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NEWS RELEASE # 47

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **27th day of June, 2003**, are as follows:

BY KIMBALL, J.:

2002-KA-1463 STATE OF LOUISIANA v. SEDWRIC E. CLARK (Parish of Richland)
(First Degree Murder, Two Counts)
For the reasons assigned herein, defendant's convictions for first-degree murder and his sentences of death are affirmed. In the 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 judge 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 original application, if filed, in the state courts.
AFFIRMED.

6/27/03

SUPREME COURT OF LOUISIANA

No. 02-KA-1463

STATE OF LOUISIANA

versus

SEDWRIC E. CLARK

ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT FOR THE PARISH OF RICHLAND

HONORABLE E. RUDOLPH McINTYRE, JR., JUDGE

KIMBALL, J.

This is a direct appeal under article V, section 5(D) of the Louisiana Constitution. The defendant, Sedwric E. Clark, was indicted by a grand jury for the first degree murders of Bertha Lee Anderson and Mariah Barnes. Following a trial, a jury found the defendant guilty on both counts and recommended sentences of death as to each count. The trial court sentenced the defendant to death in accordance with that recommendation. In his appeal to this court, the defendant raises fifteen separate assignments of error. After a thorough review, we conclude that none of the assignments or error raised by the defendant merits reversal, and we therefore affirm the defendant's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

On February 13, 2000, a home health nurse making a routine visit to the residence 68-year-old Bertha Anderson in Oak Grove, Louisiana, discovered Anderson's bloodied body on the floor of her bedroom. Anderson had been beaten, choked, and stabbed. The autopsy revealed that there were large areas of bruising around the face, eyes, and neck. Anderson received a puncture wound on

her right cheek. Her ribs and jaw had been broken, and the facial bones around the orbits and her nasal bone were fractured. In addition, the autopsy revealed that Anderson had been stabbed four times in the neck with such force that her spinal cord and both jugular veins had been severed. Neighbors and family soon gathered at the residence and alerted police that Mrs. Anderson's eight-year-old great-granddaughter, Mariah Barnes, who also lived at the residence, was missing.

Defendant, Barnes's father, gathered with others at the scene. The crowd grew hostile towards defendant, in all likelihood due to his volatile relationship with Anderson stemming from her refusal to allow him unsupervised visits with his daughter. Officers placed him in a police cruiser, and defendant agreed to accompany them to the West Carroll Parish Sheriff's Station so that he could assist the authorities in the search for his daughter. Before talking to the defendant, both Chief Criminal Deputy Louis Russell and Deputy Garland Walker gave the defendant *Miranda* warnings, which defendant knowingly and voluntarily waived. The deputies observed scratches on defendant's face and neck. When asked about their origin, defendant stated that they had been sustained the night before during a rough sexual encounter with a woman named Cocoa, whose birth name officers later clarified was Conita Ward, or possibly from an altercation he had had with his girlfriend. The deputies also noticed scratches on defendant's hands, but defendant refused to allow a search of his body for other scratches. Defendant told the officers that he had spent time with his daughter the day before, purchasing her a bicycle and some new shoes and later watching television with her at Anderson's residence until approximately 10:00 p.m. Defendant denied any knowledge concerning the circumstances of Anderson's death or his daughter's whereabouts, and the police released him. During the interview, defendant signed a consent form to search his house and car in hopes of finding Barnes. The officers' search,

however, was unsuccessful. Defendant later signed a consent to search his Peterbilt truck. Russell and Trooper Neal Harwell of the Louisiana State Police, who had been dispatched after Russell requested assistance from the State Police Bureau of Investigation, accompanied defendant to search the truck. Defendant opened the truck, and the officers found no signs of Barnes. Defendant also consented to the seizure of the clothes that he wore the night of Barnes's disappearance, which were located in the washing machine at the residence of his girlfriend's parents in Lake Providence, where defendant and his girlfriend had slept the night before.

Despite the fact that his daughter was missing, the following morning, February 14, 2000, defendant asked his pregnant girlfriend, Malisha Green, to accompany him on a shopping trip to Vicksburg, Mississippi. Defendant drove through Vicksburg, telling Green he wanted instead to go to a shopping mall in Jackson, Mississippi. Upon arrival in Jackson, defendant proceeded directly to the Greyhound bus station and boarded a bus bound for New York City. He told Green that he did not want to return to jail for crimes he did not commit and that he knew police would blame him for Anderson's murder and Barnes's disappearance. Green drove defendant's vehicle back to her parents' house. Accompanied by her mother, Virginia Green, she then notified the West Carroll Parish Sheriff's Office about the circumstances of defendant's suspicious departure.

At the time of his attempted travel to New York, defendant was on parole for previous convictions. The authorities consulted with his parole officer and learned that the unauthorized trip violated the terms and conditions of his release. The officers then obtained a warrant for defendant's arrest based upon his parole violation.

The FBI participated in the apprehension of defendant when it learned that

the case involved a possible kidnapping in which the suspect had crossed state lines. The Monroe office of the FBI learned that the bus defendant had boarded would make a scheduled stop in Atlanta at approximately 10:45 p.m. on February 14, 2000. FBI Special Agent Jeffrey Holmes was contacted in his Atlanta home and agreed to meet the bus at its scheduled stop. Holmes approached defendant, placed him under arrest, and brought him to a transit police station located across the street from the terminal. Defendant knowingly and voluntarily waived his *Miranda* rights and gave a statement about the offense in which he indicated that an unknown male was at Anderson's home when he left the residence at approximately 10:00 p.m. the night before her body was discovered. Defendant could not identify nor did he know the name of this other man. When asked of the apparent scratches on his face, defendant explained they were a result of an argument between him and Green.

The following morning, Holmes interviewed defendant a second time along with FBI agent May Jo Onusko in a cell at the Fulton County, Georgia jail. Defendant again was given his *Miranda* warnings, but he knowingly and voluntarily agreed to speak with the agents. This time, defendant told the officer that he went to Anderson's residence and found her arguing with the unknown man. When defendant approached her, Anderson grabbed at him, and the unknown man began to choke her. He admitted that Anderson had caused the visible scratches on his face but claimed that he had not killed her. Defendant was unable to provide the agents with an identification of the unknown attacker. He also admitted that he returned to Anderson's house after he left at 10:00 p.m. and that the unidentified male was still at the residence. Defendant stated that he also believed this man strangled Anderson. Defendant claimed that this man had abducted his daughter and described for Holmes where he thought that her body

could be found.

Holmes interviewed defendant a third time later that afternoon in an office at the jail in an effort to elicit more information concerning the location of Barnes's body.[1] Holmes again advised defendant of his *Miranda* rights. This time, defendant described the unknown male in Anderson's home as a six-foot tall, 160 pound African-American male in his late 30s with a dark complexion and slender build. Defendant claimed that he returned a telephone call from the unknown assailant, but he could not provide the number to Holmes. According to defendant, the assailant informed him that he had shot his daughter and told defendant where her body could be found. Defendant then claimed that he and the other man had planned the murder of Anderson so that he could rescue Barnes and that Barnes was to be out of the house before the other man actually killed Anderson. Defendant asserted he became involved however because the "other dude" was too weak and "couldn't handle it." Defendant then said that he knew where Barnes's body was located and drew a map in which he indicated the exact location where his daughter's body could be found. At approximately the same time that defendant drew the map, a telephone repairman discovered Barnes's body in some weeds south of Holly Ridge Road in Richland Parish. She had been raped and shot in the head with a .22 caliber pistol.

Defendant waived extradition and was transported from Atlanta back to West Carroll Parish. There, after being given and having waived his *Miranda* rights, he gave a lengthy recorded confession in which he admitted being the sole assailant, murdering Anderson before abducting Barnes, and attempting to rape and

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[1] Agent Holmes testified that he did not know whether Barnes's body had been located even though he had talked to the Louisiana authorities throughout the day to relay information defendant was giving him.

finally killing Barnes.

Based on the confession and corroborating physical evidence, police learned that on February 12, 2000, defendant spent much of the day with his daughter. According to his confession and the testimony of his girlfriend, Malisha Green, defendant and Green went to Oak Grove. Defendant, accompanied by Barnes's cousin Toni Anderson, took Barnes to Wal-Mart and bought Barnes a promised bicycle and some sandals. After returning to Anderson's house, defendant then picked up Green, who had stayed behind at defendant's house. Defendant and Green then proceeded to Monroe so defendant could see a dentist and shop at the mall, where he bought Barnes a necklace. Defendant, Green and a relative of Green, Derrick Cottress, then returned to Oak Grove. Defendant brought Green and Cottress to another residence, and defendant went to Anderson's house to give the necklace to Barnes. After giving Barnes the necklace, defendant claimed that she insisted that he take her for a ride in his car. Defendant stated that they drove slowly because Barnes was sitting in his lap and driving. Defendant admitted that he then "started touching her and stuff . . . ." Defendant then returned Barnes to Anderson's house and picked up Green and Cottress and went to Lake Providence.

Early that evening, defendant and Green had an argument when defendant told her he wanted to return to Oak Grove and go out on the town. En route to Oak Grove, defendant stopped at a liquor store where he met up with Conita Ward. He and Ward then had sexual intercourse. After arriving in Oak Grove and stopping at a house of a relative of Anderson, defendant went to Anderson's house and watched television with Barnes. Defendant departed at approximately 10:00 p.m. after Anderson asked that he leave so that they could go to sleep. He went to his house where he smoked marijuana and watched a pornographic video tape. Defendant became aroused and returned to Anderson's residence, entering through

her carport door, which he knew had a faulty lock. He found Barnes awake in the bed she shared with her great-grandmother and beckoned her to the living room. Upon defendant's request, his daughter removed her panties at the bedroom door and entered the living room, where he began to molest her. At some point, Anderson awoke and found defendant at the residence. Defendant then attacked the elderly woman in her bed, choking her. During the struggle, defendant went to the kitchen and retrieved a knife. Defendant then returned to the bedroom and stabbed Anderson four times in the neck area, causing her to bleed to death. Defendant admitted that he lost his Indian coin ring and his gold chain with a cross pendant during his struggle with Anderson.

After killing Anderson, defendant stated that he "grabbed little Mariah," and took her on foot to his residence located nearby. Defendant discarded the knife used in the attack in a field behind Anderson's house. With his daughter in tow, defendant drove to the home of Green's parents in Lake Providence, where he learned that his girlfriend was possibly in labor and had gone to the hospital in Monroe. Leaving Barnes in the car, defendant returned briefly to his home to collect some of his belongings and a new shirt and pair of socks for Barnes and then began to drive to the hospital in Monroe. On the way to the hospital, defendant stopped his vehicle on Holly Ridge Road, between the railroad tracks and the Interstate 20 exit in Richland Parish. Defendant claimed he then tried to penetrate his daughter, who was still nude from the waist down. Defendant then continued to Monroe. Realizing that he could not take his daughter to the hospital with him after "what [he] had just tried to do," defendant returned to the same spot at which he had stopped earlier. After Barnes stated she wanted to visit her granny in Heaven, as defendant claimed, defendant took his daughter out of the car and shot her in the head with his .22 caliber pistol. Defendant then dumped her body

into a gully where it was discovered days later.

Defendant arrived at the hospital in Monroe the morning of February 13, 2000, at approximately 1:00 or 2:00 a.m. Defendant had scratches on his face and wore different clothes than those he had on earlier. According to Green, however, defendant did not appear to be intoxicated or otherwise out of control.

On April 6, 2000, a West Carroll Parish grand jury indicted defendant for two counts of first degree murder for the homicides of Bertha Lee Anderson and Mariah Barnes in violation of La. R.S. 14:30. On June 2, 2000, the state alerted the court that it intended to seek the death penalty. On December 6, 2000, the trial court conducted a hearing on state and defense motions for a change of venue, which the court granted, ordering that the trial be moved from West Carroll Parish to Richland Parish. The court of appeal denied defendant's writ. *State v. Clark*, 34,872 (La. App. 2 Cir. 1/25/01). This court also denied defendant's writ. *State v. Clark*, 01-0339 (La. 3/16/01), 787 So.2d 319.

At trial, the state introduced considerable physical and scientific evidence corroborating defendant's confession. Susan Cook, the home health nurse who found Anderson's body, testified that the bloodied body lay beside Anderson's bed next to the bedroom door. West Carroll Parish Chief Criminal Deputy Louis Russell testified that upon being summoned to Anderson's house, he took several pictures of the crime scene that show Anderson's body lying in front of a night stand next to her bed in her bedroom. He also attested that several pieces of evidence were found underneath the body, including Anderson's dentures, diamond stud earrings, a hearing aid, and a pair of bloodied child's panties. He further took pictures of a gold chain that was lying on Anderson's pillow.

Adam Becnel and George Schiro, forensic scientists at the State Police Crime Laboratory in Baton Rouge, examined the crime scene at Anderson's house

the next day. They collected the panties that were near the bedroom door and the dentures in front of a night stand next to her bed. The investigators retrieved defendant's Indian coin ring on Anderson's night stand next to her bed and defendant's gold necklace broken mid-chain on the pillow on her bed. They found a piece of a torn fingernail at the foot of the night stand. Upon examining the blood splatters in the bedroom, Schiro determined they were consistent with medium velocity blood splatters, which are usually associated with stabbings and beatings.

Becnel and Schiro also examined the area where Barnes's body was found in Richland Parish. They found Barnes semi-dressed, wearing only two pairs of socks and two shirts. Upon examining her head, the scientists found a small hole that had blood and other discoloring, either soot, char, or burns, around its margin. After Barnes's body was transported to the funeral home, Schiro took a vaginal swab and fingernail scrapings from both hands.

Becnel and Schiro then examined defendant's car. Inside the car, the investigators found a towel on the passenger seat and a .22 pistol inside a holster-like apparatus underneath the driver's seat. After this search, Becnel and Schiro proceeded to defendant's house. Inside the home, they noticed and took a swab of a small amount of substance that looked like blood in the bathroom sink.

Chief Johnny Moss of the Oak Grove Police Department testified that on February 17, 2000, Russell asked him to go to Anderson's residence to look for the knife used in Anderson's murder. Moss stated he found the knife in a ditch containing rainwater that ran behind the house. Moss summoned Russell who then recovered the knife.

Dr. Steven Hayne, a state pathologist for the Department of Public Safety, performed an autopsy of Anderson. During his examination, he noted a tear of a

fingernail on the right hand. He also took fingernail scrapings from both the left and right hands along with a vial of blood. When questioned about the wounds on Anderson's neck, Hayne testified that they were consistent with those that could be inflicted by a knife like the one Russell recovered when held by a left-handed person who was facing Anderson.

Hayne also performed an autopsy on Barnes's body. He determined the cause of death of Barnes was a contact gunshot wound to the back of the head because of the presence of powder residue underneath the scalp. Upon examining the body, Hayne noted that there were abrasions and bruises on the body, which indicated blunt force trauma injuries. He also examined Barnes's genitalia, noting there was some bruising and scraping of the skin, some tearing of the hymen, and a small amount of blood in the vaginal bulb, which according to Hayne, indicated penetration. Finally, during the autopsy, blood, vaginal and anal swabs were taken.

Michelle Gaines, a forensic DNA analyst at the North Louisiana Criminalistics Laboratory in Shreveport, Louisiana, testified that samples of blood taken from the defendant, Anderson and Barnes were compared with left and right fingernail scrapings from Anderson and Barnes, vaginal and anal swabs from Barnes, swabs taken from defendant's firearm, suspected blood taken from the bathroom of the defendant's residence, the towel found in the defendant's car, defendant's clothing taken from the home of the parents of Malisha Green, and the knife Russell retrieved. Gaines explained that PSA[2] was found on the vaginal and

[2] PSA is an acronym for prostate specific antigen, and as Gains testified, is a substance she looked for to determine the presence of seminal fluid or male urine. She noted that PSA is commonly found in pre-ejaculate fluid, semen, a male's urine, and blood. She also stated that recent studies have indicated that females carry small amounts of PSA.

anal swabs taken from Barnes. Because there was no DNA material other than that of Barnes on the swabs, however, Gaines could not particularize the source of the PSA though she noted it was more likely from a male than a female. Gaines next testified that the blood found in the barrel of defendant's pistol matched the genetic profile of Barnes. She stated that the probability of finding this same DNA profile in an African American individual other than Barnes was approximately one in 248 trillion.

Gaines also testified regarding the DNA profile of the fingernail scrapings taken from both Anderson and Barnes. She noted that the scrapings from the right hand of Anderson matched the genetic profile of the defendant. She explained the likelihood of finding the same DNA profile from an African American individual other than defendant was approximately one in 8.3 quadrillion. Gaines noted that she also obtained a profile of the source of the material found underneath the fingernails of Anderson's left hand, but it was not consistent with that of defendant. Only Barnes's genetic material matched the scrapings taken from her fingernails. Gaines next testified that the swab taken from the defendant's bathroom sink contained DNA from at least three people. Because of the difficulty of identification in a mixed sample, Gaines attested that the genetic profiles of Anderson and the defendant could not be excluded from this swab; thus, Anderson and the defendant could have possibly contributed to the DNA in that sample. Gaines then testified that the DNA found on the towel recovered from defendant's car was not consistent with the genetic material of Anderson, Barnes, or defendant, but it was consistent with that of a female in general. In addition, Gaines explained that the person whose DNA was found on the towel could not be excluded from the possibility of being a contributor to the swab taken from the defendant's sink.

Finally, Gaines testified as to the testing of the clothes and the knife. After a

visual examination of the clothes, Gaines stated she did not find anything significant such as blood that warranted further testing. She explained that it would be possible that washing had removed the blood on the clothes and prevented its visual detection. While Gaines did not see any blood on the knife, she stated that she took a swab of the blade and performed a DNA analysis, but she was unable to get a DNA profile. She explained that this result would not be unusual if the knife had been retrieved from a ditch containing water after several days.

After a trial, the jury unanimously found defendant guilty as charged on both counts on November 8, 2001. The jury determined that the defendant should receive the death penalty based on their finding of five aggravating circumstances as to each murder.[3] *See* La. C.Cr.P. art. 905.4(A)(1), (4), (7), (8), (10). Notably, during the penalty phase, the defendant took the stand against counsel's advice, confessed to the crimes, and asked the jury to "give this family what they deserve and the answer they're looking for" so that the family could "heal" and "move on." Defendant filed a Motion for New Trial, which the trial court denied, finding the verdict was in accordance with the law and the evidence presented at trial. Defendant also filed a Motion in Arrest of Judgment, arguing the West Carroll

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[3] The jury found that the following aggravating circumstances applied to the murder of Bertha Lee Anderson: (1) the offender knowingly created a risk of death or great bodily harm to more than one person; (2) the victim was over the age of 65; (3) the offense was committed in an especially heinous, atrocious or cruel manner; (4) at the time of the commission of the offense, the offender was engaged in the perpetration or attempted perpetration of an aggravated burglary; and (5) the victim was eyewitness to a crime.

