Dr. Hannie read into the record a letter the defendant had written to request treatment while he was in jail, stating that "[t]his is absolutely not the work of a mentally retarded individual." (R. 10, pp. 2403-2404). The defendant was the podman for his area of the jail. Additionally, the defendant informed the doctors that he cooked, sang, played instruments, worked as a truck driver, and started his own businesses.[27] These doctors found no evidence which indicated that the defendant was mentally retarded, and much evidence to demonstrate that he was not.

Based upon the evidence presented, the State submits that the trial court properly found that the defendant was not mentally retarded for the purpose of the *Atkins* bar. The trial court also properly found that any evidence the defendant wanted to introduce for the purpose of demonstrating that he was mentally retarded would be admissible as a mitigating factor in the penalty phase.

---

[27] At the hearing, defense counsel suggested that the defendant might not really have the abilities he claimed. However, his penalty phase witnesses testified the defendant had many of these abilities, with one testifying that the defendant started his own business and solicited contracts for it. (R. 24, p. 5954).

B. If this Court determines that La. C.Cr.P. art. 905.5.1 was applicable to the defendant's trial, which commenced prior to its effective date, the trial court properly refused to instruct the jury as to the prohibition of executing mentally retarded offenders based upon the defendant's failure to cooperate fully with the State's mental health experts.

The provisions of La. C.Cr.P. art. 905.5.1 preclude the trial court from instructing the jury as to the prohibition of executing mentally retarded offenders where the defendant has failed to fully cooperate in any examination by experts for the State. La. C.Cr.P. art. 905.5.1(F)(G). In the instant case, Dr. Hannie testified that the defendant's refusal to cooperate in any testing forced him to resort to the use of techniques for estimating IQ which had large error factors and were not approved for use in diagnosing mental retardation.

Doctors were able to reach the conclusion that the defendant was not mentally retarded based upon their conversations with him and review of other materials. However, this does not alter the fact that the defendant refused to participate in any testing. As such, he failed to fully cooperate with their examination.

Of significance, the trial court did not deprive the defendant of his right to present a defense or exclude any evidence on this issue. The trial court previously explicitly ruled that the defendant could present evidence of mental retardation as a mitigating factor in the penalty phase.

On appeal, the defendant argues for the first time that compelling a defendant's "full" cooperation in a mental retardation exam violates the Fifth Amendment. The State submits that any claim in this respect was waived by the defendant's failure to raise it in the trial court. La. C.Cr.P. art. 841. Moreover, the defendant has not established that full cooperation with the doctors' examination would have violated his Fifth Amendment privilege.

C. Additionally, the trial court did not err in refusing to give the defendant's requested special instruction that regarding the prohibition of the execution of mentally retarded offenders as it was not wholly correct or pertinent.

Pursuant to La.C.Cr.P. art. 807, a requested special jury charge shall be given by the trial court if it does not require qualification, limitation or explanation, and if it is wholly correct and pertinent. The special charge need not be given if it is included in the general charge or in another special charge to be given. *State v. Segers,* 355 So.2d 238, 244 (La.1978); *State v. Heath,* 513 So.2d 493, 499 (La.App. 2 Cir.1987), *writ denied,* 519 So.2d 141 (La.1988). Failure to give a requested jury instruction constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. *State v. Marse,* 365 So.2d 1319, 1322 (La.1978); La.C.Cr.P. art. 921.

In the instant case, the defendant filed a motion requesting the trial court to instruct the jurors as follows: "No person who is mentally retarded shall be subjected to a sentence of death."(R. Vol. 4, p. 818). As the defendant's instruction did not address the definition of mental retardation or the burden of proof, it was properly denied as requiring qualification, limitation or explanation. La. C.Cr.P. art. 807.

Additionally, it was properly denied because it was not pertinent in the instant penalty phase of the instant trial. Of significance, the defendant did not raise the issue of mental retardation during the penalty phase of this trial. The defendant did not allege that he was mentally retarded during his opening or closing statements. Although the

defendant and State entered into a stipulation that if Dr. Zimmerman were to testify, he would state that the defendant had a full scale I.Q. of 70, there was absolutely no testimony that this would indicate mental retardation. In fact, the defendant's witnesses testified to his adaptive skills and abilities, such as his cooking ability, his skill as entrepreneur who started his own businesses, his singing ability, and his ability to motivate people and get things done.

For these reasons, the State submits that the defendant cannot show that the failure to give the requested instruction resulted in a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right.

VI. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO INTRODUCE EVIDENCE OF LOW INTELLIGENCE QUOTIENT OR MENTAL DISABILITY DURING THE CULPABILITY PHASE OF THE TRIAL.(Assignments 23-25).

In this assignment of error, the defendant contends that the trial court erred in denying his motion to allow testimony of the defendant's alleged limited intellectual functioning during the guilt phase of the trial. The State submits that this claim has no merit.

On August 23, 2003, the defendant filed a *Motion to Allow Testimony at Guilt Phase of Limited Intellectual Functioning*. In his written motion, the defendant stated that psychological testing of the defendant determined that he had an IQ of 70, a score he alleged fell within the range of mild mental retardation. The defendant alleged as follows: "[d]efendant must be allowed to present evidence of his limited intellectual functioning to provide a context for his behavior in the minutes and days surrounding the events which form the basis of this prosecution." (R. Vol. 4, p. 778). On the morning that the motion was filed, defense counsel argued its motion as follows:

> MS. daPONTE:
>
> Your Honor, I have no witnesses or evidence. I would simply submit it on the motion. I realize that I did not ever plead not guilty and not guilty by reason of insanity. However, I request, nonetheless, to be able to put forth evidence of intellectual functioning and I'll submit on that.
>
> THE COURT:
> Do you have any law whatsoever, Louisiana jurisprudence or otherwise, that would allow you to do that?
>
> MS. daPONTE:
> Judge, honestly I don't. I don't have any law that would allow me to do that, but I was hoping this Court would be interested in - -
>
> THE COURT:
> And there's no plea ever entered in this case?
>
> MS. daPONTE:
> There has not been a plea entered of not guilty and not guilty for reasons of sanity in this case. And Judge, I'm simply relying on my client's Fifth Amendment right to a fair trial. I'll submit, Your Honor.

(R. Vol. 23, pp. 5636-5637).

La. C.Cr.P. art. 651 provides that evidence of insanity or mental defect at the time of the offense shall not be admissible when a defendant is tried upon a plea of "not guilty." Counsel conceded that the defendant did not enter

a plea of "not guilty and not guilty by reason of insanity." Thus, the State submits that evidence of "low intellectual functioning" was not admissible in the instant case.

Additionally, error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by counsel. La. C.E. art. 103 (A)(2). The defendant did not proffer the testimony or evidence to the trial court which he sought to have admitted on this issue. In the instant case, the representations contained in the defendant's motion and argument made by counsel were insufficient to inform the trial court of what testimony or evidence the defendant sought to introduce for the purpose of demonstrating the defendant's alleged limited intellectual functioning. The defendant's motion and the argument advanced by counsel were also insufficient to establish the relevancy of such testimony, or demonstrate that the defendant's substantial rights were affected by the exclusion of unspecified testimony on this issue.

While the defendant contends in brief that evidence of limited intellectual functioning should have been admitted to provide an innocent explanation for the defendant's actions in cleaning the scene, the motion filed by the defendant was not so limited. The motion stated that the purpose of such testimony was ". . .to provide a context for his behavior in the minutes and days surrounding the events which form the basis of this prosecution." Thus, the State submits that the motion was broad enough to encompass testimony that limited intellectual functioning precluded the defendant from being able to distinguish right from wrong with respect to the instant offense. Such testimony was clearly inadmissible due to the defendant's failure to enter a plea of "not guilty and not guilty by reason of insanity," as stated above.

Finally, the State submits that the defendant failed to preserve for appellate review the claim that evidence of low intellectual functioning should have been admitted as evidence concerning the making of the defendant's statements for the purpose of enabling the jury to determine the weight to be given the statements. The defendant's written motion did not request the admission of evidence of low intellectual functioning for this purpose, nor did the defendant orally assert this as a ground in support of his motion or object to the denial of his motion on this basis. Therefore he has failed to preserve any claim in this respect. La. C.Cr.P. art. 841.

VII. ALLEGATION THAT THE PASSION AND PREJUDICE OF THE JURY WAS INFLAMED BY WATCHING THE VICTIM CRY. (Assignment 26)

In this claim, the defendant argues that the passion and prejudice of the jury was inflamed by watching the victim cry on the stand. He claims that the trial court erred in denying his request for a mistrial and in failing to give the jury an instruction to confine its attention to the evidence. The defendant contends that this allowed the state to make a closing argument calling for a verdict based upon emotion rather than the evidence. This claim has no merit.

In the instant case, the record reflects that the State called L.H. as a witness, and that L.H. had to be brought to the courtroom from a "witness room." (R. Vol. 22, p. 5332, p. 5349, l. 9-18). While waiting for L.H. to arrive, one of the prosecutors went to another location in the court building to meet with his supervisors regarding rulings

the trial court had made. Not realizing that the first prosecutor had left the area of the courtroom, the other prosecutor also left the courtroom, so that the victim arrived in the courtroom at a time when neither prosecutor was present. (R. 22, p. 5349-5350). The transcript reflects that L.H. was sworn, a recess was ordered, proceedings resumed in open court, and a bench conference began. (R. Vol. 22, p. 5333). The trial court reprimanded the prosecutors for leaving the courtroom, indicating that, "[t]he witness is sitting on the stand and she's in tears." (R.Vol. 22, p. 5333, l. 29-30). The defense moved for a mistrial on this basis. (R. Vol. 22, p. 5334, 5348). The prosecutor noted that when he returned to the courtroom, ". . . [the victim] was sitting still without any tears." (R .Vol. 22, p. 5349). The trial court denied the motion for mistrial, stating as follows, "You're not getting a mistrial because she's been sitting there tearing just for a few minutes." (R. Vol. 22, p. 5334).

The victim began to testify on direct examination, but the court almost immediately granted the defendant's motion for a recess, at which point the jury was removed from the courtroom. (R. Vol. 22, p. 5337). The defendant again moved for a mistrial, alleging that,

> . . .the victim is sobbing and both the prosecution, prior to the jury having left, they wer [sic] up here around the victim. I think that's improper for the jury to see and move for a mistrial on that basis.

(R. Vol. 22, p. 5338). The trial court denied the defendant's request for mistrial. *Id.* When the recess ended and the jury returned to the courtroom, the victim testified recalling her December 16, 1999 interview with Ms. Gordon. (R. Vol. 22, p. 5342). Pursuant to a stipulation between the State and the defense, the edited copy of the videotaped interview of the December 16, 1999 was played for the jury. (R. Vol. 22, p. 5342).

After the jury finished viewing the videotape, the trial court ordered a brief recess and the jury was removed from the courtroom. (R. Vol. 22, p. 5344). While the jury was outside of the courtroom and the victim was waiting in a location across the hallway from the courtroom to resume her testimony, the trial court addressed the parties and the spectators as follows:

> Okay, be seated. 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. It is absolutely essential that courtroom decorum is observed and that there be no emotional outbursts of any kind. For those of you who are just entering the courtroom, let me repeat myself. It is absolutely essential that courtroom decorum be observed and there by no emotional outbursts at any time. I don't want this witness upset because of people coming and going or because friends or family getting upset and letting her see that you're upset. And I'm warning everybody now, if I see any of that you will be removed from the courtroom and you will not be allowed to return. I know that we can get through this, okay. Now I' [sic] going to ask friends and/or family or supporters to do me a favor. You don't have to do this, but I'm going to ask you if you really don't think you need to be here at this time, for this testimony of this witness, step outside. If you think you need to be here or you want to be here, please move to the back of the courtroom. Would you do that? That's my request, not my order, okay. Now Mr. Rowen, the witness is outside?

(R. Vol. 22, p. 5344-5345).

Before the jury returned to the courtroom, counsel for the defense made another motion for mistrial, alleging that the victim cried on the witness stand for a period of twenty-three to twenty-four minutes while the videotape was being played. (R. Vol. 22, p. 5346). The trial court denied the motion for mistrial, stating as follows:

> The Court observed the witness resting her head on the shelf or desk area immediately in front of her chair. The Court did observe at one point that she seemed to have tears in her eyes and possibly on her left cheek. The Court did not observe what I would characterize as an unbridled display of emotion. The Court did not hear her weep and the Court did not see any of the jurors react to her in a way to show that they, their viewing of her, caused them to be emotionally upset. And in conclusion, let me say I don't feel that the defendant has been prejudiced and has not gotten a fair trial. Your motion is denied for those reasons.

(R. Vol. 22, p. 5348).

La.Code Crim. Proc. art. 775 requires a mistrial on motion of the defense when "prejudicial conduct inside or outside the courtroom makes it impossible for the defendant to receive a fair trial." Mistrial is a drastic remedy, and the determination of whether prejudice has resulted lies in the sound discretion of the trial judge. *State v. Sanders,* 93-0001, pp. 20-21 (La.11/30/94), 648 So.2d 1272, 1288-89; *State v. Smith,* 430 So.2d 31, 44 (La.1983). Generally, unsolicited statements and spontaneous conduct are usually not grounds for mistrial. *State v. Newman,* 283 So.2d 756, 758 (La.1973).

Of significance, the trial court had the opportunity to view the both the victim and the jury, and the State submits that the trial court did not abuse its discretion in denying the defendant's motion for mistrial. The jury could reasonably have expected that thirteen year old L.H., who was undisputedly the victim of a rape resulting in serious injuries that required surgical repair when she was only eight years old, would experience some emotion in testifying about the incident.

With regard to the defendant's claim that the trial court erred in failing to contemporaneously instruct the jury to disregard anything they had seen on the witness stand, the State submits that the defendant has failed to preserve any error in this matter, as the defendant did not object when the trial court's decided that it would not give the instruction which it initially suggested, *sua sponte.* (R. Vol. 22, p. 5351-5353). Moreover, the State would note that any error in this respect was harmless, as at the close of the guilt phase, the trial court instructed the jury as follows:

> It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors, and they have the right to expect nothing less.

(R. Vol. 24, p. 5889). The trial court further instructed the juror that:

> You are not to be influenced by sympathy, passion, prejudice, or public opinion. You are expected to reach a verdict based on the evidence or lack of evidence.

(R. Vol. 24, p. 5901, l.24-28). Therefore, this assignment has no merit.

VIII. ALLEGATIONS OF PROSECUTORIAL MISCONDUCT (Assignments 27-30).

In this assignment of error, the defendant contends that prosecutorial misconduct during the guilt and penalty phases of the defendant's trial requires reversal of the defendant's conviction and death sentence. Primarily, the

defendant's claims concern the prosecutor's closing arguments in both phases of the trial in this matter. This assignment has no merit.

A. **Closing Arguments**

Louisiana jurisprudence on prosecutorial misconduct allows prosecutors wide latitude in choosing closing argument tactics. *See, e.g., State v. Martin*, 539 So.2d 1235, 1240 (La. 1989)(closing arguments referring to "smoke screen" tactics and defense "commie pinkos" held inarticulate but not improper); *State v. Copeland*, 530 So.2d 526, 545 (prosecutor's waving a gruesome photo at jury and urging jurors to look at it if they become "weak kneed" during deliberations held not improper). In addition, La. C.Cr.P. art. 774 confines the scope of argument to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." The trial judge has broad discretion in controlling the scope of closing argument. *State v. Prestridge*, 399 So.2d 564, 580 (La. 1982). Even if the prosecutor exceeds these bounds, the Court will not reverse a conviction if not "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. *See, State v. Martin*, 93-0285, p. 18 (La. 10/17/95), 645 So.2d 190, 200; *State v. Jarman*, 445 So.2d 1184, 1188 (La. 1984); *State v. Dupre*, 408 So.2d 1229, 1234 (La. 1982). Moreover, credit should be accorded to the good sense and fair-mindedness of the jurors who have seen the evidence and heard the arguments. *State v. Bridgewater*, 00-1529 (La. 1/15/02), 823 So.2d 877, 902; citing *State v. Kyles*, 513 So.2d 265, 276 (La. 1987).

