

In the Supreme Court of Louisiana

No. 05-KA-1981

State of Louisiana,

Plaintiff-Appellee

v.

Patrick Kennedy,

Defendant-Appellant.

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

THIS IS A DEATH PENALTY CASE

Reply Brief of Appellant Patrick Kennedy

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INTRODUCTION

On May 22, 2006, Mr. Kennedy filed an Original Brief on Appeal and, pursuant to Order of this Court, a Supplemental Brief addressing the unique constitutional issues involved in this case (hereinafter referred to as "*Original Brief*" and "*Supplemental Brief*"). On June 13, 2006, Appellant filed a supplemental letter brief pursuant to Louisiana Supreme Court Rule VII, 11.2 (hereinafter referred to as "*Letter Brief*"). On November 8, 2006, the State filed an Original Brief addressing claims presented by appellant, and sought by separate motion to amend and correct the record through the supplication of three re-transcribed pages of voir dire (hereinafter referred to as the "*State's Brief*" and the "*State's Motion to Supplement*"). Appellant counsel now files this Brief in Reply pursuant to La. Supreme Court Rule VII, 11.1, responding to a limited number of issues addressed by the State, and presenting an additional grounds for reversing Mr. Kennedy's conviction and death sentence.

I. THE DEATH PENALTY FOR THE NON-HOMICIDE CRIME OF CHILD-RAPE IS UNCONSTITUTIONAL.

In *Coker v Georgia*, 433 U.S. 584 (1977), the Supreme Court applied the two-prong test from previous cases that a punishment violates the Eighth Amendment if it (1) serves no legitimate purpose or (2) is out of proportion to the severity of the crime, and the Court added a third prong, (3) that the punishment must not be so severe as to be unacceptable to contemporary society. Mr. Kennedy shows here that the State's response on each of these prongs rings hollow, beginning as he did in his principal brief (and as did the Supreme Court in *Coker*) with the third prong.

A. *The national consensus is against the death penalty for non-homicide crimes.*

Louisiana stands virtually alone in providing the death penalty for rape, irrespective of the victim's age. This is of critical importance because if a punishment is

employing the death penalty for either juvenile or mentally retarded offenders, the Supreme Court held that where 20 states permitted the punishment in each of these circumstances, this reflected a national consensus against – not in favor – of the death penalty. See *Atkins v. Virginia*, 536 U.S. 304, __ (2002) and *Roper v. Simmons*, 543 U.S. 551, 564-65 (2005), respectively. Put another way, where 60% of the states did not allow the death penalty, it was found unacceptable to contemporary society and, therefore, unconstitutional. *Id.* In this case, where 92% of the states do not allow the death penalty for rape, no matter how young the victim, it is even more apparent that the death penalty does not survive scrutiny.

Realizing that the death penalty for child-rape fails this prong of the *Coker* test, the State is ultimately relegated to making the same argument it made in *State v. Wilson*, 96-1392 (La. 12/13/96), 685 So.2d 1063, *i.e.*, that even though the national consensus is overwhelmingly against the death penalty, “the trend in this respect” is in its favor.² *State’s Br.* at 24. But this ignores the fact that when this Court decided *Wilson*, it correctly noted, “Louisiana is the only state that presently has a law in effect that provides for the death penalty for the rape of a child less than twelve,” *Wilson*, 685 So.2d at 1068, and this was already 24 years after the death penalty had been invalidated in *Furman v. Georgia*, 408 U.S. 238 (1972). The intervening decade since *Wilson* has not produced this anticipated trend toward the expansion of the death penalty for non-homicide offenses.³

² The State erroneously refers to *State v. Wilson* throughout its brief as *State v. Williams*.

³ The State’s argument also ignores the fact that even as to the offense of homicide, the national trend is against the death penalty. As reported in a article just weeks ago regarding a legislative panel’s recommendation to abolish the death penalty in New Jersey, in recent years eleven states have imposed a moratorium on the death penalty, since 1999 the number of executions has declined by nearly half, and a Gallup poll in 2006 reflects that the death penalty is no longer supported by a majority of Americans. See *New York Times*, Laura Mansnerus, “Panel Seeks End to Death penalty for New Jersey,” January 3, 2007. The New Jersey legislative panel itself concluded that the death penalty “is inconsistent with evolving standards of decency.” See <http://www.njleg.state.nj.us/committees/dpsc/final.pdf>. If the national trend is against the death penalty for homicide, it follows *a fortiori* that it is also against the death penalty for non-homicide offenses.

Moreover, while neither side in *Wilson* could prove or disprove what would happen next, at this point no crystal ball is needed. More than ten years have passed since *Wilson* and the record is there for all to see: Contrary to the State's prediction, Louisiana has not been the first of a wave of states to adopt the death penalty for this offense, but is instead still well outside the mainstream.⁴ As measured by "objective evidence of the country's present judgment," the death penalty for this offense is not acceptable to contemporary society, and must therefore be invalidated under the Eighth Amendment. *Coker*, 433 U.S. at 593; see also *Atkins*, 536 U.S. at 314-315, and *Roper v. Simmons*, 543 U.S. at 567.⁵

B. The death penalty is not proportionate to a non-homicide offense.

The State's response to another prong of the *Coker* test – whether the penalty is proportionate to the crime – is equally lacking. As Mr. Kennedy showed, the taking of a person's life is proportionate when he has himself taken a life, but, by definition the taking of a life cannot be considered proportionate to any other crime. In its brief, apparently realizing this to be self-evident, the State does not respond to the lack of proportionality, but instead in the very few sentences it devotes to this prong, it

⁴ When one looks outside the United States, Louisiana is even more isolated in providing the death penalty for a non-homicide crime, with virtually the entire civilized world deploring it. Indeed, it is telling that just weeks ago, in response to the execution of one of the most evil mass murderers in history, most of the world felt it necessary to temper its support for his punishment with its condemnation of the death penalty. See New York Times, Alan Cowell, "Around the World, Unease and Criticism of Penalty," December 31, 2006. ("Mainstream middle-class sentiment in Europe now regards the death penalty as being as ethically tainted as the crimes that produced the sentence.") If this Court allows the death penalty for an individual who has not even taken a life, it will find not find company with a single western democracy, but rather only with countries such as North Korea, Iran, and Uzbekistan. See <http://web.amnesty.org/pages/deathpenalty-countries-eng>.

⁵ Nor can the jury verdict imposed in this case provide evidence of the society's contemporary conceptions of decency given the trial court's exclusion of jurors who believed in the death penalty but disapproved of imposing such a sentence in a non-homicide offense. See Appellant's *Original Brief*, Issue XIV (B); *State's Brief* pg. 70. Dissenting from *Atkins v. Virginia*, Justices Scalia, along with Justice Thomas and Chief Justice Rhenquist, observed that "the work product of legislatures and sentencing jury determinations -- ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment." *Atkins v. Virginia*, 536 U.S. at 324 (*Scalia J. dissenting*). Such a measurement is impossible where all of those who find the sentence "indecent" are not allowed to sit on the jury making the assessment.

manages to say only that child-rape is a horrible crime. *State's Br.* at 24. But as horrible a crime as it may be, it is indisputably less so than homicide. The Supreme Court has already so held in *Coker*, stating, "[r]ape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life." 433 U.S. at 599-600. Moreover, in invalidating the death penalty for rape of a 16-year old girl, the Court left no room to argue that it could be considered proportionate to *any* rape: "We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.* at 592. In *Buford*, *supra*, 403 So. 2d 943, the Florida Supreme Court agreed, finding that *Coker* compelled the conclusion that the death penalty is disproportionate to rape, no matter the victim's age.

The State can choose to ignore all this, but it cannot obscure the simple fact that its taking of a life can only be proportionate to the defendant's taking of a life. On this separate and independent basis, the death penalty for rape is unconstitutional, no matter the victim's age.