Regarding the murder of Mariah Barnes, the jury found the aggravating circumstances that: (1) the offender knowingly created a risk of death or great bodily harm to more than one person; (2) the victim was under the age of 12; (3) the offense was committed in an especially heinous, atrocious or cruel manner; (4) at the time of the commission of the offense, the offender was engaged in the perpetration or attempted perpetration of an aggravated rape or second degree kidnapping; and (5) the victim was an eyewitness to a crime.

Parish grand jury was without jurisdiction to file an indictment with regard the first degree murder of Barnes because that murder occurred in Richland Parish. The trial court denied the motion, finding the West Carroll Parish grand jury had authority to return an indictment on both counts of murder. As to the count of first degree murder of Barnes, the trial court determined that one or more of the elements of the offense of first degree murder occurred in West Carroll Parish even though the actual killing occurred in Richland Parish. On January 9, 2002, the trial court formally imposed the death sentence on the defendant. The defendant then filed a direct appeal in this court, based on fifteen assignments of error.[4]

LAW AND ANALYSIS

As an initial matter, defendant filed a motion with this court to supplement the record with items that were not included in the trial record. We granted this motion in part, allowing defendant's memorandum in support of motion for change of venue and a series of newspaper reports to be filed in the record on appeal. We denied the motion in part, referring to the merits the motion to enlarge the record on appeal with documents not filed in the record below. The documents sought to be introduced into the record relate to defendant's arguments on appeal pertaining to the issue of whether Richland Parish was a proper venue. However, the defendant had the burden of proof below and was afforded a hearing. Defendant also could have filed a new motion for change of venue once the case was transferred to Richland Parish, subject to the discretion of the trial court and before the first witness was sworn but failed to do so.

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[4] The assignments of error not discussed in this opinion do not constitute reversible error and are governed by well-settled principles of law. Those assignments are reviewed in an unpublished appendix that will comprise a part of the official record in this case.

La. C.Cr.P. art. 621. He then could have introduced the instant evidence in support of his claim. It was therefore defendant's obligation to supplement the record in West Carroll Parish or reurge the issue in Richland Parish supported by any evidence of his claim of improper venue, and he failed do so. Thus, we will not consider it here, and defendant's motion is denied. *State v. Cosey*, 97-2020, p. 13 (La. 11/28/00), 779 So.2d 675, 683-84.

In response to defendant's motion, the state filed a corresponding motion to supplement the record with evidence that it adduced to refute defendant's evidence presented in his motion. Because this evidence was not introduced in the trial court, it will not be considered as part of this appeal. *State v. Langley*, 95-1489, p. 14 n.14 (La. 4/3/02), 813 So.2d 356, 366 n.14. Accordingly, the state's motion is denied.

Venue Issues

Assignment of Error No. 1

In his first assignment of error, defendant claims that the trial court erred when it moved his trial from West Carroll Parish to neighboring Richland Parish, where Barnes was actually shot and killed. Given that the parishes share a judicial district and their proximity to each other, defendant maintains that "[t]raveling the forty-odd miles down La. 17" did little to protect him from the poisonous influence of the pre-trial publicity that surrounded the crimes.

Because of the media coverage about the murders, both the state and defense filed motions for a change of venue. At a hearing on the motions, the state sought to move the trial to neighboring Richland Parish, while defendant maintained that publicity about the case had made a fair trial anywhere in the northern portion of the state impossible. The trial court granted the motions, choosing to hear the case in Richland Parish and ruling as follows:

> It is one of the most basic and fundamental rights of any

> person charged with a crime to have the opportunity to be tried by a fair and impartial jury. And of course, this defendant is entitled to that same right. This Court is convinced that this defendant would not be able to be tried in a fair manner in West Carroll Parish. Apparently both the State and the Defense are of that opinion. And so because of the mandates of Article 6:22 [sic] of the Louisiana Code of Criminal Procedure, The Court therefore rules and orders that the venue of this trial be moved to another parish. I have read and I also take the paper in Richland Parish. I take the News Star World and I take the West Carroll Gazette myself and I read those papers. I was privy and I did — I think I heard either all of the news broadcasts on KNOE, or at least most of them and I might have picked up on one of them on KTVE. So, I have been privy to those broadcast. I believe that the defendant can have a fair and impartial trial in Richland Parish, Louisiana. I'm going to order that the trial be moved to Richland Parish within this district.

Defendant sought review of the trial court's ruling in the court of appeal and in this court, both of which denied writs. *State v. Clark*, 34,872 (La. App. 2 Cir. 1/25/01);[5] *State v. Clark*, 01-0339 (La. 3/16/01), 787 So.2d 319. Nonetheless, this court's failure to intervene pre-trial does not bar consideration of the merits of the issue on direct appeal. *State v. Fontenot*, 550 So.2d 179 (La. 1989).

A defendant is guaranteed an impartial jury and a fair trial. La. Const. art. 1, § 16; *State v. Brown*, 496 So.2d 261, 263 (La. 1986). To accomplish this end, the law provides for a change of venue when a defendant establishes that he will be unable to obtain an impartial jury or a fair trial at the place of original venue. *State v. Frank*, 99-0553, p. 11 (La. 1/17/01), 803 So.2d 1, 12 (citations omitted).

Changes of venue are governed by La. C.Cr.P. art. 622, which provides,

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[5] In denying the writ application, the Second Circuit stated:

> At this juncture in the proceedings, applicant has neither met his burden of proving he will be unable to obtain a fair and impartial jury nor has he affirmatively shown error and an abuse of discretion in the trial court's ruling which transferred venue from West Carroll Parish to Richland Parish. (citations omitted).

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.
>
> In deciding whether to grant a change of venue, the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial.

La. C.Cr.P. art. 622.

In *State v. Frank*, we thoroughly examined the law pertaining to change of venue and Article 622. We noted Article 622 was adopted in 1966 and changed the test previously used by courts. *Frank*, 99-0553 at pp. 11-12, 803 So.2d at 12-13 (citing *State v. Bell*, 315 So.2d 307, 309 (La. 1975)). We also observed that subsequent to the adoption of Article 622, this court in *Bell* enumerated several relevant factors that would help guide the judiciary in determinations of whether to change venue under Article 622. Those factors are: (1) the nature of pre-trial publicity and the particular degree to which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (3) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire. *Bell*, 315 So.2d at 311.

In *Bell,* the court instructed that under the new provision, it was no longer appropriate for a trial court to inquire only as to whether the individual prospective jurors could be fair and impartial and uninfluenced by what they had heard or had seen outside the court. *Id*. at 313. The focus must extend beyond the prejudices and attitudes of the individual venire persons, and the defendant must be allowed to show

that, even if it would be possible to select a jury whose members were not subject to a challenge for cause, that there exists prejudice or influences within the community at large that would affect the jurors' answers during voir dire or the testimony of witnesses at the trial, or that for any other reason, a fair and impartial trial could not be held in the parish. *Id.* The trial court's ultimate determination must be of the community's attitude toward the defendant. *Id.*

Subsequent to *Bell*, we reiterated that the fact that a jury can be selected, i.e., that the requisite number of jurors are not subject to a valid challenge for cause, does not mandate the conclusion that a motion for change of venue was properly denied by the trial court. *State v. Rudolph*, 332 So.2d 806, 809 (La. 1976). We explained that a change of venue may be necessary to ensure a fair trial even if, individually, each juror is not susceptible to a valid challenge for cause, because the overriding state of the public mind against the defendant may cause the jurors not to answer completely and honestly during voir dire. *Id.*

Despite the substantive change to Article 622, the burden of proof remains on the defendant to show that there exists such prejudice in the collective mind of the community that a fair trial is impossible.[6] *State v. Vaccaro*, 411 So.2d 415, 424 (La. 1982). Whether the defendant has made the requisite showing is a question addressed to the trial court's sound discretion which will not be disturbed on review in the absence of an affirmative showing of error and abuse of discretion. *Id.*

Both this court and the United States Supreme Court have instructed that the defendant cannot meet his burden merely by showing that there exists public knowledge of the facts surrounding the offense or the alleged offender. *Frank*, 99-

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[6] Louisiana courts also recognize that in unusual circumstances prejudice against the defendant may be presumed. *Frank*, 99-0553 at p. 13 n.7, 803 So.2d at 14 n.7; *State v. Brumfield*, 96-2667 (La. 10/20/98), 737 So.2d 660, 677; *State v. David*, 425 So.2d 1241, 1246 (La. 1983).

0553 at p. 14, 803 So.2d at 14, 15. As the Supreme Court noted in 1961, "[i]n these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity . . . ." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961). The defendant must prove more than mere public knowledge or familiarity with the facts of the case to be entitled to have his trial moved to another parish; rather, the defendant must show the extent of prejudice in the minds of the community as a result of such knowledge or exposure to the case before trial. *Frank*, 99-0553 at p. 14, 803 So.2d at 15. Thus, a defendant is not entitled to a jury entirely ignorant of his case and cannot prevail on a motion for change of venue merely by showing a general level of public awareness about the crime. *State v. Thompson*, 516 So.2d 349, 352 (La. 1987), *cert. denied*, 488 U.S. 871, 109 S.Ct. 180 (1988).

On review of a denial of change of venue, courts will primarily inquire as to the scope and nature of publicity to which prospective jurors in a community have been exposed and examine the lengths to which a court must go to impanel a jury that appears to be impartial, in order to ascertain whether prejudice existed in the mind of the public which prevented the defendant from receiving a fair trial. *See, e.g., Murphy v. Florida*, 421 U.S. 794, 802-3, 95 S.Ct. 2031, 2037 (1975), *State v. Hoffman*, 98-3118 (La. 4/11/00), 768 So.2d 542, *cert. denied*, 531 U.S. 946, 121 S.Ct. 345 (2000). The seven factors enumerated by this court in *Bell* help facilitate the inquiry into the nature and scope of publicity disseminated in the community where a crime occurred. Courts must distinguish, however, largely factual publicity from that which is invidious or inflammatory, as they present real differences in the potential for prejudice. *Murphy*, 421 U.S. at 800-1 n.4, 95 S.Ct. at 2036 n.4.

Additionally, courts have examined the number of jurors excused for cause for having fixed an opinion as another gauge of whether prejudice exists in the public

mind. *Id*. at 803, 95 S.Ct. at 2037-38; *State v. Wessinger*, 98-1234, p. 7 (La. 5/28/99), 736 So.2d 162, 173, *cert. denied*, 528 U.S. 1050, 120 S.Ct. 589 (1999). As the Supreme Court noted, in a community where the majority of prospective jurors will openly admit to a disqualifying prejudice, the reliability of other jurors' assurances that they are impartial and have no preconceived notion may be drawn into question. *Murphy*, 421 U.S. at 803, 95 S.Ct. at 2037. Yet, the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is insufficient to rebut the presumption of the juror's impartiality. *Id.* at 800, 95 S.Ct. at 2036. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* (quoting *Irvin*, 366 U.S. at 723, 81 S.Ct. at 1642).

Thus, as we explained in *Frank*, there is not a bright line test for determining the degree of prejudice existing in the collective mind of the community. *Frank*, 99-0553 at p. 16, 803 So.2d at 16. There is no established minimum level of exposure to negative publicity or percentage of challenged jurors that illustrates a corruptive atmosphere mandating venue transfer. *Id.*; *Hoffman*, 98-3118 at p. 8, 768 So.2d at 555; *Wessinger*, 98-1234 at p. 7, 736 So.2d at 173. Therefore, we have advised that a comparison to other cases is proper when analyzing the question of whether a change of venue was required due to the number of prospective jurors whose ability to be impartial had been corrupted by publicity.[7] *Frank*, 99- 0553 at p. 16, 803 So.2d

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[7] For examples of other cases relying on this method of analyzing the question of possible community prejudice, *see Frank*, 99-0553 at pp. 16-18, 803 So.2d at 16-17 (110 out of 113 venire members "had been exposed to some publicity surrounding the case" and 89% of the prospective jurors indicated that they had been exposed to information about the case on more than one occasion or from multiple sources); *State v. Connolly*, 96-1680, p. 5 (La. 7/1/97), 700 So.2d 810, 815 (although 86.33%, 120 out of 139, potential jurors possessed some knowledge about the crime, most had only a vague recollection of the surrounding facts); *State v. Wilson*, 467 So.2d 503, 513 (La. 1985) ("Although a majority of prospective jurors (i.e., 24 of 39) admitted exposure to pre-trial publicity, only four were excused for cause on ground of their

at 16; *Wessinger*, 98-1234 at p. 7, 736 So.2d at 173.

Defendant urges that several *Bell* factors precluded him from receiving a fair trial in Richland Parish. First, defendant urges that the nature of pre-trial publicity and the degree to which it has circulated in the community violated his right to a fair trial in Richland Parish. In support of his claim, defendant notes that in the state's own motion for a change of venue, it conceded that newspapers in West Carroll and in its surrounding parishes had published numerous articles related to the crime, which included hearsay and other evidence that might not be admissible at trial. In defendant's memorandum in support of his motion for a change of venue, he argued:

> The changing of venue to Richland or Franklin Parish, both of which are in the Fifth Judicial District, amounts to no change of venue at all. One of the alleged homicides, that of the defendant's daughter, is even alleged to have occurred in Richland Parish. If the prejudice in this case was so likely that even the [s]tate filed a motion for change of venue prior to that of the defendant, it is difficult to understand how trying the case in Richland Parish where one homicide is alleged to have occurred, would be justified. Moving the trial to Richland Parish would clearly be reversible error.

Defendant lodged several exhibits at the hearing in support of his motion, including a series of newspaper articles relating to the case. Among them were six days of articles about the crime appearing in the Monroe News-Star between February

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formation of a fixed opinion . . . . A review of the responses by potential jurors on voir dire does not reveal the existence of collective community prejudice which could have denied defendant a fair trial before impartial jurors."); *State v. Clark*, 442 So.2d 1129, 1133 (La. 1983) (motion for change of venue granted based on dry run voir dire in which 37 of 38 jurors recalled details of crime and only six out of 24 jurors in the last two groups questioned indicated that their knowledge would not affect their decision); *David*, 425 So.2d at 1247 (out of 112 jurors, 27 had read or heard about the case, but only six of those 27 had an opinion, and all four of those jurors who said that they could not put their opinion aside were excused for cause); *State v. Rodrigue*, 409 So.2d 556, 559 (La. 1982) (in a mock voir dire set up in order to determine the impact of media coverage by the court, 26 of 30 prospective jurors had read about the case, but only nine had fixed an opinion which satisfied the court that a jury could be chosen in that parish).

15, 2000, and February 20, 2000.[8] Defendant also produced two editions of the weekly West Carroll Gazette published on February 16, 2000, and February 23, 2000, both of which feature the case as front page news. The defense also submitted the February 17, 2000, edition of the Richland Beacon News, which featured the crimes both on the front page and in an editorial. The latter item, entitled, *Death too good for killer of little girl*, concluded:

> In this case, I think that whomever killed Mariah Barnes should be killed in a way that is 10 times the torture he visited on her four-foot-tall, 65-pound body.

Defendant also introduced a number of transcripts provided by KNOE-TV in Monroe, which indicated that the station had aired stories about the crimes on February 13, 2000, through February 15, 2000. Finally, defendant produced what appears to be an unsigned affidavit summarizing stories that appeared on KTVE-TV on February 14, 16, 18, and 19, 2000. On February 14, reports about the crimes aired on the 5:00 p.m., 6:00 p.m., and 10:00 p.m. news. On the latter dates, news concerning the investigation aired on the 10:00 p.m. edition and defendant was named as a suspect in the crimes.

The record reveals that 78 of the 124 prospective jurors examined (63%)[9] concerning their familiarity with the case responded that they had some exposure to it. While significant, this percentage is considerably smaller than that found in other cases in which this court has found no abuse of the trial court's discretion in denying a motion for a change of venue based on the number of prospective jurors familiar

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[8] Responses on the jury questionnaires revealed that 101 out of 115 venire members who provided some information of the matter on their responses indicated that they read the Monroe News-Star. Five of the articles in this publication appeared on the front page while the remaining one began on page three.

[9] The record shows that not all members of the venire were questioned about exposure to the case. In fact, only one juror of the first panel potential jurors was indirectly questioned on her exposure to publicity of the case.

with the facts of the case. *See, e.g., Frank*, 99-0553 at p. 16, 803 So.2d at 16 (finding 110 out of 113 venire members had been exposed to some publicity surrounding the case). When questioned about the source of the information, most of the jurors replied they had heard of the case either on television or through conversation on the street or had read of the case in the newspaper. Of those examined, a small percentage of the venire was excused due to on an inability to judge defendant's guilt based on the evidence presented at trial. In fact, only seven members of the venire were challenged for cause based on their intractable opinion about defendant's guilt and only four of those challenges were granted.[10] This percentage of the total venire is far smaller than that seen in other cases in which this court has found the level of pre-trial publicity insufficient to warrant a change of venue. *Id.* (jurors who could not set aside pre-conceived negative opinion about the crime and were excused for cause approximated to be between 20 % and 25% of total venire).

Defendant next asserts that Richland Parish was an improper venue because West Carroll Parish and Richland Parish officials were extensively quoted in the local media and played a significant role in the release of the publicity. The record reflects that in the initial press coverage of the murder, West Carroll Parish Sheriff Gary Bennett was quoted extensively right after the murders.[11] The record does not show any other comment by a public official after February 18, 2000. In addition, the trial judge on December 6, 2000 imposed a gag order at the hearing on the motion for a change of venue after moving the case to Richland Parish, prohibiting either side from

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[10] Seven prospective jurors were challenged for cause based on their inability to set aside their pre-conceived opinion about defendant's guilt. The court granted the challenges to four of these jurors, two of whom were married and the sister- and brother-in-law to West Carroll Parish Sheriff's Office Chief Deputy Louis Russell, a witness in the case.

[11] His comments appear in the Monroe News-Star on February 15, 16, 17, and 18, 2002, and in the Richland Beacon News on February 17,2000.

talking to the press.[12] Thus, the only comments made by a public official connected with the case were those that occurred nearly twenty months before trial. Given the imposition of the gag order to prevent any further comments by the officials involved in the case and the extent of time between the publication of the comments and the trial and, defendant has failed to meet his burden of showing the comments prejudiced his right to a fair trial.