1. **Guilt Phase Closing Arguments (Claim VIII-A).**

The defendant contends that the prosecution turned its guilt phase closing arguments into a plebiscite on crime, and interjected victim impact evidence. The defendant also challenges the prosecutor's use of the words "monster" and "real man" to describe the defendant and his actions, and claims that the prosecution "treaded upon" the defendant's presumption of innocence and failure to testify on his own behalf The State submits that the defendant's allegations have no merit.

As an initial matter, the State submits that the defendant failed to preserve any claim with respect to his allegation that the prosecutor interjected victim impact evidence into the guilt phase by arguing that, "[t]his 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. 24, p. 5883). The defendant did not object to these remarks, nor did he allege in the trial court that the prosecutor used these remarks to interject victim impact evidence into the guilt phase of the trial. La. C.Cr.P. art. 841.

a. ***"Only you can protect her" and "monster"***

At the conclusion of the State's rebuttal argument, the defendant objected to the prosecutor's statements that "She can't go to her Dad, because he is the monster. Only you can protect her." Read in context, the prosecutor remarks constituted a response to the defendant's argument that the victim identified the defendant as the perpetrator only after being pressured to do so by various individuals over a period of time. (R. 24, p. 5850). The prosecutor's argument essentially asked the jury to consider the circumstances in evaluating the credibility of the victim's

testimony. He argued that when a small child ordinarily is afraid of something, like a bully at school, or a monster under the bed, the child's parent is the natural person to whom the child turns for protection and assistance. Here, the defendant, L.H.'s stepfather was the "monster under the bed", the person she feared, and for this reason it was difficult for her to accuse him of the crime. Thus, the State submits that this argument was not improper.

Additionally, in *State v. Morgan*, 82 So. 711 (La. 1919), this Court found no error with respect to the prosecutor's use of the word "monster" to describe the defendant. More recently, the State would note that this Court has reiterated that characterizing a defendant as an animal, while ill-considered, is not reversible error. *State v. Bridgewater*, 00-1529 (La. 1/15/02), 823 So.2d 877, 903.

The defendant also contends that it was improper for the prosecution to state that, "Only you can protect her." The contextual import of the prosecutor's argument is discussed above. Assuming *arguendo* that this Court finds this remark was improper, the State submits that the record does not support a determination that this brief remark influenced the jury or contributed to the verdict. The State would note that the prosecutor concluded his argument by reminding the jury of its obligation to judge the victim's credibility in light of the evidence presented. (R. 25, p. 5884).

Moreover, the trial court instructed the jury twice during the guilt phase instructions of its duty to base its verdict on the evidence without passion, prejudice or sympathy. (R. 25, pp. 5889, 5901). The trial court also advised the jury that the arguments of the attorneys were not evidence. (R. 25, p. 5901). Thus, the State submits that the defendant's claim has no merit.

b. ***Alleged indirect reference to the defendant's failure to testify.***

When a prosecutor's remarks indirectly touch upon a defendant's failure to testify, only those remarks which are intended to draw attention to that fact mandate retrial. *See*, La. C.Cr.P. art. 770(3); *State v. Smith*, 433 So.2d 688, 697 (la. 1983); *State v. Johnson*, 426 So.2d 95, 100 (La. 1983) (prosecutor's remark that defendant could take the stand and deny he made statements to a witness was not intended as reference to defendant's right against self-incrimination, but rather, was intended to explain exception to hearsay rule and, therefore, remark did not mandate mistrial); *State v. Moore*, 414 So.2d 340, 345 (La. 1982), *cert. denied*, 463 U.S. 1214, 103 S.Ct. 3553, 77 L.Ed.2d 1399 (1983); *State v. Stephenson*, 412 So.2d 553, 557 (La. 1982)("to warrant a mistrial, the inference must be plain that the remark was intended to bring to the jury's attention the failure of the defendant to testify"). Furthermore, "[i]n cases where the prosecutor simply emphasized that the state's evidence was unrebutted, and there were witnesses other than the defendant who could have testified on behalf of the defense but did not do so, the prosecutor's argument does not constitute an indirect reference to the defendant's failure to take the stand." *Johnson*, 541 So.2d at 822-23: *cf. State v. Smith*, 433 So.2d 688, 694-95 (La. 1983)(prosecutor's comments allegedly directed to defendant's failure to testify actually related to lack of evidence).

The defendant contends that the prosecutor made indirect comments regarding the defendant's failure to testify by stating as follows:

> That's what you're dealing with. You're dealing with a person whose is telling you that his - who told people that his daughter became a young lady; that he left bleeding on the bed, on the blanket on the bed, while he cleaned the crime scene.

(R. 5878).

Here, the prosecutor simply stumbled over the wording of his argument and corrected himself. The State submits that the prosecutor's comments did not constitute either a direct or indirect reference to the defendant's failure to testify. Moreover, assuming *arguendo* that this Court determines that his remarks constituted an indirect reference to the defendant's failure to testify, it is evident that it was not intended to draw attention to the defendant's failure to testify. Therefore, the defendant is not entitled to a reversal of his conviction on this basis.

c. ***"I suggest you didn't hear a tape recorder. . ."***

The defendant also contends that the prosecutor "treaded upon" the defendant's presumption of innocence by arguing as follows:

> I suggest you didn't hear a tape recorder. And they don't have to put on any evidence whatsoever, and you can't hold that against him. 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. 24, p. 5879-81). This argument was made in response to the defendant's argument that the victim only named the defendant as the person who raped her after being pressured to do so by various State actors, and the State submits that it is a proper commentary upon the evidence or lack thereof.

The defendant's investigator Robert Tucker testified that he interviewed the victim and her mother on several occasions with defense counsel Armato, and that during those interviews she denied the defendant was the perpetrator. Unlike the victim's interviews with Ms. McDermott and Ms. Gordon, which were videotaped and played for the jury, the defense made no effort to present the jury with recordings of any statements made to Tucker. While the jury was able to judge for itself the circumstances of the McDermott and Gordon interviews and evaluate the credibility of those statements in the context of the questions presented to the victim, it was presented nothing to account for the circumstances under which any alleged statements were made to Mr. Tucker. Thus, to the extent that the defendant argued to the jury that elements of coercion were demonstrated in the videotaped interviews which were introduced into evidence, the State was entitled to respond that the defendant's failure to offer recordings of alleged statements made to investigator Tucker undermined the credibility of his testimony on this issue, and additionally was suggestive of the pressure that was brought to bear upon the victim from persons associated with the defendant. This assignment has no merit.

d. ***"It takes a man . . ."***

Finally, the defendant contends that the trial court erred in overruling the defendant's objection to the prosecutor's statement that it "takes a real man to do this." (R. 24, p. 5842). Taken in context, the prosecutor's argued that after brutally raping the victim, the defendant cleaned the crime scene while she bled from her injury. Then the defendant tried to blame the crime on someone else by blurting out information whenever someone attempted to

question the little girl. The prosecutor argued that the victim was afraid of the defendant, and contrasted the relative sizes of the approximately three hundred pound defendant and his eight year old victim, concluding, "[y]es. It takes a real man to do this ladies and gentlemen." (R. 24, p. 5841).

Of significance, the defendant has not briefed his claim that this remark was improper. Assuming *arguendo*, that this Court determines this remark to have been improper, the State submits that the record does not support the conclusion that it influenced the jury or contributed to the verdict.

B. Penalty Phase Opening Statement (Claim VIII-D)

During its penalty phase opening statement, the State informed the jury that S.L. would testify that the defendant had raped her when she was approximately eight years old. The prosecutor went on to advise the jury as follows:

> 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. 24, pp. 5919-5921). Defense counsel objected to this, stating that he would also object to the introduction of any testimony regarding the effect of the crime against S.L. (R. 24, pp. 5921-5922). During Ms. Logan's direct testimony, she testified that she did not report the rape until a few years later, and that she did not go forward with the charges because family members, including her mother and an aunt told her she would hurt her cousin, who was the defendant's first wife. (R. 24, pp. 5931-5932). While this testimony briefly explained why the defendant was not prosecuted for raping S.L, it was not victim impact testimony, and it did not interject an arbitrary factor into the proceedings. Ms. Logan also testified that she had a brother named "Patrick" that she called by a nickname in preference to calling him by his real name. (R. 5931). The State submits that it cannot seriously be contended that this brief, ambiguous remark, influenced the verdict or interjected an arbitrary factor into the proceedings.

The prosecutor's opening statement did not purport to reveal how the rape had effected S.L. or the manner in which it might have effected the way she raises her children. Since the prosecutor did not elicit any testimony from S.L. detailing the effects of the rape upon her or its effects upon the manner in which she raises her children, the prosecutor's opening remarks did not influence the verdict or interject an arbitrary factor in the proceedings. Of significance, the jury was previously instructed during the guilt phase of the trial that the opening and closing statements of the attorneys were not evidence. (R. 25, p. 5901)

C. Penalty Phase Closing Argument (Claim VIII-C)

The defendant also argues that the prosecutor improperly argued that L.H. and S.L. wanted him dead. Specifically, the defendant cites the following argument which the prosecutor made during the State's rebuttal closing argument in the penalty phase of the trial:

> MR. ROWAN:
>
> I'm going to tell y'all something and then I'm going to sit down.

> You want to know what [L.H.] wants, or what she thinks. You want to know what [S.L.] was trying to tell you. Why does Patrick Kennedy deserve to die. You want me to tell you why. He asked me to tell you why. I'm going to tell you why. Because as Mr. Paciera told you yesterday; an adult, a Stepfather and a Godfather who had custody of the that child had the ultimate trust in the world. They give us love and they give us comfort, and they teach us who we are. She deserves, [L.H.] does, to have a time and place to where he's sentenced to die. She deserves that. She deserves that because of what she's been through. Because by doing that ladies and gentlemen, by doing the duty that you said you could do, each and every one of you went through ad nauseam the Voir Dire on capital sentence. And you said that if given the facts, you could impose the death penalty. We've given you those facts.
>
> [L.H.] is asking you, asking you to set up a time and place when he dies.

(R. Vol. 24, p. 6023). The defendant objected to this argument and moved for a mistrial, which the trial court denied. The defendant did not request that the trial court admonish the jury.

In *State v. Bernard*, 608 So.2d 966 (La. 1992), this Court held in the context of a first degree murder trial that evidence of the victim's survivors' opinions about the crime and the murderer is irrelevant to any issue in a capital sentencing hearing. In the instant case, L.H. did not testify at the capital sentencing hearing. S.L. testified during the penalty phase, but expressed no opinion as to whether the defendant should be sentenced to death.

Before a reviewing court will hold that an improper argument rises to the level of reversible error, that court "must be firmly convinced the remark influenced the jury and contributed to the verdict." *State v. Eaton*, 524 So.2d 1194, 1208 (La. 1988). In the instant case, the brief remark regarding the victim's possible preference for the sentencing verdict would not come as a surprise to the jurors. *State v. Harris*, 01-2730 (La. 1/19/05), 892 So.2d 1238, 1257; citing *State v. Taylor* 93-2201 (La. 3/29/96) 669 So.2d 364. The State submits that this Court may not find itself "firmly convinced that the jury was influenced by the statements and they contributed to the verdict, especially "[i]n light of the deference given to the good sense and fairmindedness of juries." *Taylor*, supra at. 375.

D. <u>Elicitation of Testimony Regarding the Severity of the Victim's Injuries</u> (Claim VIII-B)

The defendant complains that the State was allowed to elicit testimony from Dr. Benton regarding the severity of the victim's injuries over his objection as follows:

> [Dr. Benton]:
> 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. p. 5473). The defendant contends that the admission of such testimony was error. The defendant argues that this testimony was offered to improperly bolster the victim's testimony. In support of his claim, the defendant cites *State v. Calvin*, 02-1188 (La. 5/20/03), 846 So.2d 697 and *State v. Floret*, 628 So.2d 1116 (La. 1993). The State submits that the defendant's claim has no merit.

Of significance, it was undisputed that L.H. was the victim of an aggravated rape, and that she was later transported by ambulance to a hospital, where surgery was required to repair injuries she received during the rape. Dr. Benton's testimony explained to the jury that the victim had a class three perineal laceration, in that the perineal body was torn all the way from the posterior farced, where the vagina normally ends, to the anus. (R. 22, p. 5470). Another laceration tore through the left wall of the vagina and went underneath the cervix, basically separating the

cervix from the back of the vagina, and causing the victim's rectum to protrude into her vagina. (R. 22, p. 5471). Dr. Benton testified as an expert in the field of pediatric forensic medicine that children who are suspected of being abused are referred to him by various agencies and emergency rooms for evaluation. His testimony that the victim's injury was at that time the most serious injury he had seen as a result of a sexual assault, was well within his experience and his area of expertise.

Of significance, Dr. Benton did not offer any opinion as to the credibility or truthfulness of L.H.'s statements about the identity of her attacker or the circumstances under which the rape occurred. Therefore, the State submits that the admission of the complained of testimony was not error.

IX. ADMISSION OF UN-ADJUDICATED ACTS IN THE PENALTY PHASE

La.Code Crim. Proc. art. 905.2 provides that "[t]he 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." Evidence of a prior conviction is admissible in the penalty phase of a capital case, whether or not the defendant puts his character at issue, because the capital sentencing statute puts his character at issue. *State v. Sawyer,* 422 So.2d 95 (La.1982).

Rules governing the admission of evidence of unrelated and unadjudicated criminal conduct in penalty phase hearings to prove the defendant's character and propensities have evolved jurisprudentially.. In *State v. Hobley*, 98-2460 (La. 12/15/99), 752 So.2d 771, *cert. denied*, 121 S.Ct. 102, 148 L.Ed.2d 61 (2000), the Louisiana Supreme Court stated that, with regard to the admissibility of unadjudicated criminal conduct in the penalty phase:

> The court eventually recognized the necessity of standards governing the admission in the penalty phase of evidence of unrelated and unadjudicated criminal conduct such as had been set forth in *State v. Prieur*, 277 So.2d 126, 129 (La.1973), with regard to the admission of other crimes evidence in the guilt phase of trial. *State v. Brooks* (*Brooks* I), 541 So.2d 801, 803 (La.1989). Thus, we held in *Brooks* I that, before the state in its case-in- chief in the penalty phase may introduce evidence of unrelated and unadjudicated criminal conduct, the trial judge must determine that: (1) the evidence of the defendant's commission of the unrelated criminal conduct is clear and convincing; (2) the proffered evidence is otherwise competent and reliable; and (3) the unrelated conduct has relevance and substantial probative value as to the defendant's character and propensities. *Brooks* I, 541 So.2d at 814. This holding was further restricted in *State v. Jackson*, 608 So.2d 949, 954-56 (La.1992), to evidence of conduct that involves violence against the person of the victim and for which crime the period of limitation for instituting prosecution has not run at the time of the indictment of the accused for the first degree murder. *Jackson*, 608 So.2d at 955; *State v. Connolly*, 96-1680, p. 14 (La.7/1/97), 700 So.2d 810, 820.

Hobley, 98-2460 p. 6, 752 So.2d at 776. It is up to the trial judge to make the determination whether the defendant's commission of the criminal conduct was proved by clear and convincing evidence and whether the unrelated conduct has relevance and substantial probative value as to the defendant's character and propensities. *State v. Hampton*, 98-0331 p. 18 (La. 4/23/99), 750 So.2d 867, 883, *cert. denied*, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999).

