APPENDIX A

SUPREME COURT OF LOUISIANA
No. 05-KA-1981

STATE OF LOUISIANA
v.
PATRICK KENNEDY

On Appeal from the Twenty-Fourth Judicial District Court, For the Parish of Jefferson, Honorable Ross LaDart, Judge

VICTORY, J.*

On May 7, 1998, Patrick Kennedy was indicted by a grand jury for the rape of his eight-year-old stepdaughter L. H.[1] on March 2, 1998, in violation of La. R.S. 14:42 (aggravated rape; victim under the age of 12), and the state subsequently gave notice of its intent to seek the death penalty.[2] The district court declared that the defendant was indigent and appointed counsel to represent him on June 23, 1998. After a vigorous pre-trial defense, during which defense

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* Retired Judge Lemmie O. Hightower, assigned as Justice ad hoc, sitting for Associate Justice Jeannette T. Knoll, recused.

[1] In accordance with La. R.S. 46:1844(W)(1)(a), in order to protect the identity of the victim, her name, and her mother's name, will be referred to by the use of initials.

[2] This notice does not appear in the record. Defense counsel filed a bill of particulars on July 24, 1998, in which the defense requested to know whether the state would seek the death penalty. Presumably, this motion was satisfied promptly because defense counsel referred to "this capital case" in its August 26, 1998 motion for a *Bernard* hearing on the admissibility of victim impact evidence.

counsel filed approximately 50 substantive motions and sought 6 supervisory writs,[3] a jury was selected on August 8 and 11–15, 2003. Opening statements commenced immediately after the completion of jury selection and trial continued through August 25, 2003, after which the jury returned a verdict of guilty of aggravated rape. The penalty phase was held on August 26, 2003, and the jury unanimously decided that the defendant should be sentenced to death. On October 2, 2003, the district court denied the defendant's motion for new trial, in which the defense contended that sentencing a defendant to death for an aggravated rape which the victim survives is constitutionally prohibited, and sentenced the defendant to death. The defendant appeals to

[3] In 99-KK-1850, this Court denied the defendant's application from the district court's refusal to strike aggravating circumstances from the indictment and to prohibit victim impact testimony during the penalty phase, noting that the defendant could re-raise these issues on appeal if convicted (Kimball, J., would grant). In 00-KK-1554, this Court granted the defendant's application to affirm the decision of the court of appeal, which reversed the district court's pre-trial ruling that an adult witness would be permitted to testify at trial under the "lustful disposition exception" that the defendant also raped her three times when she was a child, 16 years before the instant offense, but was never charged or convicted of the crimes (Victory, J., concurred, and Traylor, J., dissented). In a related application, which this Court denied in 00-KK-2428, the defendant sought review of the district court's refusal to schedule an additional pre-trial hearing in which defense counsel could more fully cross-examine this same adult witness. In 02-KK-2088, this Court denied the defendant's application from a determination by the court of appeal that the defendant failed to establish a prima facie case of gender discrimination in the selection of grand jury forepersons in Jefferson Parish (Johnson, J., would grant). In 03-KK-2269, this Court denied the defendant's application from the court of appeal's rejection of the defendant's contention that the legislature violated the ex post facto clause when it authorized the introduction of victim impact testimony during the penalty phase of trials (Calogero, C.J., concurring). In 03-KK-2393, this Court denied the defendant's application from the district court's denial of a defense motion for mistrial during the state's opening statement.

this Court pursuant to La. Const. art. V, § 5(D)(2), assigning 69 errors.

FACTS AND PROCEDURAL HISTORY

It was not disputed that the victim was brutally raped. On the morning of March 2, 1998, the victim was transported by ambulance to Children's Hospital where she was examined in the emergency room. The victim's predominate injury was vaginal with profuse bleeding. Her entire perineum was torn and her rectum protruded into her vagina. Dr. Scott Benton of Children's Hospital testified as an expert in pediatric forensic medicine that the victim's injuries were the most serious he had seen, within his four years of practice, that resulted from a sexual assault. A pediatric surgeon was called in to repair the damage, which was repaired successfully.[4]

The evidence presented at trial centered around the identity of the defendant as the rapist. Alvin Arguello, chief dispatcher for A. Arpet Moving Co., the defendant's employer, testified that when he arrived for work on the morning of March 2, 1998, which was generally around 6:15 a.m., there was a message from the defendant indicating he would not be available to work that day. The defendant called Arguello again between 6:30 and 7:30 a.m., sounding nervous, to ask him how to get blood out of a white carpet because his stepdaughter[5] had "just become a young lady." Rodney Madere, owner of B&B Carpet Cleaning, testified at trial that the defendant, whom he identified by caller ID, called him at 7:37 a.m. on March 2 to schedule an urgent carpet cleaning job to remove bloodstains. The State

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[4] However, as a result of pain, the victim had to be fed gallons of stool softener through a tube to permit her to begin defecating again.

[5] Arguello testified that he could not remember whether the defendant said his niece or his daughter has "just become a young lady."

introduced a photo of the caller ID box from B&B Carpet Cleaning showing a call from "Kennedy P" at 7:37 on March 2. Lester Theriot, an employee of B&B, testified that Madere called him before 8:00 on the morning of March 2, 1998, and told him to report immediately to the defendant's home, but he did not get there until after he dropped his son off at school, which he routinely did between 8:15 and 8:45. When he arrived, he could not get into the home because the police and an ambulance were present.[6]

At 9:18 in the morning on March 2, 1998, the defendant called 911 to report that his stepdaughter had just been raped. The 911 call was played for the jury.[7] The defendant advised the operator that his daughter was in the garage while he was getting his son ready for school and that he exited the residence after hearing loud screaming. He told the operator that he discovered the victim lying in the side yard between their house and the empty lot next door, and that she told him that two boys grabbed her, pushed her down, pulled her over there, and raped her. When the operator asked if they were white males or black males, the defendant responded, "Ms. May [the victim], was they black or white? She said they was black boys." He further told that operator that he had seen one of the boys "walking through this neighborhood all the time," and described him as 18 years old, wearing a black shirt and blue jeans, and riding a ten-speed bike.

Jefferson Parish Sheriff Office (JPSO) Deputy Michael Burgess responded first to the reported rape from only a block away, arriving between 9:20 and 9:30. Deputy Burgess testified that he was so close to the crime scene when he got

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[6] These phone calls made to Arguello and Madere were not known to police until several days after the rape, and later served to shift the focus of the investigation to the defendant.

[7] Sergeant Billy Lewis identified a tape and summary of the 911 call.

the call that he thought he would actually catch the rape in progress. In fact, the transcript of the 911 call indicates Burgess arrived at the scene while the defendant was still talking to 911.

Burgess testified that he was confused when he arrived because the crime scene in the yard was inconsistent with a rape occurring there: there was a dog sleeping undisturbed nearby and a small patch of coagulated blood was found in otherwise undisturbed long grass. He did not see anyone fleeing on a bike.

Burgess testified that he heard voices from inside the house, approached the house through an open garage door, and proceeded through the garage to the back door. Inside the garage, he observed a straight thin line of blood drops on the concrete. The defendant came to the back door talking on the telephone, but ignored the officer as he tried to get information on the crime, continuing to talk on the phone. This prompted the officer to order the defendant to get off the phone and give him a description of the suspects so he could pursue them. Inside the house, Deputy Burgess did not see any more blood until they reached the stairs, which had a blood trail leading up them. Deputy Burgess testified that the defendant took him upstairs to the victim, who was lying sideways on the bed in her room, wearing a t-shirt, and wrapped in a bloody cargo blanket. The defendant was wiping his hands with a towel that had blood on it. When the officer asked where it came from, the defendant then told him he got the towel from the bathroom after he put the victim in the bathtub to clean her. The defendant told him further there was blood on the steps because he carried her up the stairs from the backyard like an infant. However, there was no blood on his own clothes and no blood trail from the circle of coagulated blood in the backyard.

Deputy Burgess testified he attempted to question the victim but she was only partially able to respond verbally to his questions at first. When Burgess questioned her, the defendant "kept trying to answer for her and [he] got a little upset with that." The victim told Burgess that she was selling Girl Scout cookies in the garage with her brother when two boys dragged her from the garage and one raped her.

Stephen Brown, EMS field supervisor for West Jefferson Medical Center, testified that he was in the ambulance that responded to the 911 call minutes later. He found the victim upstairs in the home, wearing a Pocahontas shirt, with her shorts pushed down around her ankles, and wrapped in a bloody cargo blanket. The defendant had a basin filled with water which he was using to wipe off the victim's genital area. The defendant told him he was wiping down the blood to see where the blood was coming from, at which point Brown directed him to stop. Brown then examined the victim and found she had blood oozing from her vaginal area, which he then covered with a pad.[8] Brown testified he attempted to interview the victim, but that the defendant interrupted the victim and tried to answer the questions for her.

Both Burgess and Brown testified that they considered the defendant's behavior to be atypical and ultimately suspicious.

Detective Brian O'Cull, formerly of JPSO, testified that he interviewed the defendant at 10:18 a.m. on March 2, 1998, about an hour after the rape was reported and before the defendant was a suspect, and that the interview was recorded.

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[8] Outside of the presence of the jury, Brown also stated that, in assessing the victim's blood loss, he noticed that the blood appeared to be more coagulated that it should have been if the time of the rape was reported accurately. This testimony was ruled inadmissible and not presented to the jury.

Detective O'Cull identified an audiotape and transcripts of this interview, in which the defendant claims that he found the victim lying in the yard behind the house with her shorts half-way off in a puddle of blood, and that he then grabbed a work blanket, picked her up on it and brought her into the house, where he sat her in the tub with the water running while he called 911. The defendant claimed that the victim told him two boys were involved, and he saw a 19-year-old boy he recognized from the neighborhood ride off on a blue ten-speed bicycle "with the handle bars turned up," which he had seen on previous occasions behind the empty house next door. The defendant also told O'Cull that he had called the school earlier to report that the victim was staying home because she was sick.

Detective Mike Hullihan testified that the defendant was *Mirandized* and interviewed by police later that day at the police station, although he was not a suspect at that time. The defendant told him that his wife left for work at 5:30 in the morning, and that after he fixed the victim breakfast, she vomited in the bathroom. After she vomited a second time, he gave her orange juice mixed with Tylenol and called school to report that she would be absent. The defendant stated that he was upstairs cleaning when the victim's younger brother came and told him that the victim was sick and lying in the yard. When the defendant went to investigate, he saw a black male fleeing on a bicycle and found the victim crying and lying in the yard with her panties and shorts next to her. The defendant told the officers he wrapped the victim in a cargo blanket, carried her upstairs, put her in the bathtub and called 911. The defendant described the attacker as a black male, about 250–270 pounds, wearing blue jeans and a black t-shirt, with a fade haircut and wearing a gold earring in his left ear, and fleeing on a light blue 10-speed bicycle with "upwards handle bars" on it. After taking the defendant to several locations in an effort to locate a bicycle similar to the one he described, the defendant identified one on display at K-Mart

and pointed to the light blue cap on a laundry detergent bottle as being the same color as the bike. Det. Hullihan testified that he was surprised that the defendant picked out this bike as a similar bike. A picture of this bike, which was not a ten-speed with handle bars turned up as earlier described by the defendant, but was instead a regular bike with straight handlebars, was introduced into evidence.

Sergeant Kelly Jones of the JPSO Personal Violence Division was lead investigator on the case. When she arrived at the defendant's home on March 2, she instructed the other officers to begin canvassing the neighborhood to look for the suspect and bike as described by the defendant.[9] In the side yard, she noticed a location in the grass which appeared to contain coagulated blood but the grass was not disturbed and she could not locate any blood leading away from this location. She observed four or five very small drops of blood on the concrete floor just inside the garage and several random small drops of blood leading up the stairs. She collected several items from the victim's bedroom, including the utility blanket she had been lying upon, the t-shirt she was wearing, a pair of black shorts and underpants, and a blood-stained towel.

Sergeant Jones then interviewed the victim at the hospital. The victim was in pain and described her attacker as a black male, age 18–19, medium build, with muscular arms. Sergeant Jones testified that the defendant was present during the interview and prompted the victim to include that the attacker had an earring and noted that they had seen the attacker cutting grass in the neighborhood previously. Sergeant Jones also testified that the defendant described the attacker as over 6' tall, large but not fat, with muscular arms,

[9] Thirty officers canvassed the neighborhood looking for the suspects but to no avail.

and described the bicycle as a blue 10-speed with curled racing-style handlebars.

On March 3, Detective Florida Bradstreet interviewed defendant in connection with her discovery of a bike belonging to Devon Oatis behind a nearby apartment on Longleaf Lane in Harvey. The blue, gearless bicycle was found in tall grass and was described by Det. Bradstreet as covered with spider webs, rusted, with flat tires, and inoperable. It appeared to have been there for some time as the grass underneath it was indented and dead. The defendant positively identified the bicycle as the one on which he saw the subject ride away and stated that he saw this bike behind the house on Sunday evening. Contrary to the defendant's earlier description of the bike, before he identified a similar bicycle at K-Mart, this bicycle was not a ten-speed with handle bars turned up, but was a regular bicycle with straight handlebars. The defendant described the bicycle's rider to Det. Bradstreet as a husky individual of 260 to 280 pounds, but that he did not have "fat hanging." Later, the defendant described the suspect to Det. Bradstreet as 18-19 with a muscular build, a low fade haircut and a gold earring in his left ear.

After the defendant identified the bike that belonged to Devon Oatis, Sergeant Jones interviewed Oatis, a 16-year-old male, who was 6'11" tall and 270-280 pounds and appeared as being very heavy set. Sergeant Jones testified that she interviewed Oatis, a juvenile, in the presence of his mother. They both gave statements, which Sergeant Jones determined to be false by investigating further at John Ehret High School.[10] However, Sergeant Jones testified that Oatis was

[10] Outside of the presence of the jury, Sergeant Jones stated that Oatis had been expelled from John Ehret High School in November, did not inform his mother of the expulsion, and that his mother would drive him to school every day, after which he would walk back home, where he spent each day while she was at work. On March 2, Oatis's friend called his mother,

ruled out as a suspect because his physical description did not match those given by the victim and the defendant and because his bicycle was inoperable.

In the meantime, the victim continued to claim that two boys on a bicycle pulled her from the garage and one of them raped her in the yard. Dr. Benton testified that when he first examined the victim at Children's Hospital, she reported to him that two boys took her from the garage and one raped her while the other watched. Dr. Benton testified that medical records showed that the victim told all hospital personnel this same version of the rape while she was at the hospital, but that she told one family member that the defendant raped her. In addition, several days after the rape, the victim was interviewed by psychologist Barbara McDermott, and the videotaped interview was introduced by the defense at trial.[11]

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pretending to be a school official, to inform her that he had been suspended for fighting and to instruct her to pick him up from school and take him home, which she did.

[11] The state and the defense stipulated that these videotaped interviews satisfied the requirements of La. R.S. 15:440.5. The interviews were videotaped on two successive days and submitted on two videotapes as defendant's exhibit 7 and 8, which were transferred to DVD and viewed in that format.

The first day is primarily devoted to collecting personal and familial history. On both days, the victim was questioned on her ability to distinguish truth from lies. On the second day, the victim was told that she must tell what happened to her. The victim initially refused and began to comply only after her favorite police officer, "Miss Rene", was brought into the room for support. This officer hugged the victim, and could be heard quietly asking the victim to trust her, and encouraging her to tell the truth about what happened. "Miss Rene" told her they want to know if her Dad did it and they want to make sure she is safe. The victim said "they want me to say my Dad did it and I don't want to say it. I'm going to tell the same story." She then said that nobody told her to change her story, but her Mom told her that may be why they want her to keep on telling her story.

In this interview, lasting for three hours over two days, the victim said that she woke up, watched television, and ate breakfast, which was prepared by the defendant, whom she called "Daddy." The victim said she was playing in the garage with her brother when she was approached by a boy who asked her about Girl Scout cookies. After a long delay, she said she fell off a ledge at the end of the garage and the boy pulled her by the legs across the concrete into the neighbor's yard with the other boy following them. She was trying to grab the grass while he was dragging her. The boy then pulled down his pants and her shorts, placed his hand over her mouth, and "stuck his thing in [her]." She could not go anywhere because he was on top of her and the other boy was behind her. When another boy saw the defendant through the window, they both fled on a bicycle. She forgot what both boys looked like and did not remember what either boy had on, though she thought one had on a black shirt and blue jeans. She did not remember anything after that until the ambulance arrived. Dr. McDermott questions the victim thoroughly and argumentatively on each element of the victim's story, telling the victim that her story does not make sense. For example, Dr. McDermott asks the victim why she did not suffer abrasions from being dragged across concrete by her legs, and asks her why she did not scream if the attacker's hand was not placed over her mouth until they reached the neighboring yard.

In spite of the victim's version of events as stated above, the focus of the investigation began to shift toward the defendant. On March 4, 1998, the police found out for the first time about the defendant's phone calls to his employer,

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The victim was extremely reluctant, stalled, spoke haltingly with long pauses, and ultimately told her version of the attack, while constantly asking to be reminded what she had said so far. She denied suffering nightmares or experiencing any fear that the rapist might return.

A. Arpet Moving Co., hours before he made the 911 call, telling Arguella that he would not be into work and asking him how to get blood out of a white carpet because his stepdaughter "had just become a young lady." Sergeant Darryl Monie testified that on March 4, the defendant evidently knew the police had this information, and explained that he called his employer at about 5:15 a.m. to report that he was available for work that day. However, the defendant told him he called his employer back after the police had arrived at his house, first to inform him that he could not come to work because "his little girl had become a young lady," and then later because she had been raped. The defendant also told Sergeant Monie that he sought advice in the first phone call on removing bloodstains from carpet.

On March 9, 1998, the police also found out about the defendant's call to B&B Carpet Cleaning, after Mr. Madere contacted them after seeing blood-stained carpets being removed from the defendant's home on the televised news. As stated earlier, the defendant made this call at 7:27 a.m., almost two hours before the defendant claimed the victim had just been raped, to request an urgent carpet cleaning job to remove blood stains.[12] The defendant was arrested and charged with aggravated rape on March 10, 1998.

The State relied heavily on the testimony of Mr. Madere and Mr. Arguello because it created a time line indicating that the rape did not occur as reported by the defendant, i.e, that the rape occurred much earlier in the morning than reported

[12] On cross-examination, Lieutenant Gray Thurman testified that he spoke with Madere, who showed him a carpet-cleaning appointment made by defendant, which the B&B computer indicated was made on March 1 and scheduled for March 5. However, Thurman testified that Madere explained that the computer was in error and that the appointment was made on March 2 and rescheduled for March 5 after Theriot was unable to do the job on March 2.

by the defendant, that the defendant waited several hours before calling 911, and that the defendant was apparently attempting to clean up evidence of the crime in the meantime. The police also became aware of physical evidence that the crime scene had actually been cleaned.

Sergeant Jones testified that pursuant to search warrants issued on March 4, 5, 7, and 8, 1998, luminol testing of areas in the victim's home presumptively established the presence of blood in a large area of the carpet at the foot of the victim's bed, on the carpet pad and on the sub-floor beneath. Sergeant Jones testified that a stain was observed on the sub-floor following the removal of the carpet and padding. The police also found a one-gallon jug container labeled "SEC Steam Low Foam Extraction Cleaner" found in the garage, and a pail and two towels from the bathroom sink. The police also discovered a stain on the underside of the victim's mattress and mattress pad, which they initially believed indicated defendant had altered the crime scene by turning over the mattress. Sergeant Charles Durel of the JPSO Crime Lab identified his sketches and photographs of the home, which showed the presumptive locations of blood visualized with luminol. Samples of several of these items from these locations were subsequently tested by Drs. Henry Lee and Michael Adamowicz of the Connecticut State Police Forensic Science Lab in 1998. Dr. Lee testified that liquid dilution demonstrated that someone had attempted to clean some bloodstains from some of the carpet samples. Dr. Adamowicz tested samples of a mattress pad and carpet and a vaginal swab of the victim. Dr. Adamowicz found no DNA on the mattress. He found otherwise unidentifiable human DNA on the carpet. He found the victim's DNA on some carpet samples, the cargo blanket, a towel, and a sanitary napkin. However, the defense had the mattress pad tested by Dr. Carolyn Van Winkle, senior forensic biologist at the Tarrant County Medical Examiner's Lab, who testified that she re-tested the same mattress pad in 2001 using a more sensitive

test that came into common usage after 1998, and absolutely could rule out the victim as the source of blood on the mattress pad.

Dr. Lee also testified as an expert in serology, DNA, crime scene analysis and reconstruction, and general criminalistics. Dr. Lee found no semen in the victim's shorts. No seminal fluid or spermatozoa was found in any of the swabs taken from the victim at the hospital. Because of the lack of positive evidence related to the defendant, the bulk of Dr. Lee's testimony was devoted to discussing the absence of evidence that might confirm the defense's theory that the victim was raped in the yard as she initially stated. He stated that he examined the shirt and shorts the victim was wearing for any grass or soil stains but could not find any, indicating that the victim was not dragged through the grass as she initially claimed. He also did not find any abrasion marks consistent with being dragged. He opined that blood staining on the back of the victim's shorts was consistent with the shorts being placed on the victim after she was raped. He also examined the victim's underwear and found a blood transfer stain on the back of them and did not find any grass or soil stains on them. He examined photographs of the crime scene outside and found nothing to indicate that a struggle had taken place, as there were no depressions in the grass and only a small blood stain sitting on top of the grass, indicating a low-velocity dripping, suggesting that the blood had been planted there.

Finally, and most important for the State was the testimony of the victim, supported by the testimony of her mother, C.H. C.H. testified at trial that she married the defendant in 1998. After the rape, the victim was removed from her custody for approximately one month because she had permitted the defendant, who was in jail, to maintain phone contact with the victim. C.H. testified that soon after the victim was returned to her custody, the victim for the first

time reported to her that defendant had raped her.[13] She testified that the victim was in the room she shared with her younger brother, crying as her mother had never seen her cry before. After she allowed the victim to come sleep in her room, the victim told her that she could not hold it in anymore and that the defendant was the one who raped her.

The victim, who was eight when raped and nearly fourteen years old at the time of trial, took the stand during the fifth day of testimony. Upon taking the stand, one of the prosecuting attorneys stepped out of the courtroom for a few minutes. Defense counsel objected that the victim was permitted to sit on the stand during this delay and cry while the jury watched. The defense approached the bench to move for a mistrial, which motion was denied. After some brief questions about her age, the State asked "Do you remember what happened to you in 1998," to which the victim answered "yes." When asked to tell what happened, the victim stated "I woke up one morning and Patrick was on top of me and." She evidently then lost her composure, which required the court to recess, at which time the defense again moved for, and was denied, a mistrial.

During that recess, out of the presence of the jury and in a discussion at the bench, pursuant to a joint stipulation, the state offered a videotaped interview performed on December 16, 1999, at the Child Advocacy Center (CAC) by Amalee Gordon. After the recess ended, the victim testified that she was interviewed by Amalee Gordon on December 16, 1999. The state then formally offered the videotaped interview into evidence and offered to stipulate that the tape was edited to satisfy the rules of evidence and that the tape in fact satisfied all of the statutory requirements that were previously

[13] The parties stipulated that the victim was returned to her mother on June 22, 1998.

discussed with defense counsel at the bench.[14] Defense counsel formally accepted the stipulation, stating "We would agree with that stipulation, Your Honor, and we have no objection to the tape." Although the videotape was offered into evidence after the victim lost her composure on the stand upon accusing the defendant, it is apparent that both parties knew from the outset of trial that the videotape would be introduced into evidence, as defense counsel asked the jury during opening statements to watch this tape closely and compare it with the first videotape made in March of 1998, in which the victim accuses two boys of dragging her out of her garage and one of them raping her.

