SUPREME COURT OF LOUISIANA

No. 95-KA-1489

STATE OF LOUISIANA
v.
RICKY JOSEPH LANGLEY

On Appeal
From the Nineteenth Judicial District Court,
For the Parish of East Baton Rouge,
Honorable Fred Godwin, Judge

Calogero, C.J.[*]

On July 9, 1994 a jury in the 19th Judicial District Court East Baton Rouge Parish, convicted the defendant, Ricky Joseph Langley, of first degree murder for strangling six-year-old Jeremy Guillory. The jury determined Langley should be sentenced to death, and he was so sentenced by the District Judge, the Honorable Fred Godwin. On appeal to this court, the defendant made numerous arguments based on 24 assignments of error in seeking to have the conviction and sentence overturned.[1] Because we find no reversible error in any assignment, we affirm the conviction and the death sentence.

FACTS

According to the defendant's confession, on February 7, 1992, six-year-old Jeremy Guillory came to the door of the house where the defendant lived as a tenant of the Lawrence family. Jeremy was looking for the Lawrence children, Joy and Joey, who had gone with their parents to visit relatives. The defendant told Jeremy that the Lawrence children were not at home and asked Jeremy if he wanted to come inside. Jeremy said that he did not, but asked when the other children would be back. The defendant invited Jeremy in a second time and

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[*]Knoll, J., not on panel, recused. Rule IV, Part 2, § 3. Justice Knoll, who was originally assigned to this panel, recused herself after oral arguments upon discovering that she, while serving as a judge on the Third Circuit, had participated in the consideration of a writ in this case some years back. L.C.C.P. art. 151(B)(3). Justice Victory, who was not assigned to the original panel, was substituted in her stead and has, before voting, had the benefit of audio tapes of the oral arguments, the briefs of the parties, the record, and conference discussions.

[1]Arguments not address in this published opinion are addressed in an unpublished appendix to the opinion.

Jeremy decided to go inside to wait. He walked in the house, went upstairs to Joy's room and sat down on the floor and started playing. Langley followed Jeremy up the stairs, grabbed him around the neck from behind and strangled him as he kicked and struggled. When Jeremy seemed dead, the defendant took him into the defendant's bedroom and placed him on the bed. He then went up and down the stairs several times. He confessed that he would sit and pet the child's hair.[2]

On one of his trips up the stairs, the defendant thought he heard a noise coming from Jeremy. He took some strong line and wrapped it around Jeremy's neck a few times, pulled it as tight as he could, and then tied it. Because noises still seemed to be coming from Jeremy's body, the defendant stuffed a dirty sock in the dead boy's mouth. The defendant then placed the dead boy in his bedroom closet.

The victim's mother, Lorilei Guillory, called for her son who was outside playing with his BB gun, and received no response. She went to the Lawrence house, where her son often played. Langley answered the door. Ms. Guillory asked Langley if he had seen her son, and he told her no. She left to search for her son, but later returned to the Lawrence house to call 911 to report her son missing. A short time later Langley also made a 911 call and pretended to help Ms. Guillory search for her child. Deputies Thomas Pitre and Ham Reid responded to the 911 call, and with the help of the volunteer fire department and some neighbors, started to search the woods in the area. Later a command center was set up across from the Lawrence residence. A search was conducted throughout the weekend, and when Jeremy was not found by Monday the FBI became involved.[3]

On Monday, the police received information from Elizabeth Clark that there was a convicted child molester named Ricky Langley whose last address was in the area. Clark is a Louisiana parole agent who was attempting to keep track of the defendant, a Georgia parole violator. The police spoke with Ms. Guillory and matched her description of the man she saw

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[2]At one point Langley confessed that he placed his penis in the victim's mouth, and ejaculated. However, Langley later denied this, and the autopsy and forensic examinations revealed no evidence of semen.

[3]According to Agent Dixon, the failure to locate a young child within 24 hours of the report that he is missing triggers a presumption of kidnaping and interstate flight; the FBI then becomes involved.

at the Lawrence house to Ricky Langley. The FBI discovered an outstanding Georgia parole violation warrant for the defendant. The police obtained a facsimile of the warrant and went to the Fuel Stop 36 where the defendant was working. According to Detective Donald "Lucky" DeLouch, Assistant Chief of Detectives of the Sheriff's Office in Lake Charles, he went to the truck stop with FBI agents Don Dixon and Neal Edwards. When they arrived at the truck stop they spoke with the manager who told them that Langley was working out back on a tractor. Langley was given his *Miranda* rights and arrested for the parole violation. While Detective DeLouch went inside to get his work records and his coat, Agent Dixon took the defendant to the car.

While waiting in the car, Agent Dixon gave the defendant his *Miranda* rights again and told him that he was a suspect in the disappearance of Jeremy Guillory. The defendant said that he had heard about it in the news. The agent asked defendant to "look him in the eye" and tell him if he knew anything about the disappearance. The defendant dropped his head and did not answer. Agent Dixon then asked Langley if he had killed Jeremy Guillory and the defendant said that he did it. When Agent Dixon asked where the body was, Langley said that it was in his bedroom closet. Then, without prompting, the defendant explained when and how the murder occurred. When Detective DeLouch came outside, the defendant agreed to sign a consent to search form for his room.

The group went to the Lawrence house. Once there, the officers explained the defendant's rights a third time and presented forms for showing waiver of rights and permission for search and seizure, which Langley signed. In addition, the police obtained consent to search from Ms. Lawrence because it was her home. Finally, the police asked Langley if he would allow them to videotape him as he walked them through the events and showed them where the body was located, and he agreed. After the defendant walked the police through the residence and showed them the body, he was taken to the police station, advised of his *Miranda* rights a fourth time, and signed another waiver of rights form. He subsequently gave another videotaped confession.

On February 20, 1992, a Calcasieu Parish Grand Jury indicted Langley for first degree murder. He was arraigned on March 2, 1992, at which time he pled not guilty and not guilty by reason of insanity. Due to pre-trial publicity in Calcasieu Parish, this Court ordered venue

changed to East Baton Rouge Parish. The case went to trial on June 27, 1994, and on July 9, 1994, the defendant was found guilty of the first degree murder of a person under the age of 12 years.

Jurors rejected the defense of insanity which emerged through the testimony of Dr. Paul Ware, a well-known psychiatrist in Shreveport and an expert in pedophilia and other deviant sexual behavior. Dr. Ware had interviewed the defendant in April of 1994, approximately two years after the crime, and recorded the defendant's statements that he killed Jeremy in the deluded belief that the victim was Oscar Lee Langley, the defendant's dead brother whom he had never known. (Oscar Lee had died with his sister in an automobile accident which also led to a lengthy hospital convalescence of his mother. During her convalescence, she became pregnant with the defendant, though confined in a full body cast at the time.) The defendant told Dr. Ware that Oscar Lee's hallucinatory presence had plagued him throughout his life, and in the days before the murder had urged him to "go ahead and have Jeremy." The defendant said that on February 7, 1992, he had determined to exorcize the demon of Oscar Lee, only to discover that he had killed Jeremy instead. At the completion of the penalty phase, the defendant received the death penalty, and on September 26, 1994 he was formally sentenced to death by lethal injection.

DISCUSSION

ASSIGNMENT OF ERROR NO. 1: The Exclusion of Mitigation Evidence in the Penalty Phase; and
ASSIGNMENT OF ERROR NO. 12: The Exclusion of Evidence in the Guilt Phase

Under his first assignment of error, the defendant makes several arguments arising from trial court's limiting of his right to present some mitigating evidence in the penalty phase. In his twelfth assignment of error, he alleges that one of items — a videotaped interview — was also erroneously excluded from the trial of his guilt. (Assignment of Error No. 12 is treated at Part "G" under these assignments of error.)

A. The "Guilty Plea" Letter

Langley first argues that in the penalty phase the trial court erred by prohibiting him from presenting evidence of his supposed desire to plead guilty unconditionally, communicated in a letter from defense counsel to the District Attorney's office. In the letter, defense counsel states that, "Mr. Langley is prepared to accept any offer of settlement short of the death

penalty that you see fit to make." Yet in the next paragraph, he states that "Mr. Langley is himself offering a plea of guilty to first degree murder regardless of your agreement. However, as you know, I do not believe that the trial judge is currently permitted to go along with the offer of a plea without your consent." Defense counsel acknowledged that the law prohibited Langley from an unconditional plea of guilty to capital murder, but the defense argued that the pre-trial offer should come before the jury at the sentencing stage as a demonstration of remorse.

B. An Alleged Flaw in the Capital Sentencing Scheme

At the time of the defendant's trial, La.C.Cr.P. art. 557 prohibited a defendant in a capital case from entering an unqualified plea of guilty in the absence of a plea agreement from the district attorney that the State would not seek the death penalty.[4] The defense asserts that this "flaw" in the capital sentencing scheme denied Langley the right to plead guilty and the right to present evidence of remorse to the jury.

This Court has held that there was "no prejudice in the statutory scheme which requires that a plea of not guilty be entered in a capital case." *State v. Watson*, 423 So. 2d 1130, 1134 (La. 1982). In *Watson*, the defense argued that the trial court erred by not allowing him to plead guilty in the first phase of trial because the overwhelming evidence of guilt prejudiced the jury. In holding that Watson did not suffer prejudice the Court noted that:

> In the guilt phase, he did not present any evidence to the jury which challenged the prosecution's evidence of guilt. In opening argument of the penalty phase, he could have pointed out the foregoing fact to the jury and argued that the only issue from the outset was life or death, pointing out that he was required by law to plead not guilty in the first phase in order to contest the issue in the penalty phase. *Id*.

C. The Letter as Dubious Evidence of Remorse

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[4]As amended by Acts 1995, No. 434, §1, La.C.Cr.P. art. 557 now provides:

> 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.

In this case, the trial judge determined that the letter offered only a guilty plea in return for a life sentence and was not an offer of an open-ended plea after which a jury would decide the penalty. In ruling that the defense could not introduce the letter, the trial court essentially ruled that any marginally probative value in defense counsel's letter was far outweighed by the risk of jury confusion and diversion in determining whether the letter reflected a genuine expression of remorse. La.C.E. art. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.").

The trial court and defense counsel could not agree on what the letter proposed, and jurors were in no better position to decide. The equivocal tone of the letter rendered it minimally probative of remorse. Moreover, if the offer did represent an invitation to bypass the guilt stage and proceed directly to the penalty phase, the letter's probative value was substantially undercut by the defense of insanity, offered to negate responsibility. The insanity defense may not absolutely preclude remorse, but neither is it consistent with remorse. The insanity plea in this case, when considered alongside the, at best, equivocal letter, indicates that the letter was mere trial strategy, more an indication of a desire to be spared than an expression of remorse. In sum, the trial court did not err or abuse its discretion in excluding the letter.

D. The Letter as Hearsay

The defense's attempt to offer the letter raised the recurring issue of hearsay. The defense claims that the letter was not an attempt at "judicial suicide" but rather was an expression of "everlasting remorse." In the end, however, only the defendant himself could explain what the letter meant. But defense counsel chose here — as it did throughout the case — to try to place self-serving statements in Langley's mouth without calling him to the stand. A sentencing hearing is to be "conducted according to the rules of evidence." La.C.Cr.P. art 905.2. The plea offer letter — an out of court statement intended to prove the truth of the matter asserted — was hearsay. La.C.E. art. 801. No recognized exception to the hearsay rule applied, nor were there any indicia of the statement's reliability. The letter was properly excluded. Moreover, although Langley was not allowed to use the letter to argue his supposed desire to plead guilty unconditionally, he was not prohibited from putting on other mitigating

evidence showing his acceptance of responsibility. Accordingly, he has failed to show that he suffered any prejudice from the trial court's ruling. The argument lacks merit.

E. The State's Closing Argument of "No Remorse"

The defendant argues that the State's penalty phase closing argument references to his lack of remorse compounded the trial court's erroneous rulings against admitting the letter. We have already held that the equivocal letter from defense counsel to the District Attorney was properly excluded. In any event, prosecutors are allowed broad latitude in choosing closing argument tactics. *See, e.g., State v. Martin*, 539 So. 2d 1235, 1240 (La. 1989). Although under La.C.Cr.P. art. 774 closing argument must be "confined to the record evidence and the inferences which can reasonably be drawn therefrom," both sides may still draw their own conclusions from the evidence and convey such view to the jury. *State v. Moore*, 432 So. 2d 209, 221 (La. 1983), *cert. denied*, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). "Before allegedly prejudicial argument requires reversal, the court must be thoroughly convinced that the jury was influenced by the remarks and that such contributed to the verdict." *State v. Taylor*, 93-2201, p. 21 (La. 2/28/96), 669 So. 2d 364, 375; *State v. Jarman*, 445 So. 2d 1184, 1188 (La. 1984). We also ask whether the remarks injected "passion, prejudice or any arbitrary factor" into the jury's recommendation. *Moore*, 432 So. 2d at 220.

Read in their entirety, the prosecutor's remarks simply gave her interpretation of the evidence and of the character of defendant's act, i.e., that killing a young child by manual strangulation, and then garrotting and hiding the body in a closet for three days while a search for the child was underway, may be fairly characterized as remorseless. To this extent, the argument did not exceed proper bounds or constitute reversible error. Accordingly, deferring to the "good sensibility and fairmindedness" of the jury, we are not convinced that the remarks improperly influenced the jury. *See Taylor*, 669 So. 2d at 375.

F. An Alleged Comment on Defendant's Failure to Testify

The defendant argues that the State referred to his failure to testify when it commented on his lack of remorse. This argument also fails. If the prosecutor makes a direct reference to the defendant's failure to testify, a mistrial should be declared, regardless of the prosecutor's intent. *State v. Johnson*, 541 So. 2d 818, 822 (La. 1989). But when the prosecutor's reference is not direct, the reviewing court inquires into the remark's "intended effect on the jury" to distinguish between impermissible indirect references to the defendant's failure to testify and permissible general statements that the prosecution's case is unrebutted. *Id*. *See also State v. Smith*, 433 So. 2d 688, 696-97 (La. 1983) (prosecutor's comments actually related to lack of evidence). The State commented on Langley's state of mind, not even indirectly on his failure to testify. Accordingly, this argument lacks merit.