C. *The death penalty for a non-homicide crime serves no legitimate purpose.*

Here, too, the State chooses to ignore Mr. Kennedy's arguments. Mr. Kennedy provided empirical evidence that Louisiana has seen no deterrent effect from providing the death penalty for child-rape. Angela D. West, *Death as Deterrent or Prosecutorial Tool? Examining the Impact of Louisiana's Child Rape Law*, 13 CRIM. JUST. POL'Y REV. 156, 159 (2002). Without a demonstrated deterrent effect, the death penalty serves no legitimate purpose. The State offers no response whatsoever.⁶

⁶The legislative commission proposing the repeal of New Jersey's death penalty recently concluded that even

Similarly, Mr. Kennedy showed that to allow the death penalty for child-rape would only encourage offenders to murder their victims. The State suggests that this is not true because murder is punishable by death. But the State is missing the point. If the penalty is the same for child-rape as it is for murder, then an offender who perpetrates a child-rape has an incentive to murder his victim so as to silence a witness, and he has no disincentive, since it will not expose him to greater punishment. The State has not answered this argument.⁷

Mr. Kennedy also showed that executing a defendant for this offense can cause great future pain to the victim, especially if, as is often the case, she and her assailant are related. The State responds that the child is an innocent victim. But again the State misses the point. Unlike adult victims, who can decide for themselves whether or not they want their assailant to be executed, a young child is not capable of making this decision. To force this decision upon a young child saddles her with a burden she did not choose to carry, an especially heavy burden if her assailant is a family member, and it sends her the message that her violation was so horrible that recovery is impossible.⁸

Finally, Mr. Kennedy showed empirical evidence that the rate of wrongful conviction for rape exceeds that for any other crime and, therefore, to permit the death penalty for rape would lead to executing innocent defendants. Rob Hall, RAPE IN

as to the offense of homicide, there is no evidence that capital punishment serves any legitimate purpose. The commission also found that while this true, the death penalty actually costs more than life imprisonment without the possibility of parole. See n. 3, *supra*, and <http://www.njleg.state.nj.us/committees/dpsc/final.pdf>.

⁷ This point may have been lost on the State, but it has not been lost on other supporters of the death penalty. In explaining his opposition to the enactment of death penalty statutes for child-rape, Michael Rushford of the pro-death penalty Criminal Justice Legal Foundation explained, "It's like this. If you get a death sentence for raping a little girl, and you get a death sentence for raping a little girl and killing a little girl, and the only witness to the crime is the little girl, why not kill them all?" *San Francisco Chronicle*, Debra J. Saunders column, June 18, 2006.

⁸ Again, this point has not been lost on other death penalty supporters. One such newspaper columnist recently explained, "America's laws should not send a message that the victims of sexual assaults have been harmed irrevocably, as murder victims are. No victim survives murder. Rape presents horrific trauma, however, over time, most victims -- even child victims -- can overcome the pain and sense of violation. I don't want laws that tell child victims they have experienced something as damaging as murder. They've been hurt enough." *San Francisco Chronicle*, Debra J. Saunders column, June 18, 2006.

AMERICA 105 (1995); see also Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & Criminology 523, 531 (2006) (noting that roughly 36% of exonerated innocents were wrongfully convicted of rape and that "the recent spike in rape exonerations . . . are the tip of an iceberg").

Mr. Kennedy further showed, citing *Atkins*, 536 U.S. at 321, that this risk of executing innocent individuals, in that case mentally retarded people, is a basis to invalidate the death penalty. In response, the State argues that defendants charged with child-rape are not like mentally retarded defendants, who cannot assist in their own defense. Yet again the State misses the point. *Atkins* is relevant not because of any similarity in the two types of defendants, but rather because both, for different reasons, are more susceptible to wrongful conviction, and this is a basis to invalidate the death penalty.

The State does not answer any of these arguments because it cannot. As the overwhelming number of states has concluded, permitting the death penalty for child-rape serves no legitimate interest. On this third and separate independent prong, the death penalty does not pass constitutional muster.

II. EVEN ASSUMING SOME STATUTORY SCHEME PROVIDING THE DEATH PENALTY FOR CHILD-RAPE COULD PASS MUSTER, LOUISIANA'S DOES NOT.

In 1972, the Supreme Court invalidated almost every death penalty statute in the nation, explaining: "We deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws, no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12." *Furman v. Georgia*, 408 U.S. 238, 253 (1972). Since *Furman*, in determining whether newly enacted capital sentencing schemes pass muster, the Supreme Court has determined that they "must genuinely narrow the class of persons eligible for the death

penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of [the same offense].” *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

Louisiana’s scheme fails this test. Neither the statute setting forth the elements of the crime, La. R.S. 14:42, nor the sentencing statute setting forth the aggravating factors, La. C.Cr.P. art. 905.4, narrows a small group of child-rapists who should be executed from a bigger group who should not be. On the contrary, La. R.S. 14:42 defines every rape of a child under twelve as an aggravated rape; nothing more is required. Similarly, because C.Cr.P. art. 905.4 was originally intended to provide aggravating factors for murder, the only aggravating factor that could possibly apply to child-rape is that the victim be a child, which in no way narrows which subclass of child-rapists should be executed from those who should not be. Thus, under Louisiana’s statutory scheme, a jury convicting a defendant of the rape of a child may, in *every* instance, sentence him to death. Such a system violates the mandate of *Furman* and its progeny that there be a “meaningful basis for distinguishing the few cases in which [the death sentence] is imposed from the many cases in which it not.” *Furman v. Georgia*, 408 U.S. at 313 (1972)(White, J. concurring).

In response, the State makes the same argument that it did in *Wilson*, which, Mr. Kennedy respectfully submits, this Court erred in adopting. In particular, the State argues that the legislature can perform the required narrowing either in defining the elements of the crime or in providing aggravating circumstances in a sentencing statute. Moreover, citing *Lowenfield v. Phelps*, 484 U.S. 231 (1988), the State argues that the fact that the narrowing may be repeated in both does not invalidate the scheme because either is enough. *State’s Br.* at 27.

Mr. Kennedy has no quarrel with this statement of the law; it simply has no application here. The problem with the application of Louisiana’s sentencing

This conclusion is reinforced upon considering the underlying policy for the required narrowing. "The source of this requirement is the paramount need to 'make rationally reviewable the process for imposing a sentence of death.'" *Arave v. Creech*, 507 U.S. 463 (1993), quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Here, it is impossible for this Court to rationally review the jury's decision to execute Mr. Kennedy, as opposed to others who commit child-rape, because the jury was given no guidance whatsoever to distinguish which child-rapists should be executed from those who should not be. Unless such a review is possible, a death sentence must be reversed. *Id.*

Accordingly, even if this Court does not hold the death penalty unconstitutional *per se* for the non-homicide offense of child-rape, Louisiana's statutory scheme as applied in this instance must be declared unconstitutional, leaving the legislature free, if it wishes, to reenact a scheme that guides the jury in narrowing the death-eligible class, those guilty of child-rape, to a subclass of child-rapists who deserve the ultimate punishment – death.

III. THE STATE'S DELAYED DISCLOSURE OF FAVORABLE EVIDENCE WAS PREJUDICIAL TO THE DEFENSE AND RESULTED IN A CONVICTION AND SENTENCE IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

Mr. Kennedy initially asserted in Issue II, Assignments of Error 4-7, that the

State's delayed disclosure of discoverable evidence warranted reversal and conviction.

The defense noted a number of items, the disclosure of which was significantly delayed:

- ⇒ DNA records and testing from the Connecticut Crime Laboratory which completely contradicted the State's **certified** assertions that forensic testing **identified** Mr. Kennedy as the perpetrator.
- ⇒ The videotape of Lavelle Hammond taken by OCS Social Workers on which she asserted that her step-father had nothing to do with her injuries, and identified two separate teenage men as the perpetrators;
- ⇒ Telephone records secured by the State from Mr. Kennedy's residence that indicate that no telephone calls were made to "carpet cleaners" on the date of the rape prior to the notification of the authorities.