Defendant's next argument relates to the third *Bell* factor, the length of time between the publicity and the trial. Specifically, defendant complains that the jury venire was not sequestered during examination and selection, thus, the potential jurors had an opportunity to read newspapers and watch television between October 29, 2001, and November 5, 2001, which would have affected their views of the case.

The crimes occurred in the middle of February 2000, and the great majority of the publicity concerning the offense took place immediately thereafter. As noted above, the court imposed a gag order on December 6, 2000. However, before trial commenced, the venire was not sequestered between October 29, 2001, and November 5, 2001, the date the trial commenced. The record shows that at the outset of voir dire, the court instructed the venire to ignore any media relating to the case.[13] In addition, the court personally examined the selected jurors individually immediately before trial

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[12] Notably, the record shows that defense counsel objected to the imposition of the gag order.

[13] The court stated:

> We want jurors who will be able to treat both sides fairly and who will make their decisions based solely on what they hear and see in the courtroom and not upon what they heard, read, or saw outside of the courtroom. Therefore, if something about this case is printed in a newspaper, then do not read it. If something is said about this case on TV or on the radio, do not watch or listen to the broadcast. If someone tries to talk to you about this case, then let them know that you have strict orders from the [c]ourt not to receive any information about this case.

began to ensure that they had complied with his order. The record is devoid of any evidence that shows the venire was exposed to or influenced by pre-trial media. Thus, defendant has failed to show that the time between any pre-trial publicity and the date of his trial affected his right to an impartial jury.

Defendant further argues that the severity and notoriety of the offense warranted a change of venue other than to Richland Parish. For support of his argument, defendant notes that the prosecutor described this case as one of the worst crimes the area had ever witnessed.[14] At the venue hearing, however, the state argued that the court had tried several other high-profile cases in Richland Parish, citing, *inter alia*, the Caston brothers, *State v. Caston*, 26,415 (La. App. 2 Cir. 10/26/94), 645 So.2d 1202, *writ denied*, 94-3137 (La. 5/5/95), 654 So.2d 337; *State v. Caston*, 583 So.2d 42 (La. App. 2 Cir.), *writ denied*, 585 So.2d 575 (La. 1991); and *State v. Cupit*, 508 So.2d 996 (La. App. 2 Cir.), *writ denied*, 514 So.2d 1174 (La. 1987), without incident. Defendant claims that those cases may be distinguished from his because none of those defendants received the death penalty and in fact did not even seek to move their cases out of the judicial district. In those cases, however, although the defendants received life sentences, the state sought the death penalty as the proper sentence. Because a motion for change of venue relates to the ability of a defendant to receive a fair trial on the charges brought by the state, the relevant inquiry when evaluating the comparative notoriety of the offenses would necessarily be the penalty sought by the state rather than that returned by the jury. Accordingly, there is nothing in the record that indicates that this case contained facts that were so severe or

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[14] In his closing argument, the district attorney stated:

> What has happened during the last three or four days, is a story so gross and so horrible that I defy you to think about any crime spree in our small community or area that compares to this tragic brutality and violence that brought the death[s] of Bertha Anderson and Mariah Barnes.

notorious so as to warrant a change of venue.

Defendant next asserts that Richland Parish is a small, rural parish so saturated with pre-trial publicity such that it could not be a proper venue.[15] Defendant notes that during voir dire, thirty-two members of the venire reported discussing the case with neighbors. In addition, two prospective jurors actually saw police vehicles at the crime scene, and one juror testified he drove past one of the crime scenes. Defendant also quotes the prosecutor, who, at voir dire, referred to discussion of the crime in the area with comments to prospective jurors such as, "[T]here's nothing wrong with about hearing about cases. In a small community like we all live in, that happens." Finally, defendant asserts that because West Carroll and Richland Parishes adjoin each other, the two parishes are too integrated such that Richland Parish was no more a proper venue than West Carroll Parish.

A more sparsely populated parish like Richland Parish arguably would be more focused on a violent crime than would be an urban community more acquainted with these misdeeds. *Compare Hoffman*, 98-3118 at p. 6 (La. 4/11/00), 768 So.2d at 553 ("[T]his event must be viewed against the backdrop of fear and desperation caused by a crime wave that engulfed both St. Tammany and Orleans in November 1996."). However, if we were to adopt defendant's position, smaller parishes would essentially be prevented from being a proper venue for a capital case. A rural parish like Richland Parish is not an improper venue merely because of the local population's familiarity with the offense. The record does contain trace instances of integration between the two parishes, most likely because of their geographical proximity.[16]

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[15] According to the U.S. Census Bureau, the population of the parish was estimated in 2001 at 20,930. See U.S. Census Bureau, *State and Country Quickfacts, Richland Parish, Louisiana available at* http://quickfacts.census.gov/ qfd/states/22/ 22083.html (last visited June 27, 2003).

[16] Namely, two venire members were related by marriage to a West Carroll deputy who was a witness at trial; one venirewoman's brother was Barnes's principal

However, none of these instances demonstrates that Richland Parish could not present defendant with a fair and impartial jury. Accordingly, there is no evidence that shows that the size of Richland Parish prejudiced defendant's right to a fair trial. Thus, this argument is without merit.

Defendant next urges that other events occurred in the community that either affected or reflected the attitude of the community or individual jurors toward the defendant. Defendant does not point to any unrelated events that had any effect on the attitude of the community towards his crime. However, he refers to a number of incidents which demonstrated the outrage in the area about the crime.[17] Defendant claims that these events reflected an "air of vigilantism" in the community and they are discussed in detail in our review of the next assignment of error. The relevant incidents, however, all involve the victims' family and do not necessarily reflect the attitude of the community at large. Thus, this argument is without merit.

In his last argument relating to the *Bell* factors, defendant claims that in the close-knit and rural community, prospective jurors were unable to give honest responses when examined at voir dire. In support of his argument, defendant points to the large percentage of jurors who had ties to law enforcement agencies or the district attorneys' offices prosecuting the case.[18] A review of the record shows that

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at school and knew Anderson; one venireman worked in West Carroll Parish with co-workers who lived next to decedents; a venirewoman worked in West Carroll.

[17] Defendant refers to the following incidents: (1) an "angry mob" attempting to extract defendant from a police cruiser outside the Anderson residence; (2) a statement by a correctional officer indicating concern about protecting defendant from the victims' family and defendant's subsequent transfer to a different jail; (3) disruptions in the courtroom caused by members of the victims' family; and (4) references by the prosecution to the desire of the victims' families to avenge their murders.

[18] Thirty-seven members of the venire admitted to some relationship with the police or the district attorneys' offices. Twenty-four prospective jurors stated that they knew either one or both of the attorneys prosecuting the case. Four other potential jurors were relatives or knew members of other Richland Parish law

these relationships were tenuous at best. Furthermore, the jurors were questioned whether their relationship would hinder their ability to impartially consider the evidence. While all of the jurors indicated their relationships would not influence their decision, the trial court determined that it was necessary to excuse only one juror based on her relationship to a witness at trial.[19] Thus, she was properly excused for cause because of the relationship. Moreover, four jurors were also excused based on their relationships to the West Carroll and Richland Parish Sheriff's Offices and the Assistant District Attorney.[20] Accordingly, defendant's claim that these relationships affected those veniremembers' responses during voir dire thus lacks support in the record.

Finally, in an argument unrelated to the *Bell* factors, defendant claims that the state sought to keep the trial in the Fifth Judicial District for the convenience of the witnesses and the victims' family. The record does reflect instances in which the prosecution argued that Richland Parish would be convenient. At the hearing on the motion to transfer venue, however, the district attorney also acknowledged that he would "not say for one second that judicial economy should prevail over the rights of a defendant."

While the record demonstrates that there was a general knowledge within Richland Parish about the case in general, the defendant has failed to present sufficient

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enforcement agencies.

[19] Katharine Darnell, Deputy Russell's sister-in-law, testified that she could listen independently to all of the evidence. Although the trial court indicated it believed her, it determined her relationship nonetheless could influence her decision and excused her for cause.

[20] The record shows that Claire Douciere, Michael Fife, and John Williams were excused based on their relationships before being questioned by the prosecution or the defense. Charles Darnell, Deputy Russell's brother-in-law, was excused shortly after the commencement of questioning but was not questioned whether he could impartially consider the evidence.

evidence of an overriding prejudice within that community's collective mind that prevented him from receiving a fair trial. Most jurors who recalled some memory of the publicity responded that they were aware of the case but could put aside that information and act impartially as a juror. Those jurors who expressed a pre-conceived opinion that could not be set aside were excused for cause. Those prospective jurors only made up approximately three percent of the total venire. We have approved several rulings in which the trial court has denied a defendant's motion for a change of venue in cases in which a far larger percentage of prospective jurors indicated an inability to set aside pre-formed opinions of the defendant's guilt. *See Frank*, 99-0553 at pp. 16-18, 803 So.2d at 16-17, *Hoffman*, 98-3118 at pp. 9-10, 768 So.2d at 555-56; *Connolly*, 96-1680 at p. 5, 700 So.2d at 815; *Wilson*, 467 So.2d at 513. Furthermore, because defendant fails to demonstrate that the trial court erred when it ordered the trial held in Richland Parish, the convenience of that venue for interested parties does not appear to be an inappropriate consideration. In conclusion, based on this record, we do not find that this is a case in which the trial court abused its discretion when it moved the trial from West Carroll Parish to neighboring Richland Parish.

Assignment of Error No. 2

In his second assignment of error, defendant argues that several incidents purportedly demonstrate a "threat of vigilante-style justice" that cast "an ugly and unconstitutional pall over the proceedings leading to [his] convictions and death sentences." Accordingly, he claims that he was denied due process, and thus this court should set aside his convictions or at the very least the death sentences imposed in the instant case.

Defendant points to several incidents that occurred following the murders to

illustrate the atmosphere in the community preceding his trial.[21] First, on the day after Anderson's body was discovered, defendant was placed in a police vehicle outside the victims' residence. Deputy Garland Walker testified that a crowd gathered around the vehicle, and he instructed the officer at the scene, Robert Epting, to transport defendant to the sheriff's office. On cross-examination, Walker described the scene, stating that Edward Anderson, a relative of Bertha's, ran to Epting's car along with two other men, pointed to defendant, and yelled, calling him a "son-of-a-bitch." Deputy Kenneth Green also testified on cross-examination that upon exiting Anderson's house when he heard the commotion, he observed Epting's car was surrounded with "[m]aybe twenty people," who were screaming, beating the car, and trying to get to defendant. Given the atmosphere, the officers "thought it necessary" to "remove [defendant] from the area."

Defendant also refers to a letter written by the warden of the jail located in West Carroll Parish to officials at the Hunt Correctional Center, requesting that defendant be housed at the out-of-town facility because "the victims' family would like to do him harm."[22] Based on these episodes, defendant claims that "[i]f the local constabulary was unable to protect [him] from physical danger, the record reveals that the trial court and prosecution were hardly equipped to protect [his] right to due process of law once the proceedings began in court."

These isolated events fail to demonstrate that defendant's due process rights

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[21] Defendant refers to an event that occurred while defendant was traveling back to the West Carroll jail from a pre-trial motion hearing in Rayville. This evidence was not made part of the trial record below, and we denied his motion to supplement the record on appeal with this evidence. Consequently, we will not consider this alleged incident.

[22] The letter additionally states the move was requested for a second reason, that defendant had returned from the hospital after having his left wrist cut in two places and each ankle cut to a lessor degree. Defense counsel introduced the letter during the sentencing phase to assert that defendant had attempted suicide.

were in any way compromised in the courtroom. The threatening incidents all involved the victims' family members and their visceral reactions to the murders of their loved ones, which could hardly have been unexpected. This evidence does not show that the community of Richland Parish held an animosity against defendant such that his right to a fair trial was prejudiced. Thus, this portion of defendant's argument lacks merit.

Defendant next complains about unbridled displays of emotion in the courtroom. The record shows that while defendant's recorded confession was played to the jury, defendant's aunt, left the courtroom without incident. Shortly thereafter, Kimberly Dobbins, a relative of the victims, exited the courtroom without incident. During a hearing relating to the trial disturbances, Dobbins explained the she was a diabetic, had not eaten anything that morning, and left to get a Coke or a peppermint. Minutes later, Barnes's mother and Anderson's granddaughter, Shalaina Smith, fainted. Defendant moved for a mistrial, which the trial court denied, describing the interruptions as minimal.[23] At the state's request, when jurors returned to the

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[23] The trial court made the following observations in his ruling:

> This was my assessment of what happened. The first lady to get up and leave the courtroom was seated to my left and I did not hear anybody crying. I just saw the lady get up and she maneuvered around, I think the back of the courtroom and left. . . . very respectfully, very gracefully, and very quietly. Then I noticed someone else get up on my right. By the same token, she did not — [t]here was no outburst. There was no crying. She simply left the courtroom. Now apparently was this lady that just testified. Just a few minutes after that, I noticed a young lady, it looked like she slumped over and was resting on someone's shoulder and they put her — kind of laid her down a little bit and then began to pick her up. When I noticed that someone was picking her up, then I instructed the jury to remove themselves from the courtroom. And by that time they had gotten her, I think in the aisle and were attempting to lift her out of the courtroom. I did not know who the lady was. But there was never any crying out. There were never any outburst[s] that I heard. And everything was

courtroom, the court admonished them and instructed them to base their decision solely on the evidence presented and not on any events in the courtroom.[24]

La. C.Cr.P. art. 775 requires a mistrial on motion of the defense when "prejudicial conduct inside or outside the courtroom makes it impossible for the defendant to receive a fair trial." However, mistrial is a drastic remedy that is warranted only when the defendant has suffered substantial prejudice such that he cannot receive a fair trial. *Wessinger*, 98-1234 at p. 24, 736 So.2d at 183; *State v. Bates*, 495 So.2d 1262, 1273 (La. 1986); *State v. Wingo*, 457 So.2d 1159, 1166 (La. 1984). The determination of whether actual prejudice has occurred lies within the sound discretion of the trial judge, and this decision will not be overturned on appeal absent an abuse of that discretion. *Wessinger*, 98-1234 at p. 24, 736 So.2d at 183; *State v. Sanders*, 93-0001, pp. 20-21 (La. 11/30/94), 648 So.2d 1272, 1288; *State v. Smith*, 430 So.2d 31, 44 (La. 1983).

In *State v. Wessinger*, the prosecutor played an audiotape of the victim's 911 call during the penalty phase of the trial. As the tape played, the victim's father shouted

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> done in a very respectful manner. There was some small commotion when they were attempting to lift this lady who had passed out or who had fainted. But it was not a huge commotion. It was not a huge commotion at all. In fact, I did not hear anyone talking. It was more scuffling of feet than anything else. So that is my assessment of what happened.

[24] The trial court made the following instruction:

> I need to instruct you that you are to base your decision in this case solely on the evidence that's presented from this witness stand and the other items of evidence that you have been given permission to look at or to listen to. You're not to base your decision on anything else that happens. Anything that happens out in the audience, anything else. You're to base your decision on the evidence that's presented by the attorneys and also apply the law that I give you at the close of the case to that evidence in reaching your decision. You're not to let anything else that happens in this courtroom have any impact whatsoever on your decision making process.

an expletive. The trial court removed the jury and the defendant from the courtroom and held a bench conference. Defense counsel moved for a mistrial based on the outburst, which the trial judge denied. We affirmed the defendant's conviction and sentence, stating it could presume that jurors viewed the outburst as "the natural and irrelevant expression of human emotion" and did not let it influence their verdict. *Wessinger*, 98-1234 at p. 24, 736 So.2d at 183.[25]

We cannot say that the trial judge abused his vast discretion in denying the mistrial at issue in this assignment of error. Defendant does not demonstrate, and we cannot ascertain from the record, how these events could have prejudiced him to such a degree that a mistrial was warranted. Even assuming that the jurors thought that the incidents were somehow related to the family's reaction to defendant's confession in which he graphically described the murders, he fails to make any reasonable showing that it unduly influenced their verdict. Furthermore, the trial judge admonished the jurors that they were to disregard any extraneous events that occurred inside the courtroom. Accordingly, this portion of defendant's argument also lacks merit.

In his next argument, defendant claims that the prosecutor made two improper statements during rebuttal at the guilt phase and at the penalty phase of the trial, which require reversal of his convictions and sentences. Defendant concedes and the record

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[25] Courts have traditionally upheld denials of motions for mistrial based on emotional outbursts when a defendant fails to show their influence upon the jury prejudiced his right to a fair trial. *See State v. Domangue*, 350 So.2d 599, 602 (La. 1977) (mistrial unnecessary when rape victim's spouse cried during closing before going outside); *State v. Hopkins*, 626 So.2d 820, 822-23 (La. App. 2 Cir. 1993) (mistrial not warranted when victim's family cried during closing arguments, at least when judge later charged the jury not to be influenced by sympathy, passions, prejudice or public opinion); *State v. Worthen*, 550 So.2d 399, 401 (La. App. 3 Cir. 1989) (unprovoked verbal outburst and crying by the victim under cross-examination did not warrant mistrial, at least after judge strongly admonished the jurors that outburst not appropriate and should not influence them); *State v. Wright*, 441 So.2d 1301, 1306 (La. App. 1 Cir. 1983) (mistrial unnecessary when spectator who had "beg[u]n crying [and] creating a scene" left promptly and judge admonished jury).

reveals that he failed to make a contemporaneous objection to either statement at trial. In these circumstances, he waived any claim based on them. La. C.Cr.P. art. 841; *State v. Taylor*, 93-2201, p. 7 (La. 2/28/96), 669 So.2d 364, 369; *Wessinger*, 98-1234 at p. 20, 736 So.2d at 181. Accordingly, this portion of defendant's argument also lacks merit.

Finally, appellate counsel claims that defendant requested the death penalty when testifying at the penalty phase because the atmosphere at the proceedings caused him to fear that the victims' relatives would seek revenge on his family if jurors spared his life. The record shows that defendant took the stand at the penalty phase, against the advice of counsel, and requested that the jury sentence him to death so the victims' family could "heal" and "move on." Defendant also stated that he had spoken with his family about his decision to request the death penalty and that they understood. There is no suggestion that defendant feared the victims' relatives would seek retribution on his family if he received a life sentence. Accordingly, this claim lacks any basis in fact.

In conclusion, the record is devoid of any suggestion that defendant was denied due process as a result of the atmosphere either inside or outside the courtroom. Accordingly, defendant's argument that there was an air of vigilante-style justice that prejudiced his due process rights lacks merit.

Assignment of Error No. 4

In this argument, defendant argues that a West Carroll Parish grand jury indicted him for the murder of Mariah Barnes even though no element of the offense occurred in West Carroll Parish. Rather, defendant contends that all the elements of the first degree murder of Barnes occurred in Richland Parish. Thus, the West Carroll Parish was an improper venue because grand jury had no jurisdiction over defendant on this count and the resulting conviction is invalid.