The videotape was played at that time for the jury while the victim remained seated on the stand. After the tape was played for the jury, the defense approached the bench and again moved for a mistrial on the basis that, while the tape was played (for approximately 23 or 24 minutes), the jury could observe the victim crying as she watched the tape. This motion was denied.[15]

This videotape has been reviewed and is briefly summarized as follows. The victim and the interviewer sit in chairs against the backdrop of a quilt. The interviewer notes that Sergeant Kelly Jones is also present working the equipment and on one occasion points to the quilt, implying that Sergeant Jones is behind it. The interviewer informs the victim that she is present because something happened to her

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[14] At the bench conference, both parties stipulated that the videotape complied with the requirements of La. R.S. 15:440.5, discussed *infra*, and had been edited to comply with the Rules of Evidence.

[15] In denying this motion, the district court noted that, although the victim had tears in her eyes at one point during the viewing of the tape, there was no outburst or excessive display of emotion by the victim and the jurors did not appear to react in a way that would indicate they were upset by the victim's response to the tape.

and asks whether she knows what that is, to which the victim responds that she was raped by Patrick Kennedy. The victim states that she woke up one morning and the defendant was on top of her. He raped her, saw that she was bleeding, and called the police after informing her that she had better tell them the story he made up. The victim could not recall what that story was. The interviewer probes for additional details and the victim can state only (over the course of about fifteen minutes) that it happened in her room, on the bed, with the defendant's hand covering her eyes, while her shorts were off and the defendant was naked. The victim draws her bed showing the location the rape occurred and identifies her and the defendant's "private parts" on male and female outline drawings as the only place (with the exception of his hand over her eyes) that the defendant touched her. The defendant did not make her do anything else or say anything else to her. After she was raped, the victim said she fainted and did not remember anything until the ambulance arrived to take her to the hospital. At the hospital, other people asked her questions. She could not remember what they asked her other than for her birth date. The victim knew that she had bled and recalled seeing blood on her bed but nowhere else. This video was crudely edited to excerpt only admissible portions of the victim's statements.[16]

After this videotape was played, the victim remained on the stand and testified on direct and cross-examination. Her testimony in full is as follows:

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[16] A substantially longer unedited tape, which was not available to the jury, was also viewed. In it, the victim makes, and in some cases also retracts, somewhat vague accusations that the defendant raped her on other occasions. The trial court denied the state's motion to introduce these prior rapes at a pre-trial *Prieur* hearing.

By Mr. Paciera:

Q. You're alright?
A. Yes.
Q. Okay, when we looked at that tape, that was I think from December of 1999. You were a lot younger then?
A. Yes.
Q. And that was almost a year and a half after this happened to you, is
that right?
A. Yes.
Q. So when this happened to you, you were even smaller and younger?
A. Yes.
Q. When this first happened to you, you said somebody else did this, do you remember?
A. Yes.
Q. Do you remember what you said?
A. Yes.
[Defense object to leading questions and judge admonishes]
Q. When this first happened, what did you say happened?
A. I said two black boys raped me.

. . .

Q. Did two black boys do this to you?
A. No.
Q. Were you outside at all when this happened to you?
A. No.
Q. Were you ever in the garage when this happened to you?
A. No.
Q. Were you ever downstairs in the house when this happened to you?
A. No.

Q. After this happened to you, did you ever go downstairs?
A. No.
Q. Who told you about saying two boys did it?
A. Patrick.

. . .

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

Q. When you said Patrick, he left your room, is that what you said?
A. Yes.
Q. And could you tell where he was or could you hear him?
A. Not when he left the first time.
Q. Okay, well, could you hear some other time?
A. Yes.
Q. What could you hear?
A. I heard when he was on the phone with his boss.
Q. What'd he tell his boss?
A. He told his boss that his daughter had became a young lady and he couldn't come in today.
Q. Did you stay in the bedroom the whole time after this happened until the police got there or - -
A. No.
Q. What happened?
A. I was throwing up and he carried me to the bathroom.
Q. Were you throwing up after he did this?
A. Yes.
Q. And when he brought you into the bathroom, what bathroom did he bring you into?
A. In the hall bathroom.
Q. Did you throw up anymore?
A. I threw up in the tub.
Q. How did you get back to your bedroom after that?
A. I don't remember.
Q. You don't remember? Do you remember either the police getting to your house or somebody else like a doctor kind of person getting to your house?
A. I remember the police coming.
Q. How did you feel when the police came? Okay, I'll ask another question. Did you talk to the police?
A. While I was in the room?
Q. What's that?
A. While I was in the room?

Q. While you were in the room, if you remember.
A. I don't remember.
Q. Do you remember going to the hospital?
A. Yes.
Q. Do you remember how you got to the hospital?
A. Yes.
Q. How did you get to the hospital?
A. In the ambulance.
Q. Do you remember being at the hospital? You, okay, do you remember being at the hospital?
A. Yes.
Q. Do you remember talking to any doctors at the hospital?
A. Yes.
Q. Did anybody tell you what they were going to have to do to help you?
A. Yes.
Q. And what did they tell you or what did they do to help you?
A. While I was in the hospital?
Q. Yes.
A. When I first got there?
Q. We don't have to be real specific but did the doctors do some kind of surgery on you?
A. I don't know.
Q. Did they give you medicine?
A. Yes.
Q. Did it put you to sleep?
A. Yes.
Q. The person, Patrick that you said did this to you, I want you to point to him right now.

Mr. Paciera: Please let the record reflect that the witness is pointing to the defendant, Patrick Kennedy.
Q. Is everything that you're saying in this courtroom today the truth?
A. Yes.

Q. Did you hear yourself when you were on that tape from December of 1999?
A. Yes.
Q. Is everything you heard on there the truth?
A. Yes.Q. That this person raped you?
A. Yes.
Q. Nobody else?
A. Nobody else.
Q. In your room?
A. In my room.
Q. Thank you, [L. H.]. I want you to answer this lady's questions.

On cross-examination, the victim testified that she remembered telling the police and people at the hospital that someone else did this to her, that after the rape the defendant did not live with them anymore, that she had to leave her mother and brother and go live with another family for a while and this was upsetting to her, and that she first told her mother that the defendant was the one that raped her right before she had the interview with Amalee Gordon. She could not remember certain other details, such as talking to one of the defense attorneys a year-and-a-half after the rape, talking to certain police officers after the rape, or making the first videotaped statement.

After the State rested its case, the defense presented evidence attempting to show that Oatis was the likely rapist, pointing out that he lied about being in school that day and that the defendant had identified his bike as the one the suspect used.[17] To counter the state's witnesses'

[17] Sergeant Jones testified that eighth-grader, R.R., was also considered a potential suspect after it was reported to the police that R.R. told his classmates that he committed the rape. However, Linda Gilmore, a teacher's assistant at the Jefferson Community School testified that R.R. was present in school on March 2, 1998. Lieutenant Thurman investigated further and found R.R.'s alibi supported by the school's principal, a coach,

characterization of the bike as inoperable, the defense presented the testimony of Kimberly Parnell, a nearby resident who was interviewed by police when they canvassed the neighborhood. She testified that she often saw several young men, including Oatis, in the neighborhood riding this same bike, some of whom used it to sell drugs, and that she saw Oatis refill the tires with air before riding it because of its poor condition. Ronnie Montgomery, a private investigator hired by the defense, testified that he was unable to locate Oatis.

A cornerstone of the defendant's case was that the victim was coerced into changing her story, and that a comparison of the first and second videotapes showed that the first tape was much more detailed than the second, suggesting that the first was more truthful. The defense also presented evidence attempting to show that the victim's mother, C.H., changed her story in order to be reunited with her daughter. Catherine Holmes, a family friend, testified that C.H. expressed great fear that she would lose custody of her daughter. According to Holmes, C.H. described visiting her daughter after she was removed from her home and telling the victim that it was okay to tell people that defendant raped her because C.H. was instructed to do so by "them." After the victim was returned to C.H., Holmes said C.H. cut off all contact with her. Robert Tucker, a private investigator hired by the defense, testified that he interviewed the victim in 1999 and that she told him that she was raped by a young man who fled on a bicycle and that defendant did not rape her. Tucker said that C.H. told him that she was afraid, based on harassment and threats from police and social workers, that she would lose custody of her

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Ms. Gilmore, the school's attendance records, and by witnesses who told him they saw R.R. picked up for school by bus at 7:45 a.m. Sergeant Jones testified that R.R. is about 5'3" with a lighter complexion and younger than any of the descriptions of the attacker.

daughter. The defense also stressed the lack of any physical evidence directly linking the defendant to the crime.

After hearing all this evidence, the jury returned a guilty verdict of aggravated rape, which necessitated a capital sentencing phase. The State presented the testimony of S.L. The defendant was married to S.L.'s cousin and godmother, C.S., and S.L. spent the summer with defendant and C.S. when she was about eight or nine years old. S.L. testified that defendant sexually abused her three times, the first involved inappropriate touching, the last was intercourse. She did not tell anyone until two years later and the family pressured her not to pursue legal action so she did not. The defense presented seven witnesses who testified as to the effect defendant's execution would have on his family and friends. At the conclusion of the penalty phase, the jury unanimously determined that defendant should be sentenced to death.

The defendant filed a motion for a new trial as to the guilt and penalty phase verdicts, a motion for judgment notwithstanding the verdict, and a motion in arrest of judgment, all arguing that the statute under which defendant was prosecuted, La. R.S. 14:42, is unconstitutional. After denying these motions, the court sentenced defendant to death in accordance with the jury's verdict. Defendant now appeals to this Court, assigning 69 errors. We will address the most significant of these errors in this opinion, and the remaining errors will be addressed in an unpublished appendix to this opinion.

Before addressing the overriding legal issue presented by this appeal, which is whether the statute under which defendant was prosecuted is constitutional in that it authorizes the death penalty for a non-homicide crime, we must first address whether the defendant's conviction must fall for any other reason assigned by the defendant.

I. Right of Confrontation and the Videotaped Victim Interviews

On appeal, the defendant raises several assignments of error related to his right of confrontation arising from the admission of the victim's videotaped interview conducted by Amalee Gordon, in which the victim accuses the defendant. First, the defendant argues that the statute which authorized the use of the videotape, La. R.S. 15:440, *et seq.*, is unconstitutional. Further, the defendant argues that the admission of the videotape constituted a statutory violation of La. R.S. 15:440, *et seq.*, because the victim was unavailable for cross-examination.

The Confrontation Clause of the Sixth Amendment safeguards the defendant's rights to confront his accusers and to subject their testimony to rigorous testing in an adversary proceeding before the trier of fact. *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930 (1970). Although face-to-face confrontation forms the core of the Clause's values, it is not an absolute right of the defendant. *Id.*; *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S. Ct. 2531, 2537 (1980). Through exceptions to the hearsay doctrine, testimony may be introduced against the defendant without a physical, face-to-face confrontation at trial under certain circumstances, provided the denial of such confrontation is necessary to further an important public policy interest and further provided that the testimony's reliability is otherwise assured. *Coy v. Iowa*, 487 U.S.1012, 108 S. Ct. 2798 (1988).

One recognized important public policy interest is the protection of abused children. *Id.*; *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990). Louisiana is one of many states which have developed special procedures to protect child witnesses testifying about abuse from unnecessary additional trauma, allowing videotaped statements of abused children to be admitted in court, provided certain conditions

are met, La. R.S. 15:440 *et seq.*, and allowing abused children to testify out of court via closed circuit television systems, La. C. Cr.P. art. 283. However, Louisiana's provisions creating special arrangements for abused children contain strict requirements designed to ensure that these accommodations do not compromise the rights of defendants to confront adverse witnesses and test the reliability of their testimony.

The legislature first authorized the videotaping of victim statements in cases of child abuse in which the victim was under the age of 14 years at the time of the offense. 1984 La. Acts 563; La. R.S. 15:440.1-440.6. The purpose of the legislation was to facilitate prosecution of offenders who have committed crimes of violence against children "with a minimum of additional intrusion into the lives of such children." The statute authorizes videotaping the statements of such victims and introducing the statements at trial "as an exception to the hearsay rule." La. R.S. 15:440.3. It sets out conditions for taking the statement in the absence of the child's parents or relatives and with a minimum of questioning "calculated to lead the child to make any particular statement." La. R.S. 15:440.4.[18]

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[18] La. R.S. 15:440.4 provides as follows:

> Method of recording videotape; competency
> A. A videotape of a protected person may be offered in evidence either for or against a defendant. To render such a videotape competent evidence, it must be satisfactorily proved:
> (1) That such electronic recording was voluntarily made by the protected person.
> (2) That no relative of the protected person was present in the room where the recording was made.
> (3) That such recording was not made of answers to interrogatories calculated to lead the protected person to make any particular statement.
> (4) That the recording is accurate, has not been altered, and reflects what the protected person said.
> (5) That the taking of the protected person's statement was supervised by a physician, a social worker, a law enforcement

In order to be admissible, the videotape must meet the requirements of La. R.S. 15:440.5, which provides as follows:

> 440.5. Admissibility of videotaped statements; discovery by defendant
>
> A. The videotape of an oral statement of the protected person made before the proceeding begins may be admissible into evidence if:
>
> (1) No attorney for either party was present when the statement was made;
>
> (2) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;
>
> (3) The recording is accurate, has not been altered, and reflects what the witness or victim said;
>
> (4) The statement was not made in response to questioning calculated to lead the protected person to make a particular statement;
>
> (5) Every voice on the recording is identified;

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officer, a licensed psychologist, a licensed professional counselor, or an authorized representative of the Department of Social Services.

B. The department shall develop and promulgate regulations on or before September 12, 1984, regarding training requirements and certification for department personnel designated in Paragraph (A)(5) of this Section who supervise the taking of the protected person's statement.

(6) The person conducting or supervising the interview of the protected person in the recording is present at the proceeding and available to testify or be cross-examined by either party;

(7) The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and

(8) The protected person is available to testify.

B. The admission into evidence of the videotape of a protected person as authorized herein shall not preclude the prosecution from calling the protected person as a witness or from taking the protected person's testimony outside of the courtroom as authorized in R.S. 15:283. Nothing in this Section shall be construed to prohibit the defendant's right of confrontation.

C. In a criminal prosecution, when the state intends to offer as evidence a copy of a videotaped oral statement of a protected person made pursuant to the provisions of this Subpart, the defendant may be provided a copy of the videotape if the court determines it necessary to prepare a proper defense. If the court orders the defendant be provided a copy of the videotaped statement, only the attorney and the defendant shall be permitted to view the tape and no copies shall be made by any person. The copy shall be returned to the court immediately upon conclusion of the case. Any violation of this Subsection shall be punished as contempt of court.

At trial, after the victim took the stand, the State offered the videotape into evidence and defense counsel stipulated that the videotape was in compliance with the requirements of

La. R.S. 15:440.5. In addition, defense counsel expressly stated that it had "no objection" to the admissibility of the tape. Furthermore, as early as the opening statement, the defense calculated the December 16, 1999, videotape would be played for the jury, as it instructed the jury to watch both this videotape and the March, 1998, videotape closely because the March, 1998, videotape would provide more detail and thus be more truthful. However, now, the defendant characterizes the impact of the admission of this tape as devastating to his case.

The defendant concedes that these issues were not presented to the court below, as defense counsel expressly stipulated to the admission of the tape and stated he had "no objection to the tape." However, he contends that La. R.S. 15:440.5 is unconstitutional on its face, which can be addressed by this Court in the absence of contemporaneous objection in the court below. He argues that under existing jurisprudence this Court may consider its validity despite the failure of the defense to move to quash the statutory provisions or otherwise object on confrontation grounds to the admission of the videotaped statement.[19] *See State v. Green*, 493 So. 2d 588, 590 (La. 1986) (The facial unconstitutionality of a statute on which a conviction is based is an error discoverable by the mere inspection of pleadings and proceedings, without inspection of the evidence, which an appellate court is entitled to review, even though the

[19] The defendant also argues in brief that even assuming the lack of objection barred direct review of the trial court's evidentiary ruling, "given the devastating impact of the videotape, to the extent the failure to object constitutes a waiver, it is clear that such a failure would constitute ineffective assistance of counsel." However, at oral argument, defense counsel specifically stated to the Court that it was not making an ineffective assistance argument at this stage of the proceedings. Thus, we do not consider whether lack of an objection constituted ineffective assistance of counsel and find that it does not provide grounds for us to consider defendant's unobjected to assignment of error.

defendant did not comply with the assignment of error procedure.) However, this Court has applied this rule only in the context of challenges to the facial validity of substantive criminal statutes. In this case, the statutes at issue concern only the nature of the evidence admitted at trial. As with any other ruling by a trial court admitting or excluding evidence, defendant must object to the ruling to preserve the issue for review. La. C.Cr.P. art. 841 ("[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence."); *State v. Thomas*, 428 So. 2d 427, 433 (La. 1982) (on rehearing) (the contemporaneous objection rule prevents "a defendant from gambling for a favorable verdict and then resorting to appeal on errors that might easily have been corrected by objection."). In the present case, defense counsel not only failed to object to the admission of the videotape but he also stipulated to its admissibility.

However, assuming the facial unconstitutionality of this statute can properly be considered in the absence of an objection at trial, we reject defendant's argument that this statute is unconstitutional on its face.[20] The defendant argues

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[20] Although this Court never considered the constitutionality of the original act, in a string of cases the circuit courts of Louisiana upheld the statutes in cases in which the victim actually appeared in court and testified. *See State v. Abbott*, 29,497, (La. App. 2 Cir. 6/18/97), 697 So. 2d 636, 640-41 (admission of videotape of interview between child victim and police officer does not violate confrontation principles when child and interlocutor both testify); *State v. Gray*, 533 So. 2d 1242, 1248-49 (La. App. 4 Cir. 1988) (videotaped testimony does not violate Confrontation Clause, at least when witnesses testify); *State in the Interest of R.C.*, 514 So. 2d 759, 761-65 (La. App. 2 Cir. 1987) (availability of witness to testify prevents statute from violating Confrontation Clause); *State v. Guidroz*, 498 So. 2d 108, 110-111 (La. App. 5 Cir. 1986) (defendant's right of confrontation not violated because defense counsel viewed the tape before trial and victim testified); *State v. Feazell*, 486 So. 2d 327, 330-331 (La. App. 3 Cir. 1986) (Confrontation Clause not violated when the state offered videotape in evidence as direct testimony and tendered witness in person for cross-examination); *but cf. State v. Navarre*, 498 So.

that *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), makes clear that the admission of "testimonial" statements, such as the victim's in this case, violates the Sixth Amendment.

Traditionally, for purposes of the Confrontation Clause, all hearsay statements were admissible if: (1) the declarant was unavailable to testify; and (2) the statement fell under a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2d 597 (1980). However, in *Crawford*, the United States Supreme Court overruled *Roberts* insofar as it applies to out-of-court statements that are "testimonial" in nature. The Court held that the adequate "indicia of reliability" standard set forth in *Roberts* is too amorphous to adequately prevent admission of "core testimonial statements that the Confrontation Clause plainly meant to exclude." *Crawford*, 541 U.S. at 63, 124 S. Ct. at 1371.

The *Crawford* Court drew a distinction between testimonial and non-testimonial hearsay and noted that non-testimonial hearsay is admissible when both prongs of *Roberts* are satisfied, regardless of whether the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 63, 124 S. Ct. at 1371. On the other hand, the Court held that testimonial hearsay statements may

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2d 194, 196 (La. App. 1 Cir. 1986) (admission of videotaped victim interview without allowing defendant to cross-examine the victim violates statute and confrontation principles). However, other courts considering the question have come to the opposite conclusion even in cases in which the victim was available to testify. *See, e.g.*, *Offor v. Scott*, 72 F.3d 30, 33 (5th Cir. 1995) ("Nor is it an answer [under the Confrontation Clause] that the defendant might have called the child in order to cross-examine.").

be admitted as evidence at a criminal trial only when the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. *Id*. The Court also declined to provide a comprehensive definition of "testimonial," observing that, "whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*, 541 U.S. at 68. "These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* [21]

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[21] In the companion cases, *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. __, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court found it necessary to fashion a test, albeit an admittedly non-exhaustive one, *Id.* 126 S. Ct. at 2273, for the determination of whether statements should be classified as testimonial or non-testimonial. The Supreme Court held that:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id., 547 U.S. at ____, 126 S. Ct. at 273-74. The Court then applied this test in *Davis* and found that statements made to a 911 operator were non-testimonial because they constituted "a call for help against a bona fide threat" by a caller who "was facing an ongoing emergency" and they were elicited by the 911 operator to "resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Id.*, 547 U.S. at ____, 126 S. Ct. at 2274 (emphasis in original). The Court applied the new test in *Hammon* (the companion case) to find that statements made by a battered wife, who initially claimed that she was fine and nothing had happened, to an officer responding to a domestic disturbance call, were testimonial because "there was no emergency in progress; [the officer] had heard no arguments or crashing and saw no one throw or break anything, . . . and there was no immediate threat to [the victim's] person." *Id.*, 547 U.S. at ___, 126 S. Ct. at 2278.

While *Crawford* did establish as an important requirement for Sixth Amendment purposes that the defendant have a prior opportunity to cross-examine the declarant, and that requirement was clearly not met in this case, *Crawford* also expressly stated:

> Finally, *we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See California v. Green*, 399 U.S. 149, 162, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)). It is therefore irrelevant that the reliability of some out-of-court statements "cannot be replicated, even if the declarant testifies to the same matters in court." *Post*, at 1377 (quoting *United States v. Inadi*,

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The Court acknowledged that "a conversation which begins . . . to determine the need for emergency assistance . . . [can] evolve into testimonial statements, . . . ," *id.*, 547 U.S. at ____, 126 S. Ct. at 2277, but suggested that:

> [T]rial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through in limine procedure, they should redact or exclude the portions of any statement that have become testimonial, ...

Id., 547 U.S. at ____, 126 S. Ct. at 2277-78.

Although not specifically enumerated as such in *Crawford* or in the companion cases that followed, it is difficult to contend that a child victim's videotaped accusation, which was obtained by the state in preparation for trial long after the emergency, as in the instant case, is anything other than clearly testimonial. The videotaped statement constitutes an out-of-court statement offered to prove the truth of the matter asserted, *i.e.*, that the defendant raped the victim.

> 475 U.S. 387, 395, 106 S.Ct 1121, 89 L. Ed. 2d 390 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (Emphasis added.)

541 U.S. 59, n. 9. Therefore, according to *Crawford*, a testimonial videotaped statement is not inadmissible under the Sixth Amendment if "the declarant is present at trial to defend or explain it." *Id.*

Thus, it is clear that La. R.S. 15:440.5 is not facially unconstitutional as it specifically requires as a condition of admissibility that "the protected person is available to testify." La. R.S. 15:440.5(8). Whether the victim was actually "available to testify" or "present at trial to defend or explain" her statement is thus the only remaining issue related to the admissibility of the videotape. This raises the related questions of whether the statute is constitutional as applied in this case, and/or whether the admission of the tape was a statutory violation of La. R.S. 15:440.5(8), because, as urged by the defendant, although she took the stand at trial, her lack of memory rendered her "unavailable."

Once again, we note that the defendant stipulated to the admissibility of the tape before it was played and expressly stated that he had "no objection to the tape." Even after the cross-examination, he still did not object on the grounds that the victim's alleged lack of memory rendered her unavailable. Thus, this objection is clearly waived. La. C.Cr.P. 841. However, in an abundance of caution, we find that even had defendant objected, we would still find that the victim was "available to testify" for purposes of La. R.S. 15:440.5(8) and the Confrontation Clause.

The defendant argues that although the victim was physically present to testify, she was unable to respond to questioning in a meaningful way and simply adopted her

videotaped statement, which was obtained without the presence of defense counsel or any opportunity to effectively cross-examine the witness either pre-trial or at trial. Defendant contends that the victim's poor memory rendered her unavailable for cross-examination despite her physical presence on the stand.