The *State's Brief* does not contest the late disclosure of this information or suggest that this information was not exculpatory. Rather, the *State's Brief* asserts that the five year pre-trial detention of Mr. Kennedy ameliorated the prejudicial effect. But that lengthy pre-trial detention did not ameliorate the prejudice, but rather exacerbated it.

The combination of the State's false claim that Mr. Kennedy was identified by the scientific testing, and the State's delay in disclosing the test reports that rebutted that claim, or even the physical evidence to disprove it, resulted in a deprivation of due process – as Mr. Kennedy languished in prison until the State was ready to proceed to trial.¹¹ As the trial court observed: "This Defendant does not deserve to languish in prison until the State decides it's ready to move its case." R. 1113. But languish until the State was prepared to proceed, Mr. Kennedy did.

A. *The State Does Not Contest That Favorable or Exculpatory Evidence Was Suppressed Or that Delayed Disclosure Occurred.*

In terms of the suppression of the Connecticut Crime Laboratory, the *State's Brief* does not contest that it was exculpatory, and that it should have been disclosed. The *State's Brief*, as well, concurs that the delayed disclosure of exculpatory information constitutes a due process violation. The *State's Brief* merely claims that the DNA report withheld until the middle of trial does not constitute reversible error because it was not *too exculpatory*; the *State's Brief* claims that the report was not that material because the report merely indicated that neither Mr. Kennedy's nor Lavelle Hammond's DNA

¹¹ Well prior to trial, the defense again moved for disclosure of blood spatter reports and all scientific test results. See *Motion for Production of Reports*, filed September 12, 2001. R. 412. The matter ultimately came for a show-cause hearing on Thursday, September 20, 2001, where the trial prosecutor stated: "I have not yet had a chance to check with Dr. Lee in the Connecticut State Police, as well as Lt. Buras to determine whether or not any reports were generated." R. 1880. The trial court again specifically ordered the State to disclose all test results by the following Tuesday, September 25, 2001. *Id.* Again this was not done. Then, at trial – over the objection of the defense – the State introduced the testimony of Dr. Henry Lee, on issues of blood spatter and as well on the significance of the apparent grass blade breakage rate where Mr. Kennedy indicated that the offense occurred. No report concerning this analysis was ever provided to the defense.

could be matched to the blood on the bottom of the mattress pad; *i.e.* that the tests were "inconclusive."

B. Mr. Kennedy's Defense Was Prejudiced By the Delayed Disclosure.

Mr. Kennedy's defense was significantly prejudiced by the delayed disclosure. Ultimately, the *State's Brief* does not contest that the delayed disclosure of favorable evidence constitutes a due process violation. Nor does the *State's Brief* contest that the prosecution delayed disclosing favorable evidence in this extraordinary capital case. Rather, the *State's Brief* merely suggests that it did not achieve too great an advantage from the delayed disclosure. Appellant suggests that in a case in which no forensic evidence tied the defendant to the offense, and where the sole inculpatory witness gave myriad inconsistent and exculpatory statements, the State's procurement of a delay in the proceedings for over eighteen months until it secured evidence sufficient to convict the defendant is a violation of due process.

Three separate harms arose from the delayed disclosure of evidence, including the denigration of Mr. Kennedy's right to compulsory process and to present a complete defense, the detention of Mr. Kennedy until such time as the State had evidence sufficient to proceed, and the impact on witness' accuracy and memory. These are addressed in detail below.

Ultimately, however, the *State's Brief* fails to respond to the emerging picture not just of a single inadvertent omission by the prosecutor, but at the least ambivalence by the State toward its discovery obligations. See R. 1379. When the State repeatedly indicated that it did not know whether information had been turned over to the defense, the trial court recalled the television program "Hogan's Hero's" and the "rather large German corporal in that program" who used to say "I know nothing." "Your words," the judge told the prosecutor, "remind me of his dialogue." R. 1379..

Given the gravity of the case at hand, and the impact the delay had on the truth-seeking function of the trial, it is of no comfort, in this unique of cases – where the State seeks to impose the death penalty for rape for the first time in fifty years -- for the State to suggest that these omissions were merely oversights rather than intentional acts of misconduct. See R. 4972 (“The State: . . . There was nothing intentionally being hidden15”).¹²

1. The Delayed Disclosure of Exculpatory Evidence Prevented Mr. Kennedy from Exercising his Right to A Complete Defense.

The delay in disclosing the July 22, 1998, Connecticut Crime Laboratory report prevented the defense from subpoenaing and securing the presence of Dr. Debra Messina, who apparently approved the production of the report at issue, and whom the State now blames for the non-disclosure of the favorable evidence. Mr. Kennedy is guaranteed the right to compulsory process and the right to present a defense. See *State v. Gremillion*, 542 So. 2d 1074, 1079 (La. 1989); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

In *State v. Mizell*, this Court reversed a conviction where the trial court failed to grant a recess in order for the defendant to secure the attendance of a witness, noting that the Court has “consistently held that the constitutional right to compulsory process for the attendance of witnesses is not to be trifled with. It is not a dead letter and must be enforced.” *State v. Mizell*, 341 So. 2d 385, 388 (La. 1976).

Here, the defense made clear that the delayed disclosure of the report changed its theory of defense – from one of ineptitude by the prosecution to that of corruption or bad-faith. It asked for a subpoena for the only witness that could confirm or provide

¹² Evidence of bad faith is unnecessary to make out a claim of due process violation. “*Brady*, we reiterate, 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.”” *Banks v. Dretke*, 540 U.S. 668 (2004) quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

evidence of that bad-faith. Dr. Messina was the only individual who could confirm or deny whether the results of the tests were provided to the State of Louisiana and withheld intentionally – an issue that became relevant mid-way through trial when the defense attempted to re-cast its theory of defense by arguing that the pressure to secure a conviction had led the State to cut investigative corners and corrupt the investigation.

The trial court's denial of a recess or continuance to secure her presence was independent constitutional error, violating the Sixth and Fourteenth Amendments to the United States Constitution, and requiring reversal of Mr. Kennedy's conviction and death sentence.

2. The Delayed Disclosure of Exculpatory Forced the Defense to Delay Proceeding to Trial Until the State Had Secured Sufficient Evidence to Proceed to Trial

The delayed disclosure of favorable evidence for over 18 months forced the defense to delay proceeding to trial until the State had gotten an inculpatory statement from Lavelle Hammond. The State makes the bald assertion that this is no prejudice at all because the defense would not have proceeded to trial prior to the victim's recantation of her initial and consistent account of the incident, because "it presumes that the defendant knew the victim would recant her earlier account of the incident and when she would do so." *State's Brief* at 32. Such a view makes the unusual presumption that Mr. Kennedy would have preferred to remain in custody facing capital charges, deprived of all liberty – a presumption belied by the *Motion for Speedy Trial* filed at Mr. Kennedy's behest by his retained counsel, and the repeated statements by Mr. Kennedy that he wanted to proceed to trial.