A claim of improper venue is governed by La. C.Cr. P. art. 615, which provides:

> Improper venue shall be raised in advance of trial by motion to quash, and shall be tried by the trial judge alone. Venue shall not be considered an essential element to be proven by the state at trial, rather it shall be a jurisdictional matter to be proven by the state by a preponderance of the evidence and decided by the court in advance of trial.

La. C.Cr.P. art. 615. By the clear language of this statute, a defendant must raise a motion to quash based on improper venue prior to trial. Accordingly, a defendant who fails to file his motion to quash prior to trial has waived his right to assert his claim of improper venue on appeal. *See State v. Amato*, 96, 0606 (La. App. 1 Cir. 6/30/97), 698 So.2d 972; *State v. Gatch*, 27, 701 (La. App. 2 Cir. 2/28/96), 669 So.2d 676; *State v. Matthews*, 632 So.2d 294 (La. App. 1 Cir. 1993).

In the instant case, the record does not reflect that defendant filed a pre-trial motion to quash the indictment based on jurisdiction. Defendant claims that he did not raise this issue pre-trial because the legal and factual intricacies of the case would have made it futile for the trial court to entertain the issue. Even assuming that defendant's allegations are true, the timing of when to raise the claim of improper venue is distinct from the difficulty of proving the claim. Defendant also urges that he preserved this issue when he filed a Motion in Arrest of Judgment after trial. However, La. C.Cr. P. art. 859 explicitly provides that "[i]mproper venue may not be urged by a motion in arrest of judgment." La. C.Cr.P. art. 859. Thus, because defendant did not file a motion to quash in advance of trial as required by statute, he waived the issue on appeal.

Guilt Phase Issues

Assignment of Error No. 7

In this assignment of error, defendant contends that the state violated his constitutional rights when it ordered him to provide biological evidence. Defendant

claims that by compelling him to surrender samples of his blood and other biological materials for forensic analysis, the state violated the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

It is well settled law that the Fifth Amendment privilege against self-incrimination only applies to evidence of a testimonial and communicative nature and is not violated by the gathering of physical evidence such as blood samples from the accused. *Schmerber v. California*, 384 U.S. 757, 761-764, 86 S.Ct. 1826, 1830-1832 (1966) ("privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it"); *State v. Carthan*, 377 So.2d 308, 312 (La. 1979) ("[t]esting of bodily evidence . . . violates no privilege against self-incrimination"). Similarly, the Sixth Amendment right to counsel does not apply to the scientific examination of a defendant's blood. *United States v. Wade*, 388 U.S. 218, 227, 87 S.Ct. 1926, 1932 (1967) (scientific analysis of an accused's blood not a "critical stage" of proceedings at which constitutional right to counsel attaches).

A court-ordered blood test or medical procedure, designed to gather evidence against the person undergoing the procedure, constitutes a search and seizure under the Fourth Amendment and La. Const. art. I, §5. *Schmerber* , 384 U.S. at 767, 86 S.Ct. at 1834; *In the Interest of J.M.*, 590 So.2d 565, 569 (La. 1991); *Carthan*, 377 So.2d at 311. Thus, to survive constitutional scrutiny, a blood test must be conducted pursuant to a warrant based on probable cause absent a recognized exception.

The record shows that the court held a probable cause hearing for defendant's arrest on the two counts of first degree murder. The judge subsequently signed an Order for Production of Physical Evidence, compelling defendant to submit to the

taking of blood, saliva, and pubic and head hairs. While this order was not labeled a "warrant," it was issued with all of the safeguards that a warrant affords. A court issued the order, which allowed for a detached and disinterested determination of whether or nor not to invade defendant's body in search of evidence of guilt. *See Schmerber*, 384 U.S. at 770, 86 S.Ct. at 1835. The order was also based upon probable cause, which is the constitutional standard for a lawful search and seizure. Given the existence of probable cause and the court order, seizure of defendant's blood was therefore not unreasonable. Accordingly, this argument lacks merit.

Assignment of Error No. 14

In this assignment of error, appellate counsel claims that trial counsel introduced insufficient evidence to support defendant's dual plea of not guilty and not guilty by reason of insanity, effectively constituting an admission of guilt on his behalf in violation of La. C.Cr.P. art. 557.[26]

A defendant asserting that he was insane at the time of the offense may urge at trial all other defenses available under the law, including that the defendant did not commit the act, that he was justified by self-defense, and other possible defenses on the merits. *State v. Branch*, 99-1484, p. 2 (La. 3/17/00), 759 So.2d 31, 32 (citing La. C.Cr.P. art. 552 cmt.). Once the state has established beyond a reasonable doubt all

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[26] La. C.Cr. P. 557 provides, in pertinent part:

> A court shall not receive an unqualified plea of guilty in a capital case. However, with the consent of the court and the state, a defendant may plead guilty with the stipulation either that the court shall impose a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence without conducting a sentencing hearing, or that the court shall impanel a jury for the purpose of conducting a hearing to determine the issue of penalty in accordance with the applicable provisions of this Code.

necessary elements of the offense and shown that defendant has committed a crime, the defendant bears the burden of establishing his defense of insanity in order to escape punishment. La. C.Cr.P. art. 652; *State v. Marmillion*, 339 So.2d 788, 796 (La. 1976).

The record shows that the defense presented no evidence in support of the dual plea, the defendant did not withdraw the plea, and the trial court instructed jurors at the close of the guilt stage as to the defense of insanity in Louisiana.[27] The record is not void, however, of suggestions the defense counsel attempted to exploit the dual plea. During closing arguments at the penalty phase, defense counsel stated, "Nobody could do that to their own child in their right mind," which suggests that the jury should consider residual doubt about defendant's sanity before imposing its sentence.

Counsel's failure to present any affirmative evidence in support of the insanity portion of the dual plea, by either lay or expert testimony, does not amount to a tacit submission on the question of guilt or innocence. Jurors are allowed to consider all pleas of innocence and defenses and would not have necessarily considered failure to present evidence supporting the dual plea an admission of guilt. Given the dual nature of the plea, defendant's failure to present evidence of insanity did not amount to an unconditional plea of guilty in violation of La. C.Cr.P. art. 557. Accordingly, this argument lacks merit.

Penalty Phase Issues

Assignment of Error No. 3

In this assignment of error, defendant claims that the court denied him the right to present mitigation evidence at the penalty phase when it curtailed the scope of his

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[27] Defendant's confession was introduced into evidence, in which he asserted that he had smoked marijuana and drunk alcohol before he committed the murders. Voluntary consumption of marijuana and alcohol could not, however, as a matter of law, support a finding that he did not know right from wrong at the time of the crime and that he had therefore been legally insane. *See State v. Scott*, 344 So.2d 1002, 1005 (La. 1977)

expert's testimony. As a result, he alleges that jurors lacked crucial information concerning the costs associated with the imposition of the death penalty, rendering their verdict unreliable.

The record reveals that at the penalty phase, defendant called Burk Foster, a professor of criminal justice at the University of Louisiana at Lafayette. After the court qualified Foster as an expert in the field of corrections, counsel asked that he "tell the jury what will happen if Sedwric Clark is given the death sentence." The state objected, and the court excused the jury.

During the examination, Foster explained that in response to defense counsel's question, he would testify about the conditions that defendant would experience while on death row.[28] Foster also indicated that his testimony would include information

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[28] Professor Foster stated:

> Sedwric would be held in a single person's cell on one of the tiers on death row. Which is a separate building near the front gate of the prison. He would be held in isolation without any kind of work assignment or participation in any other organized inmate activities. He would kept (sic) under a very high degree of security. He would be allowed out of his cell an hour a day for exercise — Get to go outside three times a week. He would be allowed to consult with his attorney or anyone else who might come to him on a legal visit. He would be allowed to have contact with a spiritual adviser. He would not be allowed to have contact visits with his family members at present because those [] have been restricted after an attempted escape at death row several years ago. He would remain in a state of suspended animation for several years until the appeal process is completed and a date is set for his execution. And then he would be taken to Camp F, where lethal injections are done and placed in a holding cell for that day, the last day. Would be allowed to meet with any family members or friends or supporters, his spiritual advisers, his attorneys, any others who might be there at some time between the hours of six and nine on some evening in the future. He would be escorted down the hall from the holding cell into a lethal injection chamber and placed on a table. And IV's (sic) inserted in both arms and he would be put to death through lethal injection.

regarding "the average length of time or how long someone stays on death row" and the "frequency and extent of use" of the governor's clemency and pardon powers. The trial court denied the state's objection and allowed the testimony, finding it to be relevant to defendant's sentencing.

Defense counsel then added that he wanted Foster to discuss "the cost of execution." When asked about that subject, the expert informed the court that while the exact cost of executions in Louisiana had never been calculated, there had been studies in other states that compared the cost of executions with the cost of life sentences. He further commented that, "generally speaking, executions cost twice as much to seven times as much as life imprisonment." The trial court ruled that it would not permit the expert to testify about the comparative costs of the imposition of a life as opposed to a death sentence and defense counsel objected. After a break, the state clarified its objection to the court, noting that it objected to testimony about the cost of an execution and not about the cost of incarceration. The court then ruled that it would allow Foster to testify as to the cost of a sentence of life imprisonment.

Defendant tendered the witness without further questioning. The state also indicated that it had no questions for Foster, and the court excused the witness. Jurors, therefore, learned nothing of substance from Professor Foster as to any aspect of capital punishment in Louisiana. Defendant now argues that "[i]n permitting the prosecution to adduce evidence about the cost of life imprisonment, but not of execution, the trial court arbitrarily tilted the playing field and thereby presented Mr. Clark in a no-win situation."

The scope of the sentencing hearing in a capital case is governed by La. C.Cr.P. art. 905.2, which provides that "[t]he 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 death of the victim has had on the victim, family

members, friends, and associates." La. C.Cr.P. art. 905.2. The trial court is to instruct the jury as to the governor's power to grant a reprieve, pardon or commutation of sentence. *Id.* Thus, the defense is allowed to argue or present evidence to the jury on the frequency and extent of use by the governor of his clemency authority. *Id.* Testimony concerning the costs associated with incarceration and the imposition of the death penalty do not relate to the circumstances of the offense, the character of the defendant, or the impact on the victims. *Cf. State v. Langley*, 95-1489 (La. 4/14/98), 711 So.2d 651, *conviction vacated on other grounds*, 95-1489 (La. 4/3/02), 813 So.2d 356 (finding in-depth evidence regarding the nature of the death penalty not relevant to the circumstances of the offense or the character of the defendant). It also does not bear upon the frequency and the extent of the governor's clemency powers.

Furthermore, La. C.Cr.P. art. 905.2 provides that the sentencing hearing is to be conducted according to the rules of evidence. Foster indicated that he could not give an accurate assessment of the cost of sentencing someone to death in Louisiana because no study had been conducted. While Foster did have evidence concerning the costs of executions in other jurisdictions, this material would have no relevance to the costs of an execution in this state. Accordingly, Foster's testimony about these studies was not admissible and was properly excluded by the trial court.

Ultimately, neither the state nor the defense presented any evidence relating to the costs to taxpayers of a death sentence or a sentence of life imprisonment. As a result, defendant suffered no prejudice resulting from the court's ruling.

Defendant also claims that the court "effectively prohibited" him from introducing evidence concerning the infrequency of grants of clemency when it ruled that the prosecution would be allowed to cross-examine Foster on the costs associated with life imprisonment. The record reveals that the state never objected to the admission of testimony pertaining to clemency. Rather, defense counsel tendered the

witness before he elicited such testimony. Defendant's claim lacks factual support to demonstrate that the court denied him the opportunity to present evidence on the clemency issue. Thus, this assignment is without merit.

Assignment of Error No. 8

In this assignment of error, defendant claims that the state presented constitutionally insufficient evidence to support the jury's finding of several of the aggravating circumstances at the penalty phase. Specifically, Defendant contends that the evidence did not support four of the five aggravating circumstances relating to the murder of Barnes and three of the five relating to the murder of Anderson.[29]

This court has held on many occasions that the failure of one or more statutory aggravating circumstances does not invalidate others, properly found, unless introduction of evidence in support of the invalid circumstance interjects an arbitrary factor into the proceedings. *Wessinger*, 98-1234 at p. 38, 736 So.2d at 192; *State v. Letulier*, 97-1360, p. 25 (La. 7/8/98), 750 So.2d 784, 799. Defendant claims that the recent decision in *Ring v. Arizona*, ___ U.S. ____, 122 S.Ct. 2428 (2002) requires this court to revisit this rule.

In *Ring*, the United States Supreme Court overruled its prior decision in *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990), and held that Arizona's capital sentencing scheme, in which the jury found all of the facts necessary to convict the defendant of first degree murder but the trial court found the aggravating circumstance

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[29] Defendant contends that the evidence was insufficient to show the following aggravating circumstances as to Anderson: (1) that the offender knowingly created a risk of death or great bodily harm to more than one person; (2) that the murder was committed in an especially heinous, atrocious or cruel manner; and (3) that the victim was an eyewitness to a crime; and the following as to Barnes: (1) that the offender knowingly created a risk of death or great bodily harm to more than one person; (2) that the murder was committed in an especially heinous, atrocious or cruel manner; (3) that the victim was an eyewitness to a crime; and (4) that at the time of the commission of the offenses, the offender was engaged in the perpetration or attempted perpetration of aggravated rape and second degree kidnapping.

necessary to punish the defendant with death, as opposed to life imprisonment, violated the Sixth, and by implication the Eighth, Amendment. *Ring*, ___ U.S. at ____, 122 S.Ct. at 2432. Defendant claims that *Ring* alters this court's long-standing analysis because this court substitutes its own fact-finding by relying on fewer aggravating circumstances than those found by the jury in affirming the jury's sentence of death.

A court does not substitute its own fact-finding for that of the jury when it invalidates certain aggravating circumstances found by jurors. Rather, the court is performing its appellate duty by reviewing the evidence to ensure that the jury's findings meet the standard set out in *Jackson v. Virginia*, 433 U.S. 307, 99 S.Ct. 2781 (1979). In *Zant v. Stephens*, 462 U.S. 862, 884, 103 S.Ct. 2733, 2746 (1983), the Supreme Court approved of this role when it found that in a state, such as Louisiana, in which a jury is not required to find that the aggravating circumstances outweigh any mitigating factors by a particular evidentiary standard, "a death sentence supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance is invalid in the sense that it is insufficient by itself to support the death penalty." On the other hand, *Ring* requires that the finding of an aggravating circumstance that supports the imposition of the death penalty be imposed only by a jury. *Ring* does not speak of the review given by a court to the sufficiency of an aggravating circumstance. Therefore, we find that *Ring* does not supplant the Supreme Court's decision in *Zant*.

Of the five aggravating circumstances found by the jury regarding the murder of Anderson, defendant does not complain of two: (1) that the victim was over the age of 65, and (2) that at the time of the commission of the murder defendant was engaged in the perpetration or attempted perpetration of an aggravated burglary. Likewise, defendant does not complain of the jury's finding of an aggravating circumstance based on the fact that Barnes was under the age of twelve. The record shows that at

the time of the murders, Anderson was 68 years of age and Barnes was 8 years old. Thus, one factor on each count of murder was supported by the evidence introduced at trial. Accordingly, the jurors most assuredly relied on the victims' age when it found defendant guilty of first degree murder.

Having found one aggravating circumstance was amply supported by the evidence, we consider it unnecessary to inquire whether the jury correctly found that the other aggravating circumstances existed. *State v. Roy*, 95-0638 (La. 10/04/96), 681 So.2d 1230; *State v. Knighton*, 436 So.2d 1141 (La. 1983); *State v. Lindsey*, 428 So.2d 420 (La. 1983); *State v. Narcisse*, 426 So.2d 118 (La. 1983); *State v. Moore*, 414 So.2d 340 (La. 1982); *State v. Mattheson*, 407 So.2d 1150 (La. 1981); *State v. Monroe*, 397 So.2d 1258 (La. 1981); *State v. Williams*, 383 So.2d 369 (La. 1980); *State v. Martin*, 376 So.2d 300 (La. 1979), *cert. denied* 449 U.S. 998, 101 S.Ct. 540 (1980), *reh. denied* 449 U.S. 1119, 101 S.Ct. 931 (1981).

However, the inquiry into the other aggravating circumstances does not end upon the finding of one constitutionally sufficient circumstance because we must review the other circumstances to assure they did not inject any arbitrary factor into the proceeding. *Wessinger*, 98-1234 at p. 46, 736 So.2d at 196. Even assuming, *arguendo*, that the other aggravating circumstances about which defendant complains were improperly submitted to the jury, our review of the record reveals that they did not interject an arbitrary factor into the proceedings because evidence of the manner in which the offense was committed and of the nature of the victims' injuries was relevant and properly admitted at trial. Thus, this assignment of error lacks merit.

As noted throughout this opinion and the appendix, defendant failed to lodge objections at trial to many of the alleged errors of which he now seeks review. Pursuant to the mandate of *Wessinger*, we reviewed all of the unobjected to alleged errors to insure they did not interject any arbitrary factors into the sentencing

proceeding. La. S.Ct.R. 28; *State v. Wright*, 01-0322, p. 16 (La. 12/4/02), 834 So.2d 974, 988. We conclude that none of these alleged errors introduced any arbitrary factor in the jury's deliberations at the penalty phase of the proceedings.

Sentence Review

Under La. C.Cr.P. art. 905.9 and La. S.Ct.R. 28, this court reviews every sentence of death imposed by the courts of this state to determine if it is constitutionally excessive. In making this determination, we consider whether the jury imposed the sentence under influence of passion, prejudice or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender. In the instant case, the trial court has submitted a Uniform Capital Sentence Report ("UCSR") and the Department of Public Safety and Corrections ("DOC") has submitted a Capital Sentence Investigation Report ("CSI"). In addition, the defense has filed an opposition to the UCSR.

The UCSR and the CSI both indicate that defendant, Sedwric Emel Clark, is an African-American male and was 29 years old at the time the crimes were committed. He was born in West Carroll Parish to Bennie and Mary Clark. Both of his parents are presently deceased, his father dying in 1991 and his mother dying in 1997. He is one of three children born to the marriage. Defendant graduated from high school in 1988 and completed an auto mechanics program at Lake Providence Vo-tech. The UCSR estimates his intelligence in the medium range (IQ: 70-100). Although defendant has never married, he has fathered three children with three different mothers. One of his daughters, Mariah Barnes, was a victim in the instant case. Defendant has two other daughters: one aged 12, who resides with her mother, and a one-year-old who lives with Malisha Green, defendant's pregnant girlfriend at the time the crimes were committed. Defendant denied any history of substance abuse problems but admitted

using alcohol and marijuana shortly before committing the instant offenses.