We disagree. A witness may be physically present in a courtroom and still be "unavailable." *See, e.g.*, *State v. Nall*, 439 So. 2d 420 (La. 1983); *State v. Pearson*, 336 So. 2d 833 (La. 1976); *State v. Ghoram*, 328 So. 2d 91 (La. 1976). However, since the Supreme Court's decision in *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970), the Court has made clear that "[t]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish.'" *United States v. Owens*, 484 U.S. 554, 561, 108 S. Ct. 838, 842, 98 L. Ed. 2d 951 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S. Ct. 2658, 2664, 96 L. Ed. 2d 631 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294, 88 L. Ed. 2d 15 (1985)) (emphasis in original). In *Owens*, the trial court allowed the admission of the testimony of a witness with amnesia that although he remembered identifying defendant as his attacker, he no longer had an independent memory of the attack. *Id.* at 840-41. The Supreme Court found that this was not in violation of defendant's Confrontation Clause rights because, even though amnesia rendered effective cross-examination difficult, it did not deprive defendant of "an opportunity for effective cross examination." *Id.* at 842.

In this case, the victim was able to answer the vast majority of the questions asked of her. *See, supra* pp. 12-18. In court, she identified defendant as the person who raped her, and testified that she remembered making the videotape, that everything happened as she reported on the videotape, that

she earlier had told police and others that a boy had raped her but that was a lie, and she testified about circumstances surrounding the rape. The fact that she could not remember meeting with specific people during the investigation and that she did not remember making the first videotape with Dr. McDermott does not render her "unavailable" for purposes of the statute or the constitution. She was clearly able to "defend or explain" the videotaped statement at trial. These assignments of error lack merit.

The defendant next claims that the admission of C.H.'s testimony that L.H. told her the defendant raped her violates the hearsay rule. As stated above, C.H. followed the victim to the stand and told jurors that after her daughter returned to her custody in 1998, L.H. came to her one night and confided that "she couldn't hold it [in] anymore that Patrick Kennedy had raped her." The state offered C.H.'s testimony over defense hearsay objections as "the first reporting to her mother," for purposes of La.C.E. art. 801(D)(1)(d) (defining as non-hearsay the prior consistent statement of a declarant who testifies in court subject to cross-examination referring to an "initial complaint of sexually assaultive behavior.") The statutory provision reflects a longstanding jurisprudential rule exempting the initial report of a child rape victim from the hearsay rule. *See, e.g.*, *State v. Prestridge*, 399 So. 2d 564, 572 (La. 1981) ("[I]n the prosecution of sex offenses the better rule is that the original complaint of a young child is admissible when the particular facts and circumstances of the case indicate that the complaint was the product of a shocking episode and not a fabrication."); *State v. Adams*, 394 So. 2d 1204, 1212 (La. 1980) (same); *State v. Noble*, 342 So. 2d 170, 173 (La. 1977) (same).

We find this statement clearly was not made under emergency circumstances shortly after the offense, and the press of the shocking episode most likely dissipated over the course of nearly two years to a point where it no longer

assured the reliability of the assertion even for purposes of Louisiana's hearsay rules. Moreover, the statement constituted L.H.'s initial report of the sexual assault only from the state's perspective. It remained for jurors to determine whether her first report to the police, that two black boys had been involved, or to her mother, told the truth of the matter.

However, even assuming that the trial erred in admitting C.H.'s testimony, the ruling was clearly harmless. This Court has long held that the admission of hearsay testimony is harmless error when the effect is merely cumulative or corroborative of other testimony adduced at trial. *State v. Johnson*, 389 So. 2d 1302 (La. 1980); *State v. McIntyre*, 381 So. 2d 408, 411 (La. 1980). As this evidence was merely cumulative of the evidence provided in the videotaped statement of L.H. previously viewed by the jury, and L.H.'s testimony at trial, the admission of this evidence constitutes harmless error.

Finding no other errors in defendant's conviction and sentence, we now reach the seminal issue in this case.[22]

II. Capital Punishment for Non-Homicide Aggravated Rape

Looming over this case is the potential for the defendant to be the first person executed for committing an aggravated rape in which the victim survived since La. R.S. 14:42 was amended in 1995 to allow capital punishment for the rape of a person under the age of twelve. The defendant contends that Louisiana stands in a minority of jurisdictions in which

[22] *See* the unpublished appendix to this opinion for a discussion of the numerous other assignments of error in this case.

legislatures have authorized capital punishment for the rape of a child not resulting in homicide[23] and predicts that La. R.S. 14:42 is unlikely to survive the scrutiny of the United States Supreme Court, whose decisions the defendant interprets as making it clear that the loss of life is the essential component which renders capital punishment a proportionate penalty under the Eighth Amendment.[24]

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[23] The defendant contends further that Louisiana is also among a minority of jurisdictions worldwide and claims the legislature, in amending La. R.S. 14:42 to authorize capital punishment for aggravated rape of a child under the age of twelve, violated Article 42 of the American Convention on Human Rights, to which this country is a signatory. However, in *Breard v. Greene*, 523 U.S. 371, 377, 118 S. Ct. 1352, 1355 (1998), the Supreme Court held that "[e]ven were [inmate's] Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." Accordingly, this assignment of error lacks merit.

[24] The defendant also contends that La. Const. art. 1, § 20 provides additional requirements of proportionality beyond that imposed by the Eighth Amendment. La. Const. art.1, § 20 provides:

> § 20. Right to Humane Treatment
>
> Section 20. No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense.

In *State v. Perry*, 610 So. 2d 746 (La. 1992), we held that "[t]he framers of our state constitution clearly intended for this guarantee to go beyond the scope of the Eighth Amendment in some respects and to provide at least the same level of protection as the Bill of Rights and the Fourteenth Amendment and all others." Indeed, distinct from the Eighth Amendment, Art. 1, §20 expressly prohibits "euthanasia," "excessive" punishment, and "cruel *or* unusual" punishment. However, for purposes of capital punishment for child rape, we find this language does not provide any additional protections beyond those provided by the Eighth Amendment. Therefore, our analysis will proceed according to Eighth Amendment jurisprudence.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In *Weems v. United States*, the United States Supreme Court first discussed the Eighth Amendment as being "progressive, and . . . not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. 349, 366-67, 378, 30 S. Ct. 544, 54 L. Ed. 793 (1910). Decades later, in *Trop v. Dulles*, the Supreme Court established that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630. (1958). This Eighth Amendment framework was further defined in *Gregg v. Georgia*, which held that a punishment is excessive and unconstitutional under the Eighth Amendment if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more that the purposeful and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (affirming the death sentence for first-degree murder). In *Coker v. Georgia*, discussed *infra*, the Court further explained:

> A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.

433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).[25]

Before 1977, aggravated rape was punishable by death in Louisiana. In 1976, the United States Supreme Court invalidated the death-penalty provision of Louisiana's aggravated-rape statute based on the notion that the imposition and carrying out of the death penalty for that crime constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Selman v. Louisiana*, 428 U.S. 906, 96 S. Ct. 32l4 (l976). In 1977, the Court held that capital punishment for the rape of an adult woman violated the Eighth Amendment. *Coker*, *supra*.

The Louisiana Legislature again capitalized the crime of aggravated rape in 1995, but restricted it to the aggravated rape of a child under the age of 12 years, and provided for the punishment of "death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury." La. Acts 1995, No. 397, § 1, La. Acts 1997, No. 898 and 757; La. R.S. 14:42(D)(2).[26]

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[25] Later, in *Stanford v. Kentucky*, which held that executing an individual for crimes committed at 16 or 17 years of age did not violate the Eighth Amendment, the Court held that the Court's independent judgment had no bearing on the acceptability of a particular punishment under the Eighth Amendment. 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989). However, as discussed *infra*, *Stanford* was later overruled by *Roper v. Simmons*, *infra*, in which the Court also reaffirmed its view prior to *Stanford* that it must exercise its own independent judgment to determine whether the death penalty is a disproportionate penalty.

[26] Defendant was tried, convicted, and sentenced under this version of the law. However, Acts 2003, No. 795, § 1 substituted 13 years for 12 years in La. R.S. 14:42(A)(4), and Acts 2006, No. 178, § 1, substituted 13 years for 12 years in La. R.S. 14:42(D)(2) to change the penalty provisions to conform to the definition of the crime.

La. R.S. 14:42 provides in full:

§ 42. Aggravated rape

A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) When the victim resists the act to the utmost, but whose resistance is overcome by force.
(2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.
(3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.
(4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.
(5) When two or more offenders participated in the act.
(6) When the victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing such resistance.
B. For purposes of Paragraph (5), "participate" shall mean:
(1) Commit the act of rape.
(2) Physically assist in the commission of such act.
C. For purposes of this Section, the following words have the following meanings:
(1) "Physical infirmity" means a person who is a quadriplegic or paraplegic.
(2) "Mental infirmity" means a person with an intelligence quotient of seventy or lower.
D. (1) Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.
(2) However, if the victim was under the age of thirteen years, as provided by Paragraph (A)(4) of this Section:
(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment may be capital shall apply.

In *State v. Wilson*, 96-1392 (La. 12/13/96), 685 So. 2d 1063, *cert. denied, Bethley v. Louisiana*, 520 U.S. 1259, 117 S. Ct. 2425, 138 L. Ed. 2d 188 (1997), in the context of pre-trial appeals by the state from the granting of motions to quash, this Court upheld the constitutional validity of the death penalty for the crime of aggravated rape when the victim is under 12 years of age.[27] In so doing, we distinguished the rape of a child from the United States Supreme Court's decision in *Coker, supra*. For while *Coker* clearly bars the use of the death penalty as punishment for the rape of an adult woman, it left open the question of which, if any, non-homicide crimes can be constitutionally punished by death. Because "children are a class that need special protection," we concluded 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 old." *Wilson, supra* at 1070. In distinguishing the *Wilson* case from *Coker*, we pointed out that the plurality in *Coker* "took great pains in referring only to the rape of adult women throughout their

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(b) And if the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

[27] The United States Supreme Court denied certiorari, with Justices Stevens, Breyer, and Ginsberg, concurring in the result but reiterating the principle that the denial of a "petition for writ of certiorari does not in any sense constitute a ruling on the merits . . ." To underscore the point, the dissenters noted "an arguable jurisdictional bar" to the Court's review because the defendant had been "neither convicted of nor sentenced for any crime" and thus the court did not have before it a final judgment of a state court for purposes of review as a matter of 28 U.S.C. § 1257(a). *Id.*

opinion," as being disproportionate to the death penalty, referring to an "adult woman" fourteen times. *Id.* at 1066.[28]

Wilson freely acknowledged at the outset that Louisiana stood alone at that time in providing the death penalty for child rape in which the victim does not die because other jurisdictions sharing similar views, *i.e.*, Tennessee, Florida, and Mississippi, had already struck down their laws for a variety of reasons. *Wilson*, 685 So. 2d at 1068. Nevertheless, on the premise that "[t]here is no constitutional infirmity in a state's statute simply because that jurisdiction [chooses] to be first," and taking into account that "[s]tatutes applied in one state can be carefully watched by other states so that the experience of the first state become available to all other states," the Court thereby left room for the possibility "that other states are awaiting the outcome of the challenges to the constitutionality of the subject statute before enacting their own." *Wilson*, 685 So.2 at 1069.

In the present case, however, unlike in *Wilson*, the issue is no longer hypothetical. For the first time since the enactment of Louisiana's present bifurcated capital sentencing scheme, the Court has before it a defendant condemned to death for a crime in which the victim did not die. The defendant predicts that Louisiana's aggravated rape statute will not survive federal scrutiny on the basis of a series of decisions, including *Coker*, in which death sentences for non-homicide offenses were set aside. *See Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed .2d 1140 (1982) (holding that the death penalty is an excessive penalty for a robber who does not take a human life); *Eberheart v. Georgia*, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977) (holding that aggravated kidnapping did not warrant a

[28] Incidentally, the victim in *Coker* was actually a sixteen-year-old married woman.

death sentence); *U.S. v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) (holding the death-penalty clause of the Federal Kidnapping Act unconstitutional).

In considering defendant's argument, we must address the question in the context of the Eighth Amendment analysis recently refined by the United States Supreme Court in the watershed decisions of *Atkins v. Virginia*, 536 U.S. 335, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2001) (exempting mentally retarded persons from capital punishment) and *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 1 (2005) (exempting from capital punishment all defendants under the age of 18 years at the time of commission of a capital crime). *Atkins* and *Roper* reaffirm the Court's view that at its core the Eighth Amendment requires the Court to refer to "the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 561, 125 S. Ct. at 1190 (internal quotation marks and citation omitted). In making that determination, *Atkins* and *Roper* also reaffirmed the Court's view prior to *Stanford v. Kentucky*, *supra*, that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Roper*, 543 U.S. at 563, 125 S.Ct at 1191-92 (quoting *Atkins*, 536 U.S. at 312, 122 S. Ct. 2242 (quoting *Coker*, 433 U.S. at 597, 97 S. Ct. at 2868)). Thus, a bare majority of the prior Court subscribed to a two-part analysis under the Eighth Amendment:

> The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. This data gives us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment . . . .

Roper, 543 U.S. at 564, 125 S. Ct. at 1192. Both *Atkins* and *Roper* also looked to the frequency of the use of capital punishment where it is permissible as an objective indicia of consensus. This test has never been reconsidered or applied by the current Court and its new members.[29]

The first part of this test takes into account more than simply a numerical counting of which states among the 38 jurisdictions permitting capital punishment stand for or against a particular capital prosecution. The Court will also take into account the *direction* of change. In *Atkins*, the Court thus noted with respect to the number of states that had abandoned capital punishment for the mentally retarded following the Court's decision in *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (Eighth Amendment does not bar execution of the mentally retarded) (overruled by *Atkins*), "it is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins*, 536 U.S. at 315, 122 S. Ct. 2242. The Court thus attached particular significance to the number of states which adopted statutes precluding execution of the mentally retarded together with the failure of any state legislature to adopt the death penalty for the mentally retarded following the decision in *Penry*. *Atkins*, 536 U.S. at 315-16, 122 S. Ct. at 2249 ("Given the well-known fact that anti-crime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the

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[29] At least two current Justices, Scalia and Thomas, disagree that the meaning of the Eighth Amendment should be determined in accordance with the Court's "modern jurisprudence," which considers whether there is a "national consensus" that laws allowing certain executions "contravene our modern 'standards of decency,'" and they particularly object to the Court's exercise of its subjective independent judgment to determine the meaning of the Eighth Amendment. *Roper*, 543 U.S. at 608-09 (Scalia, J., dissenting, joined by Thomas, J. and Rehnquist, C.J.).

large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."). In *Roper*, the Court reinforced the importance of the direction of change to its analysis, finding the fact that five states (four through legislative enactment and one through judicial decision), that had allowed the death penalty for juveniles prior to *Stanford* now prohibited it, constituted a significant trend toward the abolition of the juvenile death penalty. The *Roper* Court then concluded that, "[a]s in *Atkins*, the objective indicia of consensus in this case —the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words of *Atkins* used respecting the mentally retarded, as 'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567, 125 S. Ct. at 1194.

The second part of the test, in which the Court will bring its own independent judgment to bear on the Eighth Amendment question, proceeds from the premise that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568, 125 S. Ct. at 1194 (quoting *Atkins*, 536 U.S. at 319, 122 S. Ct. at 2251). The Court will thus consider whether capital punishment for a particular class of offenders serves the twin social purposes of deterrence and retribution.[30] Although intentional murders

[30] The Court buttressed its conclusion in *Roper* that death was disproportionate to the particular class of offender under consideration by taking into account the overwhelming weight of international opinion

unquestionably fall into the category of the most serious crimes, *Atkins* and *Roper* concluded that neither the mentally retarded nor juvenile offenders under the age of 18 years when they commit the crime can "with reliability be classified among the worst offenders." *Roper*, 543 U.S. at 569, 125 S. Ct. at 1195.[31] While the Court has exercised its independent

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disapproving of the death penalty for juvenile offenders. The Court thereby reaffirmed that reference "to the laws of other countries and to international authorities [is] instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Roper*, 543 U.S. at 575, 125 S. Ct. at 1198. The Court found it particularly instructive in *Roper* that the seven countries which had executed juvenile offenders besides the United States since 1990 (*i.e.* Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, Democratic Republic of Congo, and China) had all since then "either abolished capital punishment for juveniles or made public disavowal of the practice." *Roper*, 543 U.S. at 577, 125 S. Ct. at 1199. The Court thus deemed it "proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusion." *Roper*, 543 U.S. at 578, 125 S. Ct. at 1200.

Former Chief Justice Rehnquist rejected the Court's consideration of the sentencing practices of other countries in determining a national consensus for Eighth Amendment purposes, arguing that the Court in *Stanford v. Kentucky*, 492 U.S. 361, 391, n.1, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), explicitly rejected such consideration. *Atkins*, 536 U.S. at 325 (Rehnquist, C.J., dissenting); *Roper*, 543 U.S. at 622 (Rehnquist, C.J., dissenting).

[31] Intellectual deficits and adaptive disorders of the former, and a lack of maturity and a fully developed sense of responsibility of the latter, tend to diminish the moral culpability of the mentally retarded and juvenile offender, with important societal consequences. Retribution "is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity[,]" *Roper*, 543 U.S. at 571, 125 S. Ct. at 1196, or by reason of the "diminished capacities to understand and process information" of the mentally retarded. *Atkins*, 536 U.S. at 318-

judgment in *Coker* to determine that the rapist of an adult woman is not an offender who commits "'a narrow category of the most serious crimes' and whose culpability makes them 'the most deserving of execution,'" *Roper, supra*, 543 U.S. at 568, it has not yet analyzed whether the rape of a child under twelve falls in that category.

Thus, we must undertake the first part of the Supreme Court's Eighth Amendment test, analyzing the legislative enactments of other states that have addressed the issue. Since *Wilson*, four more states, Oklahoma, South Carolina, Montana, and Georgia, presently prescribe capital punishment for child rape. Two of the jurisdictions, Oklahoma and South Carolina, recently adopted their laws in 2006. Montana enacted a child rape capital punishment statute in 1997. These state statutes are more narrowly drawn than Louisiana, as all three require proof that the defendant previously had been convicted of sexual assault of a child before he becomes death eligible. *See* 10 Okl. St. Ann. § 7115(I) (2006 Supp); Mont. Code Ann. § 45-5-303; S.C. Code Ann. § 16-3-655(C)(I) (2006 Supp). Georgia has persistently reenacted its capital rape provisions, Ga. Code Ann. § 16-6-1(a)(1), although some 40 years have passed since the decision in *Coker*. The courts of that state readily acknowledge that while the offense remains classified as a capital crime for procedural purposes, the death penalty is not available when the victim is an adult woman. *Merrow v. State*, 268 Ga. App. 47, 601 S.E.2d 428 (2004).[32] However, in 1999, the Georgia legislature added

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19. For the same reasons, the mentally retarded and the juvenile offender "will be less susceptible to deterrence." *Roper*, 543 U.S. at 571, 125 S. Ct. at 1196; *see Atkins*, 536 U.S. at 320, 122 S. Ct. at 2251 ("[I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable . . . that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.").

[32] Thus, for some 40 years the Georgia courts have followed a classification theory similar to the one adopted by this Court for a few

subsection (1)(a)(2), which proscribes the carnal knowledge of a female less than 10 years old as a capital offense. *See State v. Lyons*, 256 Ga. App. 377, 568 S.E.2d 533, 535 (Ga. Ct. App. 2002). This statutory provision thus places Georgia in the ranks of those jurisdictions which provide capital punishment for the rape of a child which does not necessarily result in the death of the victim. Florida has retained capital child rape as a matter of statutory law but has not enforced it since 1981 following the decision in *State v. Buford*, 403 So. 2d 493 (Fla. 1981) which struck down the law in light of *Coker*. Thus, a stark analysis shows that of the 38 states allowing the death penalty, only 5 provide it for child rape.

However, the proportionality analysis question under the Eighth Amendment and the situation in the rest of the country is more complex. For in our view, and evidently the view of the United States Supreme Court,[33] child rape is the most heinous of all non-homicide crimes, and while the majority of other states may not provide capital punishment for child rape, many do provide capital punishment for other non-homicide crimes which are far less heinous. Thus, this analysis should look beyond the child rape penalty provisions of other states and instead should consider all non-homicide capital statutes to determine the national consensus for capital punishment in non-homicide cases.

Commentators taking opposite views in the debate spectrum over the question of death for child rape have

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years following the decision in *Furman v. Georgia*, 408 U.S. 237, 92 S. Ct. 2726 (1972). Under that approach, and despite the invalidity of the death penalty after *Furman*, capital cases remained "capital" for all procedural purposes, including the requirement of a unanimous 12-person jury. *State v. Holmes*, 263 La. 685, 269 So. 2d 207 (1972); *State v. Flood*, 263 La. 700, 269 So. 2d 212 (1972).

[33] *See Coker*, *supra*, 433 U.S. at 597 ("Short of homicide, [rape] is the ultimate violation of self.")

difficulty in agreeing which states among the 38 jurisdictions permitting capital punishment do or do not provide the death penalty for crimes which do not result in the death of the victim. *See* Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape States,* 45 Ariz. L. Rev. 198 (2003) (advocating capital child rape statutes); Joanna H. D'Avella, Note, *Death Row for Child Rape? Cruel and Unusual Punishment Under the Roper-Atkins "Evolving Standards of Decency" Framework,* 92 Cornell L. Rev. 129 (2006) (discussing Patrick Kennedy's case specifically and advocating the defense point of view); Ashley M. Kearns, *South Carolina's Evolving Standards of Decency: Capital Child Rape Statute Provides a Reminder That Societal Progression Continues Through Action, Not Idleness*, 58 S.C. L. Rev. 509 (2007).[34] However, most agree that the number

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[34] For example, Meister lists Missouri as a jurisdiction permitting non-homicide capital punishment. 45 Ariz. L. Rev. at 211, n. 131. However, Cornell places Missouri in the homicide-only category, D'Avella, *Note,* 92 Cornell L. Rev. at 130, n.6. On the other hand, Cornell lists Washington as a homicide-only capital jurisdiction while Meister correctly places it in the non-homicide category. *See* Wash. Rev. Code Ann. § 9.82.010 (West 2006 Supp) (treason). Kearns states that fourteen states allow the death penalty for non-homicide crimes. 58 S.C. La. Rev. 509, 520, n.9.

More importantly, for present purposes, Cornell lists Florida as among the states which provide capital punishment for the rape of a child. D'Avella, *Note*, 92 Cornell L. Rev. at 150, n. 152. In fact, Fla. Stat. Ann. § 794.011(2)(a) (West 2000), continues to provide that "[a] person 18years 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. . ." However, as this Court noted in *Wilson*, the Florida Supreme Court struck this provision down in *Buford v. State, supra* (applying *Coker*), and despite its nominal capital classification, child rape is punishable in Florida by a sentence of life imprisonment without parole. *Adawy v. State*, 902 So. 2d 746, 748 (Fla. 2005); *see* Fla. Stat. Ann. § 775.082 (West 2000) (in the event the death penalty in a capital felony is held unconstitutional by the United States Supreme Court or the Florida Supreme Court, the district court shall sentence the offender to life imprisonment without parole).

of jurisdictions allowing the death penalty for non-homicide crimes at least doubled between 1993 and 1997. Kearns, 58 S.C. L. Rev. at 520, 521, and n. 110 (citing Meister, *supra* note 108, at 210-212 and Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 Wm. & Mary J. Women & L., 129, 160-61 (1997) (noting that in 1993, at least six states authorized death for non-homicide crimes, and by 1997, that number had grown to fourteen)).