G. The Videotape Excerpts of Defendant's Interview With Dr. Paul Ware

The defendant also contends that the trial court erred by not allowing him to present excerpts of a videotape of his interview with Dr. Ware, a specialist in forensic psychiatry and neurology. The defendant raised this issue regarding the guilt phase in Assignment of Error No. 12. We treat both assignments together.

Dr. Ware taped his interview with Langley in the spring of 1994. Although that session lasted five hours, the tape defense counsel proposed to introduce shows only 20-minutes of the interview. The parties first debated the admissibility of the tape during the guilt phase after Dr. Ware testified. In his testimony, and without objection from the State, Dr. Ware recounted defendant's statements to him attributing the victim's death to his attempt

to exorcize the hallucinatory presence of Oscar Lee, the dead brother he never knew.[5] The defendant made no attempt to introduce the tape during Ware's testimony.

In its rebuttal case, the State called Dr. Arretta Rathmell to recount for jurors an entirely different confession made to her by the defendant in 1992 — shortly after the offense and two years before Dr. Ware conducted his interview. According to Dr. Rathmell, who agreed that defendant suffered from a schizotypal personality disorder, "the information that I got from Mr. Langley himself was that he knew he had killed Jeremy and he told me he knew it was wrong . . . . I distinctly remember it because I think it takes a good bit of fortitude to be able to say that, but he did say that, he did not hide it, he did not color that in any way; he said that's what he had done."

When asked by the prosecutor to explain the obvious differences in the statements given by the defendant two years apart, Dr. Rathmell attributed defendant's 1994 statement to his desire to please adult figures to make up for a lack of parenting when he was a child and to his luck in finding a "very caring attorney, and a very diligent one." The defense moved for a mistrial on grounds that Dr. Rathmell had implied that defense attorneys had manipulated Langley's responses to suit trial strategy. When the court denied that motion, counsel proposed that the jurors listen to the 20-minute excerpt from Dr. Ware's interview with the defendant to determine for themselves the credibility of the defendant's statements and "whether Ricky Langley is telling the truth as he believes it on April 1st, 1994 or . . . whether he just doesn't know what the truth is . . . and we're in a position here where they can actually see something for themselves and figure out for themselves what's going on."

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[5]According to Dr. Ware, defendant told him that:

> He had met Jeremy when he came to visit Joey and felt an attraction toward him and also protective of him . . . During the next four or five days he continued to struggle with Oscar Lee who was telling him that he might as well give in and go ahead and have Jeremy. On February the 7th he was at his home alone when Jeremy came by asking to play with Joey. He told him Joey was not at home and that Jeremy could come inside if he wanted to. He said Jeremy came inside with his BB gun, and as he came inside and started up the stairs towards Joey's room, Ricky remembered battling with Oscar Lee and telling him that he was not going to hurt Jeremy and he was not going to allow him to hurt Jeremy. He said he'd had enough of Oscar Lee and he blew on him and was going to get rid of him once and for all and started choking him. Finally when the body went limp he looked down and recognized that he killed Jeremy Guillory.

R., pp. 7939-40. (It is unclear what role delusions of Oscar Lee were supposed to have played when Langley garroted the victim to be sure he was dead.)

After extensive argument, the court excluded the tape. "I don't know of any situation," the judge observed, "where the defendant can give a self-serving statement out of court and the jury sees it and reads it . . . That would be the same thing as having him writing it all down and handing it to them to read." The court made the same ruling at the start of the penalty phase.

H. The Tape as Hearsay

Counsel argues that he offered the tape not for its hearsay content but simply as evidence of the defendant's state of mind. In fact, however, counsel's arguments at trial indicate that the tape was offered for precisely a hearsay purpose — to prove to the jury the truth of Langley's assertion that he killed in a state of delusion. The defendant's statements to Dr. Ware would have been admissible only for their non-hearsay value in revealing the basis of the doctor's opinion. See La.C.E. arts. 703 & 705(B). However, the statements themselves were already in evidence as part of Dr. Ware's testimony.

1. The "State of Mind" Exception

Counsel's argument that the tape is "state of mind" evidence also fails. The express language of La.C.E. art. 803(3) excepts from the definition of hearsay only "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . offered to prove the declarant's then existing condition or his future action." (Emphasis added). Counsel did not offer the tape to prove the defendant's state of mind in the spring of 1994 when he made the statement to Dr. Ware — a matter never at issue. Rather, defendant offered the 1994 tape to try to show his state of mind two years earlier — a matter very much at issue. "[A] state of mind evidenced by a speaker's remarks cannot be used to prove the speaker's past conduct." *State v. Martin*, 458 So. 2d 454, 461 (La. 1984) (citing *Shepard v. United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933)). While there is some authority that evidence of a particular state of mind may look backward in time to prove the continuity of that state of mind, "it is reasonable to require as a condition of invoking the continuity notion that the declaration mirror a state of mind which, in light of all the circumstances including proximity in time, has some probability of being the same condition existing at the material time. Where there is room for doubt, the matter should be left to the discretion of the trial judge." McCormick, *Evidence*, § 295, p. 696 (Cleary, ed., 1972).

The tape was offered to prove the defendant's state of mind two years before he made the statement. There was substantial room for doubt as to whether the defendant's state of mind was the same when the tape was made as it was at the time of the crime. The taped statement did not come within the hearsay exception provided by art. 803(3) or any other exception to the hearsay rule. Under these circumstances, the trial judge correctly excluded the tape.

2. The Alleged "Mitigation" Exception Under the Eighth Amendment

The defense also argues that Louisiana's hearsay rules must give way to the overriding Eighth Amendment requirement that juries have the opportunity to consider and act upon all mitigating evidence offered by the defendant. He cites *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). The Supreme Court's *per curiam* opinion in *Green v. Georgia*, is so easily distinguished from this case that it hurts Langley's cause. In *Green*, a capital case, the trial court excluded as hearsay a statement made by the defendant's co-perpetrator who had previously been tried and sentenced to death on the basis of the statement. The co-perpetrator, Moore, had confessed to a close friend that he had sent the defendant off to run an errand before he shot and killed the victim. Moore's statement that he alone killed the victim out of the defendant's presence was highly relevant to the issue of punishment at the defendant's trial, and it was only under "these unique circumstances," that the Supreme Court overturned the defendant's conviction and death sentence. *Id.*, 442 U.S. at 97, 99 S.Ct. at 2151. The *Green* Court emphasized that "substantial reasons existed to assume [the statement's] reliability": The statement had been made spontaneously to a close friend; it was amply corroborated by the other evidence at trial; it was clearly against the co-perpetrator's interest and made for no apparent ulterior motive; and "[p]erhaps most important, the state considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it." *Id.* (footnote omitted). By contrast, Langley's statements are essentially exculpatory, and were made long after his crime to a witness the defense planned to call at trial. In short, they possessed no indicia of reliability that would justify admitting them. This argument fails.

3. The "Basis of Expert Opinion" Exception

Finally, the defense argues that the tape was admissible as evidence upon which Dr. Rathmell relied in forming her opinion. *See* La. C.E. art. 705 (B). Defense Counsel had sent a copy of the tape to Dr. Rathmell, but she testified that it "really didn't help" her form her opinion. Moreover, the tape was not made until two years after Dr. Rathmell saw the defendant and rendered her opinion. The tape simply was not evidence upon which Dr. Rathmell relied in forming her opinion. Accordingly, it was not admissible under La. C.E. art. 705 (B) and the trial court properly excluded it from both the guilt and sentencing phases.

4. The Preference for Live Testimony

The trial court's ruling on the admissibility of the tape at both the guilt and sentencing stages goes to the heart of the overriding preference for live testimony in a face-to-face confrontation before the fact finder.[6] The Confrontation Clause and the intertwined rules governing the use of hearsay evidence have "as a basic purpose the promotion of the 'integrity of the fact-finding process.'" *White v. Illinois*, 502 U.S. 346, 356-57, 112 S.Ct. 736, 743, 116 L.Ed.2d 848 (1992) (Rehnquist, C.J.) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1020, 108 S.Ct. 2798, 2802, 101 L.Ed.2d 857 (1988)). Thus, neither the state nor the defendant may conduct a trial on the basis of prepared affidavits or other litigation statements which otherwise do not fall within a well-settled exception to the hearsay rule. *See State v. Rault*, 445 So. 2d 1203, 1208 (La. 1984), *cert. denied*, 469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1986); *State v. Martin*, 356 So. 2d 1370, 1373-74 (La. 1978).

I. The Limit on Social Worker Jill Miller's Testimony

Also under his first assignment of error, the defendant contends that the trial court improperly limited evidence of the impact of Ricky Langley's childhood offered through Jill Miller, a forensic social worker. The State objected to Ms. Miller's testimony because it

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[6]As embodied in the Confrontation Clause, the preference for live testimony subject to cross-examination evolved largely in reaction to abuses in 16th century English courts in which affidavits or other carefully prepared documents in anticipation of litigation were used at trial as evidence against the accused. *See White v. Illinois*, 502 U.S. 346, 363, 112 S.Ct. 736, 746, 116 L.Ed.2d 848 (1992) (Thomas, J., dissenting) ("'It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.'") (quoting *California v. Green*, 399 U.S. 149, 156, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970)).

would include the hearsay responses of everyone she interviewed. The trial court ruled that, on direct examination, Ms. Miller could give her conclusions, but she could not testify on direct examination to any hearsay statements from people she interviewed and upon whose statements she relied in forming her opinions. As the trial judge explained, Ms. Miller could testify, but she could not "come up here on direct and start reciting stories and things she's been told."

Article 705(B) of the Louisiana Code of Evidence provides that, in a criminal case, every expert witness must state the basis for her conclusion. However, if the evidence is otherwise inadmissible, it can only be brought out on cross-examination. Miller's objectionable testimony was merely a retelling of facts obtained through the defendant's family concerning the family history; thus, it was hearsay. Under the plain language of art. 705(B), the trial court correctly ruled that it was inadmissible on direct examination.

J. The Limit of Dr. Clark Heindel's Testimony

Also under this assignment of error, the defendant argues that the trial court wrongly limited the testimony of Dr. Heindel and thereby prevented the defendant from proving that he never had a chance of avoiding pedophilia. The defense called Dr. Heindel, the mental health director with the Georgia Department of Corrections when the defendant was incarcerated there. Dr. Heindel holds a doctorate in educational psychology and counseling. He met with the defendant on at least ten occasions during the defendant's incarceration. During his testimony, the defense asked Dr. Heindel what he thought of the defendant's prognosis for treatment. He responded, "Pretty poor….Well, at that point, I had not had that much experience working with pedophiles. But, I knew that it would take a significant amount of treatment with some very good aftercare." He went on to explain that in the last four or five years he had more experience with working with pedophiles. The defense further asked, "overall, in terms of when you say pretty poor, what sort of treatment do you feel, from your experience in this area, would cure Mr. Langley's problems?" The State objected to the question and the trial judge sustained the objection because, having not seen the defendant since his incarceration in Georgia, the witness was not qualified to give this opinion.

The purpose of an expert witness is to provide the jurors with a basis of knowledge and background information on a subject. La. C.E. art. 702. The trial judge is vested with broad

discretion in ruling on the scope of expert testimony. La. C.E. art. 702, comment (d); *State v. Billiot*, 94-2419 (La. App. 1st Cir. 4/4/96); 672 So. 2d 361, 373; *State v. Mays*, 612 So. 2d 1040, 1044 (La. App. 2nd Cir. 1993), *writ denied*, 619 So. 2d 576 (La. 1993).

The witness admitted that at the time he was working with and evaluating the defendant he had very little experience with pedophiles. Thus, the trial judge did not abuse is broad discretion in determining that the witness was not qualified to offer his opinion of whether or not the defendant was curable. Therefore, this is not reversible error. We note also that the trial judge excluded testimony on this subject by the State's witness, Troy Mire, who had never treated Langley.

K. The Exclusion of Evidence of the Execution Process

In his next argument, the defendant contends that the trial court erred by not allowing him to present the jury with evidence about the execution process so that they would understand what it meant to impose the death penalty. Article 905.2 of the Code of Criminal Procedure states: "The sentencing hearing shall focus on the circumstances of the offense [and] the character and propensities of the offender…." In-depth evidence regarding the nature of the death penalty does not speak to the circumstances of the offense or the character of the defendant. *See* La.C.Cr.P. art. 905.2. Accordingly, it "makes no useful contribution to the process and serves to distract the jury's attention from the task at hand." *People v. Morris*, 53 Cal.3d 152, 218, 279 Cal. Rptr. 720, 807 P.2d 949, 988 (Cal. 1991) (trial court did not err by refusing defense request to explain to jury the explanation of the method of execution). *See also People v. Pride*, 3 Cal.4th 195, 10 Cal. Rptr.2d 636, 833 P.2d 643, 683 (Cal. 1992) ("Our cases make clear that information about administration of the death penalty does not aid the jury in making an individualized determination of the appropriate penalty in a particular case.").

A jury in a capital case "must recognize the gravity of its task and proceed with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell v. Mississippi*, 472 U.S. 320, 340, 105 S.Ct. 2633, 2646, 86 L.Ed. 2d 231 (1985). However, the court's instruction that it was the jury's responsibility to determine whether the defendant should be sentenced to death or life imprisonment accurately and adequately informed the jurors of the importance of their decision, and nothing in the record suggests that the jurors were not well

aware of the gravity of their responsibility. Accordingly, the defendant's argument that the trial court erred by prohibiting him from presenting other extraneous evidence lacks merit.

ASSIGNMENT OF ERROR NO. 2: The Use of "Prior Bad Acts" in the Penalty Phase

In his second assignment of error the defendant argues that the trial court erred by allowing the State to present evidence of prior alleged bad acts at the penalty phase without proper notice. The complained of evidence came from Langley's records from the Georgia prison system where he had been incarcerated for child molestation. The evidence consisted of parts of reports compiled by Dr. Clark Heindel, a defense expert who was Mental Health Director at the Youthful Offender Unit in Hardwick, Georgia. The reports dealt with Langley's entries in what the defense called Langley's "dream diary" which he kept while incarcerated.