The *State's Brief* ignores, in this calculus, that the reason for the delay of trial – for the myriad pending discovery motions, the delay in resolving the *Motion to Suppress Statements*, and ultimately the testing of the evidence -- was the State's prior certified

claim that Mr. Kennedy was identified by the scientific results secured from the Connecticut Laboratory. As noted above, the State claimed at both the preliminary hearing and in its response to the Bill of Particulars, that it had identified Mr. Kennedy through scientific testing. Once the State made that allegation, no effective defense counsel could proceed to trial without 1) securing the actual forensic reports that formed the basis for that assertion and 2) conducting independent tests to assess the validity of those forensic reports. The *State's Brief* omits any explanation for this initial false allegation, and fails to address how this false allegation – combined with the delayed disclosure of exculpatory evidence – denied Mr. Kennedy the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

3. The Delay in Proceeding to Trial Distorted the Memories of Witnesses.

Moreover, the *State's Brief* fails entirely to address the impact that the delay of trial – caused by these myriad delays in disclosing favorable evidence – on the memory of witnesses and Mr. Kennedy's ability to effectively cross-examine those witnesses as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Indeed Carolyn Hammond Kennedy—who initially vigorously supported Mr. Kennedy's innocence—had almost total memory loss concerning much of the exculpatory information that she previously maintained.¹⁶ Similarly, Lavelle

¹⁶ See R. 5379 (can't remember when she met with Mr. Armato); R. 5380 (same); R. 5380 ("I don't remember the conversation but I remember us talking to you. . . . I don't remember, I remember talking to you, I remember your face, but I don't remember exactly what we talked about."); R. 5380 (doesn't remember Lavelle saying anything in her presence); R. 5381 ("I don't remember" whether Lavelle Hammond insisted on Mr. Kennedy's innocence); R. 5382 (doesn't remember Dr. McDermott); R. 5383 (doesn't remember whether she told defense counsel personally that someone besides Mr. Kennedy committed the rape); R. 5385 (can't remember telling Mr. Tucker that she was afraid that if she talked with defense counsel Lavelle would be taken away); id (can't remember refusing to talk to Mr. Tucker); id (can't remember telling anyone she was scared for the police to take her daughter); R. 5387 (doesn't remember talking to Manuel and Kathy Holmes regarding the removal of her daughter); R. 5388 (doesn't remember card from Lavelle Hammond to Patrick Kennedy); id (doesn't remember hearings in November of 1999); R. 5390 (doesn't remember whether she met with prosecutor Richard

Hammond—by the time of trial—apparently could not remember enough details of the ensuing events to permit real cross-examination.¹⁷

IV. THE TRIAL COURT ERRED IN REFUSING TO ASSESS THE COMPETENCY OF LAVELLE HAMMOND.

In his original Issue No. III, Assignments of Error 8-11, appellant argued that the trial court's refusal to assess Lavelle Hammond's competency violated Mr. Kennedy's rights to due process of law and a fair trial. The *State's Brief* suggests that this Court should uphold the conviction and death sentence because the trial court was in the best situation to assess the competence of the witness. See *State's Brief* at _____. This response fails to address the actual issue at stake — which was the trial court's *refusal to assess* the competency of Ms. Hammond — and in so doing it undermines the seriousness of the question at stake.

As this Court observed— in the context of the competency of a child witness in a capital rape prosecution -- over one hundred years ago:

[T]here is the obvious danger of basing the sentence for crime, especially of death, on the prattle of a child capable, as one of the authorities expresses it, of "being moulded like clay in the potter's hands" to repetition, or in the utterances of the child more advanced in years but not in understanding. 19 L. R., p. 608. The sentence for crime above, when the highest the law can interpose, should rest on a firmer basis than this record presents. 4 Blackstone, p. 214, quoted in 1 Phillips on Evidence, p. 20. In our view the voir dire examination should have excluded the child from the witness stand, and we feel constrained to sustain the exceptions with a view to another trial.

Bates just prior to Lavelle Hammond changing her story).

¹⁷ Despite the defense effort to cross-examine her, Ms. Lavelle Hammond could remember none of the salient details of her prior statements. See e.g. R. 5365-66 throughout which, Ms. Hammond responded no, to almost every significant question concerning her memory including, *inter alia*, "Do you remember Mr. Armato coming to see you about a year and a half later?"; "You don't remember telling him that somebody else did it?"; "Do you remember giving another statement that was videotaped besides the one that we just saw when it first happened?"; "You don't remember talking to another therapist and having her put you on videotape?"; "Do you remember Ms. Renee, she was one of the police officers on your case?"; Do you remember [lead detective] Ms. Kelly?". Indeed, by the time of trial, Ms. Hammond could not remember any of her initial exculpatory statements. R. 5267. Nor did she acknowledge remembering meeting with the prosecuting attorneys, R. 5269, or a card she had written to Mr. Kennedy while he was in jail. R. 5370.

State v. Washington, 22 So. 841, 843 (La. 1897). Unfortunately, in this instance – faced with a similar case in which the state sought to secure a death sentence based upon the testimony of a child witness – the trial court refused to assess the competence of Lavelle Hammond.

A. The State's Brief Errs in Suggesting that This Court Owes Deference to The Trial Court, As The Trial Court Refused to Assess Ms. Hammond's Competence to Testify

The *State's Brief* errs in suggesting that this Court owes deference to the trial court's assessment of Lavelle Hammond's competency. But what the State fails to grasp is that this Court cannot defer to an assessment that was never performed.¹⁸

The *State's Brief* claims that this Court should not review the legal issue of Ms. Hammond's competence because "the question of the competency of a person to be a witness is determined by the trial judge." *State's Brief* at 33-34 (observing that the trial court's determination "whether a child has sufficient understanding to testify is entitled to great weight.") But in cases such as this, where no competency assessment was ever performed, no such deference is warranted because the trial court did not have the "crucial advantage of seeing and hearing the child." *State v. Foy*, 439 So. 2d 433, 435 (La. 1983).¹⁹

This Court owes no deference to the lower court that refused to hear or assess the competency of Lavelle Hammond. The requirement that a finder of facts must hear the evidence offered by those whose life and liberty are at stake before ruling on issues

¹⁸ Appellant counsel acknowledges that there may be an emerging view in similar contexts to allow a conditional affirmance while remanding for a *nunc pro tunc* assessment of whether Ms. Hammond was competent to testify. See e.g. *State v. Snyder*, 750 So. 2d 832, 849 (La. 1999) (remanding for *nunc pro tunc* competency of defendant where none was made prior to trial). At the very least, such a remand is necessary in this case to determine whether Ms. Hammond's competence can be assessed.

¹⁹ Similarly, this Court cannot defer to a findings of a lower court from a hearing that never took place. *State v. Dykes*, 440 So. 2d 88, 92-93 (La. 1983) (reversing conviction where assessment of child's competence was not in the record because: "Very young children "repeat with phonographic precision the things that have been told them to say, be they true or false. Neither reason nor authority justifies the admission of such witnesses. . . .").

of deep significance to the accuracy and fairness of the proceedings “derives from deep-seated notions of fairness and human dignity.” See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). When the court refused to conduct a hearing to assess Ms. Hammond’s competence, it violated appellant’s most basic right to due process of law. *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir.1960) (“[I]t is basic to due process that an accused person have a fair opportunity to tell his story in a fair trial. . . . he is entitled to have his trial guided by a judge sensitive to the duty of protecting the accused’s constitutional rights in all cases.”).

The trial court abstained from assessing Ms. Hammond’s competence because the lower prosecutors implored the court to simply refer to Ms. Hammond’s prior testimony at a *Prieur* hearing on April 7, 2000, more than three years earlier. Given the defense request for an assessment of Lavelle Hammond’s competence, and the prevailing unanswered questions surrounding her ability to accurately and honestly recall events, the failure to hold such a hearing was error warranting reversal.

B. The State Incorrectly Suggests That the Question of Ms. Hammond’s Competence Was Resolved By Her Testimony Three Years Earlier Concerning the Difference Between “Truth and Falsehood.”

The *State’s Brief* erroneously suggests that reliance on the testimony at the prior April 7, 2000, *Prieur* hearing was sufficient to resolve the competency issue. The *State’s Brief* acknowledges that the trial court’s review of the prior testimony included the caveat 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.” *State’s Brief* at 34, citing Vol. 10, 2470.

The *State’s Brief*, however, fails to acknowledge that at this very April 7, 2000, hearing -- where Ms. Hammond’s competence was not assessed -- the trial court found her testimony incredible concerning myriad other allegations of rape:

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

R. 1279.²⁰ Indeed the testimony at the April 7, 2000, hearing undermines Ms.

Hammond's credibility rather than supports it.