In his ninth assignment of error, the defendant contends that the trial court erred when it ruled that testimony regarding unadjudicated offenses the defendant committed upon S.L would be admissible during the penalty phase

of the trial in this matter.[28] Specifically, the defendant contends that: 1) evidence of the prior offenses was not clear and convincing; 2) the statute of limitations on the unadjudicated offenses had expired at the time of the commission of the instant offense; and 3) the defendant was otherwise prejudiced by the introduction of evidence of the offenses against S.L., which occurred over ten years prior to the commission of the instant offense where he was unable to obtain records documenting S.L.'s report of the incidents to police or documenting the reason that the defendant was not arrested or prosecuted on these charges. The State submits that the trial court correctly determined that the evidence satisfied the conditions set forth by this Court in *Brooks* and *Connolly.*

On July 20, 1998, the State filed a written notice indicating that it intended to introduce evidence during the penalty phase that the defendant committed aggravated rape of S.L. on at least three occasions. (R. 1, p. 146-147). During the April 7, 2000 pre-trial hearing, twenty-four year old S.L. testified that she was raped by Patrick Kennedy on three occasions when she was eight or nine years old. At the time, Patrick Kennedy was married to her mother's cousin, Cheryl Sims, and S.L. was living with the Kennedys in Avondale. (R. 5, p. 1177-79). Three such incidents occurred during this time. *Id.* The first incident occurred in the year of the World's Fair. (R. 5, p. 1179). On the first occasion, he touched her with his hand and penis, and then touched and penetrated her vagina with his penis. (R. 5, p. 1179-81). She remembered that on the second occasion, she was wearing a gown, with no clothes on the bottom, and the defendant's clothes were off. (R. 5, p. 1182). He penetrated her vagina with his penis, but did not penetrate her "all the way." *Id.* She believed her cousin was sleeping when the second incident occurred. (R. 5, p. 1183).

During the pre-trial hearing, S.L. testified that on the third occasion, the defendant checked her out of school and brought her home with him, where he had intercourse with her. (R. 5, p. 1183). She testified that ". . .this particular time he penetrated me throughly (sic), because I bled just a small amount; but I bled like I was cut." *Id.* Afterwards, he told her to get up and take a bath. *Id.* When she wiped herself in the bathroom, there was blood on the tissue. *Id.* There was no doubt in her mind that he penetrated her with his penis on this third occasion. (R. 5, p. 1184).

All of the instances described by S.L. took place within a period of less than a year, when she lived with the defendant from the beginning of summer until school started. (R. 5, p. 1184-85). Each of three instances recounted by S.L. at the April 7, 2000 hearing meets the definition of an aggravated rape. La. R.S. 14:42.

S.L. testified at the pre-trial hearing that she told a school counselor about these incidents when she was approximately twelve years old. (R. 5, p. 1187-1188). She recalled that these offenses were reported to the police, and

---

[28] The April 7, 2000 pre-trial hearing was originally held for the purpose of determining whether evidence that the defendant raped S.L. on occasions when she was a child living with him and his first wife would be admitted as other crimes evidence in the guilt phase of this trial pursuant to La. C.E. art. 404(B). The trial court found that the State had established the prior offenses by a preponderance of the evidence, and ruled that evidence of these offenses would be permitted during the guilt phase of the defendant's trial. (R. 7, p. 1279). After the trial court's ruling was reversed by this Court's decision in *State v. Kennedy*, 00-1554 (La. 04/03/01), 803 So.2d 916, the State moved to introduce evidence of these offenses during the penalty phase of the defendant's trial. On June 20, 2001, the trial court found that there was clear and convincing evidence of the unadjudicated offenses.

that she went to the Old Gretna Courthouse on Huey P. Long, where she provided a videotaped statement about the incidents. *Id.* She also recalled that she was taken to Children's Hospital by her mother. (R. 5, p. 1189). S.L. testified that the charges were not pursued because she "backed down". (R. 5, p. 1188). She explained that other people exerted influence over her, and she became afraid to testify against the defendant. *Id.*

During the penalty phase hearing in this matter, the State elicited testimony from S.L. that the defendant had intercourse with her on three occasions when she was eight or nine years old. She testified with regard to the first incident that ". . .the first time it was more like touching", before the prosecutor interrupted her and asked her to describe the third incident. (R. 24, p. 5930).[29] S.L. testified that in the last incident, the defendant checked her out of school, brought her home and had intercourse with her. Afterwards, he brought her to her cousin after telling S.L. to tell her cousin that she had injured herself at school.[30]

A. Evidence of the Defendant's Commission of the Other Crimes was Clear and Convincing

Of significance, the State carried its clear and convincing burden of proof. A victim's or eyewitness's testimony alone is usually sufficient to support a verdict. *State v. Davis*, 2002-1043 p. 4 (La. 6/27/03), 848 So.2d 557, 559; *State v. Hills*, 1999-1750 p. 8 n. 8 (La. 5/16/00), 761 So.2d 516, 522 n. 8. Since a verdict must be supported by proof beyond a reasonable doubt, the witness's testimony here easily meets the clear and convincing standard. S.L.'s testimony at the pre-trial hearing established the defendant committed aggravated rapes upon her on three occasion, and was relevant and probative to his character and propensities. The trial court found S.L.'s testimony to be trustworthy, and otherwise competent and reliable, stating as follows:

> This Court is clearly convinced that those acts that she claimed happened to her, did happen, and happened at the hands of Mr. Kennedy.

(R. 7, p. 1513).

B. The Statute of Limitations Had Not Expired.

Likewise, there is no merit to the defendant's contentions that the statute of limitations applicable to the unadjudicated offenses had expired at the time of the commission of the instant offense. Contrary to the defendant's assertions, S.L.'s testimony at the April 7, 2000 hearing established that the defendant committed three acts of aggravated rape on her. She testified that her birthday was February 23, 1976. (R. Vol. 5, p. 1186). S.L. recalled

---

[29] The State would note that during the April 7, 2000 hearing, S.L. began her description of the first instance of aggravated rape by stating as follows:

> He was basically touching me. He was basically touching me. And at the time, I think my cousin had went to the store and stuff when he first touched me. So it was like just me and him. . ..

(R. 5, p. 1180). However, in the pre-trial hearing, S.L. went on to explain that the defendant used his penis to touch and penetrate her vagina during this first incident. (R. 5, p. 1180-81). During the (R. 24, p. 5930). The record reflects that during the penalty phase of the trial, the prosecutor interrupted her account of this incident mid-sentence to direct her attention to the third incident.

[30] During the penalty phase of the trial in this matter, S.L. testified that after the third incident it was ". . .more like I had a cut, a scratch or something down there." (R. 24, p. 5930).

that the rapes occurred when she was eight or nine years old, and that they all occurred within a few months from the summer to the start of a school year. As S.L. would have had her eighth birthday on February 23, 1984, the rapes would have to have occurred between that date and February 22, 1986, the day before her tenth birthday. She was able to provide further information regarding the date of these offenses by stating that they occurred in the year of the World's Fair, which would indicate that the offenses occurred in 1984.

Prior to the 1984 amendment to La. C.Cr.P. art. 571, the article provided as follows: "[t]here is no time limitation upon the institution of prosecution for any crime for which the death penalty may be imposed." At that time, La. C.Cr.P. art. 572 provided a six year statute of limitation for the prosecution of a felony necessarily punishable by imprisonment at hard labor. La. C.Cr.P. art. 571 was amended by Acts 1984, No. 926 § 1, to provide as follows: "[t]here is no time limitation upon the institution of prosecution for any crime for which the punishment may be death or life imprisonment."

In *Stogner v. California*, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003), the United States Supreme Court concluded that ". . .a law enacted **after expiration** of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution." [emphasis added]. This ruling by the United States Supreme Court is in accord with this Court's statement in *State v. Ferrie*, 243 La. 416, 144 So.2d 380, 384 (1962), that ". . .the State relinquishes the right to prosecute once the statute of limitations has run; until it does run, the State's right to prosecute is retained and may be extended at the will of the state."

In the instant case, assuming that the aggravated rapes occurred after February 23, 1984 (the date of S.L.'s eighth birthday), but before the effective date of the 1984 amendment to La. C.Cr.P. art. 571, the then applicable six year period of limitation upon the State's right to prosecute the defendant for the aggravated rapes of S.L. would not have expired prior to the August 15, 1984 effective date of Acts 1984, No. 926 § 1. Thus, it is clear that the amendment did not operate to revive a previously time-barred prosecution in this instance as prohibited by the *Ex Post Facto* Clause. Instead, the State retained the right to prosecute the defendant for these offenses at the time of the 1984 amendment, which operated to extend the state's right to prosecute the defendant for these crimes by removing the time limitation upon the institution of prosecution for aggravated rape, a crime which was punishable by life imprisonment.

C. Admissibility of the Prior Offenses is Not Conditioned Upon the Existence or Availability of Police Reports Regarding the Prior Offense

Finally, the State submits that there is no merit to the defendant's contention that testimony regarding the unadjudicated offenses should have been excluded on the basis of his inability to obtain certain documents or evidence concerning the report of S.L.'s allegations to the police. On May 31, 2000, JPSO Colonel Walter Gorman, commander of the Crimes against Persons Section, testified during a pre-trial hearing on this issue. According to Col. Gorman, the internal records of the JPSO Personal Violence Section reflected that S.L reported a rape in March of 1988, and that this report was assigned a complaint number. (R. 6, p. 1341-1343). However, members of his unit were

unable to locate any written JPSO reports regarding the complaint number when they checked the Records Section of the Sheriff's Office. *Id.* They were also unable to locate any evidence filed in connection with this complaint in the property and evidence sections. *Id.* Colonel Gorman was not the commander of the Personal Violence Section in 1988, when S.L. reported the rape. (R. 5, p. 1355). The defendant was able to obtain a record of S.L.'s March 22, 1988 visit to Children's Hospital. (R. 5, p. 1359-1360).

The State can find no instance in which this Court found that an unadjudicated offense must have been reported to law enforcement in order to satisfy the provisions of *Brooks* and *Jackson.* Therefore, the State submits that it would be illogical to condition the admissibility of testimony regarding an unadjudicated offense, which otherwise meets the requirements of this court's jurisprudence, upon whether records documenting the witness or victim's report of the incident were inadvertently lost, misplaced, or destroyed. Therefore, there is no merit to the defendant's claim that the trial court erred in admitting S.L.'s testimony on this basis.

X. PHOTOGRAPHS DEPICTING THE VICTIM'S VAGINAL INJURY AND SURGICAL REPAIR WERE NOT GRUESOME AND THEIR INTRODUCTION DID NOT VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

The defendant's contention that the photographs depicting the victim's injury, surgical repair and healing should have been excluded as irrelevant and gruesome has no merit.

Relevant evidence is evidence which has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. La. C.E. art. 401. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. La. C.E. art. 403. The trial court's determination regarding the relevancy of evidence is entitled to great weight and should not be overturned absent a clear abuse of discretion. *State v. Burrell,* 561 So.2d 692 (La.1990), *cert. denied,* 498 U.S. 1074, 111 S.Ct. 799, 112 L.Ed.2d 861 (1991).

Photographs are generally admissible if they illustrate any fact, shed any light upon an issue in the case, or are relevant to describe the person, thing or place depicted. *State v. Kirkpatrick,* 443 So.2d 546 (La.1983), *cert. denied,* 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 847 (1984); *State v. Hartman,* 388 So.2d 688 (La.1980). Photographic evidence will be admitted unless it is so gruesome as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient evidence, or , as explained in La. C.E. art. 403, when the prejudicial effect of the photographs substantially outweighs their probative value. The defendant cannot force the State to use drawings or other evidence instead of photographs. The defendant cannot deprive the State of the moral force of its case by offering to stipulate to what is shown in photographs. *State v. Perry*, 502 So.2d 543, 559 (La. 11/24/86)

In the instant case, the State introduced three photographic exhibits depicting the victim's injuries. Each exhibit consisted of two side-by-side photographs taken with a colposcope. State's exhibit 180 depicts the injury to the victim's genitalia when she was examined under anesthesia on March 2, 1998. State's exhibit 181 was taken on March 4, 1998, and depicts the victim's genitalia after surgical repair. Finally, State's exhibit 179 depicts the victim's

genitalia with almost normal appearance at a two week follow up examination on March 17, 1998. Dr. Benton testified that these photographs would aid him in explaining the victim's injuries to the jury. (R. Vol. 22, p. 5466). The photographs of the victim's injuries not only corroborated her testimony that she was raped, but aided Dr. Benton in explaining the seriousness of the victim's injury to the jury. The State would note that the seriousness of the victim's injury accounted for the victim's significant blood loss, which was relevant both to the State's contention that the defendant manipulated and altered the crime scene before calling the police, and to the victim's physical condition at the time that she was initially being questioned by doctors and persons responding to the incident.

Of significance, the photographs are not gruesome. The only photograph in which the presence of blood is apparent is the colposcopic photograph depicted in States-180, which was taken on March 2, 1998, when the victim was examined under anesthesia on the date of the rape. There is no reason to believe that the introduction of these photographs overwhelmed the jury's reason or led jurors to convict the defendant without sufficient other evidence. This assignment has no merit.

XI. CLAIM THAT THE TRIAL COURT ERRONEOUSLY ALLOWED THE STATE TO ELICIT EXPERT TESTIMONY ON GRASS AND SOIL STAINS OVER DEFENDANT'S OBJECTIONS WITH NO *DAUBERT* HEARING.

The defendant contends that the trial court erred in allowing Dr. Lee to provide expert testimony regarding grass discoloration, stains, and the "grass blade brake-age rates" in Louisiana in the winter without conducting a *Daubert* hearing on the reliability of such expert testimony. The defendant also argues that the State was allowed to elicit testimony over the defendant's objection regarding the condition of the scene as depicted in the photographs reviewed by Dr. Lee. The State submits that these claims have no merit.

Prior to trial in this matter, the State provided the defendant with a report from the Criminalistics Section of the Connecticut State Police Forensic Science Laboratory which was signed by Dr. Henry Lee, who was then the Director of the Laboratory. (R. 3, p. 697-735). This report reflected that microscopic examination of items of the victim's clothing failed to reveal the presence of soil or grass stains, suggesting that these items were not in direct contact with a soil or grass transfer. (R. 3, pp. 699-700, 703). The report also reflects that two photographs of the bloody area in the side yard of the residence were reviewed, and reflects that blood-like stains were observed upon the grass which were consistent with a contact transfer-type pattern, and blood drops were observed on the grass which were consistent with low velocity passive blood dripping. (R. 3, p. 703).

At trial in this matter, the parties stipulated that Dr. Henry Lee was an expert in the fields of serology, DNA, crime scene analysis and reconstruction, and general criminalistics. (R.23, p. 5569-5570). Dr. Lee testified without objection that he examined the victim's shorts ". . .inch by inch to see any grass or grass stain, because if some transfer, let's say this short is on the grass, generally we expect to see some greenish grass stain, or a portion, a small portion of little tiny grass or soil on there." (R. 23, p. 5581). The defendant objected after the prosecutor questioned Dr. Lee as follows: "[a]nd in the scenario, Doctor, would be that if the victim claimed to have been dragged through grass and/or mud – ". The following transpired at a bench conference:

MR. ARMATO:
He's doing it.

THE COURT:
Just state your objection.

MR. ARMATO:
My objection is, he's going to the ultimate credibility of [L.H.], of what [L.H.] stated, Your Honor. He's asking this witness to give scientific evidence as to whether or not [L.H.] was telling the truth.

MS. daPONTE:
Yes. And I think that that - -

MR. ROWAN:
We'd be happy to rephrase the question, to ask if someone was dragged through the grass, what would you expect to find.

MR. ARMATO:
Okay.

MR. ROWAN:
All right.

THE COURT:
Please do.