Our own survey, which also includes the 2003 Bureau of Justice Statistics report on capital punishment,[35] indicates that 24 of the 38 states permitting capital punishment provide the death penalty only for crimes resulting in the death of the victim. Of the remaining 14 states, 5 provide capital punishment for child rape, as discussed above. Five more provide the death penalty for sui generis extraordinary crimes against the government, i.e., treason, espionage, aircraft piracy. See Ark. Code Ann. § 5-51-201 (Michie 1997); Cal. Penal Code § 37 (West 1999); Miss. Code Ann. §§ 97-7-67, 97-25-55 (West 2003); N.M. Stat. Ann. § 20-12-42 (Michie 1989); Wash. Rev. Code Ann. § 9.82.010 (West 2006 Supp.).[36] Four states provide capital punishment for

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Nonetheless, Florida ranks among the non-homicide capital jurisdictions because of its strict drug laws. *See* Fla. Stat. Ann. §§ 893.135, 921-142 (*see infra* at p. 54a).

[35] U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 2003* at p.2 (Washington, DC: GPO 2004), http://www.ojp.usdoj.gov/6js/pub/pdf/cp03pdf (accessed February 21, 2007).

[36] However, the last execution for espionage and treason under state law occurred in 1862 in Texas. Federal law providing capital punishment for the same kinds of crimes all but preempts the field, *see, e.g.*, 18 U.S.C. § 794 (espionage); 18 U.S.C. § 2381 (treason), and even then, the last persons executed under federal law for espionage and treason were the Rosenbergs in 1953. *See*: http://en.wikipedia.org/wiki/Capital_punishment_in_the_United_States (accessed February 21, 2007).

aggravated kidnapping offenses similar to Louisiana's (non-capital) crime of aggravated kidnapping in R.S. 14:42. See Colo. Rev. Stat. Ann. § 18-3-301; Idaho Code, §§ 18-4502, 18-4504 (Michie 2000); Mont. Code Ann. 45-5-503 (West 2005); S.D. Codified Laws § 22-19-1 (Michie 1998). While it remains unclear why the legislatures in those states have felt free to prescribe capital punishment for a crime decapitalized by the Supreme Court in *Eberheart v. Georgia*, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977) (per curiam citing *Coker*) when it does not result in the death of the victim, *Eberheart* may be read narrowly as a companion case of *Coker* (which it cites explicitly), as the crime involved a particularly brutal but non-lethal gang rape of a woman abducted at roadside as she attempted to fix a flat tire, *see Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12 (1974), and not as a broad statement that capital punishment may not be inflicted for a kidnapping which harms but does not kill the victim. In addition, three of the statutes are narrowly drawn and decapitalize the crime if the victim is released, before conviction of the offender (Colorado) or imposition of sentence (Idaho), or released unharmed at any time (Montana), to encourage the kidnapper to spare the victim's life. On the other hand, South Dakota imposes no such limits on its kidnapping law, thus making the crime more serious in that state than the rape of a child under the age of 10, a crime carrying a mandatory term of life imprisonment. S.D. Codified Laws §§ 22-22-1; 22-6-1 (Michie 1998). Despite the constitutional uncertainty of the laws,[37] these jurisdictions count in the survey of states which permit capital punishment for non-homicide crimes.

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[37] For example, in South Dakota, the crime of rape, involving either an adult woman or a child, becomes a capital offense if it also constitutes kidnapping as defined in § 22-19-1(2), *i.e.*, abduction "[to] facilitate the commission of any felony or flight thereafter. . ." However, exactly that scenario led to the decision in *Eberheart* and may prompt an identical response from the Supreme Court today.

Utah had made aggravated assault by a prisoner as a capital crime until the Utah Supreme Court struck the statute down in *State v. Gardner*, 947 P.2d 630, 653 (Utah 1997) ("We may or may not think the Supreme Court reached the right result in [*Coker*], but we do not see the persuasiveness of an argument that any aggravated assault, no matter how vicious, could be legally more reprehensible than any rape, no matter how brutal. And under *Coker*, no rape, '*with or without aggravating circumstances*,' can constitutionally qualify for the death penalty when death has not resulted.") (emphasis added by the court). Accordingly, in terms of which jurisdictions *presently* allow for at least the possibility of capital punishment for non-homicide crimes (apart from whether it is actually imposed), Utah no longer ranks among those states. However, a similar law in Montana remains in effect. Mont. Code Ann. § 46-18-220 (2005).

In spite of its decision in *State v. Buford*, *supra*, Florida remains among the ranks of non-homicide capital jurisdiction because of its sweeping drug laws which provide for capital punishment in extreme cases even when the offense does not result in the actual death of anyone. *See, e.g.* Fla. Stat. Ann. § 893.135(3) (West 2007 Supp) (importation of 300 or more kilograms of cocaine into the state when the offender "knows that the probable result of such importation would be the death of any person"); *see also* Fla. Stat. Ann. § 921.142(1) ("The Legislature finds that trafficking in cocaine or opiates carries a grave risk of death or danger to the public; that a reckless disregard for human life is implicit in knowingly trafficking in cocaine or opiates; and that persons who traffic in cocaine or opiates may be determined by the trier of fact to have a culpable mental state of reckless indifference or disregard for human life."). In effect, Florida has imported into its non-homicide drug laws the culpable mental state found sufficient by the Supreme Court to support a sentence of death in homicide cases. *See Tison v. Arizona*, 481 U.S.

137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). Thus, 14 of the 38 states permitting capital punishment provide the death penalty for non-homicide crimes: Louisiana, Oklahoma, South Carolina, Georgia, Arkansas, California, Mississippi, New Mexico, Washington, Colorado, Idaho, Montana, South Dakota, and Florida.

At the federal level, of the 39 crimes carrying the death penalty, excluding the extraordinary crimes of treason and espionage, the overwhelming majority require the death of a person. However, 18 U.S.C. § 3591(b)(1) and 21 U.S.C. § 848(e) combine to provide capital punishment for the kingpin of an extraordinarily large continuing criminal drug enterprise.

Overall, it appears that approximately 38% of capital jurisdictions (15 of 39, including federal) authorize some form of non-homicide capital punishment, a showing strong enough to suggest that there may be no consensus one way or the other on whether death is an appropriate punishment for any crime which does not result in the death of the victim. However, when the direction of change is considered, clearly the direction is towards the imposition of capital punishment for non-homicide crimes. As stated earlier, the number of jurisdictions allowing the death penalty for non-homicide crimes more than doubled between 1993 and 1997.

Most important to our analysis is the fact that four states have enacted laws which capitalize child rape since *Wilson*, evidencing movement in the direction that this Court thought possible back in 1996 when *Wilson* was decided. Looked at another way, even after the Supreme Court decided in *Coker* that the death penalty for rape of an adult woman was unconstitutional, five states nevertheless have capitalized child rape since then, a number which the Supreme Court held in *Roper* was sufficient to indicate a new consensus regarding society's standards of decency towards the juvenile

death penalty. In fact, the trend is more compelling than in *Roper*, given the *Roper* Court's reliance on five states abolishing the death penalty for juveniles after *Stanford* held that the death penalty for juveniles was constitutional. Here, we have five states enacting the death penalty for child rape in spite of *Coker*, which held that the death penalty for rape of an adult was unconstitutional. Furthermore, it is likely that the ambiguity over whether *Coker* applies to all rape or just adult rape has left other states unsure of whether the death penalty for child rape is constitutional. These states may just be taking a "wait and see" attitude until the Supreme Court rules on the precise issue. Thus, the fact that only five states capitalize child rape should not pose an obstacle to the Court's consideration of the issue, given the direction of change, *i.e*, an increase of five since *Coker*.

Because of the direction of change towards the death penalty for child rape and given the lack of consensus either way when considering the number of capital jurisdictions that authorize the death penalty for non-homicide crimes (38%), in our view, the second stage of the *Atkins/Roper* analysis becomes relevant.

Whether child rapists rank among the worst offenders is largely an *a priori* judgment of whether the Eighth Amendment requires a bright-line rule of death only for death. The Supreme Court has characterized rape as a crime second only to homicide in the harm that it causes. *See Coker*, *supra*, 433 U.S. at 597 ("Short of homicide, [rape] is the 'ultimate violation of self.'") (quoting U.S. Dept. of Just., Law Enforcement Assistance Administration Report, Rape and Its Victims: A Report for Citizens Health Facilities and Criminal Justice Agencies (1975)). Given that characterization by the Court, it seems clear that if the Court is going to exercise its independent judgment to validate the death penalty for any non-homicide crime, it is going to be child rape.

While we cannot purport to exercise the Supreme Court's independent judgment on any matter, it can be said for child rapists as a class of offenders that, unlike the young or mentally retarded, they share no common characteristic tending to mitigate the moral culpability of their crimes. Contrary to the mentally retarded and juvenile offenders, execution of child rapists will serve the goals of deterrence and retribution just as well as execution of first-degree murderers would.[38] Our state legislature, and this Court, have determined this category of aggravated rapist to be among those deserving of the death penalty, and, short of first-degree murder, we can think of no other non-homicide crime more deserving. As we previously held in *Wilson:*

> Rape of a child under the age of twelve years of age is like no other crime. Since children cannot protect themselves, the State is given the responsibility to protect them. Children are a class of people that need special protection; they are particularly vulnerable since they are not mature enough nor capable of

[38] We reject the defendant's policy arguments that commentators have speculated that the threat of capital punishment would encourage a rapist to murder his victim, that subjecting a child rape victim to a capital trial increases the trauma to the victim, and that there is an elevated likelihood of wrongful conviction in cases of rape when the victim is a child. Policy arguments tend to be facile, speculative, and political in nature. For each policy argument advanced by anti-capital punishment commentators, equally valid responses have been offered by pro-capital punishment commentators. *See, e.g.*, Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 Am. J. Crim. L. 105-12 (1997-1998). Thus, we consider these policy arguments to be largely irrelevant for Eighth Amendment purposes. Social policy arguments are for the legislature to consider, and whether a particular law represents good or bad policy has little bearing on the question of whether it is nevertheless constitutional. Further, as we stressed in *Wilson*, regardless of a victim's reluctance to come forward against a child rapist, children are a class of persons who need special protection.

> defending themselves. A "maturing society," through its legislature has 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 to the community.[39]

Wilson, supra at 1067. We affirm that reasoning today and hold that the death penalty for the rape of a child under twelve is not disproportionate. Thus, we reject these assignments of error.

Defendant also argues that assuming that capital punishment is constitutional for child rape under the Eighth Amendment as discussed above, Louisiana's procedure for

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[39] As we further explained in *Wilson:*

> Contemporary standards as defined by the legislature indicate that the harm inflicted upon a child when raped is tremendous. That child suffers physically as well as emotionally and mentally, especially since the overwhelming majority of offenders are family members. Louisiana courts have held that sex offenses against children cause untold psychological harm not only to the victim but also to generations to come. "Common experience tells us that there is a vast difference in mental and physical maturity of an adolescent teenager . . . and a pre-adolescent child . . . It is well known that child abuse leaves lasting scars from generation to the next . . . such injury is inherent in the offense." *State v. Brown*, 660 So. 2d 123, 126 (La.App. 2 Cir.1995). ". . . Aggravated rape inflicts mental and psychological damage to its victim and undermines the community sense of security. The physical trauma and indignities suffered by the young victim of this offense were of enormous magnitude . . . ," *State v. Polkey*, 529 So. 2d 474 (La.App. 1 Cir.1988), ". . . the child's tender age made her particularly vulnerable and incapable of resisting . . . considering acutely deleterious consequences of conduct on an eight-year-old child." *State v. Jackson*, 658 So. 2d 722 (La.App. 2 Cir.1995). 685 So. 2d at 1070.

determining when child rape should result in a death sentence is unconstitutional because it does not ensure that it will not be imposed arbitrarily or capriciously.

La. R.S. 14:42, as it read at the time of trial, defined aggravated rape as "a rape committed upon a person, sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed. . . [w]hen the victim is under the age of twelve. . . ."[40] When the victim is under the age of twelve, La. R.S. 14:42(D)(2) authorizes the death penalty.[41] All other cases of aggravated rape are punishable by "life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence." La. R.S. 14:42(D)(1).

La. C.Cr.P. art. 905.3 provides:

> 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

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[40] As stated in footnote 26, *supra* at p. 32, La. R.S. 14:42(A)(4) was amended in 2003 to substitute 13 years for 12 years.

Aggravated rape also is where anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because (1) the victim resists the act to the utmost, but whose resistance is overcome by force, (2) the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution, (3) the victim is prevented from resisting because the offender is armed with a deadly weapon, (4) two or more offenders participated in the act, and (5) the victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing such resistance.

[41] As stated in footnote 26, *supra* at p. 32, La. R.S. 14:42(D)(2) was amended in 2006 to substitute 13 years for 12 years.

> imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating factors against aggravating factors, one against the other, according to any particular standard. *State v. Hamilton*, 92-1919 (La. 9/5/96), 681 So. 2d 1217, 1227-28; *State ex rel. Busby. v. Butler*, 538 So. 2d 164, 173-74 (La. 1988); *State v. Jones*, 474 So. 2d 919, 932 (La. 1985). The distinctive feature of Louisiana's capital sentencing law is that "[t]he jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court . . . but it must find a statutory aggravating circumstance before recommending a sentence of death." *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976) (also describing and upholding Georgia's sentencing provisions). The jury must consider and find one aggravating factor listed in La. C.Cr.P. art. 905.4 and must consider the mitigating factors listed in La. C.Cr.P. art. 905.5. Included as aggravating factors are that "the offender was engaged in the perpetration or attempted perpetration of aggravated rape," and the "the victim was under the age of twelve years . . . ." La. C.Cr.P. art. 905.4(A)(1) and (10).

Defendant argues that Louisiana's capital sentencing procedures fail to genuinely narrow the class of child-rapists eligible for the death penalty because 905.4 was designed solely to guide the jury's discretion in deciding which offenders guilty of first-degree murder are eligible for the death penalty and provides no basis by which juries can

determine which child rapists deserve the death penalty and which do not.

However, as we previously held in *Wilson*, the United States Supreme Court held in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988),[42] a death sentence does not violate the Eighth Amendment merely because the single statutory "aggravating circumstance" found by the jury duplicates an element of the underlying offense. To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty" of the same crime. 484 U.S. at 244 (citing *Zant v. Stephens*, 464 U.S. 862, 877, 103 S. Ct. 2733, 2742, 77 L. Ed. 2d 235 (1983)). *Lowenfield* held:

> the narrowing function required for a regime of capital punishment maybe provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Id., 484 U.S. at 246. Accordingly, the Court held that "the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm." *Id.*

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[42] In *Lowenfield*, the issue was whether a sentence of death may validly rest upon a single aggravating circumstance under La. C.Cr.P. art. 905.4 that is a necessary element of the underlying offense of first-degree murder under La. R.S. 14:30.1. The Court answered in the affirmative.

Thus, under *Lowenfield*, the narrowing function may either be done in the underlying statute itself, in this case La. R.S. 14:42, or in the sentencing statute, La. C.Cr.P. art. 905.4, and the fact that the aggravating circumstance, *i.e*., victim under the age of 12, duplicates and element of the crime, victim under the age of 12, does not invalidate the statute. As found by *Lowenfield* in the context of murderers, "the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more." *Id.*, 484 U.S. at 246.

The reasoning of *Lowenfield* plainly applies to Louisiana's sentencing scheme for capital rape.[43] This assignment of error lacks merit.[44]

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[43] In fact, the present capital rape sentencing scheme as amended in 2003 actually does allow for narrowing at the sentencing phase as well, as the underlying statute narrows those child rapists eligible for the death penalty to those who rape children under 13, and the sentencing statute provides as an aggravating factor that the child be under 12.

[44] We note that the author of this opinion concurred in *Wilson*, writing separately to express his view that "the Legislature should immediately amend Articles 905 *et seq.* of the Code of Criminal Procedure (especially Article 905.2) to clarify the sentencing procedure for an aggravated rape case in which the death sentence may be imposed." *Wilson, supra* at 1074 (Victory, J., concurring). This was directed at the fact that La. C.Cr.P. art. 905.2, which governs capital sentencing hearings, provided 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*." (Emphasis added.) The statute had no provisions for a capital case where the victim survived. This statute was amended by Acts 2001, No. 280, § 1 to provide for this and now reads "The sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that *the crime has had on the victim*, family members, friends, and associates. *The victim* or his family members, friends and associates may decline to testify but, after testifying for the state, shall be subject to cross-

III. Capital Sentence Review

Under La.C.Cr.P. art. 905.9 and Supreme Court Rule XXVIII, this Court reviews each death sentence imposed by the courts of this state to determine if it is constitutionally excessive. In making its determination, the Court considers whether the sentence was imposed under the influence of passion, prejudice, or other arbitrary factors; whether the evidence supports the jury's finding with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender.

The district judge submitted a Uniform Capital Sentence Report and Capital Sentence Investigation Report as Supreme Court Rule XXVIII requires. Those documents reveal that the defendant is a black male who was 34 years of age when he committed the instant aggravated rape in March of 1998 and is currently 43 years old. The defendant has two dependent stepchildren, a stepdaughter age 14 (the victim of the instant offense) and a stepson age 10. The Sentence Report reflects that his father predeceased him in 2000 and his mother is still living. The Sentence Report indicates that the highest grade completed was eighth grade. This report also lists the defendant as being the half-brother to a son born of his mother, half-brother to two sons from his father, and half-brother to a sister from his father. The Sentence Report reveals that no psychiatric evaluation was made to determine sanity but that the defendant was interviewed by psychologists to determine if he is mentally retarded, and the district court determined that he was not. *See* discussion in the

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examination." (Emphasis added.) Thus, the concerns the author had in 1996 have now been rectified.

appendix to this opinion. There was testimony in a pre-trial hearing that the defendant completed his GED.

Portions of the Capital Sentence Report and the Investigation Report reveal the defendant had five prior convictions for issuing worthless checks between 1987-1992. The instant capital offense involves the March 2, 1998, aggravated rape of his step-daughter who was under the age of 12 years old at the time (age 8). There was testimony presented during the penalty phase that Kennedy also raped a child, now an adult, in 1984, but that he was never charged or convicted of this offense.

Passion, Prejudice and Other Arbitrary Factors. In capital cases the Court has heightened responsibility to determine whether argument introduced passion, prejudice, or other arbitrary factors which contributed to the jury's sentencing decision. The discussion of the various alleged instances of prejudicial prosecutorial comments, gruesome photographs and expert testimony regarding the extent of the injuries, and the victim's emotional display on the stand set forth instances which the defendant claims interjected of passion, prejudice, and other arbitrary factors into these proceedings. These claims are discussed and rejected in the appendix. For the reasons set forth in the discussion of each of these assignments of error, we find that there is nothing to establish passion, prejudice, and/or other arbitrary factors were interjected into these proceedings in such a way that they contributed to the jury's decision that the defendant should suffer the death penalty.

Aggravating Circumstance. As discussed above, the state introduced sufficient evidence to prove the presence of the aggravating circumstance of aggravated rape of a victim under the age of twelve years old. That this aggravating circumstance is the same as an element of the charged offense

is discussed above, and does not merit reversal of the defendant's conviction and sentence.

Proportionality. This Court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offender and the offense. In this case, the state attempts to meet its obligations under Rule XXVIII by submission of a memorandum dealing with seventy-seven cases, purporting to catalog all first-degree murder cases in the 24th Judicial District Court in which sentence was imposed after January 1, 1976. The state also catalogs each capital rape case in which sentence was imposed after August 15, 1995, in the same judicial district. In five of the cases involving aggravated rape of a juvenile, the state opted not to seek capital punishment.[45] In two cases, prosecution was instituted as a capital case but defendants pled guilty and received life sentences. In two of the capital rape cases, the defendants were convicted but the jury did not unanimously vote to impose capital punishment during the penalty phase. Because this is the first time the death penalty has been imposed under Louisiana's revised aggravated rape law, there are no similar cases. However, the heinous nature of the crime and the severity of the injuries sustained by the victim distinguishes this case from aggravated rape cases in which the death penalty is either not requested or not imposed. In addition, we have held above that the death penalty in this case is not disproportionate under the Eighth Amendment.

[45] In one case, the state opted not to seek the death penalty because the sexual abuse spanned the period within which the aggravated rape statute was amended.

DECREE

For the reasons assigned herein, the defendant's conviction and death sentence are affirmed. In this event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial court shall, upon receiving notice from this Court under La. C.Cr.P. art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by La. R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any State post-conviction proceedings, if appropriate, pursuant to its authority under La. R.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that application, if filed in the state courts.

AFFIRMED.

APPENDIX B

SUPREME COURT OF LOUISIANA
No. 05-KA-1981

STATE OF LOUISIANA
v.
PATRICK KENNEDY

On Appeal from the Twenty-Fourth Judicial District Court, For the Parish of Jefferson, Honorable Ross LaDart, Judge

NOT FOR PUBLICATION

VICTORY, J.*

The defendant's remaining assignments of error are without merit and are addressed below in the order they arose in the proceedings.

Pre-Trial Grand Jury Proceedings

The defendant contends that discrimination in the selection of the grand jury foreperson requires reversal of the conviction. This claim was previously presented to this Court by writ application from the decision of the Fifth Circuit in *State v. Kennedy*, 02-0214 (La. App. 5 Cir. 3/4/02), 823 So. 2d 411, *writ denied*, 02-2088 (La. 1/24/03), 836 So. 2d 43, in which the Fifth Circuit analyzed the case in light of this Court's decision in *State v. Langley*, 95-1489 (La. 4/3/02), 813 So. 2d 356.[1] The court of appeal correctly found that the

*Retired Judge Lemmie O. Hightower, assigned as Justice ad hoc, sitting for Associate Justice Jeannette T. Knoll, recused.

defendant failed to establish a prima facie case of discrimination in the selection of the grand jury foreperson.[2] The instant appeal adds no new considerations for review.

Voir Dire

The defendant contends prospective jurors with prior felony convictions, who had served their sentences, were

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[1]As noted by the appellate court, *Langley* found an unrebutted prima facie case of discrimination when African-Americans were under represented by an absolute disparity of 15.5% to 15.9% and women by 25.4%. Here, on the other hand, the absolute disparity for African-Americans, which ranged from 7.12% to -0.78%, was far below the figures presented in *Langley*. However, the absolute disparity figures for women in the instant case, 13.4% to 17.21%, "all partially within the *Langley*-III range as significant." *Kennedy*, 823 So. 2d at 416. In *Langley*, the absolute disparity for women was 25.4%. Nevertheless, when reviewing the comparative disparities figures in the present case, females were under represented 29% to 32% of the time, whereas in *Langley*, the comparative disparity amounted to 48.5% for women. *Kennedy*, 823 So. 2d at 419. Given the borderline under representation of women, the improvement in the selection process, the large size of the population segment, and the small comparative disparity, the Fifth Circuit concluded that the defendant failed to establish a prima face case of discrimination in the selection of grand jury forepersons in Jefferson Parish. *Kennedy*, 823 So. 2d at 419-420.

[2] To demonstrate an equal protection violation in the context of grand jury selection, a defendant must establish a prima facie case of purposeful discrimination by showing:

(1) under representation of an identifiable group in the grand jury that returned the indictment; (2) that the degree of under representation must be proved "by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time;" and (3) that the selection process is "subject to abuse or is not racially neutral" so as to support the presumption of discrimination raised by the statistical showing. *Castaneda v. Partida*, 430 U.S. 482, 494-95, 97 S. Ct. 1272, 1280, 51 L. Ed. 2d 498. Only if a defendant established a prima facie case of discrimination using this approach would the burden shift to the state to rebut that prima facie case. *Id.*

wrongfully disqualified by the Clerk of Court in Jefferson Parish.