C. The State Erroneously Argues that Lack of Memory is Irrelevant to the Issue of Competence

The *State's Brief* unsatisfactorily argues that the trial court was correct in ruling that Ms. Hammond's ability to remember was not relevant to competence. As troubling, the *State's Brief* suggests that memory or ability to recall an event was not a factor that a court *could* consider in assessing the competence of a child-witness. The Louisiana courts have made clear that memory is a relevant factor in assessing competence. See *State v. Arnaud*, 412 So. 2d 1013, 1018 (La. 1982) (finding child competent where his "memory of this event provided the time frame for the rest of his testimony."); *State v. Foy*, 439 So. 2d 433, 435 (La. 1983) (noting that witness' "ability to recall the events about which she testified" was a critical factor in assessing her competence); *State v. Skipper*, 387 So. 2d 592 (La. 1980) (same).

Ms. Hammond's lack of memory was an essential component of her mental state

²⁰ As noted in Appellant's *Original Brief*, there are other instances in which Ms. Hammond's testimony at the April 7, 2000, hearing undermined her competence to testify. For instance, Ms. Hammond insisted, at R. 1127, that she had never met Mr. Armato or Ms. Duponte before- although she had met with defense counsel, and conducted a videotaped interview. See also R. 1129. Of particular relevance, Ms. Hammond indicated that Kelly Jones was the first person that she told about the rape-even though her mother insisted that Ms. Hammond had spoken to her before she made a statement to Ms. Jones. R. 1232, 1240. Moreover, Ms. Hammond was under the false belief that Ms. Jones was a therapist not a police officer. R. 1130. These contradictions, along with the significant lacunae in her memory, gave the defense a legitimate interest in seeking to assess Ms. Hammond's competency prior to trial.

which undermined her competence to testify.

D. The State Erroneously Argues that Concerns About the Malleability of Memory or "Coaching" Are Irrelevant or Unpreserved.

The *State's Brief* suggests that concerns that Ms. Hammond's competence was undermined by "coaching or suggesting questioning" are either irrelevant or procedurally barred. See *State's Brief* at 35. As a constitutional matter, concerns about coaching or suggestive questioning cannot be procedurally barred based upon trial counsel's failure to raise them. See *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process. 'Ordinarily, we presume that public officials have properly discharged their official duties.'").

Moreover, a core component of the assessment of a child's competence concerns the malleability of a child's memory. *State v. Washington*, 22 So. 841, 843 (La. 1897) (noting the malleability of a child's memory is an essential reason to assess her competence); *State v. Dykes*, 440 So. 2d 88, 92-93 (La. 1983) (reversing conviction where assessment of child's competence was not in the record because: "Very young children "repeat with phonographic precision the things that have been told them to say, be they true or false. Neither reason nor authority justifies the admission of such witnesses. . . ."); *State v. Willars*, 661 So. 2d 673, 682 (La. App. 2nd Cir. 1995) (trial court appropriately found competence of child witness "based on his overall demeanor, his grades and the fact that he did not appear coached, Zachary was competent to testify."); *State v. Crandell*, 604 So. 2d 123 (La. App. 2d Cir. 1992) (same); *State v. Nash*, 494 So. 2d 1329, 1332 (La. App. 2nd Cir. 1986) (noting critical factor in assessing witness' competence was that "no one had told her what to say at trial, and there was nothing in the record to show that she had been coached by anyone.").

Ultimately, the *State's Brief* attempts to confuse appellant counsel's questions

concerning the *causation* of Ms. Hammond's incompetence with trial counsel's basis for the request to assess whether the child-witness was in fact incompetent. Whatever the cause of Ms. Hammond's incompetence, the trial court had an obligation to assess it once raised by the defense.

E. *The State's Brief Erroneously Suggests that the Testimony at the April 7, 2000, Prieur Hearing, More than Three Years earlier, Established Ms. Hammond's Competence*

Even assuming the State were to prevail on each of the proceeding points,²¹ Ms. Hammonds' answers to the questions posed by defense counsel on April 7, 2000, do not provide sufficient evidence of such an understanding. The *State's Brief* cites to these statements made by Lavelle Hammond as justification for the trial court's refusal to independently assess her competence and as independent evidence proving Ms. Hammond's competence. In either respect, the *State's Brief* is incorrect. The following is a chart excerpting the questions asked by defense counsel, and Ms. Hammond's responses, upon which the *State's Brief* relies to establish competence:

EVIDENCE OF UNDERSTANDING?

1	Q: Do you always tell the truth? A: No.
2	Q: Why don't you tell us what the truth is and what a lie is? A: A lie is when somebody believes something and they don't tell what they did to you.
3	Q: When somebody does something and when they don't tell what they actually did to you? A: When somebody do something and they don't tell what they actually did.

²¹ Assuming, for instance, that Ms. Hammond's prior testimony at a hearing where her competency was not questioned could be dispositive evidence of competence; assuming that questions concerning malleability or coaching are irrelevant; assuming that deficiencies of memory are not relevant to a competency assessment; and assuming that the ability to differentiate between truth and falsity constitutes the sole factor in assessing competency, the evidence pointed to by the state to establish competence is legally insufficient.

4	Q: Allright. They tell something different than what they actually did? A: "Yes."
5	Q: Okay. What is the truth when somebody does something. A: They tell what they did.

The answers to these five questions are what the *State's Brief* indicates are sufficient to support the trial court's decision to accept Ms. Hammond's competence without an inquiry. See *State's Brief* at 34 citing R. Vol. 10, p. 2467-2470.

At best, these five statements provide evidence of a child who acknowledged that she did not tell the truth, and who with leading questions was able to affirm that a lie is saying "something different than what they actually did." But her own statements reflected the misconception that a lie was an omission "they don't tell what they did to you" rather than a falsity.

The answer to Question 1 above, offers nothing but that Lavelle Hammond knows that she does not always tell the truth. Answers to Questions 2 and 3 provide inaccurate explanations concerning what constitutes a lie, conflating dishonesty with omissions. The Answer to Question 4 is a mere affirmation of a statement provided by the prosecutor. The Answer to Question 5 repeats the prior miscalculated dichotomy that lying involves the failure to tell what happened, while telling the truth involves telling what happened. Often times, and particularly relevant to this case, telling the truth involves acknowledging that which did not occur.

Whether these answers might, on further elucidation, provide additional information concerning Ms. Hammond's competence, is unclear. As the trial court itself noted on April 7, 2000: "I find that there were questions that could have been asked that weren't asked; that would have helped me determine her credibility." R. 1279.

Defense counsel asked the Court to assess Ms. Hammond's competency to testify prior to trial. The State vigorously and successfully argued against such an assessment.

The *State's Brief* now asks this Court to defer to an assessment that did not occur.

Reversal of the conviction is required

V. THIS COURT SHOULD ADDRESS THE CONSTITUTIONALITY OF LA. R.S. 15:440.1, AS THE CONVICTION IS BASED ON THE ADMISSIBILITY OF THE VIDEO-TAPE INTRODUCED PURSUANT TO THAT STATUTE.

In original Issue IV, Assignments of Error 12-17, Mr. Kennedy asked this Court to reverse the conviction based upon the State's use of a hearsay videotape deposition of Lavelle Hammond as the evidence supporting a conviction and death sentence. The *State's Brief* only response to this argument was that the issue was waived. As discussed in Appellant's Original Brief, and below, this error was not susceptible to waiver, and reversal of appellant's conviction and death sentence is required.