(R. 23, pp. 5581-5582). At that point, the prosecutor resumed his questioning of Dr. Lee, rephrased his question as agreed, and elicited the following testimony without objection:

Q. Now, Doctor, if someone was dragged through grass, and/or mud, what would you expect to find?

A. Under ordinary conditions, this is a fabric, a fabric touch a rough surface, let's say soil surface, we generally see abrasion mark, the fabric going to damage on the surface. Under the microscope we can clearly see that, then we can see soil trapped in the fabric.

By the same token, if this contacted grass, we all have experienced if you fall down in the grass, or kids play on the grass, you going to find grass stain imbedded in the fabric, which I did not see any.

(R. 23, p. 5582-83). Dr. Lee went on to state that he did not find any soil stains on the shorts, either. (R. 23, p. 5583). Dr. Lee subsequently testified without objection that he examined the victim's Pocahontas t-shirt and panties inch by inch and did not observe any soil or grass trapped in the fabric. (R. 23, p. 5584-85).

Of significance, the defendant did not object to Dr. Lee's testimony that his examination of the victim's clothing failed to reveal the presence of grass or soil stains. The defendant also did not object to Dr. Lee's testimony regarding what he would expect to find on the clothing of someone who was dragged through the grass and mud, and did not request a *Daubert* hearing on the admissibility of expert testimony on this issue. Thus, the State submits that the defendant has failed to preserve this claim for review. La. C.Cr.P. art. 841.

Likewise, there is no merit to the defendant's claims that the trial court erred in admitting expert testimony on the rate of grass blade break-age in Louisiana in the winter time without a *Daubert* hearing. The State did not elicit testimony from Dr. Lee regarding the rate at which grass blades break in the winter, or the rate at which grass blades break under any circumstance. Dr. Lee testified only that he reviewed the photograph of the bloody location in the

grass side yard and did not observe ". . .any damage of the grass, broken grass, or impressed grass pattern on this photo." Therefore, this claim has no merit.[31]

During Dr. Lee's testimony, the defendant objected to Dr. Lee testifying about the condition of the scene depicted in S-10, a photograph reviewed by Dr. Lee and attached to the report as LA-2. (R. 3, p. 732; Exhibit S-10; R. 23, pp. 5590-5592). Dr. Lee was subsequently allowed to testify that his review of the photograph of the bloody location in the grass revealed no "large smear or broken grass, disturbance of the soil. Usually those are the indicator, say a struggle." R. 23, p. 5595). While the defendant contended that Dr. Lee's report did not contain an opinion of the condition of the scene depicted in the photograph, as stated above the report dated May 4, 1998 did indicate that Dr. Lee had reviewed the photographs and rendered some conclusions with respect to the scene depicted therein. (R. 23, p. 5591-5592). The State submits that the trial court did not err in admitting this testimony, as the defendant stipulated that Dr. Lee was an expert in the fields of crime scene analysis and reconstruction, and his testimony in this respect was well within his stipulated area of expertise.

Finally, the State would note that Dr. Lee's testimony regarding the lack of signs of a struggle in the area depicted in State's exhibit 10 was cumulative of the testimony of other State's witnesses. Deputy Burgess testified without objection that although the grass in the yard was somewhat high, and was flattened by his steps, there was no depression in the grass in the location where the defendant alleged the rape to have occurred. (R. 18, p. 4511). Also, Sgt. Jones testified without objection that the grass in the area where the defendant alleged the rape to have occurred did not appear to have been disturbed or trampeled. (R. 20, p. 4769).

For these reasons, the State submits that this assignment of error has no merit.

XII ALLEGED DISCRIMINATION IN THE SELECTION OF THE GRAND JURY FOREPERSON (Assignments 38-41).

The defendant assigns as error the denial of his motion to quash the grand jury indictment on the basis of alleged racial and gender discrimination in the selection of the grand jury foreperson. Specifically, the defendant contends that he established a prima facie showing of purposeful discrimination against African Americans and women, which the State failed to rebut. The State would note that the Louisiana Fifth Circuit affirmed the trial court's denial of the defendant's motion to quash on the defendant's application for supervisory writs. *State v. Kennedy*, 98-1425 (La. App. 5 Cir. 6/26/02)(unpublished writ decision). This Court subsequently denied the defendant's writ application. *State v. Kennedy*, 02-2088 (La. 01/24/03), 836 So. 43. The State submits that the defendant's claim has no merit.

To demonstrate an equal protection violation based on discrimination in the selection of the grand jury foreperson, a defendant is required to show that the procedure employed resulted in substantial under-representation

---

[31] While the prosecutor stated in closing argument that ". . .it's so easy to pull up grass in wintertime", the defendant did not object to this argument, and has failed to preserve any error in this regard. La. C.Cr.P. art. 841.

of an identifiable group. To establish a prima facie case of discrimination the defendant must prove: (1) those alleged to be discriminated against belong to an identifiable group in the general population; (2) the selection process is subject to abuse according to subjective criteria; and (3) the degree of under-representation, as shown by comparing the proportion of the group at issue found in the general population to the proportion called to serve, over a significant period of time. *Castaneda v. Partida,* 430 U.S. 482, 494-95, 97 S.Ct. 1272, 1280, 51 L.Ed. 2d 498 (1977). If the defendant establishes a prima facie case of discrimination using this approach, the burden shifts to the State to rebut that prima facie case. *Id.*

The defendant herein was indicted prior to the 1999 amendment allowing for random selection of the foreperson, a time when Louisiana's procedure for selecting grand jury forepersons was subject to abuse according to subjective criteria that may include race and sex. *State v. Langley*, 95-1485 (La. 4/3/02), 813 So.2d 356, 371. This court has previously acknowledged that African Americans and women are identifiable groups capable of being singled out for disparate treatment. *State v. Cosey*, 97-2020, p. 10, (La.. 11/28/00), 779 So.2d 675 , 682, citing *J.E.B. v. Alabama ex. Rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Therefore, at issue is whether the defendant proved that there was substantial under-representation of these groups over a significant period of time. The State submits that the defendant failed to do so, and therefore failed to establish a prima facie case of discrimination in the selection of the grand jury foreperson.

In the instant case, the trial court held a full evidentiary hearing on the defendant's motion to quash on January 14, 2002. The trial court designated the roughly ten year period preceding the defendant's indictment as the relevant period, beginning on May 24, 1988, ending in September 10, 1998.[32] (R. 9, p. 2107.). The defendant presented additional data totaling 19 years beginning with 1979, however the trial court only considered the ten year period to be relevant. (R. 9, p. 2107). During the ten year period considered by the trial court:

> . . .there were 19 grand juries empaneled and 19 grand jury forepersons selected 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. Thus, African-Americans made up 15.78% of the grand jury forepersons during this time period; and women were grand jury forepersons 36.8% of the time.
>
> This data was compared to several statistical population samples, the 1990 and 2000 census figures from Jefferson Parish, average voter registration from Jefferson Parish for 1990-2000, and the number of women called randomly to serve on grand juries during the above-mentioned 10-year period.FN2 For African-Americans, the 1990 census data shows that 17.63% of the population of Jefferson Parish were African-Americans. Thus, comparing the population percentage of African-Americans to the percentage of African-Americans chosen as grand jury forepersons, there is an absolute disparity of 1.85% (17.63% minus 15.78%). Considering the 2000 census data, 22.9% were African-American. Thus, the disparity in 2000 becomes 7.12% (22.9% minus 15.78%). Considering voter registration lists, 15% were African-American. Thus, the disparity is-0.78%,

---

[32] The contends in brief that the Louisiana Fifth Circuit Court of Appeal erred in finding that the relevant period considered by the trial court was May 24, 1988-September 1998. Appellant's Brief at p. 67, fn. 101. However, the record reflects that this was considered to be the relevant ten year period by the parties. (R. 9, p. 2103-2105).

> indicating that a slightly higher portion of African-Americans were chosen to serve as forepersons in comparison to the voting population of Jefferson Parish.
>
> Regarding women, it is noted that 36.8% of the forepersons were women for the 10-year period. The 1990 census figures show 51.95% females in the gross population, indicating an absolute disparity of 15.15%. The 2000 census figures show 52% as female. For 2000, the disparity is 15.2%. Considering the voter registration for 1990 to 2000, females represent 54.21%, an absolute disparity of 17.41%. The number of women randomly called to serve on grand juries from May 1988 until September 1998 was 50.2%, for an absolute disparity of 13.4%. Therefore, for women, the disparities range from 13.4% to 17.41%. We note that women comprised a much larger segment of the overall population segments than did African-Americans.
>
> Dr. Devine was qualified as an expert in quantitative sociology. He did some calculations using the binomial distribution method to determine the probability of the composition of the forepersons over the grand juries in the period covered by the data. At the conclusion of Dr. Devine's testimony the court found that the defendant had shown a prima facie case of discrimination. The court gave no reasons for its ruling.

State v. Kennedy, 02-214 (La. App. 5 Cir. 6/26/02), 823 So.2d 411, 414, (footnotes omitted).

The State offered the testimony of Judge Marion Edwards in rebuttal. Judge Edwards served as an Assistant District Attorney for over 25 years before being elected to the 24th Judicial District Court in 1996. He testified that for approximately 19 years, he was involved in the grand jury selection process. (R. 9, p. 2124). His role in this process was to solicit volunteers for the foreperson position. (R. 9, p. 2126-2127). He made positive efforts to interest and include minorities and women, though more white males volunteered than any other group. (R. 9, p. 2128-2130). He did not participate in interviews the particular judge conducted with the volunteers. *Id.* He testified that the judges who selected the grand jury foreperson looked for someone who was qualified to serve on the grand jury, was literate, had organizational skills, and was interested and capable of serving as foreperson. He was not involved with the selection of the grand jury that indicted the defendant.

After the State's rebuttal testimony, the trial court found that: "The Court is persuaded after hearing all of the evidence, that the State of Louisiana has shown that there, to the extent of the statistics in the methodology for selecting Grand Jury Forepersons, that these criteria are permissible, racially and gender neutral." (R. 9, p. 2144).[33]

A. <u>The defendant did not establish a prima facie case of discrimination.</u>

In its opposition to the defendant's writ application, the State argued that the defendant failed to meet its burden of proving a prima facie case of discrimination. Noting that the trial court had given no basis or reasons for its findings, the Fifth Circuit reviewed the denial of the defendant's Motion to Quash, in light of the evidence

---

[33] The Fifth Circuit Court of Appeal noted that under prevailing jurisprudence,

> Judge Edwards' testimony, as a matter of law, was insufficient to rebut a prima facie case if made by defendant. Jurisprudence has shown that the State should present the testimony of the actual person(s) who made the selection of the grand jury foreperson. Because Judge Edwards did not make the actual selection of the foreperson, he was not a competent witness to testify regarding what criteria the selecting person used in picking the foreperson. *State v. Kennedy,* 823 So.2d at 415.

presented to determine if the result was correct. *State v. Kennedy,* 02-214 (La. App. 5 Cir. 6/26/02), 823 So.2d 411, 414.[34]

The Fifth Circuit used two methods to determine the degree of under-representation of women and African Americans: 1) absolute disparities, a comparison of the percentage of the relevant general population composed of the particular group or class allegedly singled out for discriminatory treatment; and the percentage of the same group or class represented in grand jury venires or the office of grand jury foreperson; and 2) comparative disparities, calculated by dividing the absolute disparity by the population figure for a population group. *State v. Kennedy,* 823 So.2d at 417. Comparative disparity measures the diminished likelihood that members of an under represented group, when compared to the population as a whole will be called for jury service. *Id.*

The Fifth Circuit found as follows:

> Regarding women, it is noted that 36.8% of the forepersons were women for the 10 year period. The 1990 census figures show 51.95% women, for an absolute disparity of 15.15%, and a comparative disparity of 29.16%. The 2000 census figures show 52% female, for an absolute disparity of 15.2%, and a comparative disparity of 29.23%. Considering the voter registration from 1990 to 2000, females represent *419 54.21%, an absolute disparity of 17.41% and a comparative disparity of 32.12%. Considering the number of women called randomly to serve in grand juries from 1998 until 1998, 50.2%, the absolute disparity is 13.4% and the comparative disparity is 26.7%.
>
> The comparative disparity figures show that females served as grand jury forepersons 68-70% of the time in relation to their overall representation in the population groups, or conversely, that they were under represented 29-32% of the time. Ramseur considered a comparative disparity, or under representation, of 40% as "borderline." We note that the comparative disparities in Langley III were almost 70% for African-Americans (absolute disparity of 15.9% divided by 22.9%, the population base for African-Americans) and 48.5% for women (25.4% absolute disparity divided by 52.4% population base). [footnotes omitted].

State v. Kennedy, 823 So.2d at 418-419.

It is the totality of the circumstances that must be considered in determining whether the defendant has succeeded in making a prima facie showing of significant under representation. *Id.* at 419. Rather than emphasizing anyone factor, the Fifth Circuit noted that it had been instructed to look at all the factors that bear on the issue, including the number of years involved, the duration of the disparity, the size of the population segment, and the number of grand juries considered. *Id.*

Considering all of these factors, the Fifth Circuit properly found that the defendant had failed to meet his burden as follows:

> There was no discrimination shown in the selection of African- American grand jury forepersons. To the contrary, there was a showing that the percentage of African-Americans selected as grand jury forepersons, as it related to

---

[34] Of significance, the defendant contends once the State presented any evidence in rebuttal it was irrelevant whether the defendant had made a prima facie case. This assignment has no merit. The State would note that the remedy for intentional discrimination in the selection and composition of grand juries, whether resulting in the complete exclusion of an identifiable group or substantial under representation of that group, is to vacate the conviction and quash the indictment returned by the unconstitutionally constituted grand jury. In such a case, the State would have the right to appeal the trial court's ruling. *State v. Langley,* 95-1489 (La. 4/3/02), 813 So.2d 356, 371.

> African-Americans registered to vote, was slightly higher rather than lower over the 10 year period preceding the selection of the grand jury that indicted the defendant in this case. While the defendant makes the point that the absolute disparity was greater when the preceding 19 years are considered rather than just the preceding 10 years, the fact that the disparity did not continue, made obvious by the significant improvement in the system evidenced by the more recent numbers, provides ample justification for placing more emphasis on the preceding 10 years rather going back 19 years.
>
> Similarly, as concerns the statistical disparity between the female population in the parish and the number of female forepersons chosen for grand jury duty, we find a system that has significantly improved over time. Thus, considering the 10 years preceding the selection of the defendant's grand jury, we find that of the total number of female grand jurors randomly called to serve, 50.2% were female, and of that number, women were chosen as grand jury forepersons 36.8 % of the time, leaving an absolute disparity of 13.4%. These figures come from a total of only 19 grand juries selected over this 10 year period.
>
> In Langley III, the Court found an unrebutted prima facie showing of purposeful discrimination in the selection of grand jury forepersons where females were under represented by an absolute disparity of 25.4% and African-Americans by a 15.5%-15.9%. In our case, African-Americans*420 were slightly over represented and females were under represented by 13.4% compared to the number of female grand jurors randomly selected. When the degree of the under representation of women is considered along with all the other factors such as the improvement in the selection process in the preceding 10 years rather than 19 years, the large size of the population segment and correlative small comparative disparity, and the fact that only 19 grand juries are considered, we cannot conclude that the defendant made a prima facie showing of purposeful discrimination in the selection of grand jury forepersons.[footnotes omitted].

State v. Kennedy, 823 So.2d at 419.

The State submits that the Louisiana Fifth Circuit Court of Appeal correctly found that the defendant failed to make a showing of purposeful discrimination in the selection of the grand jury foreperson, and the defendant's claim has no merit.