La. C.Cr.P. art. 401 sets out the general qualifications for jurors in Louisiana. No one under indictment for a felony, nor anyone having been convicted of a felony for which he has not been pardoned is eligible to serve as a juror. La. C.Cr.P. art. 401(5). In Louisiana, the initial qualifications of individuals to serve as jurors are determined before their names are placed on the general venire lists. La. C.Cr.P. art. 408 (parishes other than Orleans); La. C.Cr.P. art. 409 (Orleans Parish). Defendant contends that the provisions of La. C.Cr.P. art. 401(5) are unconstitutional, as they conflict directly with La. Const. art. I, § 20, which provides for the right to humane treatment:

> No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense.

In the defendant's view, the right to sit on a jury is a full right of citizenship that shall be restored upon the completion of a criminal sentence.

However, this Court has recognized that the restoration of the full rights of citizenship under Article I, § 20 restores only the basic rights of citizenship, such as the right to vote, work or hold public office, but does not restore privileges as a first offender pardon under La. Const. art. IV, § 5(E)(1) does. *State v. Adams*, 355 So. 2d 917, 922 (La. 1978). Likewise, an automatic pardon for a first felony offender under Article IV, § 5(E)(1), while restoring some privileges, does not restore the status of innocence to the convict who has merely served out his sentence as does an executive pardon granted by the governor. *Adams*, 355 So. 2d at 922; *Diaz v. Chasen*, 642

F.2d 764, 766 (5th Cir. 1981). Moreover, La. C.Cr.P. art. 401(5) specifically provides that in order for a person to qualify as a juror they must "not be under indictment for a felony, nor have been convicted of a felony for which he has not been pardoned." *See State v. Hall*, 233 So. 2d 541 (La. 1970). Absent a pardon from the governor, a person convicted of a felony in Louisiana is not qualified to serve as a juror. *State v. Baxter*, 357 So. 2d 271, 273 (La. 1978).

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 La. C.Cr.P. art. 401. The defendant's contentions in these assignments of error are contrary to settled law.

The defendant also complains of several other rulings made by the district court during voir dire. The defendant contends that prospective jurors Lange and Subramaniam were improperly excused for cause based only on a general opposition to capital punishment. The defendant also complains that prospective jurors Butler, Howell, and Scheid were improperly excused for cause based only on a general belief that capital punishment is disproportionate to the offense of aggravated rape. The defendant contends that the district court improperly excused prospective African-American jurors Dorsey, Parkman, Martinez, Manson, and Payton for hardship, and prospective jurors Lespinasse and Jones based on youth. The defendant also contends the district court improperly denied defense challenges for cause of prospective jurors Augustus and Asfour. Finally, the defendant contends the district court improperly restricted the scope of voir dire.

To determine the correctness of such rulings, a review is

undertaken of the record of the voir dire as a whole. *State v. Lee*, 93-2810(La. 5/23/94), 637 So. 2d 102, 108; *State v. Hall*, 616 So. 2d 664, 669 (La. 1983) (citing *State v. Williams*, 457 So. 2d 610 (La. 1984)). The record has been scrutinized and the jury selection process summarized briefly below, with those prospective jurors complained of by the defendant appearing in **bold** typeface.

Voir dire commenced on August 8, 2003. The jury pool was first examined for basic qualifications, then "death qualified," and then subjected to general voir dire.[3] 39 prospective jurors were excused by the district court *without objection* for failing to meet basic qualifications: 5 were not citizens residing in the jurisdiction;[4] 3 reported difficulty reading or writing;[5] 11 expressed health concerns that rendered them physically and/or mentally unable to serve;[6] 11 were excused for family, school, or work-related hardship;[7] 7

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[3] Although defense counsel agreed to this procedure, the defendant himself objected that he believed asking prospective jurors to assume guilt hypothetically to inquire into their views on capital punishment would bias them against him *ab initio*.

[4] These included prospective jurors Montgomery, Morales, Serio, **Lespinasse**, and Richardson. The reasons for excusing prospective juror Lespinasse were not fully jurisdictional but interrelated with his attendance of high school. After the trial judge explained basic juror qualifications and other prospective jurors voiced their jurisdictional concerns, Lespinasse volunteered that, although his family resided in Jefferson Parish, he attended boarding school at the high school level outside the parish during most of the preceding year and was still in high school.

[5] These included prospective jurors Bustillo, Moore, and Robertson.

[6] These included prospective jurors Berthelot, Wallace, Wade, **Martinez**, Stoll, Roussel, Lee, Roach, Burghardt, Bodden, and Chopin. In addition to these, three prospective jurors were excused for poor health over the defense's objection: Rogers, Reech, **Dorsey**.

[7] These included prospective jurors Thibodeaux, Smith, Lizano, Dykes,

had personal experience with sexual abuse or other concerns resulting in partiality;[8] and 2 had personal familiarity with an aspect of this case.[9] Prior to "death qualification," two prospective jurors were successfully challenged for cause by the state without objection,[10] three prospective jurors were successfully challenged for cause by the defense without objection,[11] and three prospective jurors were jointly challenged successfully for cause.[12]

During "death qualification," 16 prospective jurors were successfully challenged for cause *without objection* because they would not consider life imprisonment as a punishment for an offender proved to have raped a child (reverse-*Witherspoon*)[13] and 43 prospective jurors were successfully challenged for cause *without objection* because they would not consider capital punishment either generally[14] or for an

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Oddo, Howard, Briede, Vela, Ardoin, Trosclair, and Fernandez.

[8] These included prospective jurors Carey, Pennino, Canizaro, Heyer, Buquoi, Bennet, and Unger.

[9] These were prospective jurors Johnson and Day.

[10]These were Duhe and Smith. In addition to these, four prospective jurors were successfully challenged for cause by the state over the defense's objection: Martin, **Parkman**, **Manson**, and **Payton**.

[11]These were Smith, Reyes, and Smoot. Two of defendant's challenges for cause were denied (**Asfour** and Ripp) and one of the defendant's challenges for cause was granted over the state's objection (Lacheny).

[12]These were Kavanaugh, Kenney, and Brignac. One joint challenge for cause was denied (**Augustus**).

[13]These were Kummerer, Martinez, Jackson, Kravet, Coulon, Rogers, Moore, Thomas, Lachney, Estes, Godin, Wilson, Michel, Arceneaux, Deibel, and Folse.

[14] These were Williams, Rousell, Cunningham, Hollister, Kenning, Leaumont, Carriere, McGee, Lopez, Pulizzano, Clark, Nguyen, Hahn,

offense of aggravated rape[15] (*Witherspoon*). Following "death qualification," the state's challenge for cause based on family hardship was granted for five prospective jurors without objection,[16] and the state and defense joined in one challenge for cause.[17]

By August 14, 78 jurors were found to have been qualified, had survived *Witherspoon* and reverse-*Witherspoon* challenges, and progressed to general voir dire. During general voir dire, two joint challenges for cause were granted,[18] three state challenges for cause were granted without objection,[19] and one defense challenge for cause was granted without objection.[20] Following general voir dire, peremptory challenges were made and the jury selection process completed. The district court judge gave an additional two peremptory challenges (to be used to strike prospective

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Arcement, Matthews, Wick, Williams, Babin, Delahoussaye, Hoang, Jacobs, Vincent, Klotz, Funck, St. Germain, and Quinn. In addition to these, the state's *Witherspoon* challenge for cause was granted over the defense's objection for prospective juror **Subramaniam**.

[15] These were **Howell**, **Butler**, **Scheid**, Buckman, Ohlsson, Wells, Boudreaux, Davis, Harrison, Rowen, Bonura, Landry, Sibley, Sanchez, Avery, Digiacomo, and Logan. The state's *Witherspoon* challenge for cause of Waguespack was denied.

[16] These were Griffiths, Feurtado, Collins-Jones, Shuckrow, and Blissett. In addition, the state's challenges for cause for prospective jurors **Jones** and Brady were granted over the defense's objection.

[17] This prospective juror was Nixon. The state's challenge for cause of prospective juror **Lange** was granted over the defense's objection.

[18] Prospective jurors Cheron and Fleming had some pre-existing knowledge of the crime.

[19] These were prospective jurors Carey, Ripp, and Lorens.

[20] This was prospective juror Blum.

alternate jurors) for a total of fourteen peremptory challenges for each side. The state exercised nine of its peremptory challenges,[21] which included one back-strike.[22] The defense exercised 11 of its peremptory challenges,[23] which included seven back-strikes.[24] Twelve jurors[25] and two alternates[26] were finally selected.

Lange. The district court granted the state's challenge for cause of this prospective juror. Defendant contends that ruling was in error because Lange expressed only a general opposition to capital punishment but indicated that he would consider both life and death based on the brutality of the offense and, despite some general knowledge about the case, he understood and would apply the presumption of innocence.

In fact, Lange initially indicated on his juror questionnaire that he generally opposed capital punishment but that he could put aside his feelings and impose it according to the facts and the law. He explained further on questioning by the state during "death qualification" that his view on the appropriateness of capital punishment would depend on the brutality of the crime. The defense had no

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[21] The state struck peremptorily prospective jurors Bolton, Rodriguez, Harper, K. Martinez, Yochum, Vincent, Franklin, and one unknown prospective juror.

[22] The state back-struck prospective juror B. Martinez.

[23] The defense struck peremptorily prospective jurors Ryan, Asfour, Guidry, and Sachitano.

[24] The defense back-struck Williams, Finney, Allemore, Flynn, Sheehan, Badeaux, and Marcus.

[25]These were Hezeau, Uhl, Vo, Wise, Doucet, Dufrene, **Augustus**, Servat, Hanley, Harris, Dubois, and Cavallo.

[26] These were alternates Murry and Broders.

further questions for him. Neither side objected to this prospective juror at the close of the "death qualification" process. During the general voir dire questioning that followed, Lange volunteered when the district court judge inquired into whether any prospective jurors were aware of the publicity surrounding this crime or had heard any media reports. Lange indicated that he heard that the stepfather had brutally raped the child and that there had been a search through the Woodmere neighborhood. Although Lange initially stated that he had not formed an opinion whether the stepfather was guilty, he indicated upon further probing by the district court judge that he believed the defendant, who was likely identified correctly by the victim, was obliged to present some evidence to restore his tarnished reputation. At that point, the district court instructed Lange on the presumption of innocence and the Fifth Amendment.

The state contended in challenging prospective juror Lange for cause that, although he indicated (after being instructed by the district court), that he would apply the proper legal standard regarding the burden of proof, the totality of his answers combined with his initial statements, including his knowledge gleaned from media reports, indicated that he believed the defense had to present evidence to prove the innocence of the defendant. The district court judge agreed and granted the state's challenge for cause over the objection of the defense.

A trial court is vested with broad discretion in ruling on challenges for cause, and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State v. Cross*, 93-1189, pp. 6-7 (La. 6/30/95), 658 So. 2d 683, 686-87; *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So. 2d 1278, 1280. The grounds for which a juror may be challenged for cause are set forth in La. C.Cr.P. art. 797. One of these grounds is pertinent here, namely, that "[t]he juror is not impartial, whatever the cause

of his partiality, . . .” *Id.* § (2). A trial court is not bound by a juror's assurances of impartiality, and a cause challenge should be granted if a juror's responses as a whole reveal facts from which bias, prejudice or inability to render fair judgment may be inferred reasonably. *State v. Hallal*, 557 So. 2d 1388, 1389-90 (La. 1990) (per curiam); *State v. Jones*, 474 So. 2d 919, 926 (La. 1985). As a general matter, under La. C.Cr.P. art. 800(B) a defendant is precluded from attacking a trial court’s grant of a state’s challenge for cause unless the effect of such ruling is the exercise by the state of more peremptory challenges than it is entitled to by law.

Under these circumstances, the district court did not abuse its discretion in granting the state’s challenge for cause. The trial judge makes personal observations of potential jurors during the entire voir dire, and a reviewing court should accord great deference to the trial judge’s determination and should not attempt to reconstruct voir dire by microscopic dissection of transcript in search of magic words or phrases that automatically signify juror's qualification or disqualification. Despite this prospective juror’s ability to respond correctly after being instructed, the overall tenor of his answers indicate that his awareness of facts of the case as reported by the media would substantially impair his performance as a juror. The defendant fails to show that the trial judge abused his discretion in granting the state’s challenge for cause of prospective juror Lange. Moreover, the defendant has made no showing that the effect of this ruling was the exercise by the state of more peremptory challenges than it was entitled to by law. As noted above, the state exercised only 9 of its 12 peremptory challenges.

Subramanian. The state’s *Witherspoon* challenge for cause was granted over the defense’s objection for this prospective juror. The defendant contends that this ruling was in error because, although Subramanian opined that capital punishment was costly and ineffective and likely

disproportionate for rape, he indicated that he could consider it albeit at a very high standard of proof. Although the state had remaining peremptory challenges and could exclude the juror in any event, a defendant may complain that the trial court erroneously excused a potential juror who is *Witherspoon* eligible, although the state could have used a peremptory challenge to strike the 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 338; *State v. Edwards*, 97-1797 (La. 7/2/99), 750 So. 2d 893, 903-04.

In fact, this prospective juror began the "death qualification" process by stating that he was generally opposed to capital punishment because he considered it expensive, ineffective, and uncivilized. Upon further questioning, he indicated that he believed death was a disproportionate punishment for the rape of minor; he would only seriously consider it in a case of mass murder. He conceded that his views on capital punishment would impair his ability to serve fairly and impartially. In response to further questioning by the defense, this prospective juror clearly stated that, assuming the state had met its burden of proof in the guilt phase, during the penalty phase he would revisit such guilt-phase issues as witness credibility and physical evidence, in effect requiring the state to prove its case at a higher standard than beyond a reasonable doubt because it was a capital case.

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. 412, 424, 105 S. Ct. 844, 852, 83 L. Ed. 2d 841 (1985); *State v. Sullivan*, 596 So. 2d 177 (La. 1992), *rev'd on other grounds sub nom. Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct.

2078, 124 L. Ed. 2d 182 (1993). The basis of exclusion under La. C.Cr.P. 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 rights 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.*, 88 S. Ct. at 1777.

A review of the record demonstrates that the trial judge did not abuse his discretion in granting the state's challenge for cause of Subramanian on the basis of his views on capital punishment. Although this prospective juror indicated that he could consider imposing the death penalty under extremely limited circumstances, it is clear that this juror's views exceed a general objection to the death penalty or conscientious or religious scruples against its infliction, and rose to the level of substantially impairing his ability to make an impartial decision in accordance with his instructions and his oath. If a prospective juror's inclination for or against the death penalty would substantially impair the performance of the juror's duties, a challenge for cause is warranted. *State v. Ross*, 623 So. 2d 643, 644 (La. 1993). Although this prospective juror declared his ability to remain impartial, his responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may reasonably be inferred. The juror's voir dire responses as a whole make it clear that his reluctance to impose the death penalty translated into requiring "absolute" proof of guilt, rather than proof beyond a reasonable doubt. His views on capital punishment therefore would substantially impair his performance as a juror. He was properly excluded.

Dorsey, Parkman, Martinez, Manson, and Payton. The defendant contends that African-American jurors were improperly excluded for health reasons, which reasons the defendant implies were not sufficiently severe to vitiate their ability to serve. Of these prospective jurors, defense counsel did not object to excusing Martinez.[27] Of the remaining four, each of whom voluntarily approached the bench to inform the court of his or her ill-health during the initial qualification process, all suffered significant impairments clearly rendering them unable to serve. Dorsey complained of neck pain, inability to engage in prolonged sitting, trouble with walking and standing as a consequence of recent ankle surgery, and drowsiness resulting from pain medicine. Parkman suffered from rheumatoid arthritis, experienced difficulty in sitting, laying, or standing, and endured pain in her shoulder, neck, and legs. She frequently urinated as a consequence of diabetes, takes numerous medications, and indicated that the pain she suffers would impair her ability to concentrate.[28] Manson reported a significant memory impairment: he would forget mundane things after 15-20 minutes elapsed and would forget even significant information after a week. Payton reported taking approximately 15 different medications and suffering from drowsiness and frequent uncontrolled urination.

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

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[27] Moreover, Martinez suffered from scoliosis and reported, *inter alia*, inability to sit for more than 10 or 15 minutes.

[28] The trial judge noted, following the defense's objection, that this prospective juror's condition appeared severe and that she wore numerous braces.

action on its own initiative or on the recommendation of an official or employee designated by the court. *See* La. C.Cr.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). The discretion to release prospective jurors in advance of voir dire examination is not to be disturbed unless there is a showing of fraud or collusion resulting in prejudice to the accused. *State v. Sheppard*, 350 So. 2d 615, 650 (La. 1977). A review of the transcript of voir dire shows that these jurors were properly excused for ill health.

Lespinasse. The defendant contends that Lespinasse was excused because he was 18 years old. However, this prospective juror was excused not only without objection but apparently by agreement of both sides.[29]

Jones. The defendant contends that Jones was excused for youth although she ultimately indicated that she could consider both life and death. In fact, this prospective juror initially stated during "death qualification" that she could consider capital punishment for homicide but would not for an aggravated rape under any circumstances. Upon further questioning by the defense, she indicated that she had changed her mind and "would have an open mind to both sides." Following "death qualification," the court noted that Jones appeared to have been rehabilitated, the state agreed, and no challenge was made. Jones then approached the bench to indicate that she did not believe she was sufficiently mature to serve as a juror on this case. The state challenged her for

[29] Setting aside the fact that the defense agreed to the release of this prospective juror and assuming that this boarding school student could be considered to reside in the jurisdiction, full-time students are not a protected class and "the young" are not a group requiring protection for purposes of jury composition jurisprudence, as discussed below.

cause and the defense objected. The trial court attempted to rehabilitate her. She remained obdurate that she would be unable to make a decision and that any decision she made would be based, not on the facts and the law, but rather based on her fear.

Although the law prohibits systematic exclusion of certain protected classes in the source or sources from which the jury venires are chosen, "the young" have never been held to be a group which requires protection under its fair cross-section analysis. *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 2917, 41 L. Ed. 2d 590 (1974) (upholding a system for jury selection which guaranteed that the youngest juror at the time of trial could be no younger than 24). As noted above, Jones was considered rehabilitated by the state until she voluntarily expressed her fear that she was not sufficiently mature to participate in a capital trial and stated that she would not be able to make a decision based on the law and the evidence. Under the circumstances, there was no abuse in the grant of this challenge for cause of a juror who insists that, because of her own immaturity, she cannot make a decision based on the law and the evidence.

Augustus. The district court denied a joint challenge for cause of this juror. The defendant contends that his challenge for cause of this prospective juror was improperly denied and that he exhausted all of its peremptory challenges, forcing it to accept this juror, who would only vote for death, on the jury. However, as noted above in the summary of voir dire, a review of the transcript makes it abundantly clear that the defense did not exhaust all of its peremptory challenges.[30]

[30] When this juror first made the jury, the defense had exercised only five of its peremptory challenges. When the 12th member of the jury was accepted, the defense had exercised 11. In his supplemental brief, the defendant concedes that subsequent correction of the record results in a revision to the number of peremptory challenges utilized, which the defendant contends in his reply brief shows that the record is so defective

The trial judge, in addition to affording each side two extra challenges for use in selecting alternates, repeatedly vocalized the number of challenges remaining for each side throughout the selection process. Appellate counsel's claim that the record is unclear in this regard, later withdrawn in his reply brief, is patently in error.

A trial court is vested with broad discretion in ruling on challenges for cause and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State v. Cross*, 93-1189 (La. 6/30/95), 658 So. 2d 683, 686-87; *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So. 2d 1278, 1280. Prejudice is presumed when a challenge for cause is denied erroneously by a trial court, and the defendant has exhausted his peremptory challenges. *Robertson*, 630 So. 2d at 1280; *State v. Ross*, 623 So. 2d 643, 644 (La. 1993).[31] But when a defendant has failed to exhaust his peremptory challenges, this Court has held that such a failure bars review. *See State v. Mitchell*, 94-2078, (La. 5/21/96), 674 So. 2d 250, 254 (juror allegedly would not consider mitigating evidence and would weigh against defendant a failure to testify; this Court "need not reach . . .

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as to undermine confidence in it.

[31]The rule is different at the federal level. *See United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from district court's erroneous denial of a cause challenge). However, at the federal level, a defendant may seat the challenged juror and then complain about the trial court's ruling denying the cause challenge on appeal if convicted. *Martinez-Salazar*, 528 U.S. at 315, 120 S. Ct. at 781. In Louisiana, a defendant must use one of his remaining peremptory challenges to excuse the juror or waive any complaint on appeal. *State v. Connolly*, 700 So. 2d at 818; *State v. Bourque*, 622 So. 2d 198, 229-30 (La. 1993); *State v. Fallon*, 290 So. 2d 273, 282 (La. 1974).

whether there was an erroneous denial of [a cause] challenge," because defendant struck the juror and had peremptories remaining at the close of jury selection), *cert. denied*, 519 U.S. 1043, 117 S. Ct. 614 (1996); *State v. Koon*, 96-1208 (La. 5/20/97), 704 So. 2d 756, 757 (juror held fast to belief in defendant's guilt; Court need not decide whether the challenge for cause was improperly denied, "[b]ecause the defense failed to use all its peremptory challenges . . .").

As noted above, the state exercised 9 and the defense 11 of its peremptory challenges. Regarding this particular juror, following "death qualification" both state and defense joined in challenging this juror for cause. In denying this joint challenge, the trial court described this juror as a weather vane who was easily manipulated by the questions into expressing both pro-death and pro-life leanings. A review of her full testimony shows that this assessment is accurate. She initially indicated that she favored capital punishment in general but could consider both death and life in prison depending on the circumstances of the offense and the evidence presented. However, after defense questioning, she appeared to commit her vote to death. The attorneys approached the bench and the trial court commented that the defense had taken a prospective juror who would consider both options and, by "piling on enough facts," obtained a commitment from her. The trial judge commented further:

> My concern is, is that both, all four of you know how when you keep piling on facts with a witness who's already shown a lean[ing], a predisposition, you can virtually lead that person right to where you want that person to be or not want them to be. But, what have you accomplished? My concern is you've never really accomplished that fact that he's incapable or she's incapable of considering both sides. You've just given them a set of facts which drives them right to where their lean is.

After this hiatus, this prospective juror was asked whether she could consider any penalty other than death for the rape of a child and she indicated that she would also consider a life sentence. Under these circumstances, there appears no abuse of discretion in refusing to excuse this juror for cause, who was apparently perceived as objectionable to each side, when neither exhausted its peremptory challenges. This mode of questioning by defense counsel, however, is exemplary of the type of questioning ultimately restricted by the district court, which defendant contends (as discussed below) unduly restricted his right to conduct a full voir dire of the prospective jurors.

Asfour. The defendant contends that his challenge for cause of this prospective juror, who knew someone who had been molested as a child rendering her partial, was improperly denied. In fact, Asfour first volunteered during the "death qualification" process that she had not included on her juror questionnaire that she knew someone who was molested at age 12. She was questioned further about this by defense counsel after which she remained committed to considering both life and death. She survived "death qualification" and then approached the court to note that she is a single parent of a six-year-old child whose father is serving in Iraq. The court inquired into her child care arrangements. Following general voir dire, the defendant challenged this prospective juror for cause because she was one of two prospective jurors who expressed concern that the defendant had access to their personal information on the jury questionnaires. The trial court inquired to determine whether she had formed any opinions about the defendant, and because she had not, denied the challenge. It is only in this context that the defense objected to the denial of its challenge for cause of this prospective juror. Therefore, the argument raised on appeal, that this prospective juror knew a child sex abuse victim and therefore was biased, was not properly preserved for review.