A. The Prosecution's Comments About Defendant's Diary

In his first argument under this assignment, the defendant contends that the prosecution was improperly allowed to admit prior bad acts taken from the diary. The acts in question are instances of child molestation and terrorization described in the diary. The defense referred to the events as dreams or fantasies, while the prosecution argued that the diary entries recounted actual events. Notably, neither the diary entries nor the prosecution referred to any prior murders by Langley.

During the guilt phase, the defense introduced the diary evidence when the following excerpt from the May 11, 1988 report was read into evidence by Dr. Rathmell, on the defendant's direct examination:

> Today he [Langley] showed me his diary which included several pages describing his sexual abuse of children, in which he would lure them into the woods and being to [sic] perform some sexual acts with them. When they begged to go home, he would take them further into the woods telling them this was the way home. During these episodes, he wrote that he was resolved to murdering the children after the acts, but apparently, at least in the cases of which he wrote, this did not occur.

Later, in the opening statement in the penalty phase, the assistant district attorney stated:

> Remember the Georgia Department of Corrections — and this is part of his character and propensity — the Georgia Department of Corrections records which talked about his diary and how he wrote. This wasn't a fantasy. He wrote of instances in the past where he had taken children —

The defense objected, arguing that this was not evidence and never would be. The trial judge overruled the objection on the grounds that, in the opening penalty argument the prosecution was permitted to say what it expected to prove during the penalty phase. The Assistant District Attorney then continued to read the passage and to assert that it represented actual acts of abuse.

The scope of the State's opening statement is prescribed in La.C.Cr.P. art. 766, which provides that it "shall explain the nature of the charge, and set forth, in general terms, the nature of the evidence by which the state expects to prove the charge." In telling the jury that the defense had written in his diary about actual events, the prosecutor was explaining her interpretation of the diary and stating what she hoped to prove in the penalty phase; she was challenging the defense's characterization of the diary as simply dream or fantasy. "The scope of the opening statement is left to the sound discretion of the trial judge." *State v. Kinchen*, 342 So. 2d 174. 176 (La. 1977). The trial judge did not abuse his discretion, but properly allowed the prosecutor's statement.

Even if the comments had exceeded the scope of acceptable argument, this Court will not reverse unless it is thoroughly convinced that the remarks influenced the jury and contributed to the verdict. *See, e.g.*, *State v. Taylor*, 93-2201, p. 21 (La. 2/28/96), 669 So. 2d 364, 375. Through Dr. Heindel's testimony, the defense was able to challenge the State's characterization. Moreover, through the defense's examination of Dr. Rathmell in the guilt phase, the jury already knew of Langley's damaging and "troubling" statement that he "had the urge to kill the children." In addition, the jury had already heard Dr. Ware testify at the guilt phase that Langley had discussed molesting a seven-year-old boy and threatening him with a gun. Deferring to the "good sensibility and fairmindedness" of the jury, we are not convinced that the disputed particular remarks improperly influenced the jury. *Id*. This argument lacks merit.

B. The Diary as "Other Crimes" Evidence

The defense also argues that the prosecution's opening at the penalty phase constitutes reversible error because the comments refer to other crimes, and there was no evidence that the diary was about actual events rather than just dreams or fantasies. At oral argument before this court, defense counsel conceded that the only real objection to the prosecution's

comments was that he believed they were not true. However, the record shows that there was at least an arguable evidentiary basis for the comments.

Prior to the assistant district attorney's penalty phase opening, there had been no testimony as to whether the diary passages recounted actual events or only Langley's fantasies; defense counsel simply referred to the diary as "dreams" or "fantasies". During the penalty phase, Dr. Heindel stated, "I think he was writing down his dreams. I think Ms. Harden, [a Georgia prison official] who saw him first, instructed him or asked him to keep a diary." Dr. Heindel also said that he asked the defendant to write down his dreams. In referring directly to the defendant taking children into the woods, Dr. Heindel said:

> And, there was -- I think the one that disturbed me the most — and I'm really not sure how much of it was dream and how much was fantasy. But, I think it's described about taking a child or children into the woods. And, it was so vivid to me that I think it scared me. It was very unusual.

On cross-examination Dr. Heindel stated that he was not certain that the entries referred only to dreams or fantasies, but he believed they did. Dr. Heindel's testimony that the "vivid" and "unusual" diary entries scared him suggests that they may have represented more than just a dream or fantasy. In addition, Dr. Heindel conceded that "fantasies and dreams usually groom the behavior," and that it was "a possibility" that Langley had acted out his fantasies.

In closing, the defense argued that the jury should use commonsense with regard to the argument that the diary referred to something other than dreams or fantasies. Then, on rebuttal, the prosecution again asserted the actuality of the events described in the diary:

> Let me quote from — this is Georgia Department of Corrections record from January 12, 1987: "We dealt with some of his feelings. And I made the recommendation that he start keeping a diary and dealing with his feelings. And in dealing with some of the things that have happened in the past, and what his feelings was surrounding them." Fantasies and dreams, I don't think so. Things that happened in the past. You know that this man was a terrorizer of children.

The quoted passage indicates that Langley was asked to write not only about fantasies, but about "things that have happened in the past." We also note that Dr. Ware's earlier testimony about Langley's account of a prior molestation suggests an arguable possibility that Langley's diary recounted actual events. Thus, there was at least some evidentiary basis for the State's

argument that Langley could have recounted actual events in his diary, and the prosecution was allowed this "fair comment" on that evidence.

Further, the State had the right to challenge defendant's characterization of the diary contents as only dreams and fantasies. *See State v. Jackson*, 608 So. 2d 949, 957 (La. 1992) (trial judge to determine relevance of rebuttal evidence); *State v. Davis*, 411 So. 2d 434 (La. 1982). The defense introduced the diary to show dreams or fantasies that purportedly demonstrated a mental defect as a mitigating factor. However, the defense had no right to expect that its view of the diary as mere fantasy would be unopposed. The prosecution was not required to tacitly concede that the entries represented only imagined events.

C. An Alleged Fifth Amendment Violation

Defendant claims that, if the diary entries were "confessions" of actual events (which he denies), then their admission violated his Fifth Amendment right against self-incrimination, because he "was never warned of this right, and it was never waived." First, the privilege did not attach when the entries were made in Georgia prison, because Langley had no "reasonable cause to apprehend danger" from making the entries. *See State v. Brown*, 514 So. 2d 99, 109 (La. 1987) (quoting *State v. Edwards*, 419 So. 2d 881 (La. 1982)). Thus, the diary entries were not statements taken in violation of the Fifth Amendment. We also reemphasize that it was the defense that introduced the diary evidence and asserted that it was "fantasy." The defense may have thought or hoped that the statements were not somehow incriminating, but it had no reasonable basis to believe that its view would be uncontested. The State was not required to "Mirandize" the defense against the possible adverse effects of the its own strategy. This assignment lacks merit.

D. An Alleged Notice Requirement

The defense also argues that if the diary did recount actual events, then the prosecution committed reversible error by failing to give "other crimes" notice to the defense and prove that the events occurred by clear and convincing evidence. Evidence of unadjudicated crimes is admissible during the penalty phase after the trial court determines that (1) the evidence of the defendant's connection is clear and convincing; (2) the evidence is otherwise competent

and reliable; and (3) the unrelated crimes have relevance and substantial probative value as to defendant's characters and propensities which is the focus of the sentencing hearing under La.C.Cr.P. art. 905.2. *See State v. Brooks*, 541 So. 2d 801, 814 (La. 1989). The State must furnish notice of it intention to use other crimes evidence within a reasonable time before trial. *State v. Prieur*, 277 So. 2d 126, 130 (La. 1973). In the penalty phase of a first degree murder trial, the character of the defendant is automatically at issue. *State v. Bourque*, 622 So. 2d 198, 245 (La. 1993), *overruled on other grounds by State v. Comeaux*, 93-2729 (La. 7/1/97); 699 So. 2d 16. *See also State v. Jackson*, 608 So. 2d 949, 953 (La. 1992); La.C.Cr.P. art. 905.2. Evidence of unadjudicated other crimes is relevant to the defendant's character and propensities. *Jackson*, 608 So. 2d at 954-956; *State v. Brooks*, 541 So. 2d 801, 813 (La. 1989). The jury may also consider the evidence from the guilt phase. La. Code Cr. P. art. 905.2.

Once again it is significant that the State did not enter the disputed evidence. Rather, the State merely referred to evidence raised by the defense in the guilt phase and expected to be raised during the penalty phase. When the defense raised the evidence on direct examination in the penalty phase, the prosecution cross-examined the defense witness about the diary. Under these circumstances, it would be unreasonable to require the state to give notice under *Prieur*.

Moreover, the prosecution did not need to prove by clear and convincing evidence that the events occurred in order to rebut the defense's view of the diary evidence. This precise issue has not previously been addressed by his court, but *State v. Davis*, 411 So. 2d 434 (La. 1982), is instructive. In *Davis*, the defendant testified, on direct examination by his own attorney, about two prior drug possession arrests. *Id*. at 438-39. The testimony was intended to show constant police harassment of the defendant, and similar police misconduct. The prosecution cross-examined the defendant about the prior arrests in order to rebut his claims of harassment. This court held that the State had the right to rebut defendant's testimony by questioning him about the unrelated prior arrests.[7] *Id*. Here, the defendant tried to show that

[7] Similarly, in *State v. Ward*, 483 So. 2d 578, 587-88 (La. 1986), the defendant expected the prosecution to introduce evidence of other sexual crimes. *Id*. at 587. In its penalty phase opening, the defense attempted to explain this misconduct as crimes involving "psychological problems." *Id*. This court held that introduction of the prior bad acts did not

he had dreams and fantasies about abusing and terrorizing children. The prosecution responded to the defense's assertions by trying to show that the purported dreams and fantasies represented actual events.

In any event, not every *Prieur* violation is reversible error. A defendant must show a "substantial risk of grave prejudice" arising out of inadmissible or surprise admission of other crimes evidence. *Prieur*, 277 So. 2d at 128; *State v. Hooks*, 421 So. 2d 880 (La. 1982); *State v. Strickland*, 398 So. 2d 1062 (La. 1981). The purpose of limiting evidence of unadjudicated criminal activity is to prevent surprise, undue prejudice, and the injection of an arbitrary factor into the jury's deliberations. *See State v. Comeaux*, 93-2729, p.6 (La. 7/1/97); 699 So. 2d 16, 20. There is no presumption of prejudice. *Prieur*, 277 So. 2d at 128.

Here the defendant fails to prove surprise, undue prejudice, or the injection of an arbitrary factor. First, the defense introduced the diary evidence and had no reasonable expectation that its characterization of the evidence would go unchallenged. Thus it was not subjected to surprise. Nor was the defense prejudiced. It was able to respond to the prosecutions arguments, and to examine Dr. Heindel, the compiler of the Georgia prison report, in front of the jury, and to argue that the jury should use its common sense in evaluating the diary evidence. Also, the impact of the prosecutions assertions was lessened somewhat by the fact that the jury had already learned of prior molestations through testimony in the guilt phase. Moreover, even if mere fantasy, the diary entries are, in themselves, powerfully damaging evidence of Langley's character and propensity toward harming children. We note again that the prosecution did not go beyond what was in the diary to argue that Langley had killed before. Accordingly, the defense was not surprised or prejudiced by lack of notice of the State's intent to argue that the events described were actual occurrences, and no arbitrary factor was introduced into the penalty phase. *See Comeaux*, 699 So. 2d at 20; *Ward*, 483 So. 2d at 589.

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create any unfair surprise nor inject any arbitrary element into the penalty phase. *Id.* at 587-88. Justice Lemmon concurred, but would have held that admission of the bills of information of the prior crimes was error, though harmless. *Ward*, 483 So. 2d at 592 (Lemmon, J., concurring).

ASSIGNMENT OF ERROR NO. 8: The Penalty Phase Instructions; An Alleged Presumption in Favor of Life Imprisonment

The defendant argues that the court committed error when it failed to instruct the jury that the presumption is that life without parole is the appropriate punishment. This argument is without basis in either Louisiana or federal law. There is no presumption such as the one which the defense argues. *See State v. Mitchell,* 94-2078 (La. 5/21/96); 674 So. 2d 250, (unpublished appendix at viii). No court has ever made the inferential leap from the presumption of innocence during the guilt phase to an analogous "life presumption" at the penalty phase. No "presumptions" are incorporated into the jury's sentencing considerations as part of the capital sentencing process. La.C.Cr.P. art. 905, *et. seq*. The sentencing scheme as set forth in these articles meets both state and federal constitutional requirements. *See State v. Loyd,* 489 So. 2d 898, 900-901 (La. 1986); *State v. Watson*, 449 So. 2d 1321, 1325 (La. 1984), *cert. denied*, 469 U.S. 1181, 105 S.Ct. 939, 83 L.Ed. 2d 952 (1985). Thus, this argument is groundless.

ASSIGNMENT OF ERROR NO. 10: The Defendant Briefly Removed from the Courtroom During the Guilt Phase

In this assignment of error, the defendant argues that it was reversible error to exclude him from parts of his own trial. During the prosecution's opening statement, the defendant interrupted by saying that the district attorney was lying, and then ran to try to leave the courtroom. The judge had the defendant removed from the courtroom and excused the jury. After a brief recess, the defendant was allowed back into the courtroom, and the trial continued. A few days later, while defense expert Dr. Ware was testifying, the defendant again disrupted the trial:

> Dr. Ware: He said he'd had enough of Oscar Lee and he blew on him and was going to get rid of him once and for all and started choking him. Finally, when the body went limp he looked down and recognized that he killed Jeremy Guillory. He didn't know what to do and realized --
>
> The defendant: (making noises and beating on the table) I didn't mean to kill Jeremy.