Defendant has no known juvenile record. In 1990, defendant was convicted in Texas of unauthorized use of a motor vehicle and was placed on five years supervised probation. He abided by the conditions of his probation until the following year when he was arrested in Louisiana for three counts of simple robbery and one count of aggravated battery. The CSI reveals that on August 3, 1991, officers from the Tallulah Police Department responded to a call about gunfire. When they arrived at the scene, a woman reported that an African-American male had stopped her vehicle, pulled a pistol and ordered her out of the car. She put her vehicle in reverse and ran into a ditch. When she exited the car, the man shot her in the hip. A description of the assailant ran over the police radio, and defendant was apprehended shortly thereafter. Further investigation revealed that two other individuals had also been ordered out of their vehicles at gunpoint but had refused and escaped without incident. Defendant was convicted of the crimes and was sentenced to a total of 12 years imprisonment at hard labor. At the time of the murders, defendant had been released from prison and was on parole.

According to his parole officer, defendant maintained steady employment, working at Ruffin Pre-Fab for a short period of time in Oak Grove, Louisiana, and holding a number of other jobs in West Carroll Parish before securing permanent employment with Werner Enterprises driving an 18-wheeler. He was employed by Werner at the time of his arrest.

As part of the CSI, defendant was interviewed at Angola following his convictions. During the interview, defendant contradicted the testimony he gave at the penalty phase in which he admitted committed the crimes and deserved the death penalty. Defendant maintained his innocence and expressed outrage at the conduct of

those who participated in his prosecution.[30]

Passion, Prejudice or Other Arbitrary Factors.

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[30] Defendant gave the following statement:

> I am very angry and if I was out I would kill Judge McIntyre, Mr. Stephens, all the district attorneys because they allowed people to get on the stand and frame, lie on me and kill me with their lies and destroyed my family. The court should have done what is right and should have gotten accurate evidence and I also wish that I should have followed my first plan to kill Sheriff Gary Bennett. Therefore, this time I will follow through on my plan. My two uncles are very very upset because Sheriff Bennett knew that he allowed injustice to fall. West Carroll Sheriff's Office used illegal means to gather their evidence and all of their evidence is inaccurate. Also, the West Carroll Parish Sheriff's Department used Richland Parish and its Sheriff's Department for its dirty purpose of condemning me to death.
>
> I am not an evil person. I could not have killed two people, one of which is my very own daughter, my own flesh and blood, however, I have turned evil now because of what happened. The West Carroll Sheriff's Office used evil to destroy me, so now I am evil and will return their own evil to them pretty soon.
>
> There were other people that could have been used to testify as truthful witnesses. One main witness was not even called to the stand and his name is Deputy Bob Epting and he was right there on the spot when the victims' family jumped on me and beat me. That is how those scratches got on my face and the West Carroll Sheriff's Department knew this, so that's why he, Bob Epting, was not called to the stand. Chief Deputy Russell of the West Carroll Sheriff's Department stated on the stand that he noticed my hands were swollen when I was first brought in for questioning. Now, if that were true, then why would he have released me from custody if my hands were like that. He lied to the jurors just to get a conviction. These are just a few facts to tell the court how I was tried unfairly and also the reason why I have now evil and bad blood in my heart and not just me, but also my children and family; because my family knows the truth. I think that Richland Parish should really be praying because they done let a bad bad thing happen. And because of West Carroll's failure to do justice and let me mention that there is still probably a killer among you.

The record reveals no indicia of passion, prejudice or arbitrariness. Race was not a factor in the proceedings. Defendant, the victims, and one of the twelve jurors were African-American. Although defendant contends that race was a factor in jury selection, this claim is treated in the appendix to this opinion and is found to be without merit. The UCSR indicates that defendant's case received extensive media coverage. However, as discussed above in defendant's change of venue claim, only four potential jurors out of 124 who were examined about the exposure to pre-trial publicity were excused for that cause. Moreover, defendant's trial took place twenty months after the crime occurred. In addition, as mentioned above, none of the unobjected to alleged errors argued by defendant interjected any arbitrary factor into the proceedings.

Aggravating Circumstances

At trial, the state argued that five aggravating circumstances existed as to the murder of Anderson: (1) that the offender was engaged in the perpetration or attempted perpetration of an aggravated burglary; (2) that the offender knowingly created a risk of death or great bodily harm to more than one person; (3) that the offense was committed in an especially heinous, atrocious or cruel manner; (4) that the victim was an eye witness to a crime alleged to have been committed by the defendant; and (5) that the victim was sixty-five years of age or older. La. C.Cr.P. art. 905.4(A)(1),(4),(7),(8),(10). The State argued that five aggravating circumstances existed as to the murder of Barnes: (1) that the offender was engaged in the perpetration or attempted perpetration of a second degree kidnapping; (2) that the offender was engaged in the perpetration or attempted perpetration of aggravated rape; (3) that the offender knowingly created a risk of death or great bodily harm to more than one person; (4) that the victim was an eye witness to a crime alleged to have been committed by the defendant; and (5) that the victim was under the age of twelve years. La. C.Cr.P. art. 905.4(A)(1),(4),(8),(10).

The record fully supports a finding that the instant murders were committed

against victims that were under the age of twelve and over the age of sixty-five. The record reflects that Barnes was eight at the time of her murder and Anderson was sixty-eight years of age. Even accepting defendant's claims, addressed herein above, that the evidence failed to support any of the other aggravating circumstances, the inclusion of these aggravating circumstances did not interject an arbitrary factor into the proceedings, as evidence of these aggravating circumstances was relevant to the crimes and properly admitted at trial. *See Wessinger*, 98-1234 at p. 46, 736 So.2d at 196; *State v. Roy*, 95-0638 at pp. 19-20, 681 So.2d at 1242; *State v. Martin*, 93-0285, p. 20 (La. 10/17/94), 645 So.2d 190, 201.

Proportionality

The federal Constitution does not require a proportionality review. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871 (1984). However, comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana, *State v. Burrell*, 561 So.2d 692 (La. 1990); *State v. Wille*, 559 So.2d 1321 (La. 1990); *Thompson*, 516 So.2d 349, though this court has set aside only one death penalty as disproportionately excessive under the post-1976 statutes, finding in that one case, *inter alia*, a sufficiently "large number of persuasive mitigating factors." *State v. Sonnier*, 380 So.2d 1, 9 (La. 1979); *see also State v. Weiland*, 505 So.2d 702, 707 (La. 1987) (in case reversed on other grounds, dictum suggested that death penalty disproportionate).

We review death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. *Sonnier*, 380 So.2d at 8.

The state's Sentence Review Memorandum reveals that, since 1976, this is the

first death verdict returned by a jury in the Fifth Judicial District, which encompasses West Carroll, Richland and Franklin Parishes. Seventeen other cases originated with first degree murder charges but were resolved without capital punishment. Given the lack of comparable cases in Richland Parish, it is appropriate for this court to look beyond the judicial district in which the sentence was imposed and to conduct the proportionality review on a state-wide basis. *Carmouche*, 01-0405, p. 40 (La. 5/14/02), __ So.2d __, __; *State v. Deal*, 00-0434, p. 17 (La. 11/28/01), 802 So.2d 1254, 1268; *State v. Duncan*, 99-2615, p. 38 (La. 10/16/01), 802 So.2d 533, 559; *State v. Howard*, 98-0064, p. 36 (La.4/23/99), 751 So.2d 783, 820; *Letulier*, 97-1360 at p. 27, 750 So.2d at 800; *State v. Thibodeaux*, 98-1673, p. 31 (La.9/8/99), 750 So.2d 916, 939; *State v. Ortiz*, 96-1609, p. 23 (La.10/21/97), 701 So.2d 922, 936; *Connolly*, 96-1680 at p. 19, 700 So.2d at 823; *State v. Davis*, 92-1623, p. 35 (La.5/23/94), 637 So.2d 1012, 1031.

A state-wide review reflects that this court has affirmed capital sentences in a variety of cases involving several defendants whose victims were elderly. *See State v. Howard*, 98-0064, 751 So.2d 783 (defendant and several others savagely beat and stabbed 82-year-old female victim in her home); *State v. Robertson*, 97-0177 (La. 3/4/98), 712 So.2d 8 (defendant savagely stabbed an elderly couple to death during robbery in their home; victims were 76 and 71); *State v. Tart*, 92-0772 (La. 2/9/96), 672 So.2d 116 (La. 1996) (defendant bound and repeatedly stabbed elderly couple to death during robbery in their home; victims were 70 and 66); *Wingo*, 457 So.2d 1159 (defendant and co-defendant escaped from jail, burglarized the home of an elderly couple, shot each victim in the back of the head, and robbed them, taking their car); *State v. Glass*, 455 So.2d 659 (La. 1984) (same; co-defendant of Wingo); *State v. Celestine*, 443 So.2d 1091 (La. 1983) (defendant strangled an 81-year-old woman in her home during an aggravated rape); *Narcisse*, 426 So.2d 118 (defendant repeatedly stabbed a 74-year-old woman during an armed robbery in her home). A state-wide

review also reflects that this court has affirmed capital sentences in a variety of cases involving defendants whose victims were under the age of twelve. *Carmouche*, 01-0405, __So.2d __ (defendant shot three victims with a shotgun, including his two-year-old daughter); *Deal*, 00–0434, 802 So.2d 1254 (defendant killed two-month-old son by throwing him into baby crib); *State v. Smith*, 98-1417 (La. 6/29/01), 793 So.2d 1199 (defendant and two others during the course of an attempted armed robbery or aggravated burglary killed three people, including a three-year-old); *State v. Langley*, 95-1489 (La. 4/14/98), 711 So.2d 651, *conviction vacated on other grounds*, 95-1489 (La. 4/3/02), 813 So.2d 356(finding prima facie case of discrimination in selection of jury foreperson); *Connolly*, 96-1680, 700 So.2d 810 (defendant killed nine-year-old boy during the course of an aggravated rape)*; State v. Sepulvado*, 93-2692 (La. 4/8/96), 672 So.2d 158 (defendant hit six-year-old stepson over the head with a screwdriver then submerged him in a bathtub of scalding water); *Wille*, 559 So.2d 1321 (defendant killed eight-year-old female after committing after raping her along with another male); *State v. Loyd*, 489 So.2d 898 (La.1986) (defendant drowned three-year-old girl after raping her); *State v. Brogdon*, 457 So.2d 616 (La.1984) (defendant beat with a brick and killed eleven-year-old girl after raping her with another male). Compared with these cases, we conclude that the sentence of death in this case was not disproportionate.

DECREE

For the reasons assigned herein, defendant's convictions for first-degree murder and his sentences of death are affirmed. In the 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 judge 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 original application, if filed, in the state courts.

AFFIRMED.

Note to Publishing Companies: This appendix is not designated for publication in any print or electronic format.

APPENDIX - 02-KA-1463

Voir Dire Issues

Assignment of Error No. 11

In this assignment of error, defendant complains about numerous purported errors which occurred during voir dire. First, defendant claims that the court erred when it denied several of his challenges for cause**,** arguing that the court should have excused numerous prospective jurors for a variety of reasons.

Our analysis begins with the Louisiana Constitution, which guarantees an accused the right to full voir dire examination of prospective jurors and the right to challenge jurors peremptorily. La. Const. art. I, § 17(A). The Constitution further states that the number of peremptory challenges shall be fixed by law. In trials such as this one, where the offense is punishable by death or necessarily by imprisonment at hard labor, the law provides that "each defendant shall have twelve peremptory challenges, and the state twelve for each defendant." La.C.Cr.P. art. 799. It is well settled in Louisiana that prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all of his peremptory challenges. *See, e.g.*, *Carmouche*, 01-0405 at p. 8, __ So.2d at __; *State v. Ball*, 00-2277, p. 12 (La. 1/25/02), 824 So.2d 1089, 1102; *State v. Jacobs*, 99-1659, p. 4 (La. 6/29/01), 789 So.2d 1280, 1283; *State v. Taylor*, 99-1131, p. 6 (La. 1/17/01), 781 So.2d 1205, 1213; *State v. Anthony*, 98-0406, p. 22 (La. 4/11/00), 776 So.2d 376, 391; *State v. Cross*, 93-1189, p. 6 (La. 6/30/95), 658 So.2d 683, 686; *State v. Robertson*, 92-2660, p. 3 (La. 1/4/94), 630 So.2d 1278, 1280. To prove there has been error warranting a reversal of the conviction and sentence, the defendant need only show (1) the erroneous denial of a challenge for cause; and (2) the use of all his peremptory challenges. *Taylor*, 99-1311

at p. 6, 781 So.2d at 1213; *Cross*, 93-1189 at p. 6, 658 So.2d at 686; *State v. Maxie*, 93-2158, p. 15 (La.4/10/95), 653 So.2d 526, 534; *Robertson*, 92-2660 at p. 3, 630 So.2d at 1281. In this case, it is undisputed that the defendant used all of his peremptory challenges. Therefore, we must ascertain whether the trial court erred in denying the defendant's challenges for cause regarding prospective jurors Ridgway, Greer, and Wilson. If the court erred in denying these challenges for cause, then the defendant's constitutional and statutory right to twelve peremptory challenges has been violated, prejudice is presumed, and there is reversible error requiring reversal of the convictions and sentence. *See* La. C.Cr.P. art. 921; *Carmouche*, 01-0405 at pp. 8-9, __ So.2d at __ .

As this court has repeatedly stated, a trial court is vested with broad discretion in ruling on challenges for cause, and the ruling of trial court will be reversed only when a review of the entire voir dire reveals the court abused its discretion. *See, e.g., Ball*, 00-2277 at p. 11, 824 So.2d at 1102; *Jacobs*, 99-1659 at p. 5, 789 So.2d at 1284; *Frank*, 99-0553 at p. 18, 803 So.2d at 18; *Anthony*, 98-0406 at p. 22, 776 So.2d at 391; *Wessinger*, 98-1234 at p. 9, 736 So.2d at 174; *State v. Williams*, 96-1023, p. 6 (La. 1/21/98), 708 So.2d 703, 711; *Cross*, 93-1189 at p. 7, 658 So.2d at 686; *Robertson*, 92-2660 at p. 4, 630 So.2d at 1281; *Ross*, 623 So.2d at 644. Although the trial judge has broad discretion, a challenge for cause should nevertheless be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably implied. *Ball*, 00-2277 at p. 12, 824 So.2d at 1102; *Robertson*, 92-2660 at p. 4, 630 So.2d at 1281. The proper standard for determining when a prospective juror may be excluded for cause based on his or her views on capital punishment is whether 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 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526 (1980)) (internal quotations omitted)). Thus, if the prospective juror's views on the death penalty are such that they would prevent or substantially impair the performance of his duties in accordance with his instruction or oaths, whether those views are for or against the death penalty, the prospective juror should be excused for cause. *Carmouche*, 01-0405 at p. 11, __ So.2d at __ ; *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 (1993).

Defendant first argues that the court should have granted his challenge for cause as to prospective juror Brian Ridgway because he demonstrated that he was not fit to serve when he responded at voir dire that he would "probably vote for the death penalty." The record of the voir dire reveals that defendant challenged Ridgway not because of his isolated statement about the death penalty but rather based on the fact of his being a single parent of three children. The court denied the challenge because Ridgway indicated that he could manage a five-day trial, but the court stated the issue could be revisited later. Defendant may not urge for the first time on appeal any alternative basis for an objection. La. C.Cr.P. art. 800(A); *Deal*, 00-0434 at p. 8, 802 So.2d at 1262; *State v. Stoltz*, 358 So.2d 1249, 1250 (La. 1978). Defendant is therefore foreclosed from raising this argument before this court.

Defendant next claims that the court erred when it denied his challenge for cause to prospective juror Ernest Greer, Jr., based on his response on the jury questionnaire that "if you kill you should be killed." The record reveals that defendant did not challenge Greer based on his perceived inability to consider a life sentence, but rather because of his status as a former member of the police jury. Thus, he is procedurally barred from raising the challenge on appeal before this court. La. C.Cr.P. art. 800(A); *Deal*, 00-0434 at p. 8, 802 So.2d at 1262; *Stoltz*, 358 So.2d at 1250.

Defendant next argues that the court should have excused prospective juror Brenda B. Wilson because her knowledge about the case rendered her incapable of basing her verdict on the evidence presented at trial. The court denied the challenge for cause, finding that nothing that the juror said led it to believe that Wilson would allow her knowledge to influence her decision.

La. C.Cr.P. art. 797(2) provides in pertinent part that the defendant may challenge a juror for cause on the grounds that:

> The juror is not impartial, whatever the cause of his impartiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence.

During the voir dire examination of Wilson, the parties learned that her brother was the principal of the school attended by Mariah Barnes but that she, herself, knew neither Barnes nor Bertha Anderson. She had no firsthand knowledge of the crime but had been "told that the grandmother awakened and caught the father molesting the child and that's when she was killed."

When examined by the state, Wilson indicated that she could base her verdict on the evidence presented at trial. When defense counsel asked whether her prior knowledge of the offense would have any effect on her ability to base her verdict on the evidence presented at trial, Wilson ultimately responded, "Well, I would hope it wouldn't . . . . "

The record shows that Wilson was somewhat equivocal on whether she would put aside the issue. The trial court concluded that Wilson convinced it that she would base her decision solely on the evidence presented and not on chatter that Wilson had heard some twenty months prior to trial. The trial court, in ruling on this challenge for cause, had the benefit of perceiving the juror's facial expressions and hearing her vocal

intonations and was in the best position to evaluate her ability to serve as a juror. *State v. Tart*, 93-0772, p. 16 (La. 2/9/96), 672 So.2d 116, 124 (citing *State v. Lee*, 93-2810, p. 9 (La. 5/23/94), 637 So.2d 102, 108)). When Wilson's voir dire testimony is read in its entirety, it does not appear that the court abused its discretion when it determined that she could reach a verdict based on the law and evidence. *See Lee*, 93-2810 at p. 9, 637 So.2d at 108. Thus, this claim lacks merit.

Next, without any argument, appellate counsel claims that the court erred when it denied the following challenges for cause for other prospective jurors.

First, defendant complains that the trial court erred in denying his challenge for cause for Freddie E. Howington. The record shows that defendant challenged Howington for cause based on his perceived inability to consider a life sentence. When defense counsel questioned him on some of the aggravating circumstances in the instant case, Howington stated that he would not consider life imprisonment as an option at the sentencing phase. He later indicated, however, that he could consider both a life and a death sentence and responded affirmatively when the prosecutor asked, "So you wouldn't automatically vote anything until you listened and decided for yourself." Given this rehabilitation, the court did not err when it denied defendant's challenge for cause. *Jacobs*, 99-1659 at p. 6, 789 So.2d at 1285 (citing *Robertson*, 92-2660 at p. 4, 630 So.2d at 1281).