Butler. The defendant contends this prospective juror indicated that, although he considered capital punishment a disproportionate penalty for rape, he would consider imposing it under some circumstances. However, the state's challenge for cause of Butler was granted without objection by the defense. Therefore, this issue has not been preserved for review.[32]

Howell. The defendant contends that this prospective juror indicated that she could only consider capital punishment for a rape that resulted in the death of the victim. However, the state's challenge for cause of this prospective juror was granted without objection by the defense. Therefore, this issue has not been preserved for review.[33]

Scheid. The defendant contends that although the record suggests that defense counsel challenged this prospective juror, it seems more likely that the state would have challenged this prospective juror who would not consider capital punishment if the victim of the offense lived to testify. However, assuming arguendo that appellate counsel's theory is correct and the names of the prosecuting and defense attorney were reversed during transcription, then the defense did not object to the challenge for cause of this prospective juror and this issue has not been preserved for review.[34]

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[32]Moreover, Butler made it clear that he would never consider capital punishment in a case of aggravated rape of a child victim but only in an extreme case of serial rape. Therefore, this prospective juror was properly excluded under *Witherspoon*.

[33] Moreover, Howell clearly indicated that she absolutely would never vote for capital punishment in the case of the aggravated rape of a child victim. Therefore, she was properly excluded under *Witherspoon*.

[34] Moreover, although Scheid's initial statements were confused, when pressed to imagine a situation in which he would be able to consider capital punishment for an aggravated rape that did not result in homicide,

Scope of voir dire. Finally, the defendant contends the district court improperly restricted the scope of voir dire during the "death qualification" process, which prevented the defense from fully exploring prospective jurors' views on capital punishment.

The transcript of voir dire has been reviewed to see the extent of restrictions placed on defense counsel. In addition to those described above, the transcript shows a limitation was placed on defense during voir dire of prospective juror Finney,[35] who indicated some preference for capital punishment in the case of the rape of a 12-year old. Upon further questioning Finney testified he could consider a life sentence despite his first preference for capital punishment. After this questioning, the defense added an additional hypothetical condition by probing how the juror would respond if he learned that the defendant had raped another girl previously. The court intervened, finding that the defense had sufficiently probed the prospective juror's ability to consider the alternatives. Likewise, a similar scenario occurred during *Witherspoon* questioning on the next day. On both occasions, defense counsel argued that it was necessary to present prospective jurors with the precise factual circumstances of the case to determine whether they would be able to consider both sentencing options under those circumstances. The trial court limited defense counsel a third time during the voir dire of prospective juror Unger.[36] The defense, who wished to

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he could only imagine a scenario in which the victim were his own daughter (although he conceded that he would not be able to serve on that jury). *Id.* at p. 2882. He said he would find it extremely difficult to consider capital punishment for a non-homicide rape even when the defendant had been shown to have committed prior rapes. *Id.* Therefore, the *Witherspoon* challenge was clearly properly granted.

[35] This prospective juror was ultimately back-struck by the defense.

[36]This prospective juror was excused by the trial court without objection.

continue questioning her about the impact of her grandchildren on her decision-making process, argued that her demeanor showed that she would be substantially impaired from performing her duty as a juror. The trial court, however, considered the questioning repetitive and calculated to end up with a commitment to a verdict.

As a general matter, an accused in a criminal case is constitutionally 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(La. 10/15/96), 680 So. 2d 1175, 1178; *see also State v. Burton*, 464 So. 2d 421, 425 (La. App. 1 Cir.), *writ denied*, 468 So. 2d 570 (La. 1985). The scope of voir dire is within the sound discretion of the trial court and its rulings will not be disturbed on appeal absent a clear showing of an abuse of discretion. Review of a trial judge's rulings on voir dire should be accomplished by examination of the whole record to determine whether sufficiently wide latitude was afforded the defendant in examining prospective jurors. *Burton*, *supra*, 464 So. 2d at 425.

The record as a whole shows that the trial judge acted with an even hand, spending extensive time attempting to rehabilitate jurors, and conducted voir dire in an equitable manner. The trial judge afforded the defense a full opportunity to conduct its voir dire and only appears to have restricted the defense when its questions became repetitive, badgering, or an attempt to inquire too deeply into the prospective juror's response to the specific facts of the case to be tried. In this regard, a trial judge must adhere to the fine line separating a proper inquiry into the ability of a juror to

consider both death and life imprisonment under the particular facts of the case, *see State v. Watson*, 449 So. 2d 1321, 1330 (La. 1984) ("If [a prospective juror] knows enough about the case to know that she could not consider the imposition of the death penalty regardless of what evidence might be presented, she must be excused."), and an improper use of hypothetical questions to pry into the juror's opinion concerning evidence that may be offered at trial. *State v. Vaughn*, 431 So. 2d 358, 360 (La. 1983); *State v. Square*, 257 La. 743, 244 So. 2d 200, 226 (1971); *State v. Smith*, 216 La. 1041, 45 So. 2d 617 (1950). The defendant has shown no abuse of the trial judge's discretion.

Pre-trial motions

The defendant contends the trial court erred in denying a defense motion to hold a pre-trial hearing to assess the competency of the victim to testify at trial. The defendant contends the victim's videotaped statement, her testimony at a pre-trial *Prieur* hearing, and her testimony at trial shows that her memory for, and understanding of, the relevant events was extremely limited. Defendant alleges the victim's young age and limited capacity rendered her particularly suggestible and that her recollections were therefore easily tainted by leading questions asked during interviews and the expectations of representatives of the state throughout the investigatory process.

On July 14, 2003, the defendant filed a Motion to Assess Witness' Competency to Testify, seeking 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 event was impaired.

On July 17, 2003, the trial court denied the motion, finding that the victim had previously demonstrated her

competency when she testified before the trial court on April 7, 2000, at a *Prieur* hearing 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 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 [and] in my judgment is clearly an issue for the jury to decide.
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> 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: "All right. 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.

The state argues that the trial judge is vested with great discretion in determining whether a witness is competent to testify and adds further that when the witness testified at the pre-trial hearing, the witness testified competently and the defense did not challenge her competency to testify. The state notes further that for the first time on appeal the defendant is alleging that the witness was incompetent because she was suggestively questioned. Finally, the state contends that the defense waived this issue when it did not object to the admissibility of the videotape.

Every person of proper understanding is competent to be a witness except as otherwise provided by legislation. La. C.E. art. 601. Understanding, and not age, is the test of whether any person shall be sworn as a witness. *State v. Francis*, 337 So. 2d 487, 489 (1976). 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. 1981). The determination as to 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. *State v. Edwards*, 419 So. 2d 881, 890 (La. 1982). Therefore, the trial court is vested with broad 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 manifest error. *State v.*

Arnaud, 412 So. 2d 1013, 1018 (La. 1982). This Court has upheld the competency determinations of four-year-old witnesses under circumstances which vouched for the reliability of the child's testimony. *Arnaud*, 412 So. 2d at 1018; *State v. Noble*, 342 So. 2d 170, 172 (La. 1977).

In addition to holding that the trial court decides questions of competence of child witnesses and exercises great discretion in doing so, *see e.g., State v. Foy*, 439 So. 2d 433, 435 (La. 1983), Louisiana jurisprudence holds that the same deferential standard which applies to a district judge's determination of competency of a child witness likewise applies to the judge's decision as to the method by which he will determine that competence. The predecessor to Art. 601 required the judge to examine the witness. *See* former R.S. 15:469. However, the code now allows for the judge to make his determination without an examination.

The key determination to be made was whether the child is able to understand the difference between truth and falsehoods. *See State v. Doss*, 522 So. 2d 1274, 1279 (La. App. 5 Cir. 1988). The trial judge explicitly made such a determination. The defendant has made no showing that the trial court's decision was manifestly erroneous. La. C.Cr.P. art. 930.2. As the district court ruled on July 17, 2003, in denying the defendant's motion to assess the witness's competency, he had previously observed that the victim was competent when she testified at a *Prieur* hearing on April 2, 2000, and the defense had put forth no evidence that her competency had changed since that time. Further, at trial, the jury observed the victim's inability to recall certain details during cross-examination, as well as the paucity of detail in the videotaped interview in which she accuses the defendant. The trier of fact makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony of any witness; thus, a reviewing court may impinge on the "fact finder's discretion only to the extent necessary to

guarantee the fundamental due process of law." *State v. Mussall*, 523 So. 2d 1305, 1310 (La. 1988).

Considering the deferential standard which applies to a district judge's determination of competency of a child witness, as well as that applied to a judge's decision as to the method by which he will determine that competence, the defendant's complaints lack merit. In addition, to the extent that the defendant now claims that he should have been allowed the opportunity to test the witness's competency prior to the admission at trial of the December 16, 1999, videotape, the defendant clearly waived that right as he did not request to at that time and instead freely stipulated to the admissibility of the tape. La. C.C.P. art. 841.

Trial Delayed Disclosure of Exculpatory Evidence

The defendant complains that the state delayed in disclosing exculpatory evidence. Specifically, the defendant contends the state withheld: (1) test results from the Connecticut crime lab which were unable to identify the source of blood found on the underside of the mattress or mattress pad (which were not discovered by the defense until trial), (2) the videotaped interview of March 7, 1998, in which the victim stated that the defendant did not rape her (which was not disclosed until 1999), and (3) records documenting phone calls placed from the defendant's home on the morning of the rape (which were not provided to the defense until February 1, 2000). The defendant contends that if he had timely received all of this exculpatory evidence, he could have asserted his right to a speedy trial and been tried before the production of the victim's 1999 videotaped statement taken by Amalee Gordon when, the defendant contends, the evidence would have been insufficient to support the conviction. Finally, the defendant contends that when the Connecticut report surfaced for the first time during trial, the defense should have been granted a mistrial or given

opportunities to pursue more vigorously its theory that the state had deliberately concealed this evidence.

The state responds that the Connecticut lab results were inconclusive and therefore not exculpatory and that the defense did not rely on these results but obtained independent testing that ruled out the victim as the source of blood on the mattress pad. In addition, on February 1, 2000, the defense acknowledged receipt of the 1998 videotaped interview; however, the state alleges that the defense was aware of this interview as early as August 28, 1998. Regardless, the state contends that the defense was not prejudiced by receiving the videotape three years before trial. Likewise, the state alleges that the defense received the phone records three years before trial. Further, the state contends that the fact that the defense opted not to introduce the phone records at trial indicates that this evidence was not deemed exculpatory by the defense.

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that the suppression by the prosecution of evidence favorable to the accused after receiving a request for it violates a defendant's due process rights where the evidence is material either to guilt or punishment, without regard to the good or bad faith of the prosecution. *Id.*, 373 U.S. at 87, 83 S. Ct. at 1196-97. The *Brady* rule encompasses evidence which impeaches the testimony of a witness when the reliability or credibility of that witness may be determinative of guilt or innocence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 756, 31 L. Ed. 2d 104 (1972); *State v. Knapper*, 579 So. 2d 956, 959 (La. 1991). Still, *Brady* and its progeny do not establish a general rule of discoverability. A prosecutor does not breach his constitutional duty to disclose favorable evidence "unless the omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*,

427 U.S. 97, 112, 96 S. Ct 2392, 2400, 49 L. Ed. 2d 342 (1976); *State v. Willie*, 410 So. 2d 1019, 1030 (La. 1982).

While the Supreme Court has repeatedly emphasized the duty of the prosecution to disclose material exculpatory evidence, *see e.g. Taylor v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), it has never involved itself in the timing of such disclosures. In that respect, this Court has noted broadly that "the late disclosure as well as the non-disclosure of exculpatory evidence can so prejudice a defendant that he is deprived of his constitutional right to a fair trial." *State v. Williams*, 448 So. 2d 659, 665 (La. 1984). This standard appears elastic enough to sanction a deliberate delay of disclosure to protect witness safety as long as the defendant's opportunity to investigate the evidence and prepare to exploit it is not substantially impaired. *See United States v. Higgs*, 713 F.2d 39, 43-44 (9th Cir. 1983) ("That inquiry in turn depends on what information has been requested and how that information will be used by [the defendants]. No denial of due process occurs if Brady material is disclosed to [defendants] in time for its effective use at trial.").

Not every violation of the discovery procedures requires reversal; before the defendant may complain of the violation, he must establish that prejudice resulted. *State v. Hooks*, 421 So. 2d 880, 886 (La. 1982); *State v. Strickland*, 398 So. 2d 1062, 1067 (La. 1981). When a defendant is lulled into a misapprehension of the strength of the state's case through the prosecution's failure to disclose timely or fully, and the defendant suffers prejudice when undisclosed evidence is used against him, basic unfairness results which constitutes reversible error. *State v. Mitchell*, 412 So. 2d 1042, 1044 (La. 1982); *State v. Davis*, 399 So. 2d 1168, 1171 (La. 1981). Regardless, discovery violations generally do not provide grounds for reversal of a conviction and sentence unless they have actually prejudiced the defendant; even a discovery

violation involving the state's failure to disclose exculpatory evidence does not require reversal as a matter of the Due Process Clause unless the non-disclosure was so serious that there exists a reasonable probability that the suppressed evidence would have produced a different verdict. *State v. Garrick*, 03-0137 (La. 4/14/04), 870 So. 2d 990, 993.

The defendant must show here that the state's untimely disclosure of the Connecticut laboratory report, the victim's statement, and his phone records deprived him of an opportunity to place before the jury all evidence relevant to the credibility of the witness's testimony and thereby "'undermines confidence in the outcome of trial.'" *State v. Walter*, 96-1702 (La. 6/20/97), 695 So. 2d 1340 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995)). The defendant is least able to make such a showing in the case of the laboratory report and the phone records. The Connecticut laboratory report was inconclusive and ultimately of no evidentiary value. Despite this, the district court collected voluminous testimony outside the presence of the jury to determine why the defense had not been timely provided with a copy of the report, but was unable to conclude anything more than that something had clearly gone wrong with the process. Regardless, the defense had the same material tested and was able to rule out the victim as the source of the bloodstain, rendering the evidence irrelevant to the instant case.

Regarding the defendant's own phone records, the government is not obligated to furnish the defendant with information he already has or can obtain. *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988) (government is not obligated to furnish defendant with information he already has or can obtain with reasonable diligence); *United States v. Miranne*, 688 F.2d 980, 987 (5th Cir. 1982) ("Under *Brady*, the government is not obligated to furnish a defendant with information which he already has."). Accordingly, no *Brady*

violation occurred. *See State v. Hobley*, 99-3343, p. 25 n.10 (La. 12/8/99), 752 So. 2d 771, 786 ("There is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available from another source, because in such cases there is really nothing for the government to disclose.") (quoting *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998)). It appears that although the defense had the records in time for trial, defense counsel preferred not to introduce them and instead argued during closing that the highly chaotic morning of the rape produced discrepancies between the computer records and memories and that the jury should consider the fallibility of human memory.

Although the videotaped interview conducted by Dr. McDermott was clearly exculpatory and therefore its delayed discovery more troublesome, the defendant fails to show it was prejudiced by receiving the videotaped interview approximately three years before trial. In fact, the defendant made this interview the centerpiece of his case. The defendant's contention on appeal that if he had known about the existence of the videotape earlier, he could have proceeded to trial at an earlier date (in which there allegedly would have been insufficient evidence), requires foreknowledge that the victim would recant her original statement and later make a statement implicating the defendant, which the defendant could not have anticipated. This argument is wholly speculative.

In all three instances, the defendant has shown no prejudice in the delayed disclosure that resulted in basic unfairness rising to the level of reversible error.

Mental Retardation Defense

The defendant contends the trial court erred in precluding

a defense of mental retardation, based on his failure to cooperate with expert evaluation and the prospective application of legislatively pending La. C.Cr.P. art. 905.5. The defendant disputes that he failed to cooperate sufficiently with the court-appointed experts, alleging that although he resents being considered mentally retarded he cooperated throughout their evaluations.[37] The defendant contends further that the stigma associated with the label of mental retardation renders mentally retarded defendants particularly vulnerable to the risk of being executed in violation of *Atkins, infra,* and that the court below should have chosen a less severe remedy than barring the proof of his mental retardation to the jury.

The state responds that jury selection was completed and opening statements made on the same day the enactment of La. C.Cr.P. art. 905.5.1 in 2003 La. Acts 698, became effective: August 15, 2003.[38] In response to the defendant's motion, the district court found the testimony of the defense's expert sufficient to justify the appointment of a commission to evaluate the defendant in accordance with this Court's decision in *State v. Williams*, 01-1650 (La. 11/1/02), 831 So. 2d 835. Based on the commission's opinion, the district court

[37]The state responds that a court-appointed expert made three trips to jail to interview the defendant and that the defendant refused to speak with him until the third and never complied with any form of testing.

[38]In response to *Atkins*, La. C.Cr.P. art. 905.5.1 provides that no person who is mentally retarded shall be subjected to a sentence of death. The statute further provides that any capital defendant who claims to be mentally retarded must file written notice within the time limits for filing pre-trial motions. La. C.Cr.P. art. 905.5.1((B). In addition, the statute provides that mental retardation is to be tried to the jury during the capital sentencing hearing. La. C.Cr.P. art. 905.5.1(C)(1). The state contends that this act, containing as it does provisions requiring pre-trial notice, would apply necessarily only to those cases in pre-trial posture at the time of its effective date. Therefore, the state contends that this Court's decision in *Williams* was the governing law.

found that the defendant failed to show he was mentally retarded by a preponderance of the evidence. The state also implies that the defense opted during the penalty phase to depict the defendant instead as a productive, positive, and functioning member of society rather than trying to place evidence before the jury that would show impairment in defendant's adaptive functioning.

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 execution of mentally retarded persons constitutes an excessive punishment and thus violates the Eighth Amendment. However, the Supreme Court declined to adopt a uniform definition of mental retardation, and instead, left the task of defining mental retardation to the states. *Id.*, 536 U.S. at 317, 122 S. Ct. at 2250. This Court addressed *Atkins* in *State v. Williams*, *supra* at 861, and directed trial courts in post-*Atkins* hearings:

> 1) to order a pre-trial evidentiary hearing on the issue of mental retardation when the court has 'reasonable grounds' to believe a defendant is mentally retarded, [La. C.Cr.P.] art. 643; 2) to hold the hearing before a judge, not a jury; 3) to require the defendant to prove by a preponderance of the evidence that he meets the criteria established in Louisiana's statutory definition of mental retardation, LSA-28:381 [defining retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period"].

In response to both *Atkins* and *Williams*, the legislature enacted 2003 La. Acts 698, which created La. C.Cr.P. art. 905.5.1. The recently enacted article, which took effect on August 15, 2003, provides for a procedure to be used in the

event that a defendant raises a claim of mental retardation and requires proof of the allegation of mental retardation by a defendant in a capital case before the jury unless the state and defendant agree that the issue is to be tried by the judge. In all likelihood, however, a jury determination of mental retardation is not required for the statute to survive constitutional scrutiny. In fact, in *Williams*, we addressed that very issue and opined:

> The Supreme Court would unquestionably look askance at a suggestion that in *Atkins* it had acted as a super legislature imposing on all of the states with capital punishment the requirement that they prove as an aggravating circumstance that the defendant has normal intelligence and adaptive function. *Atkins* explicitly addressed mental retardation as an exemption from capital punishment, not as a fact the absence of which operates "as the functional equivalent of an element of a greater offense."

Id., 831 So. 2d at 860, n.35 (quoting *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 2443, 153 L. Ed. 2d 556). Moreover, in *Apprendi v. New Jersey*, the Supreme Court distinguished those findings which would increase punishment and thus required a jury determination and proof beyond a reasonable doubt and those facts that reduce punishment, which are not required to be submitted to a jury, stating:

> If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum, by showing for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that

> authorized by the verdict according to statute nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone.

530 U.S. 466, 490, n. 16, 120 S. Ct. 2348, 2363 (2000). *See also* Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. Legis. 77, 208 (2003) ("[I]t does not appear that the Court's holdings in *Apprendi* and *Ring* require a jury determination regarding the *Atkins* mental retardation issue.").

In fact, both commentators and appellate courts have expressed serious reservations about jurors deciding the issue of mental retardation at the penalty phase of capital trials. *See* Tobolowsky, *supra*, p. 109 ("[P]lacing the *Atkins* mental retardation determination within the punishment proceeding could be confusing to jurors who might misconstrue it as interrrelated with the culpability issues before them or otherwise to be balanced with or against such issues."); *Murphy v. State*, 54 P.3d 556, 575-77 (Okla. Crim. App. 2002) (Chapel, J. concurring in result) (at penalty phase determination of mental retardation, jurors resolution of issue may be improperly influenced by evidence that "can only improperly appeal to jurors' emotions and passions"). Accordingly, several states actually require the court to make the determination of whether a defendant is mentally retarded before trial. *See* Ariz. Rev. Stat. § 13-703.02; Colo. Rev. Stat. § 18-1.3-1102; Ind. Code Ann. § 35-36-9-1; Ky. Rev. Stat. Ann. § 532.135; S.D. Codified Laws 23-A-27A-26.1 to .7. Twenty-one of the thirty states that have enacted procedures for determining mental retardation for those accused of capital offenses provide for a pre-trial determination by a judge. However, perhaps in an abundance of caution following *Ring*, other jurisdictions with large death row populations have adopted statutory schemes whereby the jury must determine whether a defendant has established that he is mentally retarded and thus ineligible for execution. *See e.g.*,

Va. Code Ann. § 19.2-264.3:1.1(C) ("In any case in which the offense may be punishable by death and is tried before a jury, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions . . . shall be determined by the jury as part of the sentencing proceeding . . ."); N.C. Gen. Stat. § 15A-2005(c) issue of mental retardation shall be submitted to the court pre-trial only with the consent of the state) N.C. Gen. Stat. §15A-2005(e) (court shall submit issue of mental retardation to jury at sentencing).

Emphasis has been placed on discussing the legitimacy of a judicial determination of whether a defendant is mentally retarded and therefore protected from capital punishment by *Atkins,* because that is essentially what occurred in the instant case, despite the efforts of defense counsel to make it appear that the defendant was prevented from litigating this issue. The defense first interjected the question of defendant's mental status in April, 2003, when it filed a motion to stay all proceedings pending action on several bills submitted to the legislature in response to *Atkins*. Counsel had previously submitted to the court ex parte information which they believed supported a finding that defendant is mentally retarded. The trial court denied the motion to stay the proceedings but agreed to hold a hearing on whether reasonable grounds existed for appointing a sanity commission to delve into defendant's mental status. At the hearing conducted on May 1, 2003, Dr. Marc Zimmerman, a psychologist and well-known defense expert on a variety of mental heath topics including mental retardation, *see, e.g., State v. Dunn*, 01-1635 (La. 11/1/02), 831 So. 2d 862, 877, testified that on the basis of objective tests administered to defendant in jail, he had determined that defendant has an I.Q. of 70, on the cusp of mild mental retardation. The doctor was inclined to that diagnosis but refrained from giving a firm opinion because he had not had the time to assess whether the defendant suffered from multiple adaptive skills impairment, as suggested by poor school performance and placement in

special education, or whether the signs of mental retardation had manifested themselves before defendant was 18 years old. On the basis of Dr. Zimmerman's testimony, the trial court appointed a commission composed of Drs. Hannie and Griffin to examine the defendant and determine whether he is mentally retarded.

The trial court began the hearing conducted on the commission's report, June 27, 2003, by denying a renewed motion by the defense to postpone the matter until after the effective date of the pending *Atkins* legislation. The court further noted that it was proceeding by analogy with a sanity commission and first heard testimony from Dr. Thomas Hannie, a clinical psychologist. Dr. Hannie testified that he had made three trips to the jail; on the first two occasions, the defendant refused to speak to him, although on the second trip the doctor had brought counsel with him to smooth the way; however, on the third occasion, May 27, 2003, the defendant agreed to speak with him but flatly refused to take any tests.