The introduction of the videotape was severely prejudicial as a conviction based upon Ms. Hammond's testimony without the videotape would barely, if at all, survived a sufficiency test, as she simply affirmed the trial prosecutor's leading question that the defendant was the person that raped her, and affirmed the truthfulness of the videotape deposition.²²

On appeal, counsel observed that the issue of the tape's admissibility was clarified by the United States Supreme Court decision in *Crawford v. Washington*, after the trial in this case. Appellant counsel noted, as well, that the matter, though not preserved by objection below, was reviewable by this Court as it involved the constitutionality of a statute admitting evidence upon which the conviction was based.²³

²² The *State's Brief* oddly suggests that it may have been a "tactical" or "strategic" decision for the defense to admit the December 18, 1999, video-tape of Lavelle Hammond. Given that the conviction in this case rests almost completely on that videotape, and that the record reflects the powerful emotional significance engendered by the presentation of that tape, it is inconceivable that the decision to stipulate to the admissibility of that videotape was a strategic decision. It is far more likely that defense counsel did not contest the constitutionality of the statute because the case occurred prior to the United States Supreme Court ruling in *Crawford v. Washington*, 541 U.S. 36 (2004).

²³ In *State v. Sanders*, 93-0001 (La. 11/30/94), 648 So.2d 1272, 1289, cert. denied, 517 U.S. 1246 (1996), this Court concluded that the penalty phase admission of hearsay testimony from a police officer, which attributed ownership of firearms to the defendant, was error. "The testimony of the police officer qualifies as hearsay

The *State's Brief* does not contest in any shape or form the arguments concerning the constitutionality of the foregoing statute. Moreover, the *State's Brief* does not contest that the video-tape introduced pursuant to the statute provided the evidence upon which the conviction was based. The *State's Brief* merely claims that the matter is not preserved because: "defendant's conviction is based upon La. R.S. 14:42 and not La.R.S. 15:440.1 et seq." *State's Brief* at 36.

The *State's Brief* inaccurately suggests -- citing *State v. Hoofkin* -- that this Court may only review the constitutionality of statutes which contain the very offense on which a defendant is on trial. While the statute at issue in *State v. Hoofkin*, 596 So. 2d 536 (La. 1992), was such a statute, this parsimonious view of this Court's authority to review the constitutionality of a statute is historically inaccurate. For instance, in *State v. Wrestle, Inc.*, 360 So. 2d 831, 837 (La. 1978), this Court reviewed for the first time on appeal the constitutionality of La.C.Cr.P. art. 782 (authoring non-unanimous convictions) and not merely La.R.S. 14:106 (the obscenity statute which contained the offense that defendants were charged and convicted of); see also *State v. Goodley*, 398 So. 2d 1068, 1070 (La. 1981) (reviewing constitutionality of Article 782 of the Code of Criminal Procedure in conviction of defendant of violation of La. R.S. 14:30.1 for the first time on appeal despite lack of objection below).

As in *State v. Wrestle*, where constitutional error is predicated upon a United States Supreme Court decision rendered subsequent to the present conviction but prior to the appeal, it is appropriate to consider the constitutional error:

because the constitutional error (if any) is based on a United States Supreme Court decision decided subsequent to the present conviction and is revealed by the minutes, we deem it to be appropriate here to consider

under LSA-La.C.E. 801(C), and thus does not qualify as competent and reliable, and was therefore not properly admissible against the defendant." *Id.* The Court further observed that "because hearsay testimony alone linked defendant to the guns, its admission into evidence without objection . . . would not prevent the Court from reviewing and excluding it, because 'unobjected to hearsay which is the exclusive evidence . . . is no evidence at all.'" *Id.* at 1289, n.16 (emphasis supplied) (quoting *State v. Allien*, 366 So.2d 1308 (La. 1978)).

the alleged constitutional error first raised in this court, without attempting at this time to resolve the conflicting jurisprudential principles as to whether or not the allegation represents unwaived patent error discoverable by mere inspection of the pleadings and proceedings

State v. Wrestle, Inc., 360 So. 2d 831, 837 (La. 1978). In this case, the State secured a conviction and death sentence by use of a videotape, made admissible, by a statute the constitutionality of which was called into question by recent jurisprudence from the United States Supreme Court. The minutes of plainly refer to this admission, and the Statute through which it was admitted. This Court should address the merits of the issue, find the statute unconstitutional and reverse the conviction.

VI. THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT'S REQUEST FOR A MISTRIAL OR REQUEST OF AN INSTRUCTION BASED UPON THE EMOTIONAL DISPLAY OF LAVELLE HAMMOND CREATED BY THE STATE.

In original Issue No. VII, Assignment of Error 27, Appellant observed that the trial court erred in refusing to grant a mistrial based upon, or instruct the jury to ignore, the emotional display the State created when it placed Lavelle Hammond on the witness stand where she cried for five minutes, and then allowed her to sit before the jury for twenty-three minutes while it played a videotape.

The *State's Brief* does not contest that Ms. Hammond was left by the prosecutors to sit on the witness stand, but claims that this was not done intentionally by the trial prosecutors. Regardless of whether the prosecution's actions were done intentionally in bad faith to create a scene, or were mere negligence, the impact was the same. The jury was left to view the witness crying on the stand while the prosecutors wandered the halls. Indeed, while it is unnecessary for Mr. Kennedy to prove that the conduct or misconduct was intentional, the trial record belies the suggestions of the *State's Brief*, that this was mere inadvertent error. Just prior to the debacle with Ms. Hammond, the trial prosecutors were warned about repeatedly leaving the courtroom for significant

periods of time. See R. 5281 ("Each time we go upstairs on a five minute break it winds up being thirty. Please gentlemen don't do that again to me."). When the prosecution below tried to explain that it had made a mistake, the Court responded:

No, my problem is I've got a witness here. You walk out the courtroom and say just one second, then you disappear.... The witness is sitting on the stand and she's in tears. . . . quit jerking me around, okay.

R. 5333-5334. .

The *State's Brief* suggests that the error below is not reviewable because "the defendant has failed to preserve any error in this matter as the defendant did not object when the trial court's (sic) decided that it would not give the instruction which it initially suggested, *sua sponte*." *State's Brief* at 49. The *State's Brief* also suggests that any error is cured by the trial court's final general instruction to the jury that it should only consider the evidence before it.

While the *State's Brief* claims that the issue is not preserved for appellate review, the record plainly reflects that the defense first moved for a mistrial, then objected and moved for a mistrial again, and finally supported the instruction proposed by the Court. The record further shows that the Court thereafter decided not to give the agreed-upon instruction at the behest of the trial prosecutors. In terms of the request for a mistrial, defense counsel observed:

The initial motion for mistrial, I'm sorry, **note our objection**. Judge, the initial motion for mistrial which was based upon the witness's emotional outburst at the beginning before she began testifying, I would note, and I don't know if it's already been noted for the record, or it has or hasn't, but I would just note for the record that she was brought in and left for five minutes on the witness stand without any support from the District Attorney's Office. I guess before the District Attorney's Office was ready to begin questioning and she was sitting there five minutes crying and sort of abandoned in front of the jury and that's the reason for my motion for mistrial. Thank you.

R. 5348. In response to this request for a mistrial, the Court denied the request but

offered:

I'm going to instruct this jury on the record to disregard anything they've seen on

the witness stand in terms of, if they saw any emotional displays or outbursts, okay, and confine their attention to the evidence presented and nothing more. I'm going to do that.

R. 5352. The defense agreed that this instruction was "fine." *Id.*

In response to this ruling, the State then objected that such an instruction would be telling the jury to *ignore how the rape affected her* in assessing her credibility:

Mr. Paciera: The State would object to that because I think its telling them not to see how its affected her but—

The Court: I want them to confine their consideration to the evidence not any displays of emotion that they have seen, didn't see. Your request is that I give them no instruction whatsoever?

Mr. Paciera: Yes, my request would be that you don't, that sounds like she's being scolded and so my request would be for no instructions.

The Court: Okay.

R. 5352. While *the State's Brief* now claims that the defense did not preserve its objection to the trial court's decision to accede to the State's request, the record is clear that the defense then pled with the Court to give the instruction:

Ms. Daponte: Judge --

The Court: Do what?