As the defendant was removed from the courtroom he was saying: "I thought it was Oscar," and "[w]hy don't they just kill me and get it over with." After a ten-minute recess the trial judge ruled that because of two outbursts occurred despite defense attempts to keep Langley

calm the trial would continue with the defendant and one of his attorneys in a room immediately behind the courtroom. The room had a loud speaker so that Langley and his attorney could hear the proceedings. The judge did not foreclose the defendant from returning for the remainder of the trial, and in fact, the defendant returned to the courtroom the next day.

The United States Supreme Court has addressed the question under what circumstances an obstreperous defendant forfeits his right to be present at his trial. "A defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 1060-61, 25 L.Ed 2d 353 (1970). A trial judge "must be given sufficient discretion" to deal with a disruptive defendant, and [no] one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." *Id*. *See also State v. Washington*, 322 So. 2d 185, 187 (La. 1975) (trial judge entitled to take adequate measures against accused's disruptions).

The record does not indicate that the trial judge explicitly warned the defendant that he would be excluded from the courtroom if he disrupted the trial again. The transcript merely shows that the jury was removed and the court recessed after Langley's first demonstration. Also, Langley's behavior was not as outrageous as that shown in *Allen* (defendant threatened the judge and tore up and threw around papers), or in two leading Louisiana cases, *State v. Riles*, 355 So. 2d 1312 (La. 1978) (defendant argued with judge and scuffled with sheriffs) or *State v. Lee*, 395 So. 2d 700 (La. 1981) (defendant sang the Star Spangled Banner and quoted scripture aloud during proceedings). However, the defendant's conduct was disruptive enough to warrant the trial judge's carefully measured response. The defendant was removed from the courtroom only during the afternoon of July 7th, during Dr. Ware's testimony. He was accompanied by counsel and placed in a room where he could hear the proceedings. Provisions were made so that the defendant could ask his counsel to interrupt the proceedings at any time. Though the defendant was not physically present in the courtroom, he was allowed to participate in his trial to the maximum extent his own misconduct would allow. The next morning the defendant returned to the courtroom when he indicated that he would try

to control himself, and he was present for the remainder of the trial. Under the appropriate abuse of discretion standard of review, the trial judge did not commit reversible error.

ASSIGNMENT OF ERROR NO. 13: The Defendant's Arrest and Confession

In assignment of error number 13 the defendant argues that the trial court erred by failing to suppress statements and evidence seized from him after an allegedly invalid arrest for violation of his Georgia parole. He claims first that the arrest warrant for the Georgia parole violation was invalid. In addition, he claims that even if the warrant was valid, the arrest itself was invalid because it was merely a pretext to permit the officers to question him about the murder for which he was condemned. Both arguments fail.

A. The Validity of the Arrest Warrant

The Georgia parole violation warrant was validly issued in September of 1990, shortly after Langley left that state without permission. Defendant was arrested in Louisiana on the outstanding Georgia warrant in February 1992, about 14 months after the Georgia warrant was issued, and only a few days after the murder of Jeremy Guillory. The arresting officers told defendant that they were arresting him for the parole violation, but also that they wanted to question him about the missing child. They twice advised Langley of his *Miranda* rights, and he confessed almost immediately on simply being asked whether he killed the boy. After the officers again explained his rights, and after Langley again expressly waived them, he confessed in detail, and allowed police to videotape him as he confessed and led them to the boy's body. In all, Langley was advised of his rights no less than four times.

Langley argues that the parole violation warrant became invalid because Georgia waived its right to execute it. Parolees and probationers have due process rights concerning revocation of their paroles or probations. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). However, these due process rights are less than those involved in an ordinary criminal prosecution. *Id.*, 411 U.S. at 788-89, 93 S.Ct. At 1762-63; *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). An unreasonable delay in executing a parole violation warrant may violate a parolee's due process rights in some cases. *See State v. Savoy*, 429 So. 2d 542 (La. App. 2d Cir. 1983). However, this is not such a case.

Some courts have spoken in terms of "staleness" and "waiver" with regard to unreasonable delays in the execution of parole violation warrants. *See, e.g., Green v. Michigan Dept. of Corrections*, 315 F.2d 546, 547-48 (6th Cir. 1963); *United States v. Hamilton*, 708 F.2d 1412, 1414 (9th Cir. 1983). However, the underlying rationale of waiver or staleness concepts is the deprivation of the parolee's or probationer's constitutional rights to due process. *See People ex rel. Flores v. Dalsheim*, 413 N.Y.S.2d 188, 192 (N.Y. App. Div. 1979); *Barker v. State*, 479 N.W.2d 275, 278-79 (Iowa 1991). To hold that a parole violation warrant becomes stale by the mere passage of time alone would be to reward an elusive parole violator for remaining unavailable. *Flores*, 413 N.Y.S.2d at 192 (delay of almost three years not a violation of due process); *Barker*, 479 N.W.2d 275 (four year delay not violation of due process); *Shelton v. United States Bd. of Parole*, 388 F.2d 567 (D.C. Cir. 1967). In addition, waiver alone is not the proper rationale for invalidating a warrant, because waiver implies both a knowing relinquishment of a right, and the authority of a parole officer to relinquish that right on behalf of the state. *Flores*, 413 N.Y.S.2d at 192. *See also Saunders v. Michigan Dept. of Corrections*, 406 F. Supp. 1364, 1366-67 (E.D. Mich. 1976) (noting that mere inaction does not amount to waiver).

Under a due process analysis, the length of time between the issuance and execution of a parole violation warrant is but one factor in determining its continuing validity. *Barker v. State*, 479 N.W.2d 275, 279 (Iowa 1991). A delay in execution must be unreasonable before due process is affected. *United States v. Fisher*, 895 F.2d 208, 210 (5th Cir. 1990); *United States v. Hill*, 719 F.2d 1402, 1405 (9th Cir. 1983); *State v. Newman*, 527 So. 2d 1036-39 (La. App. 2d Cir. 1988). Factors in assessing reasonableness include (1) the state's diligence in attempting to serve the warrant; (2) the reason for the delay in serving the warrant; (3) the conduct of the parolee in frustrating service; and (4) actual prejudice suffered by the parolee as a result of the delay. *Fisher*, 895 F.2d at 210; *Barker*, 479 N.W.2d at 278-79.

We also note that the aim of the entire parole concept is "to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed." *Morrissey*, 408 U.S. at 477-79, 92 S.Ct at 2598-98. In accordance with this aim, parole authorities have inherently broad discretion in the supervision of parolees. *Id*. Parole authorities are not in a race against the clock to execute parole

violation warrants. *United States v. Gernie*, 228 F. Supp. 329, 338 (S.D.N.Y. 1964). Nor must arrest and revocation be an automatic or reflexive reaction to every violation. *Hamilton*, 708 F.2d at 1415; *United States v. Tyler*, 605 F.2d 851, 853 (5th Cir. 1979).

According to the record, including testimony adduced at two separate suppression hearings on this issue, in the time between the issuance of the warrant and its execution, Georgia authorities may have initiated a process which might eventually have led to transferring Langley's parole supervision to Louisiana authorities. Langley claims to have spoken with his Georgia parole officer, Ben Poole, who purportedly said they could "work something out." (However, the defendant did not subpoena Poole.) Also about this time, Elizabeth Clark, the Louisiana parole agent, was in communication with Georgia authorities through her office. At their request, she verified that Langley was residing at his parents' home in Louisiana. Though Clark had no official authority to supervise Langley, she attempted to maintain contact with him unofficially. However, in November of 1991, without any transfer having been accomplished, Langley stopped reporting to Clark. In December of 1991, he moved from his parents' house without informing Clark, who could not locate him. In fact, Langley was not finally located until after the murder, when Clark informed investigators of Langley's last known residence (his parents' house). The investigators matched Clark's description of Langley with the description given by the victim's mother and discovered he was living in the Lawrence house where the murder occurred.

Also in September of 1991, Langley asked Louisiana State Trooper Charles Jones to see if there was a Georgia warrant out for Langley. At a pre-trial hearing, Jones testified that he told Langley he would check for warrants, and that he advised Langley to get in touch with local parole authorities to see about getting his parole transferred to Louisiana. Jones also testified that the first time he checked the computer for a warrant he found none, but a few days later he checked again and did find the Georgia warrant. Jones further testified that when discovered the warrant, he went out to arrest Langley at Langley's work place, but could not find him there. Finally, Jones testified that when he did see Langley some time later, he assumed that Langley had probably reached an arrangement with the Georgia parole authorities, based on Jones's discussion with Langley when they first spoke in September, as

well as Jones's belief that Langley and his employer were attempting to contact Georgia authorities.

The court of appeal accurately summarized the matter when denying relief on Langley's motion to suppress:

> Louisiana was investigating the defendant and the transfer had not been officially completed. Until the transfer of the defendant's parole supervision had been completed, Georgia retained the authority to execute the warrant. During this period, the defendant once again absconded from supervision, never informing anyone about his new residence, and exhibited his inability to conform to conditions of parole. The defendant's actions had frustrated the attempts by both Georgia and Louisiana authorities either to transfer parole supervision or to execute the parole violation warrant.

State v. Langley, 94-00326 (La. App. 3d Cir. 1994); 635 So. 2d 784, 785.

Under these circumstances, Langley's due process rights were not violated. First, law enforcement authorities were reasonably diligent in attempting to serve the warrant. Langley's whereabouts were simply not known or easily ascertainable from September 1990 to September 1991. Second, the Georgia authorities had a valid reason for delaying the execution of the warrant while attempting to transfer parole. Instead of having Langley arrested immediately in September of 1991, they exercised their discretion in attempting to fulfill the aims of the parole concept. They did not "waive" their right to execute the warrant, nor did they relieve Langley of his parole obligations. Any attempt at a transfer of parole was necessarily conditioned on Langley's cooperation. Third, Langley's own conduct frustrated service of the warrant. After no more than three months, and before any transfer of supervision could occur, Langley stopped his unofficial reports to Clark, and moved from his residence. Efforts to locate him had to begin anew. Fourth and finally, Langley cannot claim he was prejudiced by the delay in his arrest, partly because he was responsible for the delay, and also because he had no reasonable basis to expect that any parole transfer would proceed without adverse consequences to him if he did not do his part. A delay in execution of a parole violation warrant may frustrate the violator's due process rights if the delay undermines his ability to contest the violation, or to proffer mitigating evidence. *United States v. Tippens*, 39 F.3d 88, 90 (5th Cir. 1994). These elements of prejudice are not present in this case.

In addition, we note that the defendant claims that only Georgia waived its right to execute the warrant. The Louisiana arresting authorities confirmed the existence of a facially

and objectively valid warrant and relied in good faith upon on it. Even if we decided that there were problems with the warrant, which we do not, we would not be inclined to apply the exclusionary rule against those acting in good faith on a facially valid warrant. *See United States v. Leon*, 468 U.S. 897, 918-19, 104 S.Ct. 3405,3418, 82 L.Ed.2d 677 (1984). *Cf. also United States v. Hensley*, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (police may act on wanted bulletins issued by police departments possessing probable cause or reasonable suspicion to have the defendant seized).

B. The "Pretextual" Arrest

The officers who arrested Langley did so under the authority of a valid warrant. Thus, their subjective intent to examine defendant about the murder is not significant. "Subjective intent alone … does not make otherwise lawful conduct illegal or unconstitutional." *Scott v. United States*, 436 U.S. 128, 136, 98 S.Ct. 1717, 1723 (1978). The relevant principle of *Scott* is that "so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry." *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (citing *Scott*). Like Langley, the defendant in *Causey* sought to have his confession suppressed because he was arrested under a warrant for one crime, but questioned about another. *Causey*, 834 F.2d at 1180. The Fifth Circuit noted that the rule of suppression exists "to deter *unlawful* actions by police. Where nothing has been done that is objectively unlawful, the exclusionary rule has no application." *Causey*, 834 F.2d at 1185 (emphasis in original). Therefore, even though the police suspected that the defendant was involved in the disappearance of Jeremy Guillory, the arrest was nonetheless proper because they had an objective reason to arrest him for violation of his Georgia parole. *See also United States v. Whren*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed. 2d 89 (1996) (allowing pretextual warrantless arrests based on probable cause).

Finally on the suppression issue, when the defendant was arrested, the officers properly explained his *Miranda* rights to him. He indicated he understood his rights and confessed to killing Jeremy Guillory. He was subsequently advised of his rights no fewer than three more times, and he waived his rights each time. His confession was voluntary and untainted by any form of coercion or undue influence. There is, therefore, no basis for suppressing the confession or any other evidence seized pursuant to defendant's arrest.

ASSIGNMENT OF ERROR NO. 16: Some Prospective Jurors Excluded for Cause

A. The Exclusion of Dr. Perry Prestholdt

The defendant argues that the trial court wrongly allowed the State to exclude venireman Dr. Perry Prestholdt (a professor of psychology) for cause, and that the error mandates that the death sentence be vacated. If the granting the State's challenge of Dr. Prestholdt were error, it would not be subject to harmless error review. *Gray v. Mississippi*, 481 U.S. 648, 667-68, 107 S.Ct. 2045, 2056-57 (1987) (not subject to harmless error review). It would invalidate the death sentence, but not the conviction. *Witherspoon v. Illinois*, 391 U.S. 510, 522, n.21, 88 S.Ct. 1770, 1777, n. 21 (1968) (affects only penalty). *See also State v. Smith*, 340 So. 2d 247, 250-51 (La. 1976); *State v. Hunter*, 340 So. 2d 226, 231-32 (La. 1976). However, the trial judge did not abuse his discretion in dismissing Dr. Prestholdt or any other juror for cause.

The state has a "legitimate interest in obtaining jurors who [will] follow their instructions and obey their oaths." *State v. Williams*, 96-1023, p.5 (La. 1/21/98); __ So. 2d __ (quoting *Adams v. Texas*, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526 (1980)). The state may require "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Id*. Not all death penalty opponents are subject to removal for cause, however. "[T]hose who firmly believe that the death penalty is unjust may nevertheless serve…in a capital case so long as they state clearly that they are willing to set aside their own beliefs in deference to the rule of law." *Lockhart v. McCree*, 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, 90 L.Ed. 2d 137 (1986) (emphasis added).