Dr. Hannie had found no indicia of mental retardation in the defendant's school records.[39] Dr. Hannie had also reviewed defendant's writing samples, which this expert considered to have been produced at the level of an average high school graduate.[40] According to Dr. Hannie, the defendant was articulate, and able to discuss the consequences of retardation on his potential sentence, but politely refused to take any tests. He was neat, well groomed, and his speech was clear and intelligent, showing no impairment in thought processes. He also writes well and in an organized fashion, according to this expert. Most critically,

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[39] Instead, this expert attributed that the defendant's school problems to behavior problems.

[40] The defendant dropped out of school in junior high but then obtained his GED, although the documentary evidence of GED completion is disputed.

Dr. Hannie took a life history from defendant which appeared completely inconsistent with a diagnosis of mental retardation. By his own account, the defendant began his employment history at age 17 when he managed a cleaning crew at K-Mart. He then obtained a commercial operator's license and drove trucks throughout the United States, especially to the Eastern seaboard, using a map to find his way. The defendant also worked as a cook in a private school and ran his own catering business for parties and banquets. He had been employed by Job Link and Crossroads at their group homes for the mentally retarded. The defendant had also driven buses and worked his way up to First Mate on a tugboat. In the meanwhile, he had married twice. The defendant played the piano and taught himself all of the wind instruments. He directed a choir and recorded CDs with them. He had also opened a wholesale grocery business and operated a janitorial service. Following his arrest in the present case, the defendant became a "Podman" or someone with responsibility for an area in jail and the people in it. Dr. Hannie spoke with a Deputy Sullowd at the jail and learned that defendant had handled his responsibilities as a Podman "very well," that he communicated well and took the initiative, that he was helpful to others and that he read so much that he had to box some of the material up and send it home. Deputy Sullowd informed Dr. Hannie that he had dealt with mentally retarded prisoners and that defendant "was on the opposite side of the world . . . ."

The defendant resolutely maintained that he was not mentally retarded and after his interview with him and especially after receiving defendant's account of his own social and work history, Dr. Hannie found himself in complete agreement with him. In fact, Dr. Hannie disputed that the defendant's IQ test score of 70 placed him in the category of mild mental retardation as opposed to the "bottom of the borderline range of intelligen[ce]." Projecting the defendant's intelligence solely on the basis of the adaptive

skills he had displayed, Dr. Hannie concluded that his IQ score would be 96-100, well above the cutoff figure for mild mental retardation.

The commission's second member, Dr. Phillip Griffin, also a clinical psychologist, interviewed the defendant on June 4, 2004, after Dr. Hannie. The defendant initially resisted that interview but after Dr. Griffin sent him a message, he relented on the same day. Dr. Griffin's initial impression of defendant agreed with Hannie's. He appeared "neat and well groomed," a little "miffed at having to come talk to another psychologist," but calmed down quickly and appeared "willing to engage in conversation." Dr. Griffin agreed with Hannie that Dr. Zimmerman's measured IQ of 70 placed defendant in the borderline range of intelligence, slightly above mild mental retardation. Dr. Griffin also agreed that defendant particularly resisted any suggestion that he is mentally retarded stating, "[h]e seems to be a proud person," Dr. Griffin testified, and the defendant exhibited that pride by describing his work history in much the same manner as he did to Dr. Hannie. ("In those examples were some of his jobs: driving eighteen wheelers, counseling mentally retarded children, the fact that he's learned to play musical instruments, the fact that he reads law books to try to help his own case."). On the basis of the information provided by defendant, and his own view of the significance of the 70 IQ measured by Dr. Zimmerman, Dr. Griffin agreed with Dr. Hannie that defendant did not exhibit any of the diagnostic criteria of mental retardation.

After hearing the expert testimony, the court found that the defendant did not prove by a preponderance that he was mentally retarded. The court perceived the controlling law at that moment to be *Williams*. Although the court noted that it would have preferred that the defendant had cooperated with additional testing, the court found that clear and convincing evidence established that the defendant suffered no

impairment in adaptive functioning. The trial court then made an observation that has brought forth a firestorm of protest in the defendant's brief. Well aware that 2003 La. Acts 698 had passed both houses of the legislature and was awaiting the Governor's signature, and that it would take effect on August 15, 2003, the trial court warned counsel that it would maintain its ruling and not submit the issue of mental retardation to a jury because the defendant had failed to cooperate fully with Drs. Hannie and Griffin, as La. C.Cr.P. art. 905.5.1(G)[41] would shortly require, and had thereby lost his right to an instruction to jurors about the exemption of mentally retarded persons from capital punishment.

In a later written judgment, the trial court adhered to this ruling but clarified that the defense would have the opportunity to present, and a jury to consider, any evidence of defendant's alleged mental retardation as a mitigating circumstance. True to its word, the court then granted on July 17, 2003, less than a month before trial, the state's motion to preclude any jury instruction on the exemption of mentally retarded persons from execution. In fact, on August 16, 2003, one day after 2003 La. Acts 698 went into effect, the defense submitted a special requested charge on the exemption for mental retardation. The trial court did not rule on the motion on the record but in any event did not depart from its earlier rulings and did not instruct jurors on the exemption at the close of the penalty phase. During the penalty phase the parties stipulated to Dr. Zimmerman's measured IQ for defendant of 70. However, instead of presenting evidence of mental retardation as a mitigating factor, the defense

[41] La. C.Cr.P. art. 905.5.1(G) provides that if the defendant making the claim of mental retardation fails to submit to or fully cooperate with any examination, upon motion of the district attorney, the district court "shall neither conduct a pretrial hearing concerning the issue of mental retardation nor instruct the jury of the prohibition of executing mentally retarded defendants."

presented witnesses to give jurors the opposite impression of the defendant as a capable and socially productive person with artistic leanings.

In brief, appellate counsel bitterly complains of the patent unfairness in the trial court's ruling which retroactively applied the rule of preclusion in La. C.Cr.P. art. 905.5.1 although the statute was not in effect at the time the defendant gave the interviews with Drs. Hannie and Griffin. Apart from that basic unfairness, and even apart from the question of whether defendant had in fact been uncooperative, counsel argues that La. C.Cr.P. art. 905.5.1 raises a host of constitutional questions under both the Fifth Amendment, by compelling the defendant to waive his privilege against self-incrimination under compulsion of the preclusion rule in subsection (G), and under the Eighth Amendment, by creating "the unacceptable risk that individuals with mental retardation will be executed . . ."

Under other circumstances, the trial court's determination over defense objection to rule on the reports of Drs. Hannie and Griffin only two months before 2003 La. Acts 698 became effective, yet its willingness to apply the act's provisions against the defendant to preclude any consideration at trial of the *Atkins* exemption, might raise serious questions. However, in the present case, no basic unfairness to the defendant resulted because the record is devoid of any evidence that he is in fact mentally retarded. The trial judge was not necessarily wrong in refusing to delay matters even two months and in ruling on the question of the defendant's mental status. The court was following the procedure set out by this Court in *Williams* as appropriate for resolving the question and, as discussed above, this Court was not alone in deeming the issue one for a judge to decide in a pre-trial context before the Louisiana legislature expressed its own superseding view. Given the testimony of Drs. Hannie and Griffin which fully supported the trial court's primary

ruling that the defendant is not mentally retarded, an instruction on the *Atkins* exemption was not pertinent to the case, and the record otherwise forecloses any possibility that the trial court's ruling on the merits induced the defense decision not to present mitigating evidence of defendant's alleged mental retardation for jurors at the sentencing stage. The trial court had expressly left open the opportunity for the defense to make that showing in mitigation, and it appears that counsel instead chose of their own volition a different path by presenting evidence of the defendant's productive role in society before the rape of his stepdaughter and, even, after his arrest, in jail as a "Podman," suggesting in a positive light that the defendant had worked hard and successfully to overcome any disadvantage caused by his marginal intelligence as measured by Dr. Zimmerman. These assignments of error lack merit.

Limited Mental Functioning

The defendant contends the trial court erred in denying his motion to allow guilt phase testimony of limited mental functioning. He contends that this evidence was essential to understand his statements to police and his reactions to the crime perpetrated on his stepdaughter, including the phone calls he made. The state presented witnesses to show that the defendant's reactions were unusual and therefore suspicious. The defendant contends those reactions could be innocently explained in light of his mental limitations.

La. C.Cr.P. art. 651 provides that "[w]hen a defendant is tried upon a plea of 'not guilty,' evidence of insanity or mental defect at the time of the offense shall not be admissible." Louisiana does not recognize a defense of "diminished mental capacity" short of legal insanity. *State v. Deboue*, 552 So. 2d 355, 366 (La. 1989), *cert. denied*, 498 U.S. 881, 111 S. Ct. 215 (1990); *State v. Nelson*, 459 So. 2d 510 (La. 1984); *State v. LeCompte*, 371 So. 2d 239 (La.

1978). Legal insanity, in Louisiana, is the inability to distinguish right from wrong with reference to the conduct in question. La. R.S. 14:14.

The defendant's contention that he should have been permitted to explain his behavior by presenting evidence of mental retardation, in addition to amounting to a "diminished mental capacity" defense short of legal insanity, is contrary to the evidence presented by the defense as presented above, which showed that the defendant in fact showed no impairment in daily living skills.

Victim's Emotional Display

The defendant contends the victim's display of emotions on the stand tainted the proceedings and should have resulted in mistrial, particularly in this case in which the district court refused a defense request to instruct the jury to disregard the emotional display and makes its findings solely on the evidence. The defendant notes that the state was able to capitalize on one outburst, which resulted when the prosecuting attorney left the courtroom and the victim waited on the stand for the prosecutor to return, in closing argument.

Assuming arguendo the facts as presented by the defendant, however, La. C.Cr.P. art. 775 states that "a mistrial shall be ordered . . . when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial . . . ." *See also* La. C.Cr.P. art. 905.1 (adopting trial procedures into penalty phase). A mistrial, however, is a drastic remedy and a trial judge has broad discretion in determining whether conduct is so prejudicial so as to deprive an accused of a fair trial. *State v. Wingo*, 457 So. 2d 1159, 1166 (La. 1984). However, as a general proposition unsolicited statements and spontaneous conduct of a witness are usually not grounds for a mistrial. *See State v. Newman*, 283 So. 2d 756, 758 (La. 1973).

The record also reflects that there were no verbal outbursts by the victim; rather she was crying and looked upset, the degree to which is disputed. Furthermore, the district court noted that the victim's state was understandable, minimal, and that the jury appeared unaffected by it. In similar cases, more extreme emotional displays have not warranted a mistrial. *See e.g., State v. Hopkins,* 626 So. 2d 820, 822-23 (La. App. 2 Cir. 1993) (although the victim's family was upset and cried during closing arguments, the trial judge denied a mistrial and although not immediately, did charge the jury not to be influenced by sympathy, passions, prejudice or public opinion); *State v. Worthen,* 550 So. 2d 399, 401-02 (La. App. 3 Cir. 1989) (appellate court affirmed the denial of a mistrial based on an unprovoked verbal outburst and crying by the victim while being cross-examined; the trial judge noted the victim's emotional state was understandable and strongly admonished the jury).

Prosecutorial Misconduct

The defendant contends the prosecution made several inappropriate comments during closing: (1) asking the jury to convict the defendant to protect the victim and (2) calling the defendant a monster. The defendant also contends the state improperly elicited testimony from the pediatric expert regarding the severity of the victim's injuries (which was not disputed) as a way of bolstering the victim's truthfulness despite the refusal of the trial court to qualify this witness as an expert in delayed reporting by victims of child sexual abuse.

To assist in evaluating these claims, closing arguments in their entirety have been reviewed. First, the state argued that the defendant engaged in suspicious behavior, which included phone calls and attempting to clean the carpets, before reporting the rape. The state noted that no other person saw

the person fleeing on a bicycle, as reported by the defendant, despite the proximity of the responding officer and the quick police response. The state argued further that there was no evidence of a rape occurring outside. The state noted that the defendant's description of the perpetrator did not match Devon Oatis. Finally, the state argued that the victim's second videotaped interview resulted from her need finally to tell the truth.

The defense responded that the computer screen at the carpet cleaning service did not match the witness's memory of the call, and asked the jury to consider the fallibility of human memory when considering the phone call evidence. The defense explained the defendant's unusual behavior as resulting from an understandable and natural reluctance to tell persons outside the family that his stepdaughter had just been raped. The defense argued that the victim's first videotaped interview was more detailed and consistent with the evidence, despite the obvious pressure placed upon her by the adults present. The defense noted that the second videotaped interview lacked detail. For example, the cargo blanket, which figured prominently in the crime, was never mentioned in that interview. Therefore, the defense asked the jurors to compare the two statements and determine which was true. The defense added that the mattress pad, relied upon by the state initially in suspecting the defendant, was shown by DNA testing to be irrelevant to the crime. The defense argued that, although the police described Devon Oatis's bicycle as inoperable, a witness testified that she saw him riding it. The defense suggested that it could not be coincidental that Devon Oatis arranged to have his mother pick him up from school the same day as the rape. The defense responded to the state's assertion that the defendant delayed in reporting the rape by arguing that, given the extent of the blood loss, it was not possible that the defendant delayed very long, if at all. The defense finally characterized the case as one based solely on emotion but argued that, when the evidence was examined

without emotion, there was simply insufficient proof to establish beyond a reasonable doubt that the defendant raped the victim.

The state argued in rebuttal that the defendant's phone calls the morning of the rape are too unusual to be explained innocently and noted that the discrepancy between the cleaning service's computer and employee's testimony was adequately explained by the witness. The state emphasized that the defendant was always present to interrupt the victim when she was questioned. The state argued that the defendant's identification of Oatis's bicycle was inconsistent. The state claimed that the victim's first videotaped statement of how the crime occurred simply did not make sense. The state responded to the defense's claims that the victim was pressured to accuse the defendant by noting that, although C.H.'s custody of her daughter was restored on June 22, 1998, the victim did not accuse the defendant until December 1999. The state closed with the comments found objectionable by the defense:

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

Closing arguments in criminal cases should be restricted to the evidence admitted, to the lack of evidence, to conclusions of fact that may be drawn therefrom and to the law applicable to the case. La. C.Cr.P. art. 774. Louisiana jurisprudence on prosecutorial misconduct allows prosecutors considerable latitude in choosing closing argument tactics. 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 unless "thoroughly

convinced" that the argument influenced the jury and contributed to the verdict. *See State v. Martin*, 93-0285 (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).

In the instant case, the bulk of the state's arguments were fair statements of the evidence admitted and the lack of evidence to corroborate the defense's theory of the case. The final statement by the state during closing (quoted above), however, bordered on improper. But as noted above, improper closing argument does not constitute reversible error unless the appellate court is thoroughly convinced that the remarks influenced the jury and contributed to the verdict. The reviewing court must also give credit "to the good sense and fair-mindedness of jurors who have heard the evidence." *State v. Jarman*, *supra* at 1188. Reading the prosecutor's argument as a whole, and considering the entirety of the record, nothing the defense argues indicates that these remarks so influenced the jury that they contributed to the verdict. Given the traditional breadth accorded the scope of closing arguments by this Court, none of these comments would either individually (or collectively for that matter) merit reversing the defendant's conviction and sentence. *See, e.g.*, *State v. Martin*, 539 So. 2d 1235, 1240 (La. 1989) (closing argument referring to "smoke screen" tactics and defense "commie pinkos" held inarticulate but not reversible); *State v. Copeland*, 530 So. 2d 526, 545 (La. 1988) (prosecutor's waving a gruesome photo at jury and urging jury to look at it if they become "weak kneed" during deliberations held not improper). This Court has declined to reverse elsewhere when similarly ill-considered epithets were employed. *See State v. Bridgewater*, 00-1529, p. 33 (La. 1/15/02), 823 So. 2d 877, 903 ("animal" and "cold-blooded killer on the hunt for prey"); *State v. Martin*, *supra*, 645 So. 2d at 200-201 (defendant as "beast" to the victim's "beauty"); *State v. Gray*, 351 So. 2d 448, 460 (La. 1977) ("animal").

Given that the defendant fails to show any reasonable likelihood that the argument influenced the verdict, this assignment does not warrant relief.

Regarding the defense's complaint that the testimony of the pediatric expert regarding the victim's injuries was an impermissible means of bolstering the credibility of the victim, the trial judge is vested with broad discretion in ruling on the scope of expert testimony. La. C.E. art. 702; *State v. Billiot*, 94-2419 (La. App. 1 Cir. 4/4/96), 672 So. 2d 361, 373; *State v. Mays*, 612 So. 2d 1040, 1044 (La. App. 3 Cir. 1993), *writ denied*, 619 So. 2d 576 (La. 1993). The court did not permit this witness to usurp the jury's ultimate fact-finding role on the question of guilt or innocence.

The state is entitled to the moral force of its evidence, and just as post-mortem photographs of murder victims are admissible to prove corpus delicti, to corroborate other evidence establishing cause of death, as well as location and placement of wounds and to provide positive identification of the victim, as discussed below, this expert's testimony was permissible to establish that a rape had occurred and that it was an exceptionally brutal one. The witness never opined whether the victim would be more likely to accuse her attacker truthfully because of the severity of the injuries. This witness simply testified that it was clear that the victim had been raped and that her injuries were the most severe he had seen during his practice to have resulted from sexual assault.

Gruesome Photographs

The defendant contends gruesome photographs of the victim were admitted at trial despite the lack of probative value in a case in which the fact of the rape and the extent of the injuries were not disputed. The defendant objects that, although the state was ordered pre-trial to limit the images to the dimension of five-by-seven inches, at trial the state

produced larger images.

Under La. C.E. art. 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." The cumulative nature of photographic evidence does not render it inadmissible if it corroborates the testimony of witnesses on essential matters. *State v. Lane*, 414 So. 2d 1223, 1227 (La. 1982); *State v. Miles*, 402 So. 2d 644, 647 (La. 1981). "The trial court has considerable discretion in the admission of photographs [and] its ruling will not be disturbed in the absence of an abuse of that discretion." *State v. Gallow*, 338 So. 2d 920, 923 (La. 1976); *see Watson*, 449 So. 2d at 1326 (admission of gruesome photographs will not be overturned absent a showing that their prejudicial effect outweighs their probative value).

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. Jackson*, 30,473 (La. App. 2 Cir. 5/13/98), 714 So. 2d 87, 96, *writ denied*, 98-1778 (La. 12/6/98), 727 So. 2d 444. It is well-settled that a trial court's ruling with respect to the admissibility of allegedly gruesome photographs will not be overturned unless it is clear that the prejudicial effect of the evidence outweighs its probative value. *State v. Maxie*, 93-2158 (La. 4/10/95), 653 So. 2d 526, 532 n.8 (La. 1995).

Even when the cause of death is not at issue, the state is entitled to the moral force of its evidence and postmortem photographs of murder victims are generally admissible to prove corpus delicti, to corroborate other evidence establishing cause of death, location, placement of wounds, as well as to provide positive identification of the victim. *State v. Letulier*, 97-1360 (La. 7/8/98), 750 So. 2d 784, 794-95; *State v. Robertson*, 97-0177 (La. 3/4/98), 712 So. 2d 8, 32; *State v. Koon*, 96-1208 (La. 5/20/97), 704 So. 2d 756, 776;

State v. Maxie, *supra* at 532. 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, *i.e.*, when the prejudicial effect of the photographs substantially outweighs their probative value. *State v. Broaden*, 99-2124 (La. 2/21/01), 780 So. 2d 349, 364 (citing *State v. Martin*, 93-0285 (La. 10/17/94), 645 So. 2d 190, 198)); *State v. Perry*, 502 So. 2d 543, 558-59 (La. 1986).

The photographs at issue, although depicting serious injuries, are not so gruesome as to be overwhelming. Although they depict more severe injuries than are typically seen in a rape case, they are comparable to the photographs that are routinely deemed admissible in other capital cases, and they are directly relevant to prove the extreme brutality of this rape. The defendant shows no abuse of discretion on the part of the trial judge in admitting these photographs.

Dr. Lee's Testimony

The defendant contends Dr. Lee's testimony that the photos of the yard are inconsistent with a struggle occurring there because the grass and soil are undisturbed was "junk" science not admissible under *Daubert*. A challenge to the reliability of the methods used by an expert must be examined through a *Daubert* hearing, which was not requested by the defendant at trial.[42]

[42] As a general matter, under the standards set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct 2786, 125 L. Ed. 2d 469 (1993), which this Court explicitly adopted in *State v. Foret*, 628 So. 2d 1116, 1121 (La. 1993) (Louisiana's La. C.E. art. 702 "virtually identical to its source provision in the Federal Rules of Evidence. . . [Rule] 702"), the trial court is required to perform a "gatekeeping" function to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589, 113 S. Ct. at 2795. In performing this function, a trial court must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. *Kumho Tire Company, Ltd., v.*

The parties stipulated as to this witness's qualifications, *inter alia*, as an expert in criminalistics and crime scene reconstruction, and he was permitted to testify without objection that he examined the victim's clothes for soil or grass trace and found none. Other witnesses also testified they saw no sign of a struggle occurring in this location without objection. The defendant's characterization of this testimony as one based on knowledge of grass breakage rates, is not accurate. The expert simply opined, as did several other witnesses, that the crime scene in the yard did not appear consistent with a rape occurring there, and added that he had examined the victim's clothing and found no evidence of grass stain, soil, or abrasion consistent with being dragged through the yard.

When the state first asked Dr. Lee whether the physical evidence was consistent with the victim's story, the defense objected on the basis that the state was seeking scientific testimony as to whether the victim was telling the truth. The state rephrased, and the expert testified without objection. Because counsel did not object to the claimed error after the question was rephrased, he waived any claim based on it. La. C.Cr.P. art. 841. This assignment of error lacks merit.

Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 1176, 143 L. Ed. 2d 238 (1999). While *Daubert* specifically addressed scientific evidence, *Kumho* made clear that the trial court's essential gatekeeping function applies to all expert testimony, including opinion evidence based solely on special training or experience. *Id.*, 526 U.S. at 148-49, 119 S. Ct. at 1174-75. In the end, "the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" *Id.*, 526 U.S. at 149, 119 S. Ct. at 1174 (quoting *Daubert*, 509 U.S. at 592, 113 S. Ct. at 2796.) "Whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability . . . is a matter that . . . the trial judge [has] broad latitude to determine," and a decision to admit or exclude is reviewed on an abuse-of-discretion standard. *Id.*, 526 U.S. at 153, 119 S. Ct. at 1176.

Sufficiency of the Evidence

The defendant contends the evidence was insufficient to support the conviction because for every piece of inculpatory evidence there is exculpatory evidence, *e.g.*, in contradictory victim statements in which the defendant is alternatively denied to have been the rapist and then accused.

Aggravated rape in the instant case is vaginal intercourse, deemed to be without lawful consent, because the victim is under the age of 12 years. R.S. 14:42(A)(4); (D)(2). Any penetration, however slight, is sufficient to complete the crime. R.S. 14:41. "In reviewing the sufficiency of the evidence to support a conviction, an appellate court in Louisiana is controlled by the standard enunciated by the United States Supreme Court in *Jackson v. Virginia*, 433 U.S. 307, 99 S. Ct. 2781 (1979). . . . [T]he 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." *State v. Captville*, 448 So. 2d 676, 678 (La. 1984). This Court has stated that when a reviewing court evaluates the sufficiency of the evidence under the *Jackson* standard, all of the evidence submitted to the trier of fact should be considered, including that which was admitted in error. *State v. Martin*, 595 So. 2d 592, 597 (La. 1992). The evidence admitted in the instant case was clearly sufficient to establish that the defendant committed an aggravated rape in the form of vaginal penetration upon the victim who was less than 12 years old at the time. The jury was presented with evidence that the defendant waited to call 911 while he attempted to clean up the crime scene and that there was no evidence supporting his version of what happened to his stepdaughter. The jury also were presented with the conflicting victim statements, and obviously chose to believe the victim's testimony that the

defendant raped her. This assignment of error lacks merit.