Defendant next complains that the trial court erred in denying his challenge for cause for Elizabeth G. Clack. The court denied defendant's challenge for cause based on Clack's perceived hardship. Clack indicated that she had two children, aged nine and 11. Her husband worked at a cotton gin and was on call 24 hours a day. Accordingly, she indicated that it would be a serious problem if she was confined to a hotel room. She later stated, however, that she could serve if the trial lasted three or four days. Finally, when the court examined her, Clack stated that she could find

someone to watch her children and that she did not know sequestration was a possibility before she came to court, adding, "I'm sure I could arrange [supervision] if I had to." Under these circumstances, defendant fails to show that the court abused its discretion when it denied his challenge for cause based on Clack's perceived hardship.

Next, defendant complains that the trial court erred in denying his challenge for cause for Billy Joe Watkins. The court denied defendant's challenge for cause based on the venireperson's association with the district attorney and the court system.

La. C.Cr.P. art. 797(3) provides that a defendant may challenge a juror for cause on the grounds that:

> The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict.

At voir dire, Watkins testified that the district attorney prosecuting the case had done an incorporation for him some time earlier. He also knew defense counsel's younger brother. Finally, Watkins had acted as the county agent for Richland Parish for over 35 years, during which time he had a relationship with the sheriff's office, but had retired in 1998. When questioned whether he could be fair and impartial given his connection to the district attorney and the sheriff's office, Watkins replied affirmatively, reasoning that those activities "didn't have anything to do with this case" and that "he would vote his conscience." Given this response, defendant fails to show that Watkin's prior dealings would influence his decision. Thus, the court properly denied his challenge for cause.

Defendant also complains that the trial court erred in denying his challenge for cause for Timothy D. Hutchinson. The court denied defendant's cause challenge based

on the prospective juror's familiarity with the case. When examined by the court, Hutchinson stated that a sheriff's deputy at the scene of the crime gave him "a broad idea of what was happening." He later heard some chatter that defendant "had raped and killed the girl." Hutchinson indicated, however, that his limited knowledge of the crime would not affect his ability to serve and, moreover, that he had not heard anything about the crimes since the commission of the offenses, some twenty months earlier. Thus, defendant fails to show that the court erred when it denied his challenge for cause based on Hutchinson's perceived inability to reach a verdict based on the evidence presented at trial.

Next, defendant complains that the trial court erred in denying his challenge for cause for Jason Edward Greer. The court denied defendant's cause challenge to Greer, which was based on his perceived inability to return a life sentence. On his questionnaire, the prospective juror's response suggested that he thought that death was the preferable penalty for a defendant found guilty of murder. However, when questioned by defense counsel on the issue, he indicated that he was willing to consider a life sentence. Because Greer demonstrated that he was capable of rendering either sentence, the court did not err when it denied defendant's challenge for cause.

Defendant further complains that the trial court erred in denying his challenge for cause for James M. Drewry based on "the law enforcement background of his family." The prospective juror stated that he had a cousin who was a state trooper whom he saw every few months. When asked whether this association would cause him to be more receptive to testimony provided by state authorities, he stated that he respected the law but also claimed that he would weigh both sides. Because Drewry demonstrated an ability to consider both sides, defendant fails to show that the court erred when it determined that Drewry's association with law enforcement would not prevent him from acting impartially.

Defendant also complains that the trial court erred in denying his challenge for cause for Charlotte McKnight. The prospective juror indicated that her cousin was the telephone repairman who discovered Mariah Anderson's body. The court denied defendant's challenge, concluding that her knowledge about the case would not influence her. During voir dire, McKnight stated, "all I know" is that "he found her." Given McKnight's testimony at voir dire, we find that defendant fails to show that the court erred when it concluded that her limited knowledge of the case would affect her ability to serve.

Defendant next complains that the trial court erred in denying his challenge for cause for James J. Oliveaux. The court acknowledged Oliveaux's views were questionable when it denied defendant's cause challenge to the prospective juror based on a predisposition to vote for death. When questioned by defense counsel, Oliveaux answered affirmatively when asked whether "it would take a lot to keep [him] from voting for the death penalty if the man were convicted of killing two people." Later, however, when questioned by the state, Oliveaux indicated that he would consider mitigation evidence and would not automatically vote for death at the penalty phase. A review of the testimony does support the trial court's characterization of the issue but shows that Oliveaux would consider both life imprisonment and the death penalty. Given that Oliveaux indicated he would consider both penalties, the trial court did not abuse its discretion in denying defendant's challenge for cause. *Jacobs*, 99-1659 at p. 6, 789 So.2d at 1285.

Next, defendant complains that the trial court erred in denying his challenge for cause for William E. Stansbury, Jr. The court denied defendant's challenge for cause based on hardship as the prospective juror stated that he was enrolled in a six-month internship for nursing home administrators and that service on the jury could be a financial burden on his family. Before denying the cause challenge, the prospective

juror acknowledged that he could get an extension, if required. This argument therefore lacks factual support from the record. Defendant thus fails to demonstrate that the court erred when it denied the hardship challenge.

Defendant also claims that the court erred when it granted various state challenges for cause, claiming that prospective jurors' responses at voir dire did not demonstrate that their views on the death penalty would substantially impair their abilities to return a death verdict.

Removal of a scrupled but otherwise eligible venireman constitutes reversible error even when 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 (1987); *Wessinger*, 98-1234 at pp. 8-9, 736 So.2d at 174; *State v. Edwards*, 97-1797, p. 16 (La. 7/2/99), 750 So.2d 893, 903-04; *State v. Gradley*, 97-0641, p. 11 (La. 5/19/98), 745 So.2d 1160, 1167. A trial judge has great discretion in determining whether sufficient cause has been shown to reject a prospective juror. Such determinations will not be disturbed unless a review of the voir dire as a whole indicates an abuse of discretion. *Tart*, 93-0772 at p. 16, 672 So.2d at 124.

Defendant first claims that the court should not have excused Effie Mae Leggins. At voir dire, the prospective juror initially stated that she believed in the death penalty, however, she also stated that she did not know whether she "would want to be a part . . . of killing somebody." When questioned by the court, she reiterated that position, stating that she did not know whether she was personally capable of voting for death.[31]

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[31] Coenen [prosecutor]: Okay. Could you personally give somebody the death penalty if you thought it was proper?
Leggins: I don't know.
Coenen: Ma'am?
Leggins: I don't know.
Coenen: You can't tell me if you could or not?
Leggins: No.

* * *

Coenen: Could you vote for the death penalty?
Leggins: Yeah.
Coenen: Okay. Tell me what you meant when you said that you didn't know.
Leggins: Oh, I just don't know whether I would want to be -- have part of killing somebody.
Coenen: Okay. Well, I need to know that, thought, because it's that important. . . . Do you believe in the death penalty?
Leggins: Yeah.
Coenen: Do you believe that it should be given?
Leggins: Yes, I do.
Coenen: And would you rather other people give it and you not have to?
Leggins: Yeah. Yes, I would.
Coenen: Okay. But if you were on this jury and you were selected, could you actually vote to give it? It's one thing to say I'm for it, but it's another thing to say I could give it, and that's what I'm trying to find out.
Leggins: Oh, I guess I could. I don't know.
Coenen: Okay. Now, you just said you didn't know.
Leggins: I just don't know. But I -- you know, I guess --
Coenen: And that's okay, It's really -- it's your -- I just want to know in your heart of hearts how you think about it.
Leggins: I don't know.
Coenen: You don't know?
Leggins: I just don't know.
Coenen: Is there something in your mind about the death penalty that makes it substantially difficult for you to follow this procedure and to do what we're asking you to do in this case? That is, to listen to both sides and vote the death penalty.
Leggins: No. I guess if I sit and listen to both sides and everything. I just don't know whether I could vote for the death penalty or not.
Coenen: And you told me that about four times. One time you said you think you could, but you really don't think that you even know whether you could, do you?
Leggins: I just don't.

* * *

Court: . . . Ms. Leggins. I need to talk to her again. Ms. Leggins, you had originally told Mr. Coenen, I believe, that you're not sure if you could give the death penalty. You said, "I don't know." And then you said "I can vote for death, but I'm not sure that I want to be a part of killing somebody." And you said, "While I believe in the death penalty, I don't want to vote for it." And then you said, "I guess I could but I don't know."

The court excused Leggins for cause, finding that she was equivocal in her responses regarding whether she could impose the death penalty and that her views were such that they would prevent or substantially impair the performance of her duties.

In *State v. Langley*, 95-1489, p. 32 (La. 4/14/98), 711 So.2d 651, 674, we held that the trial court did not abuse its discretion when it granted a state challenge to a prospective juror who, despite being repeatedly asked if he could apply the death penalty, was never able to clearly state that he could consider it. In the instant case, Leggins similarly could not clearly state that she could consider the death penalty even after extensive questioning by the prosecution and the court. Thus, the trial court properly granted the State's challenge for cause with regard to Ms. Leggins.

Defendant also claims that the court abused its discretion when it granted the state's challenge to prospective juror Willie M. Smith, Jr. In *State v. Frost*, 97-1771, p. 3 n.4 (La. 12/1/98), 727 So.2d 417, 422 n.4, we noted that our rule established in *Taylor* pertaining to the requirement of a contemporaneous objection to preserve an appeal had been extended to jury voir dire issues in *State v. Williams*, 96-1023, p. 4 (La. 1/21/98), 708 So.2d 703, 709. The record fails to show that defendant properly

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> Leggins: I still don't know, Your Honor.
> Court: You still don't know?
> Leggins: No.
> Court: Okay. And we appreciate that. But do you understand that we must have jurors who can tell us yes or no? I can --
> Leggins: I understand that.
> * * *
> Court: Okay. So are you telling me that even if the State presents circumstances where you believe that the death penalty should be imposed -- are you telling me that you cannot assure me that you could vote for the death penalty?
> Leggins: I just don't know.
> Court: You're just not sure?
> Leggins: No, sir.
> Court: And you won't know until you're placed in that position. Is that what you're telling us?
> Leggins: Yes.

objected to Smith's removal for cause. Accordingly, defendant has waived his right to review this argument.

Defendant next claims that the court should not have granted the state's challenge to prospective juror Terri E. Staten. The court excused Staten based on conflicting responses concerning her ability to return a death verdict. Staten originally indicated that she could vote for death, depending on the state's evidence. Later, she responded affirmatively when asked by defense counsel if she was "flat out" for the death penalty. When the court examined Staten on the issue, she originally indicated she could consider both life imprisonment and death. She then stated that she would automatically vote for death if defendant was convicted of first degree murder, and finally she stated that she would not vote for death in any circumstances. Given that Staten gave equivocal responses concerning whether she could impose either sentence, the court did not err when it determined that she was not qualified to serve and granted the state's challenge for cause.

Finally, defendant claims that the court erred when it excused Shandra E. Junkins. At voir dire, Junkins originally stated that while she did not disagree with the death penalty, she "wouldn't want the responsibility." She then stated that while she favored the death penalty in some circumstances, she did not think she could vote for death in a case in which the defendant showed that he was remorseful. The state argued that Junkins was not appropriate because defendant's confession contained remorseful comments. The court granted the challenge, noting this was another questionable juror, and ruled that Junkins would be unable to vote for the death penalty should the defense prove that defendant was remorseful.[32]

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[32] The trial court explained:

> Ms. Junkin said that she would not want the responsibility for imposing the death penalty and if the defendant is remorseful, she could not consider the death penalty. She

The grounds for which a juror may be challenged for cause are set forth in La. C.Cr.P. art. 797. Two of these grounds are pertinent here, namely, that "[t]he juror is not impartial, whatever the cause of his partiality," and "[t]he juror will not accept the law as given to him by the court." La. C.Cr.P. art. 797(2) and (4). We have held that a juror whose responses on the whole indicate that she cannot consider both a life sentence and a death sentence is not impartial and will not accept the law as given to her by the court. *See Maxie*, 93-2158 at pp. 16-17, 653 So.2d at 534-35, *see also Ball*, 00-2277 at pp. 12-13, 1089 So.2d at 1102-3. In *State v. Robertson*, we held that when a juror expresses a predisposition as to a particular sentence, a challenge for cause should be granted. *Robertson*, 92-2660, at p. 4, 630 So.2d at 1281 (citing *Lee*, 559 So.2d at 1318).

In this case, Junkin stated that she could consider both penalties, but if the defendant was remorseful, she would vote for life imprisonment. She further stated that she did not want the responsibility for imposing the death penalty, that she "[didn't] see where she had that right," and that she "just [didn't] want to take that load

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> would consider both penalties but not if the defendant is remorseful. She could only then vote for life imprisonment. Then when I talked to her, and I think when [defense counsel] talked to her, she indicated there were some circumstances where she would be able to impose the death penalty. So this is a very unusual juror because there are certain circumstances where she could vote for the death penalty and there's one circumstance where she could not vote for the death penalty and that would be the remorse of the defendant. We haven't faced this so far that I remember. So the [s]tate has informed me, I have not read the confession, but the [s]tate has informed that there is remorse mentioned many times in the confession. This is one of those close jurors. I'm going to have to excuse her for cause. I know that y'all want to bring that up and you're certainly entitled to do so; but Ms. Junkin will be excused for cause for the reason that if remorse is proven or shown during the trial or the penalty phase, she would be unable under any circumstances to impose the death penalty.

for the rest of [her] life."

Based on a reading of the entire voir dire of Ms. Junkin, it is clear that if she were chosen to serve, she would have automatically voted for a sentence of life imprisonment had defendant been able to prove remorse. Ms. Junkin was not impartial as to the sentence to be imposed in this case nor was she able to accept the law as given her by the court. Ms. Junkin clearly stated several times that she did not feel comfortable with imposing the death penalty and that she would impose a sentence of life if the defendant showed remorse. Given the combination of these sentiments concerning the death penalty, the court did not abuse its discretion when it granted the state's challenge for cause.

In his next argument relating to jury issues, defendant urges that a number of jurors were improperly excused as a result of their status as felons. In the first portion of this argument, defendant claims that the state failed to prove that prospective jurors excluded from jury service because of their status as convicted felons were, in fact, convicted of felonies. The record shows that defendant did not contemporaneously object to the court's removal of any of these jurors. Defendant has thereby waived any claim on appeal. La. C.Cr.P. art. 841; *Taylor*, 93-2201 at p. 7, 669 So.2d at 369.

Second, defendant contends that the provisions of La. C.Cr.P. art. 401(5) that prohibit convicted felons from serving on a jury are unconstitutional as they conflict directly with La. Const. art. I, § 20, which provides for the right to humane treatment.[33] Defendant argues that the restoration of full rights of citizenship as set out in the Louisiana Constitution is automatic, without necessity of a pardon, and includes the right to serve on a jury. Defendant did not raise the issue of the constitutionality of La.

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[33] La. Const. art. I, § 20 provides, "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." (Emphasis added).

C.Cr.P. art. 401(5) in the trial court proceedings. Thus, it has been raised for the first time on appeal. In criminal cases, constitutional questions, like all other questions of law, are considered by this court only when properly brought before us. Because defendant did not raise this constitutional issue in the trial court, defendant's constitutional argument will not be considered. *State v. Pesson*, 256 La. 201, 235 So.2d 568 (1970); *State v. Sanford*, 248 La. 630, 181 So.2d 50 (1965); *State v. Maines*, 183 La. 499, 164 So. 321 (1935); *State v. Quinn*, 155 La. 287, 99 So.2d 222 (1924).

Next, defendant claims that the court erred when it did not allow him to rehabilitate prospective juror Willie Baker. When the district attorney examined Baker, Baker stated that he did not believe in capital punishment and would not vote for the death penalty under any circumstances, including for those responsible for causing the deaths at the World Trade Center on September 11, 2001. When the State tendered the panel, defense counsel examined each prospective juror on it with the exception of Baker. The State challenged Baker, and defense counsel objected, stating, "Your Honor, we feel if we're given enough time we could rehabilitate him." The state responded that Baker had indicated that he "wouldn't even give Osama Bin Laden –," and the court interrupted, telling defense counsel that it did not think Baker was capable of rehabilitation. The court then granted the state's challenge.

An accused has the right to a full and in-depth examination of prospective jurors in order to provide for the intelligent exercise of challenges and to test the individual's qualifications to serve. La. Const. art. I, § 17. Subject to a trial court's broad discretion in the conduct of voir dire and in ruling on challenges, this right entitles an accused to reexamine, requestion, reinstruct or rehabilitate a juror. *Robertson*, 97-0177 at p. 18, 712 So.2d at 25. This right is particularly important in a capital case when the juror is being examined on his views of the death penalty.

An overall reading of Mr. Baker's voir dire examination indicates that he would

not be able to consider fairly the death penalty and it was not an abuse of the judge's discretion to deny defendant a second opportunity to examine Mr. Baker in an attempt to rehabilitate him. The excusal of a prospective juror by the trial court is within its authority under La. C.Cr.P. art. 787 and "lies within the sound discretion of the trial court." *State v. Davis*, 411 So.2d 2, 5 (La. 1982). Thus, the court did not commit error in excusing Mr. Baker for cause. Accordingly, this assignment lacks merit.

Finally, defendant complains that racial bias infected the selection of the jury, noting that while 55 of the 135 persons (41%) who constituted the venire were African-American, only one African-American juror sat on the jury that convicted and sentenced him. Specifically, defendant contends that death qualification and the prosecution's alleged discriminatory questioning of jurors operated to exclude African-Americans from the jury.

Defendant first states that out of the 47 venirepersons successfully challenged for cause based on their opposition to the death penalty, 36 were African-American. Accordingly, he analogizes death qualification to a poll tax of yesteryear, claiming death qualification operated in this case to exclude blacks from the jury in violation of their equal protection rights and those of defendant.

In *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758 (1986), the Court upheld a state's right to challenge jurors who refuse to follow the law in imposing the death penalty. The record fails to reveal anything that suggests that the prosecution challenged the prospective jurors on the basis of their race rather than on their stated inability to follow the law. Defendant also does not offer any empirical evidence to support his theory, nor does he demonstrate how this method of jury examination discriminates against any certain segment of the community. Accordingly, this claim lacks factual support from the record and therefore lacks merit.