In accordance with these statements of law, Louisiana has enacted La.C.Cr.P. art. 798(2), which allows the state to challenge for cause:

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

> (c) That his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt….

In addition, a juror may be unqualified if he "is not impartial, whatever the cause [unless] he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence." La.C.Cr.P. art. 797(2).

To be properly excluded from the jury for cause, a prospective juror need not state unequivocally that he or she could not impose the death penalty. *Wainright v. Witt*, 469 U.S. 412, 419, 105 S.Ct. 844, 849, 83 L.Ed.2d 841 (1985). There need be "no ritualist adherence to a requirement that a prospective juror make it 'unmistakably clear…that [she] would automatically vote against the imposition of capital punishment….'" *Id.* (citations omitted, emphasis in original). The *Witt* Court continued:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear". . . there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . this is why deference must be paid to the trial judge who sees and hears the juror.

Id. 469 U.S. at 424-25, 105 S.Ct. at 852-53; *Williams*, 96-1023, pp. 8, 10; ___So. 2d at ___ (where trial judge noted potential juror's obvious "struggle" with *voir dire* questions regarding the death penalty). *See also State v. Nicholson*, 437 So. 2d 849, 853 (La. 1983) (where judge noted prospective juror's "body English"). Accordingly, the law only requires that the trial court's decision be "fairly supported" by the record reviewed "as a whole". *Witt*, 469 U.S. at 431, 105 S.Ct. at 856. *See also Williams*, 96-1023, p.10; ___So. 2d at ___ (trial judge should not merely consider correct answers in isolation, but potential juror's answers as a whole).

In support of his arguments that Dr. Prestholdt should have been seated, the defendant cites cases decided under the pre-1990 Code of Criminal Procedure article 798. *See State v. Berry*, 391 So. 2d 406, 410 (La. 1980); *State v. Copeland*, 530 So. 2d 526, 533 (La. 1988). Prior to 1990, the article required that the prospective juror must have made it "unmistakably clear" that he or she would "automatically" impose a life sentence no matter what the evidence. The current article, in effect at the time of the murder and trial, reflects the United States Supreme Court's *Witt* jurisprudence and eliminates the "unmistakably clear" requirement. It is also no longer necessary to show that the prospective juror would

"automatically" vote to impose life imprisonment. Now it need only be shown that the prospective juror's attitude would "prevent or substantially impair him from making an impartial decision." La.C.Cr.P. art. 798(2)(b).

On examination by the court, Dr. Prestholdt conceded that he was "very uncomfortable with the death penalty." When Mr. Bryant, the district attorney, asked Dr. Prestholdt whether his conscientious scruples would "prevent or substantially impair" him from making an impartial decision, Dr. Prestholdt indicated that he "would like to say" that he could be impartial, but "realistically, say, well, that's not true." It is apparent even from the transcript that Dr. Prestholdt conceded that his views on the death penalty would impair his partiality.

If the circumstances under which a prospective juror could vote for the death penalty are too narrowly limited, the prospective juror may be properly discharged for cause. This is similar to the issue we recently discussed in *Williams*, 96-1023; ___So. 2d ___. In our *Williams* opinion, we recognized that prospective jurors were properly excluded when their ability to decide on the death penalty would be substantially impaired by the presence of a mitigating factor — in that case the defendant's youth. *Williams*, 96-1023, pp. 9-10; ___So. 2d at ___. A juror must be able to consider mitigating factors. But when the trial judge, within his or her discretion, determines that a prospective juror's attitude towards a mitigating factor constitutes a "substantial impairment" of the juror's ability to impartially decide the case, then the prospective juror may be excluded. *Williams*, 96-1023, p. 10; ___So. 2d at ___. *See also State v. Jordan*, 420 So. 2d 420 (La. 1982) (prospective juror properly excused where he would vote for death penalty only if he witnessed the crime); *State v. Nicholson*, 437 So. 2d 849, 854 (La. 1983) (prospective juror would only vote for death penalty in a mass murder on the scale of Adolf Hitler or Charles Manson); *State v. Lindsey*, 543 So. 2d 886, 895-96 (La. 1989) (prospective juror might vote for death "where a person murdered 35 elementary school children").

In *voir dire* Dr. Prestholdt said that in order for hin to vote for the death penalty there would have to be "no mitigating circumstances." He later modified this requirement to "little or none". The prosecutor then asked Dr. Prestholdt:

> If there was anything, any mitigating factor brought up, then you would automatically vote against the death penalty?

Dr. Prestholdt:

> Automatically is a little harsh. But yes. If you're asking me what my biases are. In relation to the death penalty my biases would be to vote against the death penalty.

On the whole, Dr. Prestholdt's "requirement" that there be no mitigating evidence appears enough to justify disqualification. The trial judge was in the best position to interpret Dr. Prestholdt's statements in the context in which they were given and he did not abuse his discretion in excluding Dr. Prestholdt.

More significantly, however, Dr. Prestholdt volunteered, without being asked, that his views on the death penalty would affect his consideration of the evidence during the guilt phase of the trial. A prospective juror may be removed for cause if the juror's "attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt…." La.C.Cr.P. art 798 (2)(c); *State v. Welch*, 368 So. 2d 965 (La. 1979). Dr. Prestholdt said:

> I know that my opinions about the death penalty as consequences for crime will somehow affect the judgments that are made, and my view of the evidence.

Mr. Bryant:

> I understand. It would also affect your view of the evidence. Is that correct?

Dr. Prestholdt:

> Realistically, I believe that's true.

Mr. Walker, defense counsel, tried to rehabilitate Dr. Prestholdt.

Mr. Walker:

> And I think I understood you to say that you could be fair during --- there's no question about your ability to be fair during the first stage of the trial where the death penalty is not an issue, the only issue is guilt or innocence?

Dr. Prestholdt:

> No. I will try to be fair. Realistically and honestly, the fact that there is a death penalty as a consequence of a juror's decision in this case, it has to have some impact on the way I view evidence and the way I make decisions.

Dr. Prestholdt's admission that his attitude toward the death penalty would influence his view of the evidence of guilt or innocence is basis for his dismissal.

In sum, Dr. Prestholdt was, at best, equivocal as to whether he could follow the judge's instructions as to the burden of proof or the death penalty. Though he sometimes

suggested that he would try to follow the judge's instructions and impartially consider either the evidence or the penalty, he consistently backed off of this position by reiterating his opposition to the death penalty. Dr. Prestholdt also voluntarily noted the effect his opposition would likely have on the determination of guilt or innocence.

The trial judge saw Dr. Prestholdt's facial expressions and body language, and he heard the tone and inflection of his voice. The trial judge also applied the proper standard under *Witt* and article 798 when he found that Dr. Prestholdt's attitude toward the death penalty "would prevent him or substantially impair him from making an impartial decision." Under these circumstances, the trial judge did not abuse his discretion in dismissing Dr. Prestholdt for cause.

B. The Exclusion of Mr. Wilbert Robertson

The defendant also argues that Mr. Wilbert Robertson was also improperly excused for cause when he could have sat with the requisite impartiality. Initially, when asked if he could consider imposing the death penalty Mr. Robertson stated, "I don't know." Although the defense attempted to rehabilitate him, when asked whether he could consider imposing a death sentence and consider imposing a life sentence, he again answered that he did not know. When questioned further he said, "I guess I have to know the evidence of what happened." The defense tried one last time by asking: "But you're not ruling out the possibility that, in fact, you could vote for the death sentence if you were convinced that the facts were really bad enough?" Mr. Robertson answered, "I guess. I don't know."

These responses do not indicate that Mr. Robertson could consider the death penalty. Despite being repeatedly asked if he could apply it he was never able to clearly state that he could consider it. Accordingly, the trial judge properly granted the State's challenge with regard to Mr. Robertson.

ASSIGNMENT OF ERROR NO. 21: An Alleged Impediment to Some Mothers' Jury Service

In this novel assignment of error the defendant argues that the refusal of the trial court to take steps to enable mothers of small children to sit as jurors deprived Langley of a fair trial. The Court may excuse petit jury members when family problems "would make service on a sequestered jury an undue hardship." *State v. Sheppard*, 350 So. 2d 615, 650 (La. 1977). Likewise, a trial judge may excuse a prospective juror in cases in which jury service

would entail significant financial hardship and prevent him or her from concentrating fully on the case. *State v. Sears*, 298 So. 2d 814, 820 (La. 1974), *overruled on other grounds by State v. Lovett*, 345 So.2d 1139 (La. 1977). Although the economic impediment to jury service caused by the lack of compensation or support services may be less than ideal, it is not the role of this Court to establish a system in which lost wages and child care are provided to jurors who demonstrate economic hardship but nonetheless desire to serve. In any event, we fail to discern how the defendant may have been prejudiced by the exclusion of this vaguely defined group. Accordingly, this assignment lacks merit.

CONCLUSION

The defendant, Ricky Langley, raises no errors that would mandate reversal of his conviction or death sentence.

DECREE

The defendant's conviction and sentence of death are hereby affirmed for all purposes, except that this judgment shall not serve as a condition precedent to execution, as provided by La. R.S. 15:567, until (a) the defendant fails to petition the United States Supreme Court timely for certiorari; (b) that Court denied his petition for certiorari; (c) having filed for and been denied certiorari, the defendant fails to petition the United States Supreme Court timely, under their prevailing rules, for rehearing of denial of certiorari; or (d) that Court denies his application for rehearing.

SUPREME COURT OF LOUISIANA

No. 95-KA-1489

STATE OF LOUISIANA

v.

RICKY JOSEPH LANGLEY

Appeal from the 19th Judicial District Court,

Parish of East Baton Rouge,
Honorable Fred Godwin, Judge

UNPUBLISHED APPENDIX TO OPINION

Calogero, C.J.

ADDITIONAL ARGUMENTS UNDER ASSIGNMENT OF ERROR NO. 1:
The Limiting of Mitigation Evidence

A. The Exclusion of "Victim Impact" Testimony

In addition to the arguments addressed in the published opinion, the defendant also argues under his first assignment of error that he should not have been barred from putting on "victim impact" evidence during the penalty phase. Specifically, the defendant contends that the trial judge committed reversible error by not allowing him to call the victim's mother to testify about the difficulty she had with her son's murder and how, in the words of defense counsel, she "wants to meet with Mr. Langley because she feels like it's going to help her deal with [Jeremy's murder]."

The Eighth Amendment does not preclude some limited "victim impact" testimony from members of the victim's family. *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597,

115 L.Ed.2d 720 (1991). However, permissible victim-impact evidence does not include "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence…." *Id.*, 501 U.S. at 831 n. 2, 111 S.Ct. at 2611 n.2. Admissible victim impact evidence is designed to show "each victim's 'uniqueness as an individual human being' whatever the jury might think the loss to the community resulting from his death might be." *Id.*, 501 U.S. at 823, 111 S.Ct. at 2607. "Evidence of the victim's survivor's opinions about the crime and the murderer is clearly irrelevant to any issues in a capital sentencing hearing." *State v. Bernard*, 608 So. 2d 966, 970-71 (La. 1992). As the State notes in brief, Ms. Guillory's belief that she would benefit from talking to the defendant is irrelevant and does not fall within the scope of victim impact evidence which helps to show the victim as a unique individual. Accordingly, this argument lacks merit.

B. Some Alleged Improper Comments About Deception

Though the argument does not directly related to the purported exclusion of mitigating evidence, defendant also argues under this assignment of error that the State committed reversible error when it repeatedly argued that the defense had been misleading the jury. The assistant district attorney introduced this theme during the rebuttal when she stated:

> I'm also amazed by the statements that [defense counsel] makes. We admit that Ricky Langley showed no mercy to Jeremy Guillory. Well, they spent three days trying to convince you that he didn't know it was Jeremy Guillory. So, how can he come in here now and say we admit, he showed no mercy to Jeremy Guillory? Do you know why? Because this entire process has been about fooling you and misleading you.

Several different times throughout the rebuttal she referred to the fact that the defense was misleading the jury and argued the defense "theme of the case, pretend to be open, but mislead as much as you can." The State's remarks referred to the defense's somewhat inconsistent arguments of both a lack of responsibility and remorse. Moreover, "references to 'smoke screens,' while undesirable, plainly do not rise to the level of prejudice necessary to constitute reversible error." *State v. Martin*, 539 So. 2d 1235, 1240 (La. 1989). Similarly, in this case the State's remarks do not constitute reversible error.

ADDITIONAL ARGUMENTS UNDER ASSIGNMENT OF ERROR NO. 2: The Prior Bad Acts

A. A Prior Conviction

Under his second assignment of error, the defendant contends that the evidence of his Georgia child molestation charge was inadmissible under *State v. Jackson*, 608 So. 2d 949 (La. 1992), and that it was highly misleading and unreliable. At the penalty phase, the State produced Sonya Freeman (fourteen years old at the time of trial), whom the defendant had molested when she was six years old. The defense moved for a pre-trial hearing anticipating that her testimony would be unreliable because she was only six at the time of the crime, and also because her testimony would be tainted by therapy she received. The court denied the motion over defense objection.

Due to the risk that evidence of convictions for serious crimes inject an arbitrary factor into the sentencing hearing, evidence supporting the conviction is limited "to the document certifying the fact of conviction and to the testimony of the victim or of any eyewitness to the crime." *Jackson*, 608 So. 2d at 954. Evidence of the original charge is specifically prohibited when the conviction is for a lesser offense. *Id*. The defense moved for a mistrial claiming that Ms. Freeman's testimony suggested that the defendant raped Ms. Freeman when in fact he pled guilty to the lesser charge of attempted crime against nature. Testimony about rape would have violated *Jackson* because Langley was convicted of attempted crime against nature rather than rape.

However, Ms. Freeman's testimony proved not to unfairly prejudice the defendant. Ms. Freeman merely testified that she and the defendant were naked and he laid her on a pallet, but that she had no further recollection of anything except for the ambulance arriving and the doctor examining her vagina. Neither Ms. Freeman nor the prosecution mentioned or implied rape. After Ms. Freeman's testimony, the State marked and entered into evidence State exhibit number 49, a document certifying conviction of the defendant for attempted crime against nature. Thus, the State's presentation conformed to *Jackson*, 608 So. 2d at 954. In addition, there was no indication that Ms. Freeman's sparse testimony was unreliable or tainted in any way.