XIII. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO QUASH THE INDICTMENT BASED UPON THE EXCLUSION OF CONVICTED FELONS FROM THE GRAND JURY. (Assignments 42-44)

The defendant argues that the trial court erred in relying on the provisions of La. C.Cr.P. art. 401(A)(5) to deny his *Motion to Quash the Indictment Based Upon Violations of Article I, Section 20 of the Louisiana Constitution in Excluding Convicted Felons from Grand Jury Service.* (R. Vol. 2, p. 408-410). Specifically, the defendant appears to contend that La. C.Cr.P. art. 401(A)(5), which sets forth qualifications for grand and petit jurors, is unconstitutional in that it provides as a qualification for service that the person must "[n]ot be under indictment for a felony nor have been convicted of a felony for which he has not been pardoned." He argues that La. C.Cr.P. art. 401(A)(5) violates the provisions of La. Const. Art. 1 §20, which provides for the restoration of the rights of citizenship upon termination of state and federal supervision following conviction for any offense, and that the trial court denied his motion to quash the indictment The State submits that the defendant's claims have no merit and that his motion should be denied.

As a general matter, La. C.Cr. P. Art. 401 forbids a person from serving as a juror if he "ha[s] been convicted of a felony for which he has not been pardoned." La. C.Cr.P. art. 401(A)(5). While La. Const. Art. 1§ 20 provides

that the "[f]ull rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense[,]" the Louisiana Supreme Court has interpreted that provision to restore "only the basic rights of citizenship, such as the right to vote, work, or hold public office." *State v. Adams,* 355 So.2d 917, 922 (La. 1978); *State v. Selmon,* 343 So.2d 720, 721-722 (La.1977). 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. *State v. Haynes*, 514 So.2d 1206, 1211 (La. App. 2 Cir. 1987); *State v. Jacobs*, 04-1219 (La. App. 5 Cir. 5/31/05), 904 So.2d 82, 91.

Article V, § 33(A) of the Louisiana Constitution provides: "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." The legislature was well within its constitutional authority in instituting the qualifications in LSA-C.Cr.P. art. 401. Thus, the State submits that the trial court properly denied the defendant's motion to quash the indictment on this basis.

XIV. THE TRIAL COURT DID NOT ERR IN ITS RULINGS GRANTING AND DENYING CHALLENGES FOR CAUSE IN THIS MATTER (Assignment 45-58).

In the instant case, the trial court In his fourteenth claim, the defendant challenges the trial court's rulings on challenges for cause during the death qualification and/or general voir dire. Additionally, the defendant challenges the trial court's decisions to excuse several jurors for hardship. These claims have no merit.

A. Allegations that the trial court erroneously granted the State's challenges to jurors based upon their opposition to the death penalty.

In *State v. Tate*, 2001-1658, (La. 5/20/03) 851 So.2d 921, this Court recently reviewed the law applicable to cause challenges based upon a juror's views on capital punishment:

> A prospective juror is properly excluded for cause because of his/her views on capital punishment when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt,* 469 U.S. at 424, 105 S.Ct. at 852. The basis of exclusion under La.Code Crim. Proc. art. 798(2)(b), which incorporates the standard of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), as clarified by *Witt,* is that the juror's views "would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath." *Witherspoon* further dictates that a capital defendant's right under the Sixth and Fourteenth Amendments to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.,* 391 U.S. at 510, 88 S.Ct. at 1777.

Although La.C.Cr.P. Art. 800(B) precludes a defendant from complaining of an erroneous grant of a challenge to the State unless the ruling results in the exercise by the State of more peremptory challenges than it is entitled to by law," the United States Supreme Court, has held that the erroneous exclusion of a juror eligible to serve under *Witherspoon* is reversible error, not subject to harmless error analysis, even if the State could have used a peremptory strike to remove that potential juror. *Gray v. Mississippi,* 481 U.S. 648, 664, 107 S.Ct. 2045, 2054, 95 L.Ed.2d 622 (1987); *Davis v. Georgia,* 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

In reviewing a trial court's rulings on voir dire, great discretion must be afforded the trial judge's decision whether sufficient cause has been shown to reject a prospective juror; the trial judge's determination will not be

disturbed on review unless an examination of the voir dire as a whole shows an abuse of discretion. *State v. Tate*, 2001-1658, (La. 5/20/03) 851 So.2d 921, *State v. Hart;* 96-0599 (La. 1/14/97), 687 So.2d 94; *State v. Lee*, 93-2810 p. 9 (La. 5/23/94), 637 So.2d 102, 108.

> A reviewing court's deference to the trial judge's determination is due to the fact that the trial judge has the benefit of seeing the facial expressions and hearing the vocal intonations of the members of the jury venire as they respond to questioning by the parties' attorneys. Such expressions and intonations are not readily apparent at the appellate level where review is based on a cold record. Furthermore, to the extent he or she believes it is necessary or desirable to do so, the trial judge has the benefit of the ability to directly participate in the examination of the members of the jury venire.

Lee, p. 9, 637 So.2d at 108.

Dwayne Lange

The defendant contends that prospective juror 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. However, the State submits that the record clearly reflects that Mr. Lange was not challenged for cause during the death qualification proceedings, nor was he challenged or excused on the basis of his views regarding the death penalty. (R. Vol. 14, p. 3460).

Instead, the record reflects that on August 15, 2003, the trial court granted the State's challenge for cause and excused Mr. Lange during the general voir dire, after Mr. Lange advised the parties that he lived in the Marrero area, and was aware of various details of the offense from media reports and word-of-mouth. (R. 18, p. 4282-4287). Mr. Lange stated that from what he heard it was a brutal rape, and that the stepfather had done it. (R. 18, pp. 4279-4281). Though he initially stated that this was only what he had heard, he went on to state that the defendant had to prove something to him as follows:

> Well, being that you know, it has come to this, and he's on trial for it, I believe it's ruined his character, so he has to - - I believe he has to stand up for his character, to regain his character, which probably never will be again, you know.

(R. 18, p. 4282). The trial court queried, "What makes you think this is the guy - -this is the right guy?" Mr. Lange replied,

> Well, this was the right guy they picked up for the - - for the situation, for the case, you know. I think the little girl complained that it was, you know, - -

(R. 18, pp. 4282-4283). The trial court explained the presumption of innocence to Mr. Lange, after which it asked whether Mr. Lange was expecting anything from the defendant. Mr. Lange replied, "No, no, not exactly. I think I'm expecting more from the prosecutors." (R. 18, p. 4285). After being prompted, Mr. Lange replied that he wasn't expecting anything from the defendant, but stated that he thought there was a possibility that the defendant had committed this crime. (R. 18, p. 4285).

The State submits that the trial court did not err in granting the State's challenge for cause. Based upon the overall tenor of Mr. Lange's responses, it is evident that Mr. Lange was unable to be fair and impartial based upon the information he had learned about this case from the media and word of mouth. Although Mr. Lange was able to give appropriate responses to basic questions after being told what those responses were, the overall tenor of his personal comments was inconsistent with those responses.

Additionally, the State would note that because this cause challenge was granted during the general voir dire and Mr. Lange was not excused based upon his views regarding the death penalty, the harmless error rule established by La. C.Cr.P. art. 800(B) applies in full force, unaffected by *Gray*, and as the ruling did not result in the exercise by the State of more peremptory challenges than it is entitled to by law, the State submits that this claim has no merit.[35]

Venkata Subramanian

The defendant also argues that the trial court erred in granting the State's challenge for cause to prospective juror Subramanian during the death qualification of the jury. The State submits that this claim has no merit.

Mr. Subramaniam was questioned by the State regarding the fact that he indicated on his juror questionnaire that he was opposed to the death penalty because it was expensive, not a good deterrent, and uncivil. After agreeing that those were his views regarding capital punishment, Mr. Subramaniam was asked whether his opinion would change if he were sitting on this case and found the defendant guilty of the brutal rape of a twelve year old. Mr. Subramaniam stated as follows:

> MR. SUBRAMANIAM:
> Not really, I still think it's disproportionate punishment, for rape, albeit a minor's rape, I still think death penalty is probably too much. It's, it's cruel and unusual for this crime. Maybe for a mass murder I would seriously consider it, for this I probably wouldn't.

Though Mr. Subramaniam went on to state that he would listen to the trial court's instructions, and would "try" to follow the law in the case, he also agreed that his views on the death penalty would impair his ability to serve as a fair and impartial juror, as follows:

> MR. ROWEN:
> And because of that and your personal feelings on the death penalty, that would impair you to serve as a fair and impartial juror?
>
> MR. SUBRAMANIAM:
> Probably if death penalty is very important to you, yes.

When questioned by the defense, Mr. Subramaniam agreed that he would consider lingering doubt in the penalty phase, and that he would not "automatically" exclude either penalty, although he stated that he was ". . .very close to shutting the door on death penalty".

Of significance, Mr. Subramaniam stated that he probably would not seriously consider the death penalty in the instant case and agreed that his personal feelings about the death penalty would impair his ability to serve as a fair and impartial juror. Although he later stated that he would not automatically exclude the death penalty, the overall tenor of his responses indicates that his views regarding the death penalty in general, and in the instant case in particular, would substantially impair his ability to serve as a fair and impartial juror in the instant matter. The trial court personally observed Mr. Subramaniam and listened to his responses, and the record does not reflect that the trial court abused its discretion in granting the State's challenge for cause to Mr. Subramaniam.

---

[35] The State only used nine peremptory challenges during jury selection. (R. p. 4359). Of significance, in *Ross v. Oklahoma*,487 U.S. 81, 87-88, 108 S.Ct. 2273, 2278 (1988), the United States Supreme Court explicitly stated as follows:

> We decline to extend the rule of *Gray* beyond its context: the erroneous " *Witherspoon* exclusion" of a qualified juror in a capital case.

B. **Claim that trial court erroneously granted State's challenges to jurors who believed death sentence was inappropriate and/or excessive for the aggravated rape of a child under twelve.**

In this claim, the defendant contends that the trial court erred in granting the State's challenges to prospective jurors Henry Butler, Darlene Howell, and Ralph Scheid based on their inability to consider a death sentence in a case of aggravated rape, as opposed to murder. However, if a juror is unable to consider the death penalty under the facts of the instant case, the juror is not impartial. The trial court did not err in granting challenges to these prospective jurors who categorically stated that they could not follow the law and consider the death penalty in a case involving the aggravated rape of a child under the age of twelve. La. C.Cr.P. art. 798(2).

Although Mr. Butler initially advised the prosecutor that he could not consider the death penalty for someone convicted of a rape unless they were a serial rapist, he later advised defense counsel that he would not consider it even under that circumstance. (R. 12, pp. 2835-2830, pp. 2872-2874). Additionally, the record indicates that counsel for the defendant conceded to the trial court that Mr. Butler should be excused following the pre-qualification voir dire. (R. 12, pp. 2895-2896). While the defendant has suggested that the transcript may erroneously identify the defense as the party advising the court in this respect, the State would note that the transcript does not indicate any objection to the trial court's ruling excusing this juror. Thus, it appears that the parties conceded that Mr. Butler did not meet the qualifications of La. C.Cr.P. art. 798(2). Therefore, the State submits that any error in this respect has been waived. La. C.Cr.P. art. 841.

Ms. Howell explicitly advised both the prosecutor and the defense counsel that she could not consider imposing the death penalty in a rape case. (R. Vol. 12, p. 2762-2763, 2789-2790). Moreover, there was no objection to the State's challenge for cause, and the defendant did not object when the trial court excused Ms. Howell. (R. 12, pp. 2808-2810). Therefore, any error in this respect has not been preserved for appellate review. La. C.Cr.P. art. 841.

Finally, Mr. Scheid advised defense counsel that the only scenario in which he could envision sentencing someone to death for a rape would be if it were for the rape of Mr. Schied's own daughter. (R. 12, pp. 2881-2882). Additionally, as counsel for the defendant conceded that Mr. Schied was subject to removal, and did not object to Mr. Schied's removal, this claim has not been preserved for appellate review. (R. 12, pp. 2895-2896). La. C.Cr.P. art. 841.

C. **Claim that the trial court granted the State's "hardship" challenges to a significant number of minority venire members.**

The defendant also alleges that the trial court granted the State's challenge for "hardship" to a significant number of minority venire members, citing the trial court's excusal of prospective jurors Jacqueline Dorsey, Pamela Parkman, Lionel Martinez, Eddie Manson, Julius Payton for undue hardship. (R. 1, p. 55). While citing the basis of his objection to the trial court's ruling excusing each of these prospective jurors, the defendant has failed to brief his claim. In the event this Court finds this claim subject to review, the State submits that it has no merit.

In *State v. Williams*, 96-1023 (La. 1/21/98), 708 So.2d 703, 710, this Court stated as follows:

> The trial court is authorized to excuse a person from jury service either before or after selection to the general venire or jury pool if such service would result in undue hardship or extreme inconvenience. The court is permitted to take this action on its own initiative or on the recommendation of an official or employee designated by the court. *See* La.Sup.Ct. R. 26; La.Code Crim.P. art. 783(B); *State v. Brown*, 414 So.2d 726, 728 (La.1982). The trial court is vested with broad discretion in excusing prospective jurors for undue hardship. *State v. Ivy*, 307 So.2d 587, 590 (La.1975).

In the instant case, the trial court advised the first panel of prospective jurors of the general qualifications of jurors set forth in La. C.Cr.P. art. 401. After the trial court advised the prospective jurors of the qualification set forth in La. C.Cr.P. art. 401(A)(4),[36] the trial court asked those prospective jurors with concerns about this qualification to "come up front" to advise the court of their concerns. (R. 11, p. 2569). Several prospective jurors approached and advised the Court of concerns involving their health and/or ability to concentrate on the proceedings. These prospective jurors included Dorsey, Parkman, Martinez, Payton and Manson.

Of significance, Ms. Dorsey, Ms. Parkman, and Mr. Martinez were removed after they volunteered to the trial court that they suffered from painful medical conditions which would make it difficult for them to sit throughout the trial in this matter. Ms. Dorsey was excused by the trial court *sua sponte*, after she advised the court that she was presently in pain and unable to sit or stand for very long due to neck problems and an ankle surgery.[37] (R. 11, p. 2583-2585). Ms. Parkman was excused by the trial court over the defendant's objection after she advised the court that she suffered from rheumatoid arthritis.[38] (R. 11, p. 2591-2595). Ms. Parkman indicated to the court that her condition was painful, that she was unable to sit for very long, and that she thought the pain would interfere with her ability to attend to the proceedings. (R. 11, p. 2591-2593). Mr. Lionel Martinez was excused by the trial court *sua sponte* after he advised the court that he had scoliosis of the spine, that he suffered from recurrent injuries to his back, that he experienced pain after sitting for approximately fifteen minutes, and that this pain was frequently so severe that he was unable to think of anything else. (R. 11, p. 2603-2606). The State submits that it is clear that the trial court did not abuse its discretion in excusing these jurors for whom service in a lengthy capital trial would have presented an undue hardship due to their medical and physical conditions.

Mr. Payton advised the trial court that he had type two diabetes which was not currently controlled. For this condition and another condition, he was prescribed numerous medications which he must take daily, including an antidepressant. (R. 11, p. 2620-2623). With regard to his diabetes, Mr. Payton had been given "fluid pills" which caused him to urinate with great frequency. *Id.* He advised the court that on some days he might not be able to control his urge to urinate for as long as fifteen minutes. (R. Vol. 11, p. 2623). Mr. Payton stated that even if the court were to excuse him every time he needed to urinate, he felt that it would interfere with his ability to concentrate on the proceedings and that it would additionally be disruptive to the proceedings. (R. 11, p. 2623-2624). The State challenged Mr. Payton for cause on the basis of this information, and the trial court granted the objection over the defendant's objection. (R. 11, p. 2624). The record clearly reflects that service for Mr. Payton would have been an undue hardship and extreme inconvenience. Moreover, he was properly challenged for cause as he testified that his

---

[36] La. C.Cr.P. art. 401 (A)((4) provides in pertinent part that in order to qualify to serve as a juror, a person must not be under interdiction or incapable of serving as a juror because of a mental or physical infirmity.