Ms. DaPonte: *Give the instruction* --

The Court: I'm not giving any instructions.

R. 5352- R. 5353.

The suggestion in the *State's Brief* that the error complained of here is not preserved, despite the myriad requests for a mistrial, the numerous objections and the specific request by defense counsel to give the instruction proposed by the trial court, is plainly contrary to the jurisprudence of this Court. *State v. Haddad*, 99-1272 (La. 02/29/00); 767 So. 2d 682, 686 (numerous objections by defense counsel indicated that matter was preserved regardless of lack of specific written instruction and that further

objection would have been futile); *State v. Glass*, 455 So. 2d 659, 672 (La. 1984) (“Since defense counsel objected to the allegedly improper argument, even though counsel did not move for a mistrial or request an admonition thereafter, the issue has been properly preserved for treatment on appeal.”) citing *State v. Williams*, 373 So.2d 1278 at 1280 (La. 1979); *State v. Hamilton*, 356 So.2d 1360 at 1363 (La. 1978).

Finally, the *State’s Brief* suggests that the general instruction given at the end of the proceedings by the trial court sufficed in directing the jury to consider the evidence in this case. See *State’s Brief* at 49. First, no general instruction given at the close of the evidence could “unring the bell” caused by the presentation of five minutes of Ms. Hammonds tears. Moreover, because the trial court failed to give the instruction at the time defense counsel requested it, the jury was never instructed contemporaneous that the display of Lavelle Hammond on the witness stand was “not evidence.” For all the jury was to presume, this visage was in fact evidence it was supposed to rely upon in assessing her credibility. Indeed, the trial prosecutors specifically objected to the proposed instruction because the instruction purportedly told the jury to ignore “how its [sic] affected her.” R. 5352.

It appears clear from the record that the trial court decided to allow the State to live with the consequences of its strenuous objection to the proposed instruction, and live it with it, the State must. The State cannot have it both ways – at trial rejecting the instruction because they want the jury to consider Ms. Hammond’s emotional state in assessing her credibility, and on appeal claiming that the general instruction would suffice to inform the jury that it could not consider her emotional state.

VII. THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT’S REQUEST FOR A MISTRIAL IN THE FACE OF PROSECUTORIAL ARGUMENT THAT WAS CLEARLY IMPROPER.

The *State’s Brief* suggests that the prosecutor’s argument to the jury that “only

you can protect her," is, if error, only harmless, and that the prosecutor's remarks that the "characterizing a defendant as an animal, *while ill considered* is not reversible error.

State v. Bridgewater, 001-1529 (La. 1/15/02), 823 So. 2d 877, 903." Citation in original.

The *State's Brief* claims that the jury would have understood these comments to mean, within their context, "as an argument by the prosecutor to consider the circumstances in evaluating the credibility of the victim's testimony." Appellant counsel feels constrained to note that the case to which the State cites – *State v. Bridgewater* – which found this type of argument ill-advised, involved the exact same prosecutor as the one in this case. Inflaming the emotions of the jury is an improper means to inform the jury of the credibility of the victim's testimony. Indeed, the Louisiana Code of Criminal Procedure Article 774 states in part that:

The [closing] argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw there from, and to the law applicable to the case. . . . The argument shall not appeal to prejudice.

Id. The United States Supreme Court has recognized the danger posed by such behavior when it warned that a prosecutor's improper argument "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18 (1985).

Similarly, the *State's Brief* suggests that the prosecution's argument at closing in penalty that "L.H. is asking you to set up a time and place where he dies" was permissible because "the brief remark regarding the victim's *possible* preference for the sentencing verdict would not come as a surprise to the jurors." *State's Brief* at 54.

Appellant counsel again is constrained to observe that the comments by the trial prosecutor do not concern the "possible preferences" of Lavelle Hammond, but rather the absolute certitude this was what Ms. Hammond desired and deserved.

Furthermore, this case is patently different than the one cited to by the State -- *State v. Harris*, 01-2730 (La. 1/19/05), 892 So. 2d 1238 -- where the Court observed that defense counsel did not object to the analogous comments. See *id.*, at 1257 (“No objection was raised to this argument by the defense.”). Moreover, in that case the rape-victim testified in the penalty phase concerning the *murder* of her mother – an instance in which the victim-witness’ preference for the death penalty might well be more presumed as compared to this case, which involves a non-homicide intra-family allegations. Significantly, there had been no evidence that these were in fact the views of the victims’ family members – indeed when the State performed the Uniform Capital Sentence Report seeking the views of the Lavelle Hammond and her mother on the propriety of executing Mr. Kennedy, the family apparently refused to meet with the investigators. See UCSR, Investigation at pg 12-13.²⁴ In this unique of cases, it is well possible that Ms. Hammond did not have a personal preference for the death penalty; and yet the prosecutor used the power and position of his office to implore the jury to impose the death penalty on her behalf. The comment was improper, and reversal of the death sentence is required.

VIII. THE NUMEROUS FLAWS IN THE RECORD RAISES SIGNIFICANT CONCERNS ABOUT THE VIABILITY OF THE TRANSCRIPT UPON WHICH THIS APPEAL IS BASED [Supplemental Assignment of Error, Assignment No. 70].

Mr. Kennedy has, under the United States and Louisiana Constitution the right to an appeal based upon a complete and accurate record. La. Const. Art. I, Section 19, 22; U.S. Const. Amend. XIV. The transcript in this case leaves significant questions and concerns. Indeed, the State’s recently filed Motion to Supplement the Record with

²⁴ The UCSR Capital Sentence Review Investigation Report indicates that the investigating officer repeatedly attempted to meet with Ms. Carolyn Hammond and her daughter Lavelle Hammond, first independently, then through “Nancy Michele, a victim’s advocate employed with the Jefferson Parish District Attorney’s Office” and finally through “the prosecuting attorney, Donald A. Rowan to explain to Carolyn Hammond the nature of my investigation and the importance of her and or her daughter’s statements.” The investigating officer noted that Ms. Hammond repeatedly refused to make arrangements to meet at the District Attorney’s Office or her home, “failed to return her telephone calls, and avoided answering her telephone.” *Id.* at 12-13.

three newly transcribed pages of the record gives rise to this supplemental assignment of error, as we are now confronted with a record in which the same court reporter has transcribed the matter substantially differently on two separate occasions.

On February 22, 2006, the defense filed a motion detailing significant potential problems with the transcript of the record, and moved to remand the record for further assessment and to retain the audio-tapes for further review.²⁵ The State declined to join in the defense request for a remand. The gravaman of the motion included the observation that unusual inconsistencies existed throughout *voir dire* that undermined confidence in the *completeness* of the record. The defense motion was effectively denied by this Court.²⁶

When preparing its response to Appellant's *Brief on Appeal*, the State apparently became aware that a number of cause challenges by the defense provided grounds for reversal of Mr. Kennedy's conviction and death sentence. See State's *Motion to Supplement the Record*. Without leave of this Court, the State requested that the court reporter review the transcript of a narrow portion of the record that would benefit the State; and—without evidentiary hearings, a remand, or contradictory assessment—the State has sought to supplement the record with a new transcript of three pages.

In Mr. Kennedy's Original Brief on Appeal, counsel noted that reversal was required based upon any erroneous ruling on a defense challenge for cause based upon the defense's use of twelve peremptory strikes. Defense counsel noted that the record established trial counsel expended Mr. Kennedy's peremptory strikes based upon counsel's reading of the minutes and the trial transcript. In the State's *Brief on Appeal*,

²⁵ The deficiencies identified by the defense in the *Motion to Complete the Record* spanned a universe of problems. Appellant hereby incorporates by reference all existent of the legal and factual claims made in the *Motion to Complete the Record*.