B. The Defendant's Behavior in Jail

Also under his second assignment of error, the defendant argues that the trial court erroneously allowed Marilyn McFarland, the nurse for the Calcasieu Parish Sheriff's Department, to testify to Ricky's alleged disciplinary violations. Ms. McFarland testified that when she first came into contact with the defendant he was yelling and screaming. He was not hearing voices, but simply "acting out." She also testified that the defendant liked to tease people at the jail who had trouble dealing with the type of crime defendant was accused of committing. Moreover, she testified that she never saw the defendant act withdrawn or as if he heard voices. She was in contact with the defendant for approximately two and a half years while he was at the Calcasieu Parish Correctional Center, and she simply recounted her observation of the defendant's behavior.

The testimony of the jail nurse regarding the defendant's behavior is evidence of his character, and was clearly at issue — especially because the defense claimed that the defendant hallucinated, spoke with his dead brother, and was insane. La.C.Cr.P. art. 905.2 (character of defendant automatically at issue in penalty phase). *See also Jackson*, 608 at 953. As the State correctly argues, the Code of Criminal Procedure does not require notice of this type of testimony. *See* La.C.Cr.P. art. 701 *et seq.*, arts. 717 & 720. This argument lacks merit.

ASSIGNMENT OF ERROR NO. 3: Some Penalty Phase Testimony

A. Sergeant Schroeder's Testimony

In his third assignment of error, the defendant argues that State witness Sgt. Larry Schroeder was erroneously allowed to testify that the defendant would get out of jail and "do it again." He also argues that the prosecution compounded the error by arguing in closing that Langley "told Larry Schroeder later — he was in his presence and told him he enjoyed it, and that he would do it again … The most important thing to consider is that he enjoyed it, and if he ever got out he would do it again."

Schroeder, a transportation officer with the Department of Corrections, testified that in February or March, 1992, he was in Calcasieu Parish Courthouse when an inmate he had transported there, Gerald Foley, brought Langley to his attention. According to Schroeder, while he was guarding the holding cell where his prisoner and the defendant were waiting, the defendant told Schroeder that he had killed and molested a boy and that he had enjoyed it.

Schroeder also testified that, "Langley said that if he ever got out he would do it again."[8] On cross-examination the defense confronted Schroeder with testimony he had given the previous March when he did not mention that the defendant said that if he got out he would do it again.

B. The Alleged Improper Reference in Closing Argument

The defendant first argues that the prosecutor's reference to the statement in closing argument constitutes reversible error, because it is a comment on future remedial measures. Closing argument must be "confined to the record evidence and the inferences which can reasonably and fairly be drawn therefrom." *State v. Smith*, 554 So. 2d 676, 681 (La. 1989), *overruled on other grounds by State v. Taylor*, 93-2201 (La. 2/28/96); 669 So.2d 364; La.C.Cr.P. art. 774. Both sides may draw their own conclusions from the evidence and "may press upon the jury any view arising out of the evidence." *State v. Moore*, 432 So. 2d 209, 221 (La. 1983), *cert. denied*, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed. 367 (1983). The statement of which the defendant complains is simply a direct reference to testimony properly elicited during the penalty phase and therefore came well within the permissible scope of closing argument.

C. The Defendant's Alleged Lack of Notice

The defense also argues that the court erroneously allowed the witness to testify about the statement itself. The defense argues that this statement should have been produced in response to its discovery requests for any statements made by the defendant. Discovery rules are intended to eliminate unwarranted prejudice arising from surprise testimony and evidence, to permit the defense to see the State's case, and to allow proper assessment of the strength of its evidence in preparing a defense. La.C.Cr.P. art. 716 *et seq.*; *State v. Statum*, 390 So. 2d 886, 890 (La. 1980), *cert. denied*, 450 U.S. 969, 101 S.Ct. 1489, 67 L.Ed.2d 619 (1981). The State's failure to comply with discovery rules does not bring automatic reversal; prejudice must be shown. *State v. Schrader*, 518 So. 2d 1024, 1031-32 (La. 1988); *State v. Sweeney*, 443 So. 2d 522, 527 (La. 1983). When the defendant is lulled into the misapprehension of the state's case through the prosecution's failure to disclose timely or fully and the defendant

[8]The admissibility of this statement was litigated pre-trial and the Third Circuit ruled that the statement was admissible in the penalty phase as the evidence relevant to the defendant's character and propensities. *See State v. Langley*, 94-0326 (La. App. 3rd Cir. 4/14/94); 635 So. 2d 784, 786.

suffers prejudice when undisclosed evidence is used against him, basic unfairness results which constitutes reversible error. *Sweeney*, 443 So. 2d at 527. However, the defense was aware of this statement because the admissibility of the statement was decided before trial in *State v. Langley*, 94-0326 (La. App. 3rd Cir. 4/14/94); 635 So. 2d 784, 786 (where the appellate court ruled that the statement would be admissible during the penalty phase). Therefore, the defense had sufficient notice and suffered no prejudice. This argument lacks merit.

D. The Prior Consistent Statement

In addition, the defense argues that the trial court erred by allowing Schroeder's prior written statement to Mike Byrne at the district attorney's office to be entered by the State as a prior consistent statement. The defendant claims that Schroeder added a critical element to his trial testimony, because when he testified at a pre-trial hearing on March 4, 1995, he did not include the fact that the defendant said that "if he got out he would do it again." Article 801(D)(1)(b) of the Code of Evidence provides that prior consistent statements of a witness are admissible "to rebut an express or implied charge against him of recent fabrication or improper influence or motive." Defendant impeached Schroeder by noting that Schroeder did not testify to the complete statement at the pre-trial hearing. Once the defendant suggested on cross-examination that the statement was recently fabricated, he opened the door to the rehabilitation of Schroeder's testimony with the prior consistent statement to Mr. Byrne at the district attorney's office, which was made before either the trial or the pre-trial hearing. *Cf. Tome v. United States*, 513 U.S. 150, 155-56, 115 S.Ct. 696, 700, 130 L.Ed.2d 574 (1995) (witness's prior consistent statements must have been made at an unsuspicious time when the motive to fabricate does not exist). The statement was therefore properly admitted.

ASSIGNMENT OF ERROR NO. 4: The Jurors' Conduct

In his fourth assignment of error, the defendant argues that the trial court erred when it denied the motion for new trial based on juror misconduct. The defendant primarily attacks the jury's alleged reliance upon the Bible during deliberations. In addition, he argues that the jury improperly speculated about the potential for the defendant's release.

Regarding juror disqualification, La. C.E. art. 606 (B) provides in pertinent part:

> Upon inquiry into the validity of a verdict … a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or

> any other juror's mind or emotions influencing him to assent to or dissent from the verdict … or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror, and in criminal cases only, whether extraneous prejudicial information was improperly brought to the jury's attention. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Those cases which have allowed jury testimony under art. 606(B) have focused on allegations of outside influence as opposed to testimony regarding deliberations. *See, e.g.*, *State v. Sinegal*, 393 So. 2d 684, 686 (La. 1981) (extraneous influences, direct or indirect, may invalidate a jury's verdict if the effect is not harmless; jury read obsolete law book during deliberations). The defendant's allegation that the jury speculated on whether the defendant would be released does not allege any outside influence, but focuses on the jury's deliberations. Accordingly, the jurors plainly are not eligible to testify regarding this matter, and this argument lacks merit. *See State v. Copeland*, 419 So. 2d 899, 904 (La. 1982) (jurors incompetent to testify about matters involving the deliberation process among themselves).

In the instant case, the defendant relies upon the affidavit of juror John Taylor in which Mr. Taylor says that the jurors opened their deliberations with a prayer and prayed together each day before going to the courthouse. Even assuming that we should consider Mr. Taylor's affidavit (which is dubious), his statement does not suggest that the Bible was used to find justification for sentencing the defendant to death. In *State v. Copeland*, 530 So. 2d 526 (La. 1988), the defendant moved for a mistrial after learning that the jury had prayed together at least three times a day during the trial. This Court ruled that "[r]eligious services among jurors do not constitute a substantial deprivation of constitutional rights necessary to overcome the prohibition against juror testimony." *Copeland*, 530 So. 2d at 544; *State v. Graham*, 422 So. 2d 123, 135-36 (La. 1982). Accordingly, this assignment is devoid of merit.

ASSIGNMENT OF ERROR NO. 5: The Aggravating Circumstance

In his fifth assignment of error, the defendant argues that the death penalty cannot stand because the only aggravating circumstance in this case is defined by an arbitrary status, the victim's age. In a pre-trial motion, the defense challenged the constitutionality of the under-12 aggravating circumstance. La.C.Cr.P. art. 905.4(A)(10). Louisiana Revised Statute 14:30 (A)(5) provides that first degree murder is the killing of a human being:

> When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

Article 905.3 of the Code of Criminal Procedure provides that, "a sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists…" At the time the defendant committed the crime, and at the time of his trial and conviction, La.C.Cr.P. art. 905.4 provided a list of the aggravating factors applicable under La.C.Cr.P. art. 905.3. One aggravating factor was that, "the victim was under the age of twelve years." (Acts 1995, No. 1179, § 1 amended the article by inserting "or sixty-five years or older" into subparagraph (A)(10).)

The creation of an aggravated factor falls within the plenary power of the state legislature to define and punish crimes. The legislature alone determines what are punishable as crimes and the proscribed penalties. *State v. Dorthey*, 623 So. 2d 1276, 1278 (La. 1993); *State v. Woljar*, 477 So. 2d 80, 81-81 (La. 1985). Legislative enactments are presumed constitutional under both federal and state constitutions. *Gregg v. Georgia*, 428 U.S. 153, 175, 96 S.Ct. 2909, 2926, 49 L.Ed.2d 859 (1976). The party challenging the constitutionality of a statute bears a heavy burden in proving that statute to be unconstitutional. *Id*. The defendant make no showing that the statute is or was unconstitutional. Moreover, the aggravating circumstance is proper because it provides a "principled distinction between those who deserve the death penalty and those who do not." *Lewis v. Jeffers*, 497 U.S. 764, 776, 110 S.Ct. 3092, 3099, 111 L.Ed.2d 606 (1990). Accordingly, this assignment lacks merit.

ASSIGNMENT OF ERROR NO. 6: The Denial of Allocution

In his sixth assignment of error the defendant argues that the trial court committed error by not allowing the defendant his right of allocution at the sentencing hearing. In *State v. Thibodeaux*, 96-0656 (La. 3/15/96); 669 So. 2d 1207 (*per curiam*), this court held that a defendant is not entitled to address the jury in the penalty phase of a capital case unless he is subject to cross-examination. In *State v. Williams*, 96-652 (La. App. 3d Cir. 2/5/97); 688 So. 2d 1277, 1284, the Third Circuit explained that the "right of allocution has normally been

reserved to a defendant addressing the sentencing judge." *Id*.[9] The Third Circuit denied the defendant the right to give closing arguments, and correctly noted the danger that the defendant would attempt to testify without being under oath, and that he would introduce additional testimony without being subject to cross examination. *Id*. In this case, the defense was merely repeating its attempts to elicit testimony from Langley without his being under oath, and without subjecting him to cross examination. The trial court properly resisted the attempts and this assignment lacks merit.

ASSIGNMENT OF ERROR NO. 7: The Denial of the Jury's Request to Review Evidence

In his seventh assignment of error, the defendant argues that the trial court erred by not allowing the jury to review defense evidence upon request. After the jury retired for deliberation in the penalty phase, the trial judge received a note requesting "all material available." The defense requested that, because written materials such as the defendant's medical records could not be sent into the jury, if the jury wanted to see such materials, they should be allowed to come into the courtroom to view them. The judge denied the defense request to send back or allow the jury to view all of the defense evidence.

Article 793 of the Code of Criminal Procedure provides:

> A juror must rely upon his memory in reaching a verdict. He shall not be permitted to refer to notes or to have access to any written evidence…Upon the request of a juror and in the discretion of the court, the jury may take with it or have sent to it any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict.

See also State v. Perkins, 423 So. 2d 1103, 1109-1110 (La. 1982) (jury not to inspect written documents for the contents during deliberation); *State v. Johnson*, 541 So. 2d 818, 824 (La. 1989) (error to allow jury to view autopsy and crime lab reports where they would only assist jury if examined for content). Evidence such as the defendant's medical records could only have aided the jury if they reviewed the contents. Thus the judge properly ruled that although the jurors could view the photographs, they were not entitled to the written evidence. This assignment lacks merit.

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[9]*See, e.g., Boardman v. Estelle*, 957 F.2d 1523 (9th Cir. 1992) (defendant wanted to address trial judge at sentencing hearing, in non-capital case, in order to address letter written by victim's father concerning impact of molestation on son).

ADDITIONAL ARGUMENTS UNDER ASSIGNMENT OF ERROR NO. 8: The Penalty Phase Instructions

In his eighth assignment of error, the defendant argues that the trial court erroneously instructed the jury in the penalty phase.

A. The Lack of an Instruction on Mitigation and Unanimity

The defendant first contends that the trial court erred by failing to instruct the jurors that they should consider the mitigating factors as individuals and that they need not unanimously agree on mitigating factors.[10] The defendant maintains that absent clear instruction from the trial court there is danger that the jurors might have misunderstood how to consider mitigating factors.