[37] Ms. Dorsey also advised that she was taking medication for these conditions that made her drowsy. (R. 11, p. 2584).

[38] Ms. Parkman also advised that she suffered from diabetes, a condition which sometimes resulted in her having to urinate as frequently as every twenty to thirty minutes. (R. 11, p. 2592). The prosecutor also noted for the record that Ms. Parkman ". . . had multiple braces." (R. 11, p 2594).

medical condition and the effects of his medication would interfere with his ability to concentrate on the proceedings.

Likewise, record does not reflect that the trial court abused its discretion in granting the State's cause challenge to excuse prospective juror Eddie Manson. Mr. Manson advised the trial court and the parties that he worked for a company that makes fifty-five gallon drums, and that his memory was so bad that he needed a schedule in front of him to enable him to do his job every day. (R. 11, p. 2615-2616). If his supervisor gave him oral instructions, he would need to write them down in order to remember them, otherwise he might forget the instructions in ten or fifteen minutes. (R. 11, p. 2616-2617). Mr. Manson also indicated that he would have trouble in deliberations discussing something that occurred on the first day of a week long trial because of his problem with his memory. (R. 11, p. 2618). Here, where the State noted that it would not consent to the jurors taking notes, the trial court properly excused Mr. Manson based upon Mr. Manson's concern that his ability to remember was too poor to enable him to fulfill his duty as a juror in deliberating upon the evidence presented at trial. (R. 11, p. 2619).

D. Alleged challenges to jurors based upon their age.

The defendant also contends that the trial court improperly excused prospective jurors Henri Lespinasse and Jasmine Jones based upon their young age. This claim has no merit.

After Ms. Jones survived the *Witherspoon* questioning without being challenged by either party, Ms. Jones indicated to the trial court that she had a problem that she needed to discuss with the court. At the bench, Ms. Jones advised the parties as follows:

> Ms. Jones:
> I just don't think I'm ready to like put that judgment over somebody. I'm only 18 and I just don't think I'm ready. And I have school starting like Saturday and I'm just not ready.

(R. 13, p. 3045). She stated that, "I just don't think I'm mentally ready right now." *Id.* Ms. Jones went on to indicate that she didn't think she would be able to focus on things, and that the determination of guilt in a case where the sentence would be life or death would ". . .just be too much on me." (R. 13, p. 3046). She reiterated that she wouldn't be able to make the determination and that she didn't believe she was mentally fit for it at present. *Id.* When questioned by the trial court whether she would be able to listen to the evidence and base her determination of the defendant's guilt or innocence upon that evidence, and she stated that she would base her determination on the fact that she was scared and frightened. (R. 13, p. 3048). The trial court properly granted the State's challenge for cause to this prospective juror who expressed an unwillingness and inability to fulfill her duty as a juror in the instant case, and furthermore indicated that she would base her determination of the defendant's guilt or innocence not upon the evidence, but upon the fact that she was scared and frightened of being placed in the position of making such a decision. Thus, Ms. Jones expressed an inability to follow the law in deciding this case.

With regard to Mr. Lespinasse, he was excused by the trial court *sua sponte* without objection from either party after he informed the court that he was still in high school. (R. 13, p. 3078). As the defendant did not object to the excusal of Mr. Lespinasse, any error in this regard has not been preserved for review. La. C.Cr.P. art. 841.

E. **Claim that trial court erred in denying his challenges for cause and forced him to exhaust his peremptory challenges.**

The defendant contends that the trial court erred in denying his challenges for cause to prospective jurors Bernice Augustus and Melissa Asfour, and that he was forced to exhaust his peremptory challenges.

With regard to Ms. Augustus, the record reflects that she initially advised the prosecutor that she could consider both penalties. (R. 13, pp. 3215-3219). Counsel for defendant asked Ms. August if she leaned toward the death penalty, to which Ms. August replied, "[d]epending on the evidence." The following exchange then occurred:

> Ms. daPonte:
> And again, when we're talking about the evidence, we're only talking about he[sic] evidence that you would see at the penalty phase. I have asked some of the other people in the box to imagine some pretty bad evidence, some bad injuries, some lasting and significance impact to the victim and the victim's family and some pretty bad evidence about Patrick Kennedy and not much good to say about him.
>
> Ms. Augustus:
> I may consider the death penalty, wait, let me rephrase this. Yes, I would give him the death penalty.

Shortly thereafter, the trial court interrupted the examination of this Ms. Augustus. During a bench discussion, the court told counsel "what you've been asking this lady for example is by piling on enough facts in the penalty phase to get a commitment." (R. 13, p. 3252). When counsel returned, she asked Ms. Augustus whether, given the circumstances she described, she would be able to consider anything other than the death penalty in the case that she described. (R. 13, p. 3260). Ms. Augustus replied as follows:

> I've had time to think about it. I would say life sentence cause death penalty would be to easy for him and he'd have a good while to think about what he did to a twelve year old. And I may consider after I hear all the evidence in front of me besides just knowing that he raped a twelve year old child.

(R. 13, p. 3260). Ms. Augustus went on to affirm that she would consider a life sentence. *Id.*

Here the prosecutor challenged Ms. Augustus saying that she had concluded by stating that she would only impose a life sentence. The defendant joined in the challenge for cause without stating a reason. The trial court denied the challenge for cause stating as follows:

> What this lady has demonstrated from artful questions and because I think she's really not quick is that she may be on her best day a weather vane. The punch questions really weren't put to her to my satisfaction. I'm denying your challenge.

(R. 13, p. 3270). The record does not reflect that the trial court abused its discretion in this respect.

La. C.Cr.P. art. 798 provides that it shall be a good cause for challenge on the part of the state, but not on the part of the defendant, 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. Therefore, the defendant was not permitted to challenge Ms. Augustus on the basis that she would always impose a life sentence because she felt it was more severe.

When questioned by the State, Ms. Augustus indicated her ability to consider both penalties. The defendant's hypothetical question about serious injuries, lasting harm, and bad evidence about the defendant, appears to have suggested to Ms. Augustus that counsel was asking her what penalty she would impose if that was the evidence she was presented with in the penalty phase. First Ms. Augustus said she would return a verdict of death

based upon that evidence, but then stated that she would give him life so that he would have a long time to think about what he had done. Clearly, Ms. Augustus was able to consider both penalties based upon the hypothetical evidence presented.

Defense counsel's line of questioning was confusing and improper. The State submits that the questioning of Ms. Augustus on the whole does not reflect that her views on capital punishment would prevent or substantially impair her from making an impartial decision as a juror in accordance with her instructions and her oath. It also does not demonstrate that she would be unable or unwilling to consider mitigating circumstances.

In the event that this Court determines that the trial court's failure to grant the defendant's challenge for cause was in error, the State submits it is harmless as the defendant did not exhaust his peremptory challenges.[39]

The record reflects that Melissa Asfour was not challenged by either party during the death qualification of the prospective jurors. Ms. Asfour was challenged for cause by the defendant during the general voir dire, after she expressed her concern to the trial court that the defendant was reviewing some papers which she thought included the juror questionnaire she filled out and on which she had written her address. (R. 17, p. 4179). Defense counsel asked why she felt uncomfortable, and she stated as follows:

> Because I felt like you all have our questionnaires, and when we come in here, and you're asking these questions, and I know that when I filled out the questionnaire, it had my name and address. And I don't feel comfortable that - - I don't know,, I didn't feel comfortable that he - - if he knew my address, not my name, obviously he knows my name, my address, I do feel uncomfortable. Whether he's guilty or innocent, I just don't - - I feel - - I felt strange about it, I mean, that's just an emotion that came up.

(R. 17, p. 4148). After the trial court was able to advise Ms. Asfour that the defendant was not furnished with her address, she stated that she did not have any problem. (R. 17, p. 4147). When defense counsel asked whether she had formed an opinion about whether the defendant was guilty or not, Asfour replied, "[a]bsolutely not, and I'm very very serious about that." (R. 17, p. 4149)

Of significance, the record does not reflect that the trial court erred in denying the defendant's challenge for cause to Ms. Asfour, as she was adamant that she had not formed an opinion about whether the defendant was guilty or not.

F. <u>The trial court did not frustrate the defendant's right to a full and fair voir dire.</u>

A defendant is entitled to a full and complete voir dire examination. La. Const. Art. I. §17. The purpose of voir dire is to determine the qualifications of prospective jurors by testing their competency and impartiality and to assist counsel in articulating intelligent reasons for exercise of cause and peremptory challenges. *State v. Stacy*, 96-0221, p. 5 (La.10/15/96), 680 So.2d 1175, 1178. The scope of voir dire is within the sound discretion of the trial judge and his rulings will not be disturbed on appeal absent a clear showing of an abuse of discretion.

Nevertheless, as this Court found in *State v. Ball*, 00-2277 (La. 1/25/02), 824 So.2d 1089, 1110:

---

[39] This contention is based upon the facts contained in the *State's Motion to Supplement the Record* which remains pending before this Court as of November 6, 2006.

> . . . voir dire does not encompass unlimited inquiry by defendant into all possible prejudices of prospective jurors, including their opinions on evidence, or its weight, hypothetical questions, or questions of law that call for any prejudgment of supposed facts in the case. Louisiana law clearly establishes that a party interviewing a prospective juror may not ask a question or pose a hypothetical which would demand a commitment or pre-judgment from the juror or which would pry into the juror's opinions about issues to be resolved in the case. "It is not proper for counsel to interrogate prospective jurors concerning their reaction to evidence which might be received at trial." *State v. Williams,* 230 La. 1059, 89 So.2d 898, 905 (1956). *See also State v. Square,* 257 La. 743, 244 So.2d 200, 226 (1971), *judgment vacated in part,* 408 U.S. 938, 92 S.Ct. 2871, 33 L.Ed.2d 760 (1972), *mandate conformed to,* 263 La. 291, 268 So.2d 229 (1972)("Voir dire examination is designed to test the competence and impartiality of prospective jurors and may not serve to pry into their opinions concerning evidence to be offered at trial"); *State v. Smith,* 216 La. 1041, 45 So.2d 617 (1950)("hypothetical questions and questions of law are not permitted in the examination of jurors which call for a pre-judgment of any supposed case on the facts").

Id. at 1110.

The State submits that in the context of the instant case, the trial court did not frustrate the defendant's right to full and fair voir dire. With respect to the defendant's reference to the trial court's ruling at R. 16, 3785-3786, the record reflects that the trial court sustained the State's objection after repeated questioning of the same juror regarding her grandchildren. R. 16, pp. 3779-3785. Otherwise, the defendant's complaints appear to concern instances in which he tried to pry into jurors opinions about issues to be resolved in the case or to interrogate them as to how they would react to evidence that might be introduced. The record does not reflect that the trial court abused its discretion in this respect.

XV. DENIAL OF THE MOTION FOR NEW TRIAL (Assignment 59)

As the denial of a motion for new trial based upon La. C.Cr.P. art. 851(1) is not subject to review on appeal, the State addresses the sufficiency of the evidence herein. *State v. Bartley*, 329 So.2d 431, 433 (La. 1976).

In reviewing the sufficiency of the evidence to support a conviction, an appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Captville*, 448 So.2d 676, 678 (La. 1984). The trier of fact makes credibility determinations, and may, within the bounds of rationality, accept or reject the testimony of any witnesses. *State v. Mussall,* 523 So.2d 1305 (La. 1988); *State v. Rosiere*, 488 So.2d 965 (la. 1986). At the time of the instant offense, aggravated rape was defined as a rape committed where the where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because the victim is under the age of twelve years. La. R.S. 14:42 (A)(4).

In the instant case, it was undisputed that the L.H. was raped on March 2, 1998, and that she was under the age of twelve. The defendant contended that he was not the person who raped her. Instead, the defendant claimed that she was raped in the outside yard by someone else. The L.H., who was eight years old at the time of the offense and thirteen years old at the time of trial, testified that the defendant was the person who raped her.

Where the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. *State v. Smith*, 430 So.2d 31, 45 (La. 1983); *State v. Brady*, 414 So.2d 364, 365 (La. 1982); *State v. Long*, 408 So.2d 1221, 1227 (La. 1982).

However, a victim's testimony alone is usually sufficient to support a verdict. *State v. Davis*, 2002-1043 p. 4(La. 6/27/03), 848 So.2d 557, 559; *State v. Hills*,1999-1750 p. 8 n. 8 (La. 5/16/00), 761 So.2d 516, 522 n. 8.

Although the defendant called 911 to report the rape at approximately 9:20 a.m., he called Mr. Arguello before 7:30 a.m. to tell him the victim had "become a young lady" and to ask him how to get blood out of the carpet.[40] He also called B&B Carpet Cleaners at 7:37 a.m. on March 2, 1998 with an urgent request to have his carpet cleaned, but when B&B employee Lester Theriot arrived after 9 a.m. that morning, police and an ambulance were already there.

Moreover although police initially saw blood outside, inside the garage door, and on the stairs, chemical testing confirmed that blood had been cleaned from the carpet at the foot of the victim's bed and in the master bedroom.

Of significance, the jury was aware that L.H. initially maintained that the defendant was not the perpetrator of this offense. She testified that the defendant had told her to what to say. Deputy Burgess, Stephen Brown, and Sgt. Jones all testified that when they attempted to interview the L.H., the defendant answered questions for her or otherwise prompted her statements. Her initial account of being dragged around the house and raped in the yard was inconsistent with the lack of grass or soil on the clothing she wore that morning.

Given this evidence, the jurors could rationally have found that the defendant was guilty of aggravated rape of his stepdaughter, L.H.

XVI. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTIONS TO SUPPRESS THE STATEMENTS AND EVIDENCE (Assignments 60-62).

The defendant contends in brief that the trial court improperly denied the defendant's motions to suppress statements and evidence. The State submits that these claims have no merit.

A. Motion to Suppress Statements.

In the instant case, the trial court denied the defendant's motion to suppress statements that he made to Deputy Burgess, Detective O'Cull, Detective Hullihan, Detective Bradstreet, and Sgt. Darren Monie. The State submits that the trial court did not err in denying the motion to suppress the statements.

Before introducing a defendant's confession into evidence, the prosecutor must show affirmatively that the statement was free and voluntary, and not the result of fear, duress, intimidation, menace, threats, inducements or promises. La.Rev.Stat. 15:451; *State v. Simmons,* 443 So.2d 512 (La.1983). Before the State can introduce into evidence a confession or statement of an accused, made during a custodial interrogation, the State must also prove beyond a reasonable doubt that the defendant was first advised of his constitutional rights as per *Miranda v. Arizona.* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) The prosecutor must expressly rebut a defendant's specific allegations of misconduct. *State v. Vessell,* 450 So.2d 938, 942-43 (La.1984). Credibility determinations lie within

---

[40] Of significance, the defendant supports his claims with reference to phone records which were neither introduced at trial nor offered in support of his motion for new trial. The State submits that it is in possession of a faxed return on which is written words to the effect that 100% of Louisiana calls are not recorded. Thus, it appears that the records were not offered at trial because they did not conclusively establish what calls were made from the defendant's residence.

the sound discretion of the trial court, and the ruling should not be disturbed unless clearly contrary to the evidence. *Vessell,* 450 So.2d at 943. In reviewing a trial court's judgment denying a motion to suppress, an appellate court is not limited to the evidence adduced at the hearing on that motion, but may consider all pertinent evidence given at trial . *State v. Green,* 94-0887, p. 11 (La.5/22/95); 655 So.2d 272, 280.