Admission of Evidence

The defendant contends that his allegedly contradictory statements to investigating officers should not have been admitted because several of them were taken without a preceding *Miranda* warning. The defendant also contends that evidence collected after the victim was transported by ambulance from the crime scene should have been suppressed.

Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602 (1966), bars government use of any statement, of whatever stripe, stemming from interrogation of a defendant who has been "taken into custody or otherwise deprived of his freedom of action in any significant way," unless warned that he has the right to remain silent, that any statement he does make can be used against him and that he has the right to counsel, retained or appointed. The warnings are a prerequisite to the admission of any statement in the state's case-in-chief, whether confession, alibi, exculpatory assertion or admission, as "[t]he privilege . . . protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination . . . [and] . . . no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" *Id.*, 86 S. Ct. at 1629.

However, the obligation to administer *Miranda* warnings attaches only when a person is questioned by law enforcement after he has been taken "into custody or otherwise deprived of his freedom of action in any significant way." *Id.* Custody is decided by two distinct inquiries: an objective assessment of the circumstances surrounding the interrogation to determine whether there is a formal arrest or restraint on freedom of the degree associated with formal

arrest; and, second, an evaluation of how a reasonable person in the position of the interviewee would gauge the breadth of his freedom of action. *Stansbury v. California*, 511 U.S. 322-25, 114 S. Ct. 1526, 1528-30 (1994) (citing *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520 (1983) (per curiam), *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714 (1977) (per curiam)). *See Thompson v. Keohane, Warden*, 516 U.S. 99, 112-15, 116 S. Ct. 457, 465-466 (1995). No one factor, such as time, place, kind of question, focus of investigation, probable cause for arrest prior to questioning, intent of the officer or belief of the suspect, is dispositive of the question of custody; each case turns on its own facts and is decided under the totality of circumstances. *See, e.g., Stansbury v. California*, *supra*.

As such, *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 arrest. *State v. Davis*, 448 So. 2d 645, 651-652 (La. 1984); *State v. Mitchell*, 437 So. 2d 264, 266 (La. 1983); *State v. Thompson*, 399 So. 2d 1161, 1165-67 (La. 1981) (dissent at 400 So. 2d 1080); *State v. Menne*, 380 So. 2d 14, 17 (La.1980); *State v. Hodges*, 349 So. 2d 250, 255-57 (La. 1977); *State v. Brown*, 340 So. 2d 1306, 1308 (La. 1977); *State v. Watkins*, 526 So. 2d 357, 359-360 (La. App. 4 Cir 1988). Thus, an individual's responses to on-the-scene and non-custodial questioning, particularly that carried out in public, are admissible without *Miranda* cautions. *See State v. Davis*, *supra* (Question, "Who shot the deer?" directed to a group of hunters did not point the finger of suspicion at any one person, even though wildlife agent knew that does had been taken and that citizens were holding the culprits, and therefore did not require *Miranda* warnings); *State v. Thompson*, *supra* (question of "how he came by the blood spots on his shirt," asked by officer of man in motel lobby identified as perpetrator of assault and who agreed to

talk with the officer, was to learn if crime had occurred and therefore occurred in a pre-custodial setting which did not require *Miranda* warnings); *State v. Mitchell*, *supra* (question asked by an Arkansas deputy after handcuffing a drunken Monroe driver for traffic offenses and noticing dried blood on his neck, "What happened?" did not amount to custodial interrogation for *Miranda* purposes; defendant's reply, "My wife shot me," admissible without *Miranda* under time pressure of finding injured wife).

That general, preliminary questioning is conducted in a private home does not alter the analysis or necessarily transform the situation into custodial interrogation. *Beckwith v. United States*, 424 U.S. 341, 96 S. Ct. 1612 (1976) (rejecting claim that questioning in home by two IRS agents after the investigation had focused on the defendant requires *Miranda* cautions; partial *Miranda* warnings given, however). *See State v. Hodges*, *supra* (officer merely conducted non-custodial preliminary questioning when he responded to a report of shooting, saw a crowd gathered, asked "Who got shot?" and elicited the defendant's response, "My wife;" no custody found); *State v. Anderson*, 332 So. 2d 452, 456-457 (La. 1976) (Single question, "What happened?" after deputy went to the defendant's home and issued incomplete *Miranda* warnings, did not require *Miranda* warnings; defendant's replies were admissible on grounds that he was not in custody); *State v. Roach*, 322 So. 2d 222, 226-227 (La. 1975) (police, executing a search warrant found marijuana seeds and gleanings, asked occupant which was his bedroom; response held admissible on grounds that no custody or significant detention existed).

The following statements are at issue. Deputy Burgess responded to the reported rape and spoke with the defendant to ascertain what was going on. He obtained a description of the perpetrators, which he conveyed to other officers by radio. This clearly constituted a preliminary, non-custodial, on-the-

scene questioning to determine whether a crime has been committed, requiring no *Miranda* warnings. Detective O'Cull later obtained information from the defendant as the caller or complainant in the form of a witness statement. This was a recorded statement taken at the dining room table in the home. The defendant was not a suspect at this time. The fact that this statement was given in the home tends to negate a custodial setting and no *Miranda* warnings were necessary. Detective Bradstreet indicated that the defendant voluntarily accompanied him to the store to assist the officers in identifying the type of bicycle used by the attacker. All the remaining statements followed *Miranda* warnings: Detective Hullihan indicated that he was going over information with the defendant at the Detective Bureau and it was his standard procedure to go through the rights form and *Mirandize* as a precaution; Sergeant Monie said he *Mirandized* the defendant and obtained a voluntarily signed rights waiver form before taking a statement.

The trial judge heard the officers' testimony at the November 12, 1999, hearing on the motion to suppress. There appears no error in the trial judge's determination. The initial statements were clearly preliminary, non-custodial, on-the-scene statements to police. Thereafter, the defendant was *Mirandized* before being questioned and the trial judge determined that his statements were voluntarily made. *See State v. Vessell*, 450 So. 2d 938, 943 (La. 1984) (credibility determinations at motion to suppress hearings lie within the sound discretion of the trial court). Regarding the defendant's contention that evidence was impermissibly seized from the home, the police processed the crime scene after responding to the reported rape. Sergeant Jones testified that they were invited into the home and not asked to leave when the victim was transported to the hospital. When the defendant became a suspect, four separate search warrants were obtained and executed for his body and the home. The trial judge also evaluated this claim at the motion to suppress hearing, and the

defendant has shown no abuse of discretion in the denial of his motion to suppress.

Jury instructions

The defendant contends the jury received several inappropriate jury instructions and that the jury should have been instructed on mitigating circumstances as requested by the defense.

The defense objected to the following instruction, contending that it prohibits jurors from using outside evidence to acquit but does not contain a comparable prohibition against using outside evidence to convict:

> 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 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.

However, the jury instructions *in toto* clearly instruct the jury that the defendant is presumed innocent and his guilt can only be proved beyond a reasonable doubt by the evidence, which is defined clearly for the jury as testimony and exhibits and stipulations and to exclude attorney argument and things the judge instructed the jury to ignore. The jury is clearly instructed that "[y]ou are expected to reach a verdict based on the evidence or lack of evidence." This final cautionary note which permitted jurors to find reasonable doubt from the lack of evidence reclaimed the instruction as a whole. *Cf. State v. Mack*, 403 So. 2d 6, 10 (La. 1981) (charge confining jury to

the evidence presented at trial as a basis for finding reasonable doubt does not comply with La. C.Cr.P. art. 804(A)(2) which requires a trial judge to instruct jurors to give defendant the benefit of "every reasonable doubt arising out of the evidence or out of the lack of evidence in the case."); *see also State v. Rault*, 445 So. 2d 1203, 1212 (La. 1984) (trial court may either read Art. 804 to jurors or give a "substantially equivalent" charge.).

The defense also objects to the instructions as a whole contending they give the impression of an elevated reasonable doubt standard throughout, and in particular in stating:

> 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 firmly convinced of the truth of the charge.

The defendant contends this creates an impermissible articulation requirement. However, the reasonable doubt instruction in its entirety is as follows: A person accused of a crime is presumed by law to be innocent until each element of the crime, necessary to constitute his guilty, is proved beyond a reasonable doubt. 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 firmly convinced of the truth of the charge. It is the duty of the jury if not convinced of the guilt of a defendant beyond a reasonable doubt, to find him not guilty. The defendant argues a reasonable juror could have interpreted the reasonable doubt instruction to allow a finding of guilt based on a degree of proof below that required by the due process clause of the Fifth and Fourteenth Amendments. In a criminal charge, the state must establish the guilt of a defendant by proof beyond a reasonable doubt. *State v. Smith*, 91-0749 (La. 5/23/94), 637 So. 2d 398, 400 (citing *In re Winship*, 397 U.S. 358, 361 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970)). The

purpose of reviewing a reasonable doubt instruction is to ensure that the trial judge did not overstate the degree of doubt required. *State v. Gamble*, 93-0809 (La. App. 3 Cir. 2/2/94), 631 So. 2d 586. A reviewing court is required to consider how reasonable jurors could have understood the charge as a whole. *Id*. at 590 (citing *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990)).

The instruction in the present case is not constitutionally deficient. It is not reasonably likely that the instructions provided by the trial court led the jurors to convict based on proof insufficient to meet the *Winship* standard. The trial court did not use words and phrases such as, "moral certainty" or "substantial doubt," like those found in the improper instruction given in *Cage*. The instruction delivered by the trial court is clear and concise in defining the burden of proof. The trial court repeatedly stated the burden of proof upon the state was beyond a reasonable doubt. Furthermore, after the judge instructed the jury on the state's burden, he defined "reasonable doubt." The definition provided was it is "doubt based on reason and common sense." The jury instructions clearly outlined the proper burden of proof and did not include any confusing or misleading language as to affect the degree of doubt required. The defendant's claim, therefore, is without merit.

Cumulative Effect of Errors

The defendant contends the cumulative effect of errors renders the proceedings defective and asks this Court to examine the record of any additional errors that were not briefed.

The record has been reviewed *in toto* and the proceedings do not appear defective or globally unfair. Although not briefed by the defendant, in his appellate brief defendant makes a cursory allegation that he received ineffective

assistance of counsel, as in context of the admission of the second videotaped victim interview:

> Moreover, given the devastating impact of the videotape, to the extent the failure to object constitutes a waiver, it is clear that such a failure would constitute ineffective assistance of counsel.

A claim for ineffective assistance of counsel is properly raised in an application for post-conviction relief. *State v. Burkhalter*, 428 So. 2d 449, 456 (La. 1983). Although it is not clear whether by making such a skeletal claim in his appeal brief whether defendant wished to pursue this claim at this time, at oral argument before this Court, defense counsel clearly stated that he was not making a claim for ineffective assistance of counsel at this time. In addition, the defendant has not demonstrated that any claimed errors rendered his trial globally unfair or the verdict generally suspect. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

Penalty Phase Errors Prosecutorial Misconduct

The defendant contends the state engaged in misconduct by arguing in essence that the victim would like the defendant to be killed. To assist in evaluating the extent of the prosecutorial misconduct, if any, the state's argument from the penalty phase (which is brief) is reproduced below *in toto:*

> 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. I'm going to tell you why. Because as Mr. Paciera told you yesterday; an adult, a

> Stepfather and a Godfather who has custody of the 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 nauseum 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.

At this point, defense counsel objected that this argument amounted to testimony, was highly prejudicial, was outside of the evidence, and was not appropriate. The state continued:

> Ladies and gentlemen, as a child—Mr. Paciera is right—it's the same thing. Those of you that have children know that people have nightmares. They want the lights on, don't they. They want you to check under the bed; make sure there is no monster. Make sure there's nothing under the bed, Daddy. Make sure all of these things.
>
> Do your jobs and do what you told me you could do, each and every one of you. Each and every one of you do your jobs. Tell L.H. we're turning out the light. You can go to sleep baby, because we're going to make sure—we're going to make sure that you sleep. We're going to make sure; turn out the light and rest easy.
>
> Do your jobs ladies and gentlemen. The State is

> asking you to impose the death penalty on Mr. Kennedy, because this is how Mr. Kennedy touched L.H. That's how he touched L.H., and that's how he left her. That's his footprint in the sand. That's his footprint. This is wrong. He is wrong. Give him the death penalty for what he has done.

The scope of proper argument is limited to the evidence admitted, to the lack of evidence, to conclusions of law either side may draw, and to the law applicable to the case. La. C.Cr.P. art. 774. Generally, a prosecutor may not resort to personal experience or inject personal opinions about the defendant into argument. On the other hand, prosecutors have considerable leeway in making closing arguments and may press upon the jury any view of the case supported by the evidence. *State v. Frost*, 97-1771 (La. 12/1/98), 727 So. 2d 417, 432-433. Improper argument will not bring reversal unless this Court is "thoroughly convinced that the jury was influenced by the remarks and that such contributed to the verdict." *State v. Hart*, 96-0697 (La. 3/7/97), 691 So. 2d 651, 660 (quoting *State v. Jarman*, *supra* at 1188).

During its closing, the defense argued first as follows:

> How will executing him help L.H.? These are questions I want you to consider. How will it affect her? How would it affect her if she were to learn, which she will, because she will be notified every time there is a decision, every time there is any proceeding in the future regarding a death sentence. How will she handle having to deal with that for many years to come . . . How will L.H. ever be able to get past this until it is final. What would it do to her? Why is it necessary for Patrick Kennedy to be executed?

Thus, the state's arguments would appear a fair attempt

to respond to the issues raised by the defense regarding the psychological impact on the victim and her need for finality. Some additional leeway is allowed the prosecutor in making remarks that would ordinarily be inappropriate but are provoked by defense argument. *State v. Thomas*, 572 So. 2d 681 (La. App. 1 Cir. 1990); *State v. Lockett*, 332 So. 2d 443 (La. 1976); *State v. Sosa*, 328 So. 2d 889 (La. 1976).

In any event, as discussed above in the context of the state's arguments during the culpability phase, Louisiana jurisprudence on prosecutorial misconduct allows prosecutors wide latitude in choosing closing argument tactics. Even urging a death verdict on the basis of an "eye-for-an-eye" argument, although criticized, *State v. Monroe*, 397 So. 2d 1258, 1271 (La. 1981), has been held to be not reversible unless the argument, when reviewed as a whole, urges jurors to "disregard the law as given" by the trial court in its instructions. *Id.* Thus, the state's arguments appear more fairly characterized as claims that the victim has been deeply affected by the crime, that the defendant abused his paternal role and position of trust, and that the victim requires finality. The first two are simply fair characterizations of the evidence and reasonable conclusions of fact. The second, a fair response to the defendant's own closing argument. The prosecutor's rebuttal is entitled to the same breadth and scope as the defendant's closing. *State v. Williams*, 353 So. 2d 1307 (La. 1977).

Unadjudicated Prior Conduct

The defendant objects to the presentation of evidence regarding an unadjudicated prior rape of another victim alleged to have been committed by him several years ago upon a different victim, which defendant contends was not proved by clear and convincing evidence. The defendant contends that permissible victim impact testimony does not extend to other victims. The defendant objects that these

allegations, in addition to be unadjudicated, were impossible to defend against considering that all relevant documentation had been destroyed. Moreover, the defendant contends the conduct at issue could no longer be prosecuted given the expiration of the limitations period.

In this case, the state gave pre-trial notice of its intent to introduce evidence of this prior unadjudicated criminal conduct during the culpability phase, which was ultimately prohibited by this Court. Although barred from the culpability phase, the state's witness, S.L., testified to the following during the penalty phase. The defendant was married to her cousin and godmother, C.S. S.L. spent the summer with them when she was about eight or nine years old. The defendant sexually abused her three times. The first was inappropriate touching. The last was intercourse. She did not tell anyone about it until two years later. The family pressured her not to pursue legal action. The testimony was brief and is transcribed in four pages.

La. C.Cr.P. 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 family members." Rules governing the admission in penalty phase hearings of unrelated and unadjudicated crimes evidence to prove the defendant's character and propensities have evolved jurisprudentially. In *State v. Brooks*, 541 So. 2d 801 (La. 1989) this Court approved the state's introduction in its case-in-chief in the penalty phase of two unrelated and unadjudicated murders once the trial judge determined 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*, 541 So. 2d at 814. In *State v. Jackson*,

supra, the Court granted pre-trial writs to establish limitations on admissibility of unrelated and unadjudicated criminal conduct in capital sentencing hearings. *Jackson* also incorporated the three-pronged test from *Brooks*. *Jackson*, 608 So. 2d at 956. There, the Court ruled that the evidence of the unadjudicated criminal conduct must involve violence against the person of the victim for which the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for capital murder. *Jackson*, 608 So. 2d at 955. Applying the limitations of *Jackson*, this court in *State v. Bourque*, 622 So. 2d 198 (La. 1993) held that evidence of an unrelated and unadjudicated killing, committed one hour before the murder at issue in the capital case being tried, was admissible, since it was relevant evidence of Bourque's character and propensities and fell within *Jackson*'s limitations. However, a majority of the court reversed the death sentence on the basis that the prosecutor "presented a prohibited 'mini-trial' on the issue of the defendant's guilt or innocence of the killing of Jasper Fontenot," the unrelated and unadjudicated conduct. *Id.* at 248.

Thus, the *Bourque* decision limited the amount of admissible evidence that the prosecutor may introduce in the case-in-chief of the penalty phase, holding that anything beyond "minimal evidence" of the unadjudicated criminal conduct impermissibly shifts the focus of the capital sentencing jury from the character and propensities of the defendant to the determination of the guilt or innocence of the defendant with respect to the unadjudicated criminal conduct. However, in *State v. Comeaux*, 93-2729 (La. 7/1/97), 699 So. 2d 16, this Court revisited the issue and held that *Bourque*'s further limitation on the amount of admissible evidence, no matter how highly relevant to the defendant's character and propensities, was unnecessary to guarantee due process. The Court noted that the thrust of the *Jackson* decision was not to exclude any evidence that was significantly relevant to the

defendant's character and propensities, no matter what the amount of the evidence was, but rather to maintain the jury's focus on their function of deciding the appropriate penalty by eliminating marginally relevant evidence that does not aid the jury in performing this function.

As a result, *Comeaux* provided guidelines to help determine whether character and propensity evidence is admissible at the penalty phase. The court held that evidence which establishes that the defendant, in the recent past, "has engaged in criminal conduct involving violence to the person is highly probative of the defendant's character and propensities." *Id.* "On the other hand, the type of evidence that tends to inject arbitrary factors into a capital sentencing hearing usually is evidence which is of only marginal relevance to the jury's determination of the character and propensities of the defendant." *Id.*

The State did not inject an arbitrary factor into the penalty phase when it introduced evidence of the unadjudicated rape of S.L. by the defendant when she was a child, when considering the standard set forth in *Comeaux*. The state only introduced one witness, the victim, who testified briefly, and thus, did not present a "prohibited mini-trial." *See State v. Robertson*, *supra* at 40 (permitting both victims to testify at penalty phase to defendant's previous criminal conduct did not violate *Jackson* limitation allowing either "testimony of the victim or of any eyewitness to the crime"). The evidence presented was highly relevant to defendant's character and propensity to rape children under his supervision.

Nor does it appear that the state was prevented from prosecuting the conduct at issue by a statutory limitations period, as the defendant contends. The parties disagree to some extent on the precise dates of the prior unadjudicated criminal conduct, but both place the events in the vicinity of

1984. At that time, these offenses would constitute aggravated rape of a juvenile and have been punishable by life in prison. The parties agree that the defendant could have been prosecuted for the aggravated rape of S.L. when La. C.Cr.P. art. 571 was amended by 1984 La. Acts, No. 926 § 1 to remove the limitations period for such an offense.

This Court has previously ruled that when a prescriptive period has not yet expired, the state may institute prosecution at any time within the newer prescriptive period. *State v. Adkisson*, 602 So. 2d 718 (La. 1992); *State v. Ferrie*, 243 La. 416, 144 So. 2d 380 (1962). In *Ferrie*, the bill of information was filed eight months after the original prescriptive period of one year had expired. However, while the original prescriptive period was still running, it was legislatively extended to two years. *Id.*, 243 La. at 419-20. This Court found that the more recent time limit applied, because the original period was extended before it had expired. *Id.*, 243 La. at 427-28. This Court reasoned that the right against prosecution had not vested because the time limit in effect when the alleged offense occurred had not run when the amendment became effective. *Adkisson*, 602 So. 2d at 719; *Ferrie*, 243 La. at 425.

This assignment of error lacks merit.

APPENDIX C

SUPREME COURT OF LOUISIANA
No. 2005-KA-1981

STATE OF LOUISIANA
v.
PATRICK KENNEDY

CALOGERO, Chief Justice, dissents and assigns reasons.

With the possible exception of *sui generis* crimes against the state involving espionage or treason, the Eighth Amendment precludes capital punishment for any offense that does not involve the death of the victim. Nearly thirty years ago, *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), and its companion decision in *Eberheart v. Georgia*, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977), made that concept clear by striking down the death penalty for the crimes of rape and kidnapping in cases wherein the victims, although experiencing the "ultimate violation of self" short of death, and sustaining severe injuries, did not die. In the context of a rape of a sixteen-year-old juvenile, *Coker*, 433 U.S. at 605, 97 S. Ct. at 2872 (Burger, C.J. dissenting) ("After twice raping this 16-year-old victim, [Coker] stripped her, severely beat her with a club, and dragged her into a wooded area where he left her for dead."), the Supreme Court specifically observed that "the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life." *Coker*, 433 U.S. at 598, 97 S. Ct. at 2869 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S. Ct. 2909, 2931, 49 L. Ed. 2d 859 (1976)). Although drawing support from an apparent widespread legislative rejection of the death penalty for rape in other state jurisdictions at the time, "in the end" the Supreme Court

brought its "own judgment . . . to bear on the question of the acceptability of the death penalty under the Eighth Amendment," *Coker*, 433 U.S. at 597, 97 S. Ct. at 2868, just as, more recently, the Supreme Court brought its independent judgment to bear on the questions of whether the Eighth Amendment precludes capital punishment for mentally retarded offenders, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), or for offenders under the age of eighteen years when they commit a capital crime. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

Despite recent legislative enactments in other states, nothing approaching a consensus exists in capital jurisdictions on the appropriateness of the death penalty for non-homicide crimes. *Coker* retains its force undiminished today not only because the decision set out a bright-line and easily administered rule, but also because the "abiding conviction" expressed in that decision, *id*., 433 U.S. at 598, 97 S. Ct. at 2869, has served as the wellspring of the Supreme Court's capital jurisprudence over the past thirty years since *Gregg*. Capital punishment is unique in its severity and irrevocability and it is reserved by the Eighth Amendment for the worst of fully culpable offenders committing the worst crimes different in kind and degree from all others because they result in the taking of human life. *See Roper*, 543 U.S. at 568, 125 S. Ct. at 1194 ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'") (quoting *Atkins*, 536 U.S. at 319, 122 S. Ct. at 2251).

I would adhere to that fundamental principle and therefore respectfully dissent.

APPENDIX D

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE # 041

FROM: CLERK OF THE SUPREME COURT
OF LOUISIANA

On the 29th day of June, 2007, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING(S) DENIED:

1999-KA-0553
STATE OF LOUISIANA v. ANTOINETTE FRANK
(Parish of Orleans)
CALOGERO, C.J., would grant a rehearing.
JOHNSON, J., would grant a rehearing.

2005-KA-1981
STATE OF LOUISIANA v. PATRICK KENNEDY
(Parish of Jefferson)
CALOGERO, C.J., would grant a rehearing.

2005-C -2275
IN RE: MEDICAL REVIEW PANEL PROCEEDINGS
IN THE MATTER OF STEPHANIE NOE
(Parish of Orleans)
CALOGERO, C.J., would grant a rehearing.
KNOLL, J., would grant a rehearing.