In *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed. 2d 384 (1988), the Court found that instructions that emphasized the need for unanimity in decision making could

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[10] At the penalty phase the jury was instructed:

> You are required to consider the existence of aggravating and mitigating circumstances in deciding which sentence should be imposed. You must decide the weight to be given each aggravating and mitigating circumstance….
>
> Before you could decide that a sentence of death should be imposed you unanimously must find beyond a reasonable doubt that an aggravating circumstance existed.
>
> If you find that an aggravating circumstance existed, you may consider imposing a sentence of death. The finding of an aggravating circumstance does not mean that you must impose the death penalty. If, however, you do not find beyond a reasonable doubt that a statutory aggravating circumstance existed, then life sentence is the only sentence that may be imposed.
>
> Even if you find the existence of an aggravating circumstance, you must also consider any mitigating circumstances before you decide that the sentence of death should be imposed. The law does not provide for a burden of proof with respect to mitigating circumstances. The weight to be given such circumstances is a decision which you must make. The law specifically provides certain mitigating circumstances. They include….
>
> You are not limited only to those mitigating circumstances which are defined. You must consider any other relevant circumstances which you feel should mitigate the severity of the penalty imposed. Although you may unanimously agree beyond a reasonable doubt that at least one statutory aggravating circumstance exists, you would be free, even in the absence of any evidence of mitigation, to return a verdict of life imprisonment without the benefit of probation, parole, or suspension of sentence.

have led jurors to believe that unanimity among the jury was required to find the existence of a mitigating circumstance. In *Mills* it was not made clear to the jury that any juror alone could find the presence of a mitigating factor and vote for life, thus preventing a death sentence. Indeed, the verdict form asked the jurors to mark "yes" to indicate which if any mitigating factors they had "unanimously" found. *Id.*, 486 U.S. at 387, 108 S.Ct. at 1871. The Supreme Court vacated Mills's sentence on the ground that one or more of the jurors might have been precluded from considering mitigating factors. *Id.* 486 U.S. at 384, 108 S.Ct. at 1870.

However, the jury instruction in the instant case is unlike that of *Mills* or *Kubat v. Theriet*, 867 F.2d 351 (7th Cir. 1989). In *Mills*, the Court was analyzing Maryland's three-part sentencing scheme. In part one, the jury found whether any aggravating circumstances existed. In part two, the jury found whether any mitigating circumstances existed. In the final part, the jury weighed the aggravating circumstances against the mitigating circumstances. *Mills*, 486 U.S. at 384-89, 108 S.Ct. at 1870-72. The error in the charge occurred because the trial judge repeatedly instructed jurors that decisions had to be unanimous without stating that the unanimity requirement was inapplicable to the second part consideration of mitigating circumstances. *Id.*, 486 U.S. at 377-79, 108 S.Ct. at 1867.

In *Kubat v. Theriet*, 867 F.2d 351 (7th Cir. 1989), the trial court instructed the jury: "If after your deliberations you unanimously conclude that there is a sufficiently mitigating factor or factors…" and the verdict form reiterated this instruction. *Kubat*, 867 F.2d at 369-370. The Seventh Circuit relied on *Mills* to find that there was a substantial possibility that one or more of the jurors might have been precluded from granting mercy because of a mistaken belief that the sufficiency of mitigating factors had to be found unanimously. *Kubat*, 867 F.2d at 373.

However, the jury instruction in the instant case is unlike that of *Mills* or *Kubat* because neither the instruction nor the verdict form mentions unanimity in connection with the mitigating circumstances. As a result, the dangers present in the instruction in *Mills* and *Kubat* are not present here.

In *State v. Tart*, 93-0772 pp. 41-42 (La. 2/9/96); 672 So. 2d 116, 149, in instructing the jurors in the penalty phase, the trial judge read the list of statutory mitigating factors and

instructed the jurors that they must consider any other relevant factors. The judge did not instruct the jurors that consideration of these factors did not have to be unanimous. This Court held that, "[a] fair reading of the instructions does not suggest a requirement of unanimity in consideration of a mitigating factor." *Id*. *See also State v. Flowers*, 441 So. 2d 707, 716 (La. 1983), *cert. denied*, 466 U.S. 945, 104 S.Ct. 1931, 80 L.Ed. 2d 476 (1984). Similarly, the instruction in the instant case does not suggest that jurors must unanimously find a mitigating factor for it to be considered. Accordingly, this argument lacks merit.

B. The Failure to Assign a Burden of Proof to Mitigation

The defendant next argues that the trial court's instructions to the jury in the penalty phase require a reversal because the jury was not instructed as to what the burden of proof should be as to mitigation. The judge instructed the jury, "[t]he law does not provide for a burden of proof with respect to mitigating circumstances. The weight to be given such circumstances is a decision which you must make." The defense urges there is no other realm of the law where jurors are not told the burden of proof, and there should be no exception where mitigation is concerned, because mitigation is such a critical determination.

In *State v. Jones*, 474 So. 2d 919, 932 (La. 1985), *cert. denied*, 470 U.S. 1178, 100 S.Ct. 2906, 90 L.Ed. 2d 982 (1986), the Court rejected an argument that the trial court should have charged that the jury might find mitigation based on "any substantial evidence" or a preponderance of the evidence. "The capital sentencing procedure does not establish any presumptions or burdens of proof with respect to mitigating circumstances." *State v. Sonnier*, 402 So. 2d 650, 657 (La. 1981), *cited in Jones*, 474 So. 2d at 932. The lack of standard gives the defendant an advantage because the jurors are not precluded from voting their conscience even in the event that there is little mitigating evidence presented. The jury merely has "to consider" evidence of any mitigating circumstance and "weigh" it against any aggravating circumstance. *Sonnier*, 402 So. 2d at 657. This argument lacks merit.

C. An Alleged Required Instruction Regarding Failure to Testify

The defendant next argues that the trial court erred by failing to instruct jurors in the penalty phase that they could not draw negative inferences from the defendant's failure to testify. In support of his argument the defendant relies upon the decision in *People v. Ramirez*, 457 N.E.2d 31 (Ill. 1993), which ruled that the defendant was entitled to an

instruction on the right not to testify at the penalty phase. However, the *Ramirez* decision does not support the defendant's claim in this case. In *Ramirez*, the trial court refused to give an instruction tendered by the defendant for inclusion in the court's charge. The *Ramirez* court was guided by the United States Supreme Court's holding in *Carter v. Kentucky*, 450 U.S. 288, 305, 101 S.Ct. 1112, 1121-22, 67 L.Ed.2d 241 (1981), that "a state trial judge has a constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." In *Ramirez* the defendant testified voluntarily at the guilt phase, but declined to testify at the penalty phase. *Ramirez*, 457 N.E.2d at 35. The prosecutor argued that the defendant had waived his Fifth Amendment privilege by testifying at the guilt phase. *Id*. In addition, the prosecutor plainly referred to the defendant's failure to testify in the sentencing phase. *Id*. at 37. The Illinois Supreme Court held the refusal of the *Ramirez* trial judge to give the requested "no inference" instruction with respect to the penalty phase was reversible error. *Id*. at 35-36.

In this case, there was no request for an instruction. In addition, there was no apparent need for one, because Langley, unlike Ramirez, did not testify at the guilt phase which might have caused confusion among the jurors as to whether the defendant retained his privilege against testifying at the penalty phase.

At the end of the guilt phase, the judge had charged that the defendant was not required to testify and that no presumption of guilt nor inference of any kind could be drawn from the fact that the defendant did not testify.[11] During the penalty phase the judge instructed the jurors that they could "consider the evidence adduced at the guilt-determination trial." Under the circumstances, it is reasonable to conclude that the jurors applied the instruction from the guilt phase when the defendant did not testify. *See State v. Tart*, 93-0772, p. 44 (La. 2/9/96); 672 So. 2d 116, 150 ("The jury was allowed to consider Tart's [lack of] guilt phase testimony

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[11]The judge instructed the jurors:

> The defendant in a criminal trial has a constitutional right not to testify in the case. If he does not testify, this may not be held against him in any way. Under our system of laws, the State bears the burden of proof in this case and no burden of any kind rests upon the accused. A person may elect not to testify for any number of reasons. Despite the number and variety of reasons why a person may elect to assert his constitutional right not to testify, it would be a violation of your oath as a juror for you to speculate in any manner at all as to why the defendant did not testify. This shall have no bearing on your decision whatsoever.

in its determination of sentence; thus it was previously instructed that no inference could be drawn from the defendant's failure to testify."). This assignment lacks merit.

D. The "No Sympathy" Instruction

In his next argument, the defendant contends that the trial court erroneously left the jurors with the idea that they could not individually consider sympathy for a person who suffered chronic mental illness. The defense contends that there were many reasons to be sympathetic for the defendant in this case, and the trial judge committed reversible error by instructing the jurors not to consider sympathy in the guilt phase and by not instructing them otherwise in the penalty phase. However, this Court has upheld instructions to jurors to remain uninfluenced by sympathy, even during the penalty phase of a capital trial. *See State v. Brogdon*, 457 So. 2d 616, 629 (La. 1984); *State v. Watson*, 449 So. 2d 1321, 1331-32 (La. 1984). Accordingly, the judge was not required to instruct the jurors that they could consider sympathy in the penalty phase, an instruction jurors may have (mis)applied to the victim as well as to the defendant. This assignment lacks merit.

ASSIGNMENT OF ERROR NO. 9: The Death Penalty and "Mental Disease"

In this assignment of error the defendant argues that the death penalty is not appropriate in this case because of the defendant's mental disabilities. The defendant has not argued any circumstances specific to him which would suggest that the death penalty is inappropriate, but rather argues that the death penalty in this case is excessive and disproportionate considering his disabilities. His mere assertion that the death sentence is not appropriate because of his various disabilities lacks merit. *See Mitchell*, 674 So. 2d at 255. *See also Blystone v. Pennsylvania*, 494 U.S. 299, 304-305, 110 S.Ct. 1078, 1082, 108 L.Ed.255 (1990) ("jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime") (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)).

At the penalty phase of trial, the jury was instructed to consider as a mitigating factor:

> The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;
>
> At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect.

By instructing the jury to consider mitigating circumstances such as a mental defect, the court discharged its principal duty under the Eighth Amendment. Based upon the instruction, the jury had full opportunity to consider the copious evidence offered at both the guilt and sentencing stages to show the defendant's mental deficiencies or disabilities. *Cf. Boyde v. California*, 494 U.S. 370,383, 110 S.Ct. 1190, 1199, 108 L.Ed.2d 316 (1990) (fact that jury heard much mitigating evidence made it unlikely that they failed to consider it). The jury was simply not persuaded that the alleged mental defect mitigated the harshness of the crime. Whether the sentence is disproportionate is treated fully in the Capital Sentencing Review, *infra*, pursuant to this Court's self-imposed duty under Rule 28 to review the proportionality of the sentence.

In addition, the defendant's claims of arbitrariness or caprice in prosecutorial discretion in seeking the death penalty lack merit, as indicated in the Capital Sentencing Review.

ADDITIONAL ARGUMENT UNDER ASSIGNMENT OF ERROR NO. 10: The Defendant's Competency after His Removal from the Courtroom

The defense also argues that the judge erred by failing to ascertain whether the defendant was even competent to stand trial because — according to the defense — Langley's outbursts were not intentional but were uncontrollable emotional convulsions. A trial court is required to order a mental examination of the defendant only if there is a reasonable basis to doubt the defendant's competency to stand trial. *State v. Charles*, 450 So. 2d 1287, 1290 (La. 1984) (trial court did not err by refusing defendant's request for continuance and redetermination of competency). Before trial, a sanity commission determined that Langley was competent to stand trial. After his outburst at trial, the defendant did not offer any evidence to suggest that he was no longer competent. Although the proceeding obviously was emotionally taxing, the defendant was able to understand the proceedings and his emotions do not appear to have impeded his ability to assist his attorneys in his defense.

A defendant is mentally incompetent to stand trial when he lacks the capacity to understand the proceedings against him or to assist counsel in preparing a defense. La.C.Cr.P. art. 641; *State v. Narcisse*, 426 So. 2d 118, 127-28 (La. 1983), *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983). A defendant has the burden of proving by a preponderance of the evidence that he lacks competency to stand trial. *Narcisse*, 426 So. 2d

at 128; *Charles*, 450 So. 2d at 1289. The trial court's determination of capacity to stand trial is entitled to great weight and will not be overturned on appeal absent clear abuse of discretion. *State v. Bickham*, 404 So. 2d 929, 934 (La. 1981). The original determination of Langley's competency was not an abuse of discretion, and the trial judge was not required to order a reexamination of the defendant prior to proceeding with the trial. Accordingly, this asignemt lacks merit.

ASSIGNMENT OF ERROR NO. 11: The State's Guilt Phase Closing Arguments

In his next assignment of error the defendant argues that the district attorney made improper and highly prejudicial comments in his closing argument during the guilt phase of trial. He alleges that the district attorney implied that the jury should ignore the insanity defense because the defendant might be released, and also alleges that the district attorney referred to the defendant's failure to testify. As we have noted earlier, a conviction will not be reversed for improper closing argument unless the court is thoroughly convinced that the remarks influenced the jury and contributed to the verdict. *State v. Taylor*, 93-2201, p. 21 (La. 2/28/96), 669 So. 2d 364, 375; *State v. Jarman*, 445 So. 2d 1184, 1188 (La. 1984).

A. The Insanity Defense and Speculation on Possible Release

In the State's rebuttal during closing arguments, the prosecutor argued the following:

> We talked a lot about responsive verdicts and crimes and different things that you heard about. You are not here to determine the sentence in this case. That has nothing to do with why you here. You're here simply to determine guilt or innocence. And we listen to this idea, well, you know, he's going to be punished no matter what happens, you know, this idea that, well, even if it's life imprisonment, insanity, and he said something to the effect that he would be put in jail, and he could be in jail for as long as the maximum sentence which is life, and could be released. He could be released any time, next week, next month.

Defense counsel approached the bench at this point and moved for a mistrial which the judge denied. The prosecutor resumed his rebuttal argument and stated that "it is up to the judge to determine when he'll be released, and that can be at any time." The defendant's attorney again approached the bench and the judge told the district attorney that he had to include the fact that the defendant could be released from a mental hospital only after a judge determined that he was not a danger to himself or others. The defense again moved for a mistrial and the judge denied it. The district attorney resumed his argument: "After a hearing if a judge

determines that he could not be a danger to himself or others, he can be released from the mental institution. When that occurs will be up to the court and those people who'll decide that."

Although the prosecutor's initial comment was highly improper, he ultimately corrected the statement. It is unlikely that the erroneous comment contributed to the verdict once the jury was informed that the defendant, if found not guilty by reason of insanity, would not be released until a judge found that he was not dangerous to himself or others. This argument lacks merit.