In *State v. Saltzman,* 03-1423 (La. 4/8/04) 871 So.2d 1087, 1088, this Court, in a per curiam decision, addressed the issue of whether an individual is in custody for purposes of *Miranda* warning, as follows:

> In determining whether an individual is in custody for purposes of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), courts must consider all of the circumstances surrounding the interrogation, and "the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293 (1994). This determination "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officer or by the person being questioned." *Id.* That an individual is a suspect of the police conducting a criminal investigation therefore does not determine whether the interrogation occurs in a custodial context for purposes of *Miranda,* and "[e]ven a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest." *Stansbury,* 511 U.S. at 325, 114 S.Ct. at 1530. Accordingly, "an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." *Id.*

State v. Saltzman, 871 So.2d at 1088.

In the instant case, none of the defendant's statements amounts to a confession of guilt. Each statement is in fact an exculpatory account of the incident, attributing responsibility for the incident to a third party the defendant described to the police. As an initial matter, the State submits that the voluntary nature of each of these statements is evidenced by the fact that it is exculpatory. An exculpatory statement suggests that it is voluntarily given. *State v. Cousan,* 94-2503 (La. 11-25-96), 684 So.2d 382.

Of significance, *Miranda* warnings are not required when officers conduct preliminary, non-custodial, on-the-scene questioning to determine whether a crime has been committed, unless the accused is subjected to arrest or a significant restraint short of formal arrest. *State v. Manning,* 03-1982 (La. 10/19/04), 885 So.2d 1044,1073. The State submits that the defendant's statements to Deputy Burgess fall into this category of questioning, as Deputy Burgess was the first member of law enforcement to arrive on the scene following the defendant's 911 call. Deputy Burgess testified that his initial concern was the safety of the reported rape victim, and to determine what was happening. (R. 4, p. 961). Once the defendant led Deputy Burgess to L.H., Deputy Burgess obtained information regarding the incident from them which he relayed to assisting units so that they could attempt to locate the alleged perpetrators in the area. (R. 4, p. 996). During this time, the defendant made oral statements to him indicating that L.H. had been raped by a stranger on the side lawn of the residence. Deputy Burgess did not have any reason to doubt the defendant's story at that time (R. 4, p. 973). Thus, the State submits that the trial court properly denied the defendant's motion to suppress this statement.

As additional units arrived on the scene to assist in the investigation, Det. O'Cull was assigned to take a statement from the defendant. Det. O'Cull testified that he did not *Mirandize* the defendant before taking this statement, and that the he interviewed the defendant as a complainant and a witness. (R. 4, pp. 979, 985). The

defendant voluntarily cooperated in giving this interview, which took place at the defendant's dining room table and was tape recorded. (R. 4, p. 980).[41] The defendant was not under arrest and was free to leave if he so desired. (R. 4, p. 984). Det. O'Cull testified that if anything had occurred during the taking of the statement that would have led him to believe that the defendant was anything other than a witness, he would have stopped the statement and *Mirandized* the defendant before proceeding with the statement. (R. 4, p. 985). As the record reflects that this statement was freely and voluntarily given, and was not the product of a custodial interrogation, the State submits that the trial court properly denied the motion to suppress this statement.

The State submits that the trial court also properly denied the motion to suppress the defendant's statements to Det. Mike Hullihan, as his statements were voluntarily made and not the result of a custodial interrogation. Det. Hullihan testified at trial that on March 2, 1998, the defendant willingly agreed to accompany him and Lt. Snow from Children's Hospital to the detective bureau to provide additional information about the incident. (R. 19, p.4596). The defendant not under arrest and was free to leave. (R. 4, pp. 995, 1001).

Det. Hullihan acknowledged that a family member had told him that when asked, the victim had acknowledged that the defendant was the perpetrator. (R. 4, p. 998). However, Det. Hullihan said that this information had not been verified as accurate, and he did not consider the defendant to be a suspect at that time. (R. 994). Det. Hullihan advised the defendant of his *Miranda* rights and executed a waiver of rights form with the defendant prior to discussing this incident with him as a precaution. (R. 4, p. 994).

At the trial in this matter, the State introduced State's exhibit 24, the waiver of rights form executed by the defendant, indicating that he understood his rights and wished to waive them. Thus, the record also reflects that the defendant's statements to Det. Hullihan were made after the defendant had been advised of his rights as per *Miranda* and he had voluntarily waived his rights and agreed to give a statement. The trial court did not err in denying the motion to suppress this statement.

On March 3, 1998, the defendant made a statement to Det. Florida Bradstreet. Also present, were Det. Kelly Jones and Lt. Antoinette Ulmer on the night of March 3, 1998. (R. 5, p. 1030). The defendant was not *Mirandized* prior to this statement, however he was not under arrest or otherwise in custody at the time of this statement. (R. 5, pp. 1019, 1035). The defendant voluntarily cooperated with deputies to provide this statement and was free to leave afterwards.

Of significance, Det. Jones testified that the defendant was interviewed as a witness, not as a suspect. (R. 5, p. 1019). Earlier, the defendant had voluntarily accompanied deputies to stores to look at bicycles. (R. 5, p. 1036-1037). The purpose of the taped statement was to document his identification of a bicycle. (R. 5, p. 1057). The trial court did not err in denying the motion to suppress this voluntary, non-custodial statement.

On March 4, 1998 at 6:45 p.m., Sgt. Darren Monie took a statement from the defendant after advising him of his rights from a rights of arrestee form. (R. 4, p. 1005; R. 19, p. 4643-4645; S-35). The contents of this exculpatory statement are discussed in the facts, supra. The State submits that the trial court did not err in denying

---

[41] The content of this statement is summarized in the statement of facts, supra.

the defendant's motion to suppress this statement, as the defendant was not in custody, and his statement was voluntarily made after being advised of and waiving his rights.[42]

B. Motion to suppress evidence.

The defendant contends that the trial court erred in denying the defendant's motion to suppress the following evidence seized from the victim's bedroom on March 2, 1998: the bloodstained cargo blanket upon which Deputy Burgess observed the victim lying; the towel he saw covering her; the Pocahontas t-shirt she was wearing; and the victim's black shorts and Lion King panties which were lying on the bed beside her. The State submits that this evidence was properly seized without a warrant. Deputy Burgess observed this evidence in plain view in the victim's bedroom after the defendant admitted him to the residence and led him to the room. The fact that Deputy Burgess summoned a crime scene technician to the residence to recover these items, who seized them while officers were still present on the scene a short time after the victim was transported from the scene for treatment does not require suppression of this evidence. This claim has no merit.

Under the plain view doctrine, if police are lawfully in a position from which they view an object that has an incriminating nature that is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. *State v. Leger*, 05-0011 (La. 7/ 10/06) 936 So.2d 108 (La. 7/10/06); citing *Horton v. California,* 496 U.S. 128, 136-137, 110 S.Ct. 2301, 2308, 110 L.Ed.2d 112 (1990). In the instant case, the defendant, who was the owner of the residence called 911 to report that the victim had been raped and to request assistance. When Deputy Burgess arrived, the defendant led him to the victim's bedroom where Deputy Burgess observed the complained of items in plain view. The victim was covered by the towel, and the defendant advised Deputy Burgess that the nearby clothing was worn by the victim when she was attacked and that he had used the blanket to carry the victim inside after she was raped. Thus, Deputy Burgess was lawfully in a position to view these objects. While the presence of these objects was not immediately incriminating to the defendant, their evidentiary significance and the fact that physical evidence on these items might identify the perpetrator of this crime was readily apparent.

Of significance, the defendant, who was the owner of the residence, called 911, reported that the victim had been raped by two men, and requested assistance. By his voluntary actions, the defendant indicated his interest in the officers conducting an investigation on the scene. He admitted them to the residence, led them to the victim, and disclaimed culpability by making voluntary statements to officers and emergency workers upon the scene which indicated that the victim was raped by a male who left the scene on a bicycle. Thus, the defendant significantly indicated that his expectation of privacy had yielded to his interest in apprehending his step-daughter's rapist. *See, State v. Brady*, 90-2415 (La. 9/9/91), 585 So.2d 524.

Thus, the State submits that the trial court properly denied the defendant's motion to suppress this evidence.[43]

---

[42] Of significance, it was not until March 4, 1998 that deputies learned the defendant asked Mr. Arguello how to get blood out of the carpet, information that Det. Jones testified shifted the focus of the investigation. (R. 22, pp. 5328; R. 19, pp. 4739-4740).

[43] For this reason the State submits that the defendant's (unbriefed) claim raised in a footnote on page 80 of his brief, that the consent to search and four subsequent search warrants were fruits of this allegedly poisonous tree, has no merit and will not be addressed further herein.

XVII THE TRIAL COURT DID NOT ERR IN OVERRULING DEFENSE OBJECTIONS TO GUILT PHASE JURY INSTRUCTIONS. (Assignments 63-66).

A. Claim that the trial court erroneously instructed the jury not to go beyond the evidence to acquit/ Denial of proposed second jury instruction.

In his sixty-third assignment of error, the defendant contends that the trial court erroneously instructed the jury not to go beyond the evidence to **acquit**, citing *State v. McDaniel*, 410 So.2d 754, 755-56 (La. 1982). In argument, however, the petitioner contends that the trial court's instruction failed to advise the jury that it could not go beyond the evidence to **convict**. Specifically, the defendant challenges the following jury instruction:

> 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. That is, you must not go beyond the evidence to find facts or circumstances creating doubts, but you must restrict yourselves to the evidence that you heard on the trial of this case, or the lack of evidence.

(R. 24, p. 5898).

As an initial matter, the State submits that the defendant failed to preserve the claim that the above instruction erroneously prohibited the jury from going beyond the evidence to acquit, as he objected only to the omission from the instruction of language advising the jury that it could not go beyond the evidence to convict. (R. 4, p. 764). La. C.Cr.P. art. 841.[44] With regard to the omission from this instruction of language advising the jury that it could not go beyond the evidence to convict, the State submits that the trial court did not err in denying the defendant's *Second Objection to Court's Jury Instructions and Proposed Substitution.*

On August 13, 2003, petitioner filed written requests for special jury instructions. Petitioner contended that the above instruction ignored ". . .the duty of the jury not to go beyond the evidence to find factors on which to base a conviction." (R. 4, p. 764). The defendant requested that the trial court's instruction be substituted with the following proposed instruction:

> You are prohibited by law and your oath from going beyond the evidence to seek doubts upon which to acquit the defendant, or so seek factors on which to convict him, but you must confine yourselves strictly to a dispassionate consideration of the testimony given upon the trial. You must not resort to extraneous facts and circumstances in reaching your verdict. That is, you must not go beyond the evidence to find facts or circumstances on which to base a verdict, but you must restrict yourselves to the evidence that you heard on the trial of this case, or the lack of evidence.

Id.

Pursuant to La.C.Cr.P. art. 807 , a requested special jury charge shall be given by the trial court if it does not require qualification, limitation or explanation, and if it is wholly correct and pertinent. The special charge need not be given if it is included in the general charge or in another special charge to be given. *State v. Segers,* 355 So.2d 238,

---

[44] Although the State submits that the defendant has failed to preserve this claim for review, the State would note that the defendant's reliance in brief upon *State v. McDaniel*, 410 So.2d 754, 755-56 (La. 1982), is misplaced. In *McDaniel*, this Court found that reversal of a defendant's conviction was warranted where the trial court's instructions prohibited the jury from going beyond the evidence to seek for doubts upon which to acquit the defendant, admonished the jury to confine itself to the evidence presented at trial, and did not inform the jury that reasonable doubt may arise from the lack of evidence in the case. Unlike the charge in *McDaniel*, the trial judge in the instant case explicitly advised the jury that it could consider the lack of evidence. (R. 24, p. 5898).

244 (La.1978); *State v. Heath,* 513 So.2d 493, 499 (La.App. 2 Cir.1987), *writ denied,* 519 So.2d 141 (La.1988). Failure to give a requested jury instruction constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. *State v. Marse,* 365 So.2d 1319, 1322 (La.1978); La.C.Cr.P. art. 921.

Here, the trial court did not err in refusing to give the requested special instruction, as the trial court's general charge otherwise properly defined the term "evidence" for the jury and instructed it that it could not consider any evidence which was not admitted, or which it was instructed to disregard, or to which an objection was sustained. (R. 24, p. 5899). Thus, it is clear from the instructions as a whole that the trial court's general instructions were sufficient to inform the jury that it could not convict the defendant otherwise than upon the evidence presented at trial, and the defendant's claim has no merit.

B. <u>The reasonable doubt instruction was not improper.</u>

The defendant contends that the reasonable doubt instruction improperly contained an "articulation requirement" which narrowed the definition of reasonable doubt. The trial court instructed the jury that:

> Reasonable doubt is based upon reason and common sense and is present when, after you have carefully considered all of the evidence, you cannot say that you are convinced of the truth of the charge.

(R. Vol. 24, p. 5897). The State submits that this claim has no merit.

In support of his claim, the defendant cites *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 162 L.Ed.2d 339 (1990). In *Cage*, the Supreme Court held unconstitutional an instruction which "equated a reasonable doubt with a 'grave uncertainty' and 'actual substantial doubt.'" *Cage*, 111 S.Ct. At 329. The instruction in this case, which tracks verbatim the proposed charge on reasonable doubt in the Louisiana Judge's Criminal Bench Book, Vol. I, § 3.03 (1993), did not include any terms which would mislead the jury. Unlike the instruction in *Cage,* the trial judge's charge does not overstate the degree of reasonable doubt required by the Due Process Clause. In addition, according to the Supreme Court's re-examination of its reasonable doubt jurisprudence undertaken in *Victor v. Nebraska,* 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), and this Court's implementation of *Victor* in *State v. Smith,* 91-0749 (La.5/23/94), 637 So.2d 398, the instruction in the instant case did not allow the jury to convict without satisfying the reasonable doubt requirement.

C. <u>Instruction regarding burden of proof</u>

Finally, the defendant contends that the trial court erred in denying his request for special instruction regarding the number of witnesses. (R. Vol. 4, p. 766, R. 24, p. 5829-30). With regard to this issue, the trial court instructed the jury as follows:

> You are not bound to decide any fact because of the number of witnesses presented to you on that point. Witnesses are weighted and not counted. Your function is to determine the facts, and this is not done by counting noses. 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 State's burden of proof.

(R. Vol 24, p. 5901). The defendant's proposed instruction would have amended the final sentence of the instruction to read, "[t]he test is not which side brings the greater number of witnesses before you, or presents the greater quantity

of evidence, but rather, after evaluating the testimony and the evidence you are satisfied that the State has sustained its burden of proof." (R. 4, p. 766).

As discussed above, a special charge need not be given if it is included in the general charge or in another special charge to be given. La. C.Cr.P. art. 807. Here, the State submits that there is no merit to the defendant's contention that the instruction given by the trial court softened the State's obligation by presuming it would carry its burden of proof. Elsewhere, the trial court advised the jury that, "[t]he government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant." (R. Vol. 24, p. 5890). It also advised the jury that, "[a]s jurors, you alone shall determine the weight and credibility of the evidence." (R. Vol. 24, p. 5899). The trial court further advised the jury that, "[y]ou are the sole judges of the credibility of "believability" of each witness and the weight to be given to the witness' testimony." (R. 24, p. 5900). The trial court's instructions clearly advised the jury of its duty to determine the weight and credibility of the evidence and testimony, of the fact that the weight of the evidence was not to be determined simply by the number of witnesses, and that it must acquit the defendant unless the State proved the defendant guilty beyond a reasonable doubt. Thus the trial court did not err in denying the defendant's motion for substituted jury instruction.