²⁶ This Court, on March 14, 2006, denied the defense motion to dislodge and remand the record, but noted that a supplement was filed with the trial court's instructions to the jury.

the State claimed that prejudice cannot be presumed from the record below claiming that defense counsel only expended eleven peremptory strikes. See State's Brief at 74 ("In the event that this Court determines that the trial court's failure to grant the defense challenge for cause was in error, the State submits it is harmless as the defendant did not exhaust his peremptory challenges. . . . This conclusion 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.").

What is significant here is that the three re-transcribed pages do not merely contain the addition of something that was "missing" from the record before; nor do they – as the Court Reporter attempts to characterize it – reflect a typographical error. Rather there is a significant substantive difference between the three pages as initially transcribed and the three pages as transcribed at the behest of the State. This renders the transcript as a whole unreliable. *Beginning with the Supreme Court of Louisiana's 1983 decisions in State v. Lynch, 441 So. 2d 732 (La. 1983) and State v. Godejohn, 425 So. 2d 750 (La. 1983), it has remained the rule that where a discrepancy exists between a transcript and the minutes (or other documents of the Court, such as a criminal commitment), the transcript always prevails. See also State v. Watson, 00-1580 p. 3 n.4 (La. 5/14/02), 817 So. 2d 81, 83 n.4.* But now we are left with a question – which transcript.

It appears that the re-transcription of the record has resulted in the reduction of the defense peremptory strikes from twelve to eleven. There is a bald unfairness and violation of due process when the State is able to re-transcribe a portion of the record without any scrutiny whenever it might prove helpful to the state, and the indigent defendant is unable to do so. Moreover, a major problem exists when the re-transcription of a mere three pages raises the very real possibility that any number of other pages contain transcription errors. Indeed, as discussed below, appellate counsel had brought a number of potential transcription errors to the attention of the State and

Court – and the State sought retranscription solely of the one from which it might receive some benefit.

It is a cause of some consternation that when the defense sought remand to review or re-transcribe the *entire* record, the State refused to join with the defense. It is of an altogether greater source of frustration that where the record as it stood might have reflected that the defense had exhausted its peremptory strikes, the State was able to secure a new transcript of the proceedings at issue in order to review the transcript.

Undersigned appellate counsel, as this Court must, places inestimable trust in the transcript of the record. When a court reporter re-transcribes a three page portion of the record differently than it was initially transcribed, it undermines the very confidence that we must have in our review of the proceedings that renders the death penalty acceptable.

TRANSCRIPTION ERRORS

Page	Original Transcript	New Transcript
351	THE COURT: You'll accept her. We're back to eleven. Ms. Mari Marcus? THE COURT: Ms. Mari Marcus, number 472? Do you take Ms. Marcus? MR. ARMATO: Yes, sir. THE COURT: Did you take Ms. Marcus? MR. ARMATO: Acceptable. THE COURT: Okay. How does the State feel about Mr. Servat?	THE COURT: You'll accept her. We're back to eleven. Ms. Mari Marcus? THE COURT: Ms. Mari Marcus, number 472? Do you take Ms. Marcus? Did you take Ms. Marcus? Mr. Rowan: Yes Sir The Court: Did you take Ms. Marcus? MR. ARMATO: We're going to go back and cut Mr. Pellagal. The Court: Okay. We're cutting Mr. Pallegal for Ms. Marcus. How does the state feel about Mr. Servat?
353	MR. ARMATO: We're going to go back and cut the first juror, Ms. Sheehan. THE COURT: Ms. Sheehan. All right, ten.	MR. PACIERA: We're going to go back and cut the first juror, Ms. Sheehan. THE COURT: Ms. Sheehan. All right, ten.

One of the errors above involves the whole-sale omission of a significant portion of voir dire – leaving us to wonder how many other instances this might have occurred²⁷ – the second error above involves the incorrect identification of the parties speaking.

This second error has substantial significance. During appellant counsel's *Motion to Remand*, counsel noted that concern over the mis-identification of the speaker throughout the transcript of voir dire undermined counsel's confidence in the record. Appellant counsel noted that there were a number of "odd" instances where it appears the court reporter might have erred in assigning names or parties to a specific speaker. For instance, the record suggests that defense counsel challenged Juror Scheid for cause. See R. 2895. However, a review of the voir dire of Mr. Scheid suggests that this would have been an odd, if not patently ineffective challenge as – though he supported the death penalty for murder -- he was reluctant to impose the death penalty unless a victim died. See R. 2841, R. 2842. Indeed, on defense questioning, Mr. Scheid made clear that he believed in the death penalty for murder but was not likely to impose a death sentence where the victim was here to testify. R. 2881. Had the record reflected that the State challenged Mr. Scheid for cause, appellant counsel might have had grounds to appeal the trial court's grant of the challenge. It is simply unexplainable why defense counsel would exercise a challenge on such a juror, where the victim in this case was plainly alive to testify about it²⁸. Putting aside the validity of defense counsel's challenge to jurors who generally oppose the death penalty – see La. C. Cr. P. Art 798 ("It is good cause for challenge on the part of the state *but not on the part of the*

²⁷ Assuming, that the error rate in the transcription of these three pages was approximately 5%. Given the over six thousand pages in the record, at this error rate, odds are that there are three hundred other instances of erroneous transcription.

²⁸ Similarly, the transcript suggests that defense counsel made the odd challenges for cause to prospective juror Margie Clark, who "doesn't believe in the death penalty because of her Catholic beliefs." See R. 2735, 2845, and the challenge on R. 2895, and to prospective juror Hanh Nguyen who made clear that he could not impose the death penalty without a murder, see R. 2846, but was nevertheless allegedly challenged for cause by the defense.

defendant that . . . (2) the juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment. . . ") – it appeared to undersigned counsel that the court reporter may have mis-identified the speaker at issue. While appellant counsel's motion to remand was based upon the conjecture that the court reporter may have erred in identifying the parties, the State's Motion to Supplement the Record makes clear that this is a legitimate concern.

In *State v. Landry*, this Court reversed the conviction and death sentence based upon differences in versions of the transcripts and the misidentification of various speakers in the record. The Court observed:

different versions of the victim impact statement of the victim's father appear in the record; (8) references to other unrecorded bench conferences are contained in the record; and (9) it appears that various speakers during the trial are misidentified for the record.

State v. Landry, 97-0499 (La. 06/29/99); 751 So. 2d 214, 215. Ultimately, here, as in *Landry*, where there is no consistent or accurate transcript "a defendant's right of appellate review is rendered meaningless."

CONCLUSION

As detailed above, in appellant's *Original Brief* and *Supplemental Brief*, and in appellant's *Sentence Review Memorandum*, the sentence in this case is truly extraordinary and unprecedented. Yet, as the trial record, appellant's *Original Brief*, and now the *State's Brief* make abundantly clear, the level of attention to this case—and concern for fairness and due process—has not, unfortunately, reached a level which would instill public confidence in sanctioning the ultimate penalty of death. The filings in this matter make clear that each of the columns (including the defense, prosecutorial, and judicial functions) upon which this case sits erodes in its own desultory fashion.

There remains considerable debate in this matter concerning whether Mr.

Kennedy is indeed the actual perpetrator and, with all due respect, it is telling that the State on appeal is forced to rely on procedural bars and claims of harmless error in its effort to save this conviction. The penultimate assertion in the *State's Brief* is perhaps the understatement that gilds the proverbial lily: The *State's Brief* suggests that this Court must remember that even given appellant's numerous claims of error, Mr. Kennedy is "not entitled to a perfect trial." Mr. Kennedy has never requested a perfect trial, merely a fair one – a trial that befitted the occasion of the possible punishment.

For all of the reasons set forth in Appellant's *Original Brief*, Appellant's *Supplemental Brief*, Appellant's *Sentence Review Memorandum*, and this *Brief in Reply*, as well as for any other error whether briefed or unbriefed, patent or otherwise, Appellant respectfully moves this Court to reverse the conviction and death sentence imposed in this case.

Respectfully submitted,



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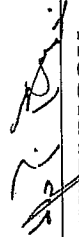
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