Defendant also claims that the state examined prospective African-American

jurors differently than it did Caucasian jurors in an attempt to remove the African-American jurors from the jury. The voir dire transcript reveals that defense counsel objected during the proceeding, alleging that the prosecutor varied the ordering of his voir dire questioning, initially focusing more on the death penalty when examining African-American jurors as opposed to Caucasian jurors. Specifically, defense counsel suggested that the prosecution's lead question to African-Americans presented a scenario of lethal injection whereas that posed to Caucasians did not. Defense counsel suggested that this variation was an attempt to intimidate or unearth a reluctance to vote for death from African-American jurors. Defense counsel indicated he was noting the apparent pattern of questioning to prepare for an objection to the state's use of its peremptory challenges pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), however, the defense made no *Batson* claim. The prosecutor responded that without regard to race, he informed nearly all prospective jurors about the state's method of execution before ascertaining their individual views on the death penalty. The trial court agreed, finding that the prosecutor had been consistent in his examination of prospective jurors.

"A general venire, grand jury venire, or petit jury venire shall not be set aside for any reason unless fraud has been practiced, some great wrong committed that would work irreparable injury to the defendant, or unless persons were systematically excluded from the venires solely upon the basis of race." La. C.Cr.P. art. 419. The burden of proving the basis for setting aside the venire rests with defendant, and this burden requires that he show more than underrepresentation of people of a certain race from the venire; rather, he must prove that this underrepresentation is the result of a systematic exclusion of members of a certain race in "the source or sources from which jury venires are chosen." *Lee*, 559 So.2d at 1313.

Defendant has not met that burden in this case. He has not specifically shown

that African-Americans were systematically excluded from the venire. While defendant contends that the prosecution questioned potential jurors in a discriminatory manner by varying the order of questioning, a review of the record supports the trial court's finding that African-American jurors were questioned similarly to Caucasian jurors. Thus, this assignment of error is without merit.

Guilt Phase Issues

Assignment of Error No. 5

In this assignment of error, defendant alleges that because the grand jury in West Carroll Parish lacked jurisdiction to indict him for the murder of his daughter, the jury was exposed to other crimes evidence, rendering the verdict on the murder of Bertha Anderson unreliable. As we discussed above, defendant waived any claim based on the grand jury's alleged lack of jurisdiction when he failed to file a motion to quash prior to trial. In addition, defendant never lodged any objection to the introduction of the evidence pertaining to Barnes's murder. Therefore, under *Taylor*, we will not review this argument. La. C.Cr.P. art. 841; *Taylor*, 93-2201at p. 7, 669 So.2d at 369. Accordingly, this assignment of error lacks merit.

Assignment of Error No. 6

In this argument, defendant makes two claims relating to the introduction of the state's DNA evidence. Defendant first asserts that the state failed to identify conclusively key DNA evidence, thus, it failed to exclude every reasonable hypothesis of innocence. Defendant contends that omissions in the state's DNA evidence undermined its reliability, leaving questions about the killer's identity unanswered. Specifically, defendant complains that tests conducted on one swab taken from Barnes's vagina did not reveal the presence of his DNA. In addition, defendant notes that some unidentified male DNA was located under one of Bertha Anderson's left hand fingernails. Finally, defendant refers to the presence of a towel found in his

automobile that contained DNA of an unidentified female.

In reviewing the sufficiency of the evidence to support a conviction, the reviewing court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. *Jackson v. Virginia*, 433 U.S. 307, 99 S.Ct. 2781 (1979); *State v. Captville*, 448 So.2d 676, 678 (La. 1984). In cases where the conviction is based on circumstantial evidence, La. R.S. 15:438 provides that such evidence must exclude every reasonable hypothesis of innocence. *State v. Camp*, 446 So.2d 1207, 1209 (La. 1984); *State v. Wright*, 445 So.2d 1198, 1201 (La. 1984). However, La. R.S. 15:438 does not establish a stricter standard of review than the more general rational juror's reasonable doubt formula. *State v. Porretto*, 468 So.2d 1142, 1146 (La. 1985).

At trial, the state presented evidence that the defendant's DNA matched the genetic material found underneath Anderson's right fingernails with the possibility of a match with another African American male being one in eight point three quadrillion. The state introduced pictures of scratches on defendant's face and torso. At the crime scene in Anderson's house, defendant's ring was found on a night stand in the bedroom and his necklace, broken mid-chain, was found on a pillow. The DNA found in defendant's .22 caliber pistol matched that of Barnes, with the likelihood of another African American female being one in 248 trillion. The state also established that a .22 caliber bullet was retrieved from Barnes's head. Defendant also drew a detailed map of where Barnes's body could be found. All of this evidence placed defendant at the crime scene and corroborated his detailed confession.

While defendant points to a portion of the state's DNA evidence that does not identify him as the victim's murderer, after a review of the record, we find that the evidence presented by the prosecution was sufficient to convince a rational trier of fact

that all the elements of the crime had been proven beyond a reasonable doubt. Thus, this assignment of error lacks merit.

In his next argument, defendant contends that the trial court's failure to conduct a *Daubert* hearing resulted in the introduction of prejudicial and confusing DNA evidence. As a result, defendant argues this impacted the jury's determination that the state had linked defendant to the offenses beyond a reasonable doubt.

At trial, the state presented scientific evidence demonstrating defendant's involvement in the victims' murders. Defendant did not request a pre-trial hearing to determine the reliability of the evidence nor did he object to its admission at trial. Thus, under *Taylor*, we will not review this argument. La. C.Cr.P. art. 841; *Taylor*, 93-2201at p. 7, 669 So.2d at 369. Accordingly, this assignment of error lacks merit.

Assignment of Error No. 10

In his next assignment of error, defendant asserts several claims that the court erred when it did not suppress his various statements to the authorities and evidence derived from them.

At the suppression hearing, Deputy Walker testified he encountered defendant on February 13, 2000, in front of Anderson's residence shortly after her body had been discovered. Barnes remained missing, and officers transported defendant to the West Carroll Parish Sheriff's Office, where he executed a written waiver of his *Miranda* rights around 2:30 p.m. or 3:00 p.m. Defendant told the officers that he did not know where his daughter could be found but gave the officers written consent to search his vehicle and home. Officers did not locate Barnes nor did they seize anything from either defendant's home or his vehicle. Officers asked defendant about visible scratches appearing on his hands and face, and he told them that he could have sustained them either from a recent sexual encounter or from moving boxes at his job. Walker requested that defendant remove his shirt so that he could examine his torso for

other wounds, but defendant refused.

Chief Deputy Russell testified that defendant executed a second written waiver of his *Miranda* rights and gave a recorded statement at approximately 3:50 p.m. At approximately 7:30 p.m., Russell received consent to search defendant's work vehicle, an 18-wheel-truck. At the time, Russell maintained that defendant was not under arrest and remained free to leave.

Malisha Green, defendant's girlfriend, testified at trial that the following morning, defendant told her that he wanted to go shopping in Vicksburg, Mississippi. They drove through Vicksburg and then on to Jackson, Mississippi, where defendant boarded a bus, bound for New York City. Defendant told Green that he wanted to disappear because he thought that police would blame him for Anderson's murder and Barnes's disappearance. When Green returned to Louisiana, she went to the Oak Grove police station and told Deputy Russell what had occurred.

At the time of the offense, defendant was on parole and required permission from his parole officer, John Lee, before leaving the state. After Green alerted officers that defendant had boarded a Greyhound bus bound for New York, further investigation revealed that he had used an alias, C. Smith, when purchasing the ticket. Investigating officers contacted Lee to confirm that defendant was, in fact, in violation of his parole. They then acquired a warrant for his arrest.

FBI Agent Jeffrey Holmes was contacted at home and asked to detain defendant at the bus station in Atlanta, a scheduled stop on the trip to New York. Holmes apprehended defendant at the station and mistakenly informed him that he was under arrest for murder. After receiving more detailed information, Holmes learned that the warrant was for violating his probation or parole and defendant was, in fact, booked on the parole violation. Officers transported defendant to the Metropolitan Atlanta Regional Transportation Authority (MARTA) Police Department office across the

street from the Greyhound station where they administered *Miranda* warnings. Defendant waived them and made a statement which did not include any inculpatory information. The following morning, February 15, 2000, Holmes again read defendant his *Miranda* rights and interrogated him. Defendant waived his rights and again agreed to speak to the officer. His story changed slightly, and he suggested that he had information concerning the death of Anderson. Later that afternoon, Holmes interviewed defendant a third time after obtaining another *Miranda* waiver. Defendant changed his story again and admitted that the scratches on his face and body had been sustained in a fight with Anderson. He also told Holmes that he knew where his daughter's body could be found and actually drew a map for the Georgia authorities, alerting them to its exact location in North Louisiana.

Detective Neal Harwell, accompanied by Chief Deputy Russell and FBI Agent Nathan Songer, drove to Atlanta the following day. Defendant waived extradition, and officers transported him back to Louisiana, leaving Atlanta at approximately 3:00 p.m. On the return trip, defendant asked Harwell for his notebook and surreptitiously informed the officer in writing that he was frightened. Defendant expressed a desire to see his pregnant girlfriend, and Harwell told him that he would allow a visit if there was "any way possible," assuming that she wanted to see him. When they returned to Oak Grove, defendant told Harwell that he wanted to tell him what had happened. Harwell responded that they should talk the next day after some rest. Defendant insisted on making a statement that night, and after Harwell administered *Miranda* warnings, defendant made a lengthy tape-recorded confession. Harwell maintained throughout that defendant had not been threatened, coerced and that no promises had been made in exchange for the statement. Rather, Harwell testified that defendant's demeanor suggested that there was something he wanted "to get off his chest."

Before a confession may be introduced into evidence, the State must

affirmatively show the statement itself was free and voluntary, and not the result of fear, duress, intimidation, menace, threats, inducements or promises. La. R.S. 15:451; *Robertson*, 97-0177 at p. 28, 712 So.2d at 31; *State v. Lavalais*, 95-0320, p. 6 (La. 11/25/96), 685 So.2d 1048, 1053, *cert. denied*, 522 U.S. 825, 118 S.Ct. 850 (1997); *State v. Simmons*, 443 So.2d 512, 515 (La. 1983). If the alleged acts of police misconduct or overreaching, the state must specifically rebut each specific allegation. *State v. Vessell*, 450 So.2d 938, 942-43 (La. 1984). Credibility determinations lie within the sound discretion of the trial court, and its ruling should not be disturbed unless clearly contrary to the evidence. *Id.* at 943.

Defendant first argues that his consent to the initial searches of his vehicles and home were involuntarily because he was frightened as a result of the mob-like activity outside Anderson's residence after the discovery of her body. Despite defendant's claims, the evidence presented demonstrated that he accompanied the officers to the police station voluntarily, waived his *Miranda* rights and agreed to assist the officers in their search for his daughter. During these searches, the officers testified that they were focused on locating Barnes and did not seize anything from his residence or vehicles. Further testimony demonstrated that defendant was not in custody and was free to leave at any time. Thus, there is nothing in the record that suggests defendant's permission to search his home and vehicles was in any way coerced by the authorities. Rather, the record shows that defendant consented voluntarily. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041 (1973); *State v. Mitchell*, 360 So.2d 189 (La. 1978). Accordingly, defendant shows no basis for suppression of his subsequent confession or any evidence seized as fruits of illegal search. *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963). This portion of defendant's argument lacks merit.

Next, defendant claims that his arrest for a parole violation in Atlanta was on a

pre-textual basis because officers were primarily concerned with investigating him as a suspect in Anderson's homicide and Barnes's disappearance. Thus, he claims that the court should have suppressed any statements made to the authorities in Atlanta, as well as any evidence derived from those statements. *Id*. The state concedes that officers sought to question defendant further about Anderson's murder and his daughter's disappearance, claiming that given the suspicious circumstances of his departure, police would have been malfeasant not to want to talk to one of the last persons to see the victims alive.

We have made clear that the determination of probable cause for an arrest does not rest on the officer's subjective beliefs or attitudes, but rather it turns on a completely objective evaluation of all of the circumstances known to the officer at the time of his challenged action. *State v. Kalie*, 96-2650, p. 1 (La. 9/19/97), 699 So.2d 879, 880 (citing *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769 (1996) and *State v. Wilkens*, 364 So.2d 934, 937 (La. 1978)).

In the instant case, officers clearly possessed probable cause to detain defendant based on the parole violation. Thus, his arrest was legal on that violation despite the fact that Holmes initially and mistakenly told defendant that he was under arrest for murder. *See, e.g., United States v. Bizier*, 111 F.3d 214, 218 (1st Cir. 1997) ("Probable cause justifying a lawful custodial arrest . . . need not be for the charge eventually prosecuted."); *Barna v. City of Perth Amboy*, 42 F.3d 809, 819 (3rd Cir. 1994) ("Probable cause need only exist as to <u>any</u> offense that <u>could</u> <u>be</u> charged under the circumstances")(emphasis added); *United States v. Philibert*, 947 F.2d 1467 (11th Cir. 1991) ("An arrest is not rendered unlawful merely because, having probable cause to believe the arrestee guilty of a federal felony, the officer's precise designation of the charged offense was arguably incorrect."); *United States v. Lester*, 647 F.2d 869 (8th Cir. 1981) ("The validity of the arrest should be judged by whether the arresting officer

actually had probable cause for the arrest rather than by whether the officers gave the arrested person the right reason for the arrest."). Accordingly, defendant shows no basis for suppression of his statements to Holmes or their derivative evidence on grounds of an illegal arrest. This portion of defendant's argument thus lacks merit.

Defendant also claims that Officer Harwell made illusory promises during the trip from Atlanta to Louisiana, rendering the subsequent confession inadmissible. Specifically, defendant refers to Harwell's promise that he could talk to his pregnant girlfriend and trial testimony in which Harwell maintained that he told defendant during the drive back to Louisiana that he "would help him, if [he] could." Additionally, in response to defendant's written assertions that he was scared because he did not know what he faced, Harwell wrote, "I will help you every way I can. I promise."

The record supports defendant's factual assertion that Harwell indicated that he would be allowed to talk to his girlfriend. The transcript also shows that defendant initiated the discussion on the lengthy trip back to Louisiana and that Harwell conditioned the meeting upon the girlfriend's approval. When the group returned to the police station in Oak Grove, defendant told the officer that he wanted to discuss the crime. Harwell responded that they should wait until the following day, but defendant persisted. Harwell thus administered *Miranda* warnings, which defendant waived before making a detailed confession about the offenses. Based on a review of the record, Harwell's promise to allow defendant the opportunity to talk to his girlfriend clearly was not contingent upon defendant confessing to the crime. Accordingly, Harwell did not improperly induce the confession.

Defendant also complains of Harwell's promises to help defendant. Courts have held that a mild exhortation to tell the truth, or a remark that if the defendant cooperates the officer will "do what he can" or "things will go easier," will not negate

the voluntary nature of a confession. *State v. Petterway*, 403 So.2d 1157, 1159-60 (La. 1981); *State v. Magee*, 93-0643, pp. 3-4 (La. App. 3 Cir. 10/5/94), 643 So.2d 497, 499-500; *State v. English*, 582 So.2d 1358, 1364-65 (La. App. 2 Cir.), *writ denied*, 584 So.2d 1172 (La. 1991). Even informing a defendant that the district attorney will be advised of any cooperation is not sufficient inducement to overcome the free and voluntary nature of a confession. *State v. Vernon*, 385 So.2d 200, 204 (La. 1980).

In this case, the officer verbally and wrote generic promises that he would help defendant in every way he could. Harwell's statements did not include any promises of immunity from prosecution, clemency or leniency, and were therefore not inducements that made defendant's confession involuntary. *See State v. Serrato*, 424 So.2d 214 (La. 1982). Thus, this claim lacks merit.

Defendant also claims that probable cause did not exist for issuances of warrants to search his home and vehicle acquired before defendant made the inculpatory statements concerning the murders. Thus, any evidence seized as a result should be suppressed. *Wong Sun,* 371 U.S. 471, 83 S.Ct. 407.

The record shows that officers acquired warrants to search defendant's residence in Oak Grove on February 14, 2000, at 10:55 p.m. after they learned that defendant had left the state under suspicious circumstances. Another warrant was acquired to search defendant's car shortly past midnight on February 15, 2000. Because defendant claims that the state only possessed probable cause at that point to arrest him for a parole violation and not for the murders, he alleges that the issuing magistrates likewise lacked probable cause to issue the search warrants.

The sworn affidavits in support of the warrants to search defendant's home and vehicle contain the following information.

> (1) Defendant is a convicted felon and pursuant to information related to officers by his girlfriend, Malisha Green, he is in possession of a firearm in violation of his

> parole status.
> (2) Bertha Anderson was found murdered on the morning of February 13, 2000, and defendant's daughter, Mariah Barnes was missing; defendant's vehicle was observed at the scene of the homicide at around the time the crime was committed.
> (3) Defendant had a volatile relationship with Anderson stemming from her refusal to allow defendant unsupervised visitation with his daughter. Defendant had been overheard threatening Anderson, stating, " I'm going to get back my daughter even if I have to kill the bitch!"
> (4) Authorities were currently investigating defendant for molesting his daughter who had been diagnosed with a sexually transmitted disease.
> (5) Defendant told Green that he was fleeing the state because he was suspected in Anderson's homicide. In fact, when officers interviewed defendant following Anderson's death, they did not tell him that she had been murdered.
> (6) Defendant told police that visible scratches on his face, hands and neck had been sustained during a rough sexual encounter with Conita Ward. However, when officers questioned Ward, she maintained that while defendant had forced himself on her sexually, she did not resist him and did not cause these injuries.

The foregoing reveals that the issuing magistrates possessed probable cause to support search warrants of defendant's residence and car. Even assuming, *arguendo*, that the magistrates lacked probable cause, defendant has shown no basis for exclusion of the evidence seized because he has failed to demonstrate that the officers who executed the warrants did not act in good faith. *See United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984). Accordingly, this claim lacks merit.

Defendant next claims that the court should have suppressed a spontaneous statement made on February 18, 2000, in which he expressed a desire to receive the death penalty. At a suppression hearing held on the issue, Officer Harwell testified that he was going to the kitchen in the jail at the sheriff's office when defendant beckoned him to his cell. Defendant then spontaneously told the officer that he wanted Harwell to ask the district attorney to seek the death penalty because he felt he deserved to die and that it would make the family feel better. The trial court found the statement was admissible, and at trial, Harwell testified about defendant's request for the death

penalty.

Police are not obligated to ignore spontaneous and unsolicited statements by someone in custody, as long as those statements do not result from police-initiated custodial interrogation or questioning reasonably likely to elicit an incriminating response. *State v. Ross*, 95-1798, p. 2 (La. 3/8/96), 669 So.2d 384, 386. In this case, there is no evidence that suggests that Harwell's conduct in any way elicited defendant's spontaneous statement. Accordingly, the court did not err when it ruled the evidence admissible. Furthermore, defendant had already confessed to the crime when he made this statement and essentially relayed the same sentiment about his desire to receive the death penalty at the sentencing phase. Thus, he fails to show any reasonable likelihood that the testimony prejudiced him. Accordingly, this claim lacks merit.