XVIII. DENIAL OF THE DEFENDANT'S MOTION FOR SPECIAL PENALTY PHASE JURY INSTRUCTIONS. (Assignment 67)

Pursuant to La.C.Cr.P. art. 807, a requested special jury charge shall be given by the trial court if it does not require qualification, limitation or explanation, and if it is wholly correct and pertinent. The special charge need not be given if it is included in the general charge or in another special charge to be given. *State v. Segers,* 355 So.2d 238, 244 (La.1978); *State v. Heath,* 513 So.2d 493, 499 (La.App. 2 Cir.1987), *writ denied,* 519 So.2d 141 (La.1988). Failure to give a requested jury instruction constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. *State v. Marse,* 365 So.2d 1319, 1322 (La.1978); La.C.Cr.P. art. 921.

In his sixty-seventh assignment of error, the defendant contends that the trial court erred in denying the defendant's written requests for specific instructions on mitigating circumstances in violation of the Eighth and Fourteenth Amendments to the Unites States Constitution. In argument, the defendant references the denial of seven requested penalty phase instructions. (R.4, p. 812-819). However, the trial court included the defendant's first requested special charge in its instructions to the jury, therefore the defendant is incorrect in stating that this instruction was denied. (R. 4, p. 812; Supp. Vol., p. 18). The State would also note that the defendant has failed to brief his claim with regard to the sixth requested penalty phase instruction. (R. 4, p. 817). As the defendant has offered no argument in support of his claim that the trial court erred in denying his sixth requested instruction, and as the record reflects that the trial court read an almost identical instruction to the jury, the State submits that the defendant has failed to demonstrate that he was prejudiced by the trial court's failure to read his sixth requested instruction exactly as written.

Finally, the State would note that the denial of the defendant's request for an instruction regarding the prohibition of executing mentally retarded is discussed with regard to the defendant's fifth claim, supra.

A. **Second, Third, and Fourth Requested Special Charges**

Defendant contends that the trial court erred in failing to give special jury charges instructing the jurors that they were never required to return a death sentence (second proposed charge), that they were required to consider mitigating evidence individually and that defendant did not have to prove mitigating circumstances beyond a reasonable doubt (third and fourth proposed charges).

In a motion entitled *Defendant's Proposed Penalty Phase Jury Instruction No. 2*, the defendant requested a special charge on what has elsewhere been referred to as the role of "grace" in Louisiana's capital sentencing scheme.[45] This Court found no error in the denial of a request for a special jury charge on this issue in *State v. Hoffman*, 98-KA-3118 (La. 4/11/00) 768 So.2d 542, 572-573, stating as follows:

> The court did not give either the defendant's or its own charge on the role of "grace" in Louisiana's capital sentencing scheme; i.e., that even without any evidence of mitigating circumstances, and in the face of the State's proof of one or more aggravating circumstances, the jury remains free to return with a life sentence. Although the court has approved such an instruction, *State Martin*, 550 So.2d 568, 573-74 (La. 1989); *State v. Watson*, 449 So.2d 1321, 1327-28 (La. 1984), it has not required it in the absence of an explicit request for clarification from the jury. *Martin*, 550 So.2d at 574. Additionally, the Benchbook accordingly does not include the charge in its pattern. This assignment is without merit.

Hoffman, 768 So.2d at 572-573.

Additionally, the defendant's requested second special charge contains a reference to a potential finding by the jury that the aggravating circumstances in the case outweigh the mitigating circumstances. (R. 4, p. 813). In Louisiana, aggravating factors are not to be weighed against mitigating circumstance found by the jury. La. C.Cr.P. art. 905.3. Thus, the defendant's second requested charge was not wholly correct or pertinent and would have required qualification, limitation, or explanation. Defendant's special requested charge was properly denied for this reason as well. La. C.Cr.P. art. 807.

The defendant also contends that the trial court erred in denying his third and fourth requested special charges, which respectively stated as follows:

> Patrick Kennedy does not have to prove the existence of a mitigating circumstance beyond a reasonable doubt. Rather, you must find a mitigating circumstance to exist if you find any evidence to support it.
>
> Furthermore, each individual juror must consider mitigation. Therefore, even if all eleven other jurors find that no mitigating circumstance exists, if you believe that it does exist, you must find that mitigating circumstance and consider it in your deliberations.
> (R. Vol. 4, p. 814).
>
> . . . . .
>
> Each individual juror must consider mitigation in determining the appropriate

---

[45] In his second requested charge, the defendant proposed that the jury be instructed as follows:

> 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. *State v. Myles*, 389 So.2d 12 (La. 1980).

(R. Vol. 4, p. 813).

> penalty in this case. Therefore, even 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. *Mills v. Maryland*, 486 U.S. 367 (1988). (R. Vol. 4, p. 815).

The defendant claims that his third and fourth requested charges would have instructed jurors that the defendant did not have the burden to prove mitigating circumstances, and that they should consider mitigating factors individually, citing *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

This Court has noted that "[t]he capital sentencing procedure does not establish any presumption or burdens of proof with respect to mitigating circumstances." *State v. Jones*, 474 So.2d 919, 932 (La. 1985), *cert. denied*, 476 U.S. 1178, 106 S.Ct. 2906, 90 L.Ed.2d 992 (1986); *see also State v. Sonnier*, 402 So.2d 650, 657 (La. 1981), 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983).

In *State v. Howard,* 98-0064 (La. 4/23/99),751 So.2d 783, this Court discussed the decision in *Mills* as follows:

> In *Mills,* the Court found that instructions that emphasized the need for unanimity in decision making could have led jurors to believe that unanimity among the jury was required to find the existence of a mitigating circumstance. It was not made clear to the jury that any juror alone could find the presence of a mitigating factor and vote for life, thus preventing a death sentence. The Court vacated Mills' sentence on the ground that one or more of the jurors might have been precluded from considering mitigating factors. *Id.*, 486 U.S. at 384, 108 S.Ct. At 1870.
>
> . . . .
>
> In *Mills*, the Court was analyzing Maryland's three-part sentencing scheme. In part one, the jury found whether any aggravating circumstances existed. In part two, the jury found whether any mitigating circumstances existed. In the final part, the jury weighed the aggravating against the mitigating circumstances. *Mills*, 486 U.S. at 384-394, 108 S.Ct. At 1870-1874. The error in the charge occurred because the trial judge repeatedly instructed jurors that decisions had to be unanimous without stating that the unanimity requirement was inapplicable to the second part consideration of mitigating circumstances.

State v. Howard, 751 So.2d at 815.

The instructions in the instant case are distinguishable from *Mills*. A fair reading of the trial court's instructions at the close of the penalty phase reveals that the judge instructed the jurors that, as to the aggravating circumstances, any finding must be unanimous and beyond a reasonable doubt. (Supp. pp. 17, l. 24 - p. 18, l. 2). The instruction on mitigation did not include such a burden. (Supp. pp. 18-19). The broad language used by the judge, particularly as contrasted with the rigid standards pronounced with reference to aggravating circumstances adequately guided the jury on the way in which mitigation evidence is to be considered. *See, State v. Howard*, 751 So.2d at 815. In addition, the defendant makes no showing that jurors mistakenly applied the wrong burden in their deliberations as to mitigation.

Of significance, the trial court instructed the jury as follows:

> If you find beyond a reasonable doubt that an aggravating circumstance existed, you may consider imposing a sentence of death. The finding of an aggravating circumstance does not mean that you must impose the death penalty. If however you do not unanimously find that the statutory aggravating circumstance existed, the[n] life imprisonment without the benefit of parole, probation or suspension of sentence is the only sentence that may be imposed.
> Even if you find the existence of an aggravating circumstance, you shall also consider any mitigating circumstances before you decide that a sentence of death should be imposed.

(Supp. p. 17-18). The trial court then provided the jury with a list of statutory mitigating circumstances and explained that in addition to the specifically provided mitigating circumstances, "[y]ou must also consider any other relevant mitigating circumstance. You're not limited only t [sic] those mitigating circumstances which are defined. You may consider any other relevant circumstances which you feel should mitigate the severity of the sentence to be imposed." (Supp., p. 19). Finally, the trial court instructed the jurors not to "surrender you honest belief as to the weight and effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a decision." (Supp. p. 22).

Therefore, the State submits that the trial court did not err in denying the defendant's proposed third and fourth penalty phase jury instructions.

B. Fifth Proposed Instruction

In his fifth proposed special charge, the defendant requested that the jury be instructed as follows:

> 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. Vol. 4, p. 816). The defendant contends that the trial court erred in denying his motion for this special instruction, citing *State v. Hamilton*, 92-1919 (La. 9/5/96), 681 So.2d 1217, 1225.[46]

The defendant did not testify during either the guilt or penalty phases of the instant trial. At the end of the guilt phase of the trial in this matter, the judge charged the jury that the defendant was not required to testify and that no presumption of guilt or inference of any kind could be drawn from the fact that the defendant did not testify.[47] During the penalty phase, the judge instructed the jurors that they could "consider the evidence presented during the guilty determination trial." Under the circumstances, it is reasonable to conclude that the jurors applied the instruction from the guilt phase when the defendant did not testify. For this reason, the State submits that the defendant has not established that the trial court's failure to give the requested instruction resulted in a miscarriage of justice, prejudice

---

[46] The defendant's reliance upon this Court's decision in *Hamilton* appears to be misplaced. The issue presented in Hamilton was whether the prosecutor's reference to the defendant's lack of remorse constituted an indirect reference to the defendant's failure to testify in violation of La. C.Cr.P. art. 770(3). In the instant case, the defendant has not complained that the prosecutor referred to his failure to testify during the penalty phase either directly or indirectly.

[47] During the guilt phase of the trial, the trial court instructed the jury as follows:

> Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all and no inference may be drawn from the election of a defendant not to testify.

(R. 24, p. 5890)

> The defendant is not required to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify.

(R.. 24, p. 5901).

to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. *State v. Marse,* 365 So.2d 1319, 1322 (La.1978); La.C.Cr.P. art. 921.

XIX THE JURY IS NOT REQUIRED TO DETERMINE THAT DEATH IS THE APPROPRIATE PENALTY BEYOND A REASONABLE DOUBT. (Assignment 68).

In this assignment of error, the defendant appears to contend that his death sentence is invalid because the jury was not required to determine beyond a reasonable doubt that death was the appropriate penalty, citing *Ring v. Arizona*, 536 U.S. 584 (2002). As an initial matter, the State would note that the trial court instructed the jury in accordance with La. C.Cr. P. art. 905.3 as follows:

> [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 circumstances, determines that the sentence of death should be imposed.

The defendant did not object to the trial court's penalty phase instructions with regard to this issue, or otherwise raise this claim in the trial court in the proceedings leading to conviction. For this reason, the matter has therefore not been preserved for appellate review. La. C.Cr.P. art. 841.

Should this Court find the defendant's claim to be preserved for review, State would note that the defendant's contention that United States Supreme Court jurisprudence requires a jury to determine that death is the appropriate penalty beyond a reasonable doubt has no merit. In *Ring*, a jury deadlocked on premeditated murder but convicted the petitioner, Timothy Ring, of felony murder occurring during the course of an armed robbery. Under Arizona law, the petitioner could not be sentenced to death unless further findings were made by the presiding trial judge. Thereafter, the judge found sufficient aggravating factors to justify imposition of the death penalty, and one mitigating factor which would not warrant leniency. As such, the petitioner was sentenced to death. On review, the United States Supreme Court reversed the conviction and sentence and held that a sentencing judge, sitting without a jury, may not find an aggravating circumstance necessary for imposition of the death penalty. *Id.* at 609, 122 S.Ct. 2428.

Of significance, Louisiana's capital sentencing scheme commits the determination of the existence of aggravating circumstances necessary for the imposition of the death penalty to the jury and requires that the aggravating circumstances be proven beyond a reasonable doubt. La. C.Cr.P. art. 905.3. The State submits that the defendant's claim has no merit.

XX. CUMULATIVE ERROR CLAIM

The State has shown that the assignments of error urged by the defendant do not constitute error at all. Even were such error to exist, the State has shown that any such error was harmless. This Court has previously held that it is "unwilling to say that the cumulative effect of assignments of error lacking in merit warrants reversal of a conviction or sentence." *Strickland,* 94-0025 p. 51-52, 683 So.2d at 239; *Tart,* 93-0772 p. 55, 672 So.2d at 154; *State v. Sheppard,* 350 So.2d 615, 651 (La. 1977). Further, "the combined effect of the incidences complained -of, none of which amounts to reversible error, did not deprive this defendant of his right to a fair trial." *Robertson,* 97-0177 App. p.2; *State v. Copeland,* 530 So.2d 526, 544-545 (La. 1988), *cert denied,* 489 U.S.1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989). The Court must remember that "a defendant is not entitled to a perfect trial, only a fair one."

(Supp. p. 17-18). The trial court then provided the jury with a list of statutory mitigating circumstances and explained that in addition to the specifically provided mitigating circumstances, "[y]ou must also consider any other relevant mitigating circumstance. You're not limited only t [sic] those mitigating circumstances which are defined. You may consider any other relevant circumstances which you feel should mitigate the severity of the sentence to be imposed." (Supp., p. 19). Finally, the trial court instructed the jurors not to "surrender you honest belief as to the weight and effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a decision." (Supp. p. 22).

Therefore, the State submits that the trial court did not err in denying the defendant's proposed third and fourth penalty phase jury instructions.

B. Fifth Proposed Instruction

In his fifth proposed special charge, the defendant requested that the jury be instructed as follows:

> 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. Vol. 4, p. 816). The defendant contends that the trial court erred in denying his motion for this special instruction, citing *State v. Hamilton*, 92-1919 (La. 9/5/96), 681 So.2d 1217, 1225.[46]

The defendant did not testify during either the guilt or penalty phases of the instant trial. At the end of the guilt phase of the trial in this matter, the judge charged the jury that the defendant was not required to testify and that no presumption of guilt or inference of any kind could be drawn from the fact that the defendant did not testify.[47] During the penalty phase, the judge instructed the jurors that they could "consider the evidence presented during the guilty determination trial." Under the circumstances, it is reasonable to conclude that the jurors applied the instruction from the guilt phase when the defendant did not testify. For this reason, the State submits that the defendant has not established that the trial court's failure to give the requested instruction resulted in a miscarriage of justice, prejudice

---

[46] The defendant's reliance upon this Court's decision in *Hamilton* appears to be misplaced. The issue presented in Hamilton was whether the prosecutor's reference to the defendant's lack of remorse constituted an indirect reference to the defendant's failure to testify in violation of La. C.Cr.P. art. 770(3). In the instant case, the defendant has not complained that the prosecutor referred to his failure to testify during the penalty phase either directly or indirectly.

[47] During the guilt phase of the trial, the trial court instructed the jury as follows:

> Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all and no inference may be drawn from the election of a defendant not to testify.

(R. 24, p. 5890)

> The defendant is not required to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify.

(R.. 24, p. 5901).

Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968); *Strickland*, 94-0025 p. 52, 683 So.2d at 239; *State v. Martin,* 550 So.2d 568 (La. 1989). Patrick Kennedy received a constitutionally fair trial.

CONCLUSION

Based on the foregoing, the State respectfully requests this Honorable Court to affirm the conviction and sentence of the defendant.

Respectfully submitted,

JULIET CLARK, #23451
ASSISTANT DISTRICT ATTORNEY
200 DERBIGNY STREET
GRETNA, LOUISIANA 70053
(504) 368-1020

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing motion for extension of time upon opposing counsel, by placing a copy of the same in the United States Mail, this the 8th day of November, 2006, postage prepaid and properly addressed to:

Jelpi Picou, Jr. #18746
G. Benjamin Cohen
The Capital Appeals Project
636 Baronne Street
New Orleans, Louisiana 70113
(504) 529-5955

Martin A. Stern #17154
Robert Markle #22111
Adams and Reese, LLP
4500 One Shell Square

New Orleans, Louisiana 70139

(504) 581-3234

Juliet Clark, #23451
Assistant District Attorney
24th Judicial District
Parish of Jefferson