In his final claim relating to the admissibility of his statements, defendant alleges that hostility in the courtroom coerced him into requesting the death penalty at the sentencing phase to "defuse the mob atmosphere infecting the community." This argument has been addressed in the discussion of assignment of error no. 2 pertaining to a venue issue. In addition, the record reflects that defendant took the stand against the advice of counsel. No portion of his testimony suggests that it was in any way coerced by the atmosphere in the courtroom. Accordingly, this argument lacks factual support and is thus without merit.

Assignment of Error No. 9

In this assignment of error, defendant argues that the state introduced impermissible other crimes and bad character evidence at the guilt phase of the trial. Specifically, he complains of the admission of evidence that was contained solely in his confession — evidence of marijuana use, evidence of a dice game, references to prior burglaries, and evidence of prior molestations of Barnes — and evidence of

sexual activity with Conita Ward and certain pornographic video tapes introduced into the record. Defendant contends that the jury returned death verdicts "in part because of constitutionally protected activity — engaging in promiscuous sex and watching pornography in the privacy of his home."

A portion of the evidence about which defendant now complains was contained in his recorded confession. While the defendant filed a motion to suppress based on the voluntariness of the confessions, the record shows that defendant did not object to admission of the statement based on its other crimes content. It is well-settled that a new basis for an objection cannot be raised for the first time on appeal. *Deal*, 00-0434 at p. 8, 802 So.2d at 1262*; State v. Sims*, 426 So.2d 148, 155 (La. 1983); *Stoltz*, 358 So.2d at 1250; *State v. Ferguson*, 358 So.2d 1214, 1220 (La. 1978). Thus, we find that defendant is not entitled to relief based on the introduction of the evidence contained in his confession because he did not raise this objection at trial.

Defendant next claims that the court should not have admitted evidence that he had sexual intercourse with Conita Ward shortly before the crime. The record reveals that in his statement, defendant alluded to his encounter with Ward. When questioned on direct examination, Ward stated that she had sex with defendant in the back seat of his car. She further stated that defendant did not appear to have scratches on his face or chest during the encounter, contradicting his initial statement to police. Finally, she indicated that she did not see defendant drink that night nor did he seem intoxicated to her when she last saw him between 9:00 p.m. and 10:00 p.m.

On cross, defense counsel asked Ward if she agreed to have sex with defendant, and she responded that she did not. In fact, she stated that defendant "made me have sex." She further maintained that she did not scratch defendant during the encounter.

In a pre-trial hearing on the matter, the state maintained that it would not make any reference to the fact that the defendant used force but would elicit the fact that he

had sex with Ward that night. At trial, it was defense counsel who elicited the testimony suggesting that the encounter was not consensual. In this context, defendant cannot now complain of the testimony's other crimes content. Ward's testimony on direct did not refer to other crimes and was not objected to on that basis. Thus, this argument lacks merit.

Finally, defendant claims that the court should not have admitted pornographic videotapes that defendant watched before committing the murders. In his confession, defendant discussed smoking marijuana, after which he viewed the pornographic material. Defendant stated that was when "the temptation came up" and "the temptation was just getting stronger."

The state sought to introduce the actual videotapes at trial. The court overruled defense counsel's objection to admission of the tapes, finding there was a connection between the tapes and defendant's need to fulfill his sexual desires caused by any temptations. While the court admitted the tapes themselves, the jury did not view their content. Rather, the state simply described the tapes as pornographic and examined the witness as to their general content. The court allowed the jurors only to view the outsides of the tapes, which contained no graphic pictures.

In his confession, defendant admitted to becoming aroused after watching pornography and then going to Anderson's house where the commission of the crimes commenced. Thus, the admission of the evidence was relevant to corroborate his confession. In addition, the state presented no evidence suggesting that, in and of itself, possession of the pornography was illegal. Even assuming, *arguendo*, that the court erred in admitting the videos, erroneous admission of other crimes evidence is subject to harmless-error analysis. *See State v. Johnson*, 94-1379 (La. 11/27/95), 664 So.2d 94. Because the jury did not actually watch the videos but only heard a general description of their contents, the admission of the evidence was unattributable to the

jury's verdict and the error was harmless. Thus, this argument lacks merit.

Assignment of Error No. 12

In this assignment of error, defendant claims that jurors were unduly influenced by a total of 33 photographs of the victims introduced into evidence. Defendant argued in a pre-trial motion that the prejudicial effect of the photos outweighed their probative value.

Post-mortem photographs of murder victims are usually admissible to show the location, number, and severity of the wounds, prove corpus delicti, establish the victim's identity, and to corroborate any other evidence of the manner of death. *Wessinger*, 98-1234, 736 So.2d 162; *Robertson*, 97-0177, 712 So.2d 8; *State v. Koon*, 96-1208 (La. 5/20/97), 704 So.2d 756; *Maxie*, 93-2158, 653 So.2d 526; *Martin*, 93-0285, 645 So.2d 190. Further, the state is entitled to the moral weight of its evidence. *Robertson*, 97-0177 at p. 29, 712 So.2d at 32. Photographic evidence will be admitted unless it is so gruesome as to overwhelm the jurors' reason and lead them to convict defendant absent other sufficient evidence. *Robertson*, 97-0177 at p. 29, 712 So.2d at 32; *Maxie*, 93-2158 at p. 11 n.8, 653 So.2d at 532-33 n.8; *State v. Perry*, 502 So.2d 543, 558 (La. 1986), *cert denied*, 484 U.S. 872, 108 S.Ct. 205, (1987).

In the instant case, the photos at issue are not overly gruesome. They are, however, relevant because they corroborate defendant's confession concerning the manner of the victims' deaths, the location of the victims' wounds, and the angle of entry of the bullet into Barnes's head. Defendant complains specifically about a photograph of Barnes's genitalia and one depicting a portion of her leg, which had been partially eaten by animals. The photograph of the victim's genitalia, however, was relevant to illustrate the state's recovery of fluid taken from the area that subsequently was found to have contained PSA. The photograph of the victim's leg was also relevant to give some indication of the length of time that Barnes's body

remained in the isolated rural area before discovery.

Defendant also specifically complains of the admission of photographs of Anderson's bloody body. As previously stated, these photos were relevant because they verified the location and severity of her wounds, depicted the manner of her death, and corroborated testimony of several witnesses. The defendant therefore has not shown, and we cannot ascertain from the record, how the probative value of these photographs is outweighed by their prejudicial effect. Accordingly, this assignment of error lacks merit.

Assignment of Error No. 15

In this assignment of error, without any argument on the issue, defendant cites to sixteen segments of the trial record in which he alleges the court admitted hearsay during the guilt phase. With few exceptions, no objection was lodged to the admission of the alleged hearsay. We will therefore not review those unobjected to instances of alleged hearsay. La. C.Cr.P. art. 841; *Taylor*, 93-2201at p. 7, 669 So.2d at 369.

The record shows that defense counsel objected four times, and the trial court overruled the objection on three of those occasions.[34] During the testimony of Peggy Creech, Anderson's daughter, counsel objected when the prosecutor asked the witness about a telephone conversation she had with defendant. After overruling the objection, Creech stated that defendant told her that, "he wanted [Barnes] to go places with him and you know, my mom wouldn't allow that, you know he wanted to take her places and stuff." Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. La. C.E. art. 801(C). A statement is not hearsay when it is offered

[34] Virginia Green, the mother of defendant's pregnant girlfriend, attempted to testify about a conversation she had with a clerk at the Ponderosa Motel, where defendant had called her from earlier. The court sustained defendant's objection.

against a party and is his own statement. La. C.E. art. 801(D)(2). Because this statement was made by the defendant and offered against him at trial, it was an admission. Thus, the objection was properly overruled.

Daniel Williams, a special agent with the FBI, testified that he went to Jackson, Mississippi to confirm Green's story about defendant boarding a Greyhound bus there bound for New York City. Defense counsel objected when Williams was about to state what information he received from employees of the bus station in Jackson. The court overruled the hearsay objection. Williams then testified that the employee recognized defendant from a photo, recalled defendant was at the station, remembered defendant's ticket was under the name C. Smith, and recalled the bus was heading for New York.

In *State v. Watson*, 449 So.2d 1321, 1328 (La. 1984), we explained that when a police officer explains his own actions in an investigation, these statements are not admitted to prove the truth of the assertion but rather to explain the sequence of events leading to the arrest from the officer's viewpoint.[35] In the instant case, the statement at issue was not offered to prove the truth of the matter therein but rather to explain the course of the police investigation of the crime. Thus, the trial court properly overruled defendant's objection.

Sam Mac Aluso, another FBI Agent, testified that he had learned from Agent Williams's conversation with a ticket clerk that defendant had boarded the Greyhound bus bound for New York. Defense counsel objected, asserting this testimony was double hearsay. The trial court overruled the objection on the same grounds, noting

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[35] We refined this holding in *Wille*, 559 So.2d at 1331, when we determined that the if the nonhearsay content of the statement has little or no relevance, then the statement should be excluded on both relevance and hearsay grounds in order to prevent marginally relevant hearsay from being a passkey to introduce highly relevant and highly prejudicial hearsay that is not subject to cross-examination. This holding is not applicable to this case, however, because the record does not contain any nonhearsay.

that Williams had already testified to the underlying facts. This statement similarly was not offered to prove the truth of the matter contained therein but rather to explain to course of the investigation of the crime. Therefore, defendant's objection was correctly overruled. Accordingly, defendant's hearsay arguments lack merit.

Penalty Phase Issues

Assignment of Error No. 13

In this assignment of error, defendant claims that a number of errors introduced arbitrary factors into the jury's penalty phase deliberations, rendering its verdict unreliable.

First, defendant complains of his trial attorney's performance at the closing argument in the penalty phase. Defendant does not raise the issue of ineffective assistance of counsel as an error in this direct appeal but rather that trial counsel's arguments created an arbitrary factor that influenced the sentence. While couched under a different name, the substance of the complaint, however, is that of ineffective assistance of counsel.

Ineffective assistance of counsel claims are usually addressed in post-conviction proceedings, rather than on direct appeal. *Wessinger*, 98-1234 at p. 34, 736 So.2d at 195; *Brumfield*, 96-2667 at p. 16, 737 So.2d at 668; *State v. Hart*, 96-0697, p. 15 (La. 3/7/97), 691 So.2d 651, 661. We have, however, addressed such claims on direct review if the evidence needed to decide the issue may be found in the record. *State v. Mitchell*, 94-2078, p. 6 (La.5/21/96), 674 So.2d 250, 255; *State v. Cousan*, 94-2503, pp. 15-16 (La.11/25/96), 684 So.2d 382, 391-92. In the instant case, the defendant essentially raises one ineffective assistance of counsel claim. The record, however, does not contain sufficient evidence to resolve this claim. *See State v. Hampton*, 98-0331, p. 8 (La. 4/23/99), 750 So.2d 867, 877. Therefore, in accordance with our normal procedure, we find that this argument would be best relegated to

post-conviction relief.

Next, defendant claims that penalty phase testimony provided by his parole officer, John Lee, interjected arbitrary factors into the jury's sentencing determination and rendered its death verdict unreliable. Defendant contends that Lee's testimony led the jury to believe that if it sentenced him to life imprisonment, he could become eligible for release from prison and thus presented a viable threat to society.

Defendant's parole officer, John Lee, testified that defendant was on parole for aggravated battery and simple robbery at the time of the instant offenses. At the close of the penalty phase, the court instructed jurors several times that a sentence of life imprisonment would be without benefit of parole, probation or suspension of sentence. Because of the trial court's instruction and the content of Lee's testimony, it is unlikely that the jury was under the mistaken impression that defendant would become eligible for release if it sentenced him to life imprisonment. Allowing Lee to testify to the fact that defendant was on parole at the time of the offense thus had no effect on the jury's deliberations at sentencing. Thus, this argument lacks merit.

Defendant further complains that the court's penalty phase instructions failed to inform the jury that a determination of mitigation need not be unanimous in violation of the rule of *McKoy v. North Carolina*, 494 U.S. 433, 444, 110 S.Ct. 1227 (1990) and *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860 (1988). The record shows that defendant did not file any objection to the form of the jury instructions. Thus, defendant has waived the right to a review of this issue on appeal. La. C.Cr.P. art. 841; *Wessinger*, 98-1234 at p. 20, 736 So.2d at 181.

Defendant also claims that various errors argued elsewhere in his brief arbitrarily affected the jury's deliberations at sentencing. Specifically, defendant complains of the prosecution's comments during argument in the guilt and penalty phases, the introduction of the pornographic video tapes, and the specter of alleged vigilantism all

introduced arbitrary factors into the proceedings. These claimed errors have been addressed in other assignments of error. From a review of the record, none introduced arbitrary factors into the jury's penalty phase deliberations.

In the same argument, defendant complains that the presence of family members in the courtroom, even though they were prosecution witnesses, injected an arbitrary factor into the proceedings. Specifically, defendant argues, in his reply brief, that Shalaina Smith, Barnes's mother; Toni Anderson, Bertha Anderson's granddaughter; Joyce Austin, Bertha Anderson's niece; and Joe Brown, Bertha Anderson's brother, should not have been allowed to remain in the courtroom while they were not testifying. The record shows that defendant did not object to the presence of any of these witnesses during the proceedings. Thus, under *Taylor*, he waived his right to review of this argument on appeal. La. C.Cr.P. art. 841; *Taylor*, 93-2201 at p. 7, 669 So.2d at 369. Accordingly, this argument lacks merit.

Next, defendant claims that his race arbitrarily led jurors to sentence him to death. The record reveals that defendant, an African-American male, killed two African-American females and received a sentence of death from a jury which contained one member of defendant's race. Defendant has failed to show, nor does a review of the record indicate, that race played any part in the jury's sentencing determination. Accordingly, this argument lacks merit.

Defendant next argues that the jury's finding of the aggravating circumstance that Barnes was killed in an especially heinous, atrocious or cruel manner was not argued at trial, thus, this introduced an arbitrary factor into the proceedings. Evidence of defendant's conduct, Barnes's manner of death, and conduct leading up to and following the murder was relevant in the guilty phase as essential elements to the crime charged and was properly admitted. Even assuming, as discussed above, that the jury's finding of heinousness was erroneous, it did not have any effect on the jury's

sentencing determination. Thus, this argument is without merit.

Defendant also claims that no evidence demonstrated that Anderson caught him in the act of molesting his daughter; thus, the court's finding of that aggravating circumstance in the Uniform Capital Sentencing Report was in error. Assuming, *arguendo*, that there was insufficient evidence presented at trial on defendant's act of molestation to support the jury's finding of the appropriate aggravating circumstance, the state's insufficient proof would not constitute grounds to invalidate the jury's death sentence. As mentioned above, this court has held on many occasions that the failure of one or more statutory aggravating circumstances does not invalidate others, properly found, unless introduction of evidence in support of the invalid circumstance interjects an arbitrary factor into the proceedings. *Wessinger*, 98-1234 at p. 40, 736 So.2d 193; *Letulier*, 97-1360 at p. 25, 750 So.2d at 799. Here, defendant's act of molesting his daughter was relevant to the crime charged and was properly admitted. Accordingly, this argument is without merit.

Defendant next alleges that the language employed on the penalty phase verdict form impermissibly shifted the burden of proving the propriety of a life sentence on the defense. Specifically, defendant claims that although verdict form used in this case conformed to the statutory requirements of La. C.Cr.P. art. 905.7, it offends constitutional principles by limiting the jury's consideration of mitigating circumstances to those offered by the defense. Nothing in the record suggests nor has defendant provided any support for his argument that the jury was misled by the statutory language used in the verdict form. Thus, defendant fails to show that it introduced an arbitrary factor into its deliberations. Accordingly, this assignment is without merit.

Other Issues

Assignment of Error No. 13

In this argument, defendant contends without supporting authority that lethal injection constitutes an unconstitutionally cruel, excessive and unusual punishment.[36]

The United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), and its companion cases, held that the death penalty, when properly imposed, does not violate the Eighth Amendment's prohibitions against cruel or unusual punishment. Likewise, *State v. Martin*, 376 So.2d 300, 310 (La. 1979), at the dawn of this court's capital jurisprudence, demonstrates that the death penalty, when properly imposed, does not violate the prohibitions against cruel, excessive or unusual punishment contained in La. Const. art. I § 20. All of this court's decisions affirming death sentences support the same proposition. While we have not specifically addressed whether death by lethal injection violates any constitutional provision, many courts have considered and rejected the notion that lethal injection runs afoul of any constitutional protection. *See*, *e.g.*, *Olsen v. State*, 67 P.3d 536 (Wy. 2003); *People v. Jones*, 64 P.3d 762 (Cal. 2003); *Moore v. State*, 771 N.E.2d 46 (Ind. 2002); *State v. Carter*, 734 N.E.2d 345 (Oh. 2000); *State v. Webb*, 750 A.2d 448 (Conn. 2000); *Provenzano v. State*, 761 So.2d 1097 (Fla. 2000); *People v. Samayoa*, 938 P.2d 2 (Cal. 1997); *State v. Hinchey*, 890 P.2d 602 (Ariz. 1995); *State v. Moen*, 786 P.2d 111 (Ore. 1990).

Defendant filed a pre-trial Motion to Strike and Quash as Unconstitutional the Louisiana Statutes Providing for the Imposition of the Death Penalty and Their Application to This Case. In his motion, defendant contended that La. C.Cr.P. arts. 905-905.9 are unconstitutional because they violate the constitutional prohibition against cruel and unusual punishment of the Eighth and Fourteenth Amendments of the

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[36] This subargument appeared misplaced in the section alleging that arbitrary factors affected the jury's deliberations at sentencing. Therefore, it is addressed separately.

U.S. Constitution and because they are applied in a discriminating manner against certain classes of defendants in violation of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972).

At the hearing on the motion to quash, defendant argued the contents of his written motion but failed to support his argument with any factual or legal support other than *Furman v. Georgia*. Without reasons, the trial court denied the motion.

Defendant now requests this court to remand his case for an evidentiary hearing so he can demonstrate that lethal injection is an unconstitutionally cruel and unusual punishment. Without supporting authority, he contends that he will be able to show certain deficiencies in the protocol that render death by lethal injection unconstitutional. Based on the showing made, we cannot find that the trial court erred in denying defendant's motion to quash. We pretermit discussion of the constitutionality of death by lethal injection until the issue is properly presented. Thus, this argument lacks merit.