B. An Alleged Reference to the Defendant's Failure to Testify

The defendant also contends that the district attorney committed reversible error by referring to the defendant's failure to testify. La.C.Cr.P. art. 770(3) provides that the trial court "shall" declare a mistrial when the prosecutor "refers directly or indirectly to …[t]he failure of the defendant to testify in his own defense…." The prohibition against such prosecutorial comments safeguards the defendant from unfavorable inferences which might otherwise be drawn from his silence. *State v. Fullilove*, 389 So. 2d 1282, 1283 (La. 1980). The rule helps implement a defendant's Fifth Amendment right against self-incrimination and is constitutionally required. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965).

When the prosecutor makes a direct reference to the defendant's failure to take the stand, a mistrial should be declared, and "it is irrelevant whether the prosecutor intended for the jury to draw unfavorable inferences from defendant's silence." *Fullilove*, 389 So. 2d at 1284. Where the reference to the defendant's failure to take the stand is not direct, this Court will inquire into the remark's "intended effect on the jury" in order to distinguish indirect references to the defendant's failure to testify (which are impermissible) from general statements that the prosecution's case is unrebutted (which are permissible). *State v. Johnson*, 541 So. 2d 818, 822 (La. 1989). *See also State v. Bourque*, 622 So. 2d 198, 240 (La. 1993); *State v. Jackson*, 454 So. 2d 116, 118 (La. 1984).

The statement at issue was made during the State's closing argument when the district attorney was arguing about the lack of evidence that the defendant hallucinated and heard voices. He argued: "You know, he didn't hear any during the entire period of time he was in

Georgia, and he didn't hear any and there's no evidence or testimony he hears any when he's in jail. But when he's out of jail, I guess that's when it happens."[12]

The test to determine the intent of such a statement was articulated in *Johnson*: "In cases where the prosecutor simply emphasized that the state's evidence was unrebutted, and there were witnesses other than the defendant who could have testified on behalf of the defense but did not do so, the prosecutor's argument does not constitute an indirect reference to the defendant's failure to take the stand." *Johnson*, 541 So. 2d at 822-823. *See also Bourque*, 622 So. 2d at 239-40; *State v. Smith*, 433 So. 2d 688, 697 (La. 1983); *State v. Latin*, 412 So. 2d 1357, 1362 (La. 1982). On the other hand, where the defendant is the only witness who could have rebutted the State's evidence, "a reference to the testimony as uncontroverted focuses the jury's attention on the defendant's failure to testify" and mandates a mistrial. *State v. Perkins*, 374 So. 2d 1234, 1237 (La. 1979). *See also State v. Harvill*, 403 So. 2d 706, 711 (La. 1981); *Fullilove*, 389 So. 2d at 1282. Furthermore, arguments merely addressing a theory of defense, not the election not to testify, reflect no intent on the part of the prosecutor to emphasize the defendant's decision not to testify and thus do not violate art. 770(3). *State v. Banks*, 627 So. 2d 756, 758 (La. App. 2nd Cir. 1993).

In the instant case, the prosecutor's comments merely addressed the theory of the defense regarding the defendant's insanity evidenced by his hallucinations. Immediately before the statement to which the defense objects, the district attorney was addressing the failure of Dr. Ware to talk to people where the defendant had been incarcerated to find out how the defendant acted during his incarceration. Consequently, this comment was not an indirect reference to the fact that the defendant did not testify, but rather a comment on the weakness in the defendant's theory of insanity and the inadequacy of Dr. Ware's testimony. This assignment lacks merit.

ASSIGNMENT OF ERROR NO. 14: The Photographs of the Victim

In his next assignment of error, the defendant argues that the trial court erred by allowing the State to use photographs of the victim at the guilt phase. The defendant contends that, because he stipulated to the fact that he killed the victim, and how he did it, the

[12]The defense did not object to this statement at that time.

photographs were admitted only for the emotional impact that they would have on the jury and served only to inflame the jury's prejudice. In addition, the defense objected generally to the use of still photographs as cumulative because the videotape of the discovery of the body had already been admitted into evidence. The defendant has not specified which photographs he believes were erroneously admitted into evidence; he simply makes a broad objection to the admissibility of the photographs as a whole.

It is well-established that photographs of the body of the deceased victim relevant to prove *corpus delicti*, to corroborate other evidence of the manner in which death occurred and to establish the location and number of wounds. *State v. Perry*, 502 So. 2d 543, 558-59 (1986); *State v. Watson*, 449 So. 2d 1321, 1326 (La. 1984), *cert. denied*, 469 U.S. 1181, 105 S.Ct. 939, 83 L.Ed.2d 952 (1985). The cumulative nature of photographic evidence does not render it inadmissible if it corroborates the testimony of witnesses on essential matters. *State v. Lane*, 414 So. 2d 1223, 1227 (La. 1982); *State v. Brown*, 414 So. 2d 689, 698 (La. 1982). Moreover, "the defendant cannot deprive the state of the moral force of its case by offering to stipulate to what is shown in photographs." *Perry*, 502 So. 2d at 559. Accordingly, murder photographs are inadmissible only when they "are so gruesome as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient other evidence." *Id*.

The photographs show the murdered child's body slumped in the defendant's closet. They depict the line tied tightly around the boy's neck, the dirty sock in the boy's mouth and some signs of decomposition. They are, of course, very unpleasant. Still, they are not "so gruesome as to overwhelm the jurors' reason." *Id*.

Before allowing photographs of the victim at trial, the judge looked at all of the photographs which the State wanted to present and excluded those which were not relevant or which were cumulative. The judge ruled that the still photographs provided a different context than the videotape and that the still photographs were probative because they allowed the jury to focus on a particular feature or aspect of the case. The judge also stated that the photographs were not "unduly prejudicial given the necessity of showing some of the specific things that are displayed in each of these pictures." The trial judge excluded photographs he found to be cumulative, and he considered whether the probative value of each of the

photographs outweighed the prejudicial impact. We agree. Accordingly, it was not error to admit the photographs into evidence.

ASSIGNMENT OF ERROR NO. 15: The Instructions at the Guilt Phase

In this assignment of error the defendant argues that the trial court's instructions at the end of the guilt phase misstated the law and erroneously instructed the jury in several areas.

A. The Lack of an Instruction on theVoluntariness of a Statement

The defendant first argues that the trial court erred by not instructing the jury that if it believed the defendant's statement to be involuntary, it should be given no weight at all.

The court instructed the jury as follows:

> If you find that the defendant made a statement, you must also determine the weight or value that the statement should be accorded, if any. In determining the weight or value to be accorded a statement made by a defendant, you should consider all the circumstances under which the statement was made. In making that determination, you should consider whether the statement was made freely and voluntarily, with the influence of fear, duress, threats, intimidation, inducements, or promises.

The trial court's instruction tracks the suggested charge on voluntariness of statements in 1 *Louisiana Judge's Criminal Bench Book*, § 5.01 (1993). Moreover, the Due Process Clause does not absolutely bar a jury from considering an involuntary statement. *See Arizona v. Fulminante*, 499 U.S. 279, 295, 111 S.Ct. 1246, 1257, 113 L.Ed.2d 302 (1991) (introduction of involuntary statement constitutes trial error subject to harmless-error analysis). In addition, the defendant fails to show that the model instruction given here misled the jury. *See State v. Jefferson*, 379 So. 2d 1389 (La. 1980) (instruction based on Code of Criminal Procedure acceptable where jury not misled), *overruled on other grounds by State v. Mack*, 403 So.2d 8 (La. 1981).

B. The Presumption Regarding Mental State

The defendant next argues that it was unconstitutional to instruct the jury that the mental state of a mentally ill man is the same as an average person's mental state. In *State v. Mitchell*, 94-2078 (La. 5/21/96), 674 So. 2d 250 (La. 1996), where the defendant had an IQ of 66 (making him mildly mentally retarded), the judge instructed the jury that it "[m]ay infer that the defendant intended the natural and probable consequences of his acts." *Id.* at 254-56 The *Mitchell* defense challenged the instruction on the ground that it created an improper

presumption regarding the burden of proof. This Court upheld the instruction and stated that it was not erroneous because it did "not set forth a conclusive presumption shifting the burden of proof from the state to the defendant." *Id*. at 255 The jury in this case was instructed: "You are permitted to infer that the defendant intended the natural and probable consequences of his act." As in *Mitchell*, the trial court's instruction does not constitute error, and this assignment lacks merit.

C. The Instruction Regarding Lesser Offenses

The defendant also argues that the trial court erroneously instructed the jury that they could not consider a lesser offense until they first determined that he was not guilty of first degree murder.

The judge instructed the jury: "If you are not convinced that the defendant is guilty of first degree murder, you may find the defendant guilty of a lesser offense if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser offense." The defendant argues that this instruction has the effect of taking away consideration of the possible lesser verdicts from the jury's consideration unless they can all agree that the defendant is not guilty of first degree murder. The defendant acknowledges that this Court considered and rejected a similar argument in *State v. Sanders*, 93-0001 (La. 11/30/94); 648 So. 2d 1272, 1278-1280, but asks that this Court reconsider its holding in *Sanders* and rule that the instruction is improper.[13]

The jury instruction in this case, like the one in *Sanders*, states clearly that the jury could consider second degree murder and manslaughter in addition to first degree murder. As this Court stated in *Sanders*, the instructions "do not contain error because they do not present 'the reasonable likelihood' that jurors were prevented from considering evidence of the mitigating factors." *Sanders*, 648 So. 2d at 1280 (citing *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed. 2d 316 (1990)). Given the similarity between the instructions, *Sanders* applies to this case. And because the defendant offers no reasons for reconsidering *Sanders*, this assignment lacks merit.

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[13]In *Sanders*, the judge stated: "If you are not convinced that the defendant is guilty of the offense charged, you may find the defendant guilty of a lesser offense." *Sanders*, 648 So. 2d at 1278-79 n.1.

D. The Instruction on Reasonable Doubt

In his next argument the defendant argues that the trial court erred by giving an erroneous instruction on reasonable doubt. The judge instructed the jury:

> While the State must prove guilt beyond a reasonable doubt, it does not have to prove guilt beyond all possible doubt. Reasonable doubt is based on reason and common sense and is present when after you have carefully considered all the evidence you cannot say that you are firmly convinced of the truth of the charge.

The defendant, relying in part upon *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 162 L.Ed 339 (1990), argues that the instruction is improper.

In *Cage*, the United States Supreme Court held that the instruction was unconstitutional because it allowed a finding of guilt based on a degree of proof below that required by the due process clause of the Fourteenth Amendment. *Cage*, 398 U.S. at 40-41, 111 S.Ct. at 329 (quoting flawed instruction). However, the Court in *Cage* determined that the use of the terms "grave uncertainty," "moral uncertainty" and "actual substantial doubt" may have left the jury with the impression that a higher degree of uncertainty was necessary than that suggested by the term "reasonable doubt." *Id*.

The instruction in this case, which tracks the proposed charge on reasonable doubt in 1 *Louisiana Judge's Criminal Bench Book*, § 303 (1993), did not include any terms which would mislead the jury. In addition, according to the United States Supreme Court's reexamination of its reasonable doubt jurisprudence undertaken in *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994),[14] and this Court's implementation of *Victor* in *State v. Smith*, 91-0749 (La. 5/23/94); 637 So. 2d 398, the instruction in the instant case did not allow the jury to convict without satisfying the reasonable doubt requirement. Thus, the instruction passes constitutional muster, and defendant's argument fails.

ADDITIONAL ARGUMENTS UNDER ASSIGNMENT OF ERROR NO. 16:
The Exclusion of Prospective Jurors

A. The Limited *Voir Dire* of Ms. Louise Smith

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[14]In *Victor*, the United States Supreme Court held that the proper inquiry when a defendant challenges a "reasonable doubt" intruction is "not whether the instruction 'could have' been applied in an unconsitutional manner, but whether there is a reasonable likelihood that the jury did so apply it." *Victor*, 511 U.S. at 6, 114 S.Ct at 1243 (emphasis in original).

In his next argument under his sixteenth assignment of error, the defendant contends that the trial judge erroneously limited his *voir dire* questioning of juror Louise Smith and did not give him enough of a chance to rehabilitate the witness. The defendant contends that the State erroneously restricted him from questioning Ms. Smith in an attempt to rehabilitate her comments which indicated that she was not certain if she could impose the death penalty.

The scope of *voir dire* examination lies within the sound discretion of the trial court and its ruling will not be disturbed in the absence of a clear abuse of that discretion. *State v. Lee*, 559 So. 2d 1310, 1315-1316 (La. 1990). Although a court has discretion to restrict *voir dire*, it must nevertheless afford the attorneys wide latitude in examining prospective jurors as a means of giving effect to an accused's right to full *voir dire*. *Id.*; La. Const. art. I, §17; La.C.Cr.P. art. 786; *State v. Hall*, 616 So. 2d 664, 668-669 (La. 1993). Thus, limits on the scope of jury selection and *voir dire* examination may not be so restrictive as to deprive counsel of a reasonable opportunity to determine grounds for challenges for cause and for the intelligent exercise of peremptory challenges. *Hall, 616 So. 2d at 668-69*; *State v. Duplessis*, 457 So. 2d 604, 606 (La. 1984).

Initially, when asked by the judge if she could consider imposing the death penalty, Ms. Smith said that she did not know if she could give fair consideration to imposition of the death penalty. The district attorney asked if she had a problem with the imposition of the death penalty she said, "Well, yeah, sometimes. I don't know." Upon further questioning she stated that she could impose the death penalty if, after hearing all of the evidence, she thought that it was the right thing to do. However, she later indicated, upon hearing another prospective juror's comments, that she did not think that she could impose the death penalty because she would have to live with her decision and did not want to be responsible for taking a life. When given an opportunity to rehabilitate her, the defense attorney explained that she did not have to impose the death penalty even if the other jurors wanted to, but she just had to be able to consider it. He then asked whether, given that it was an intentional murder and perhaps a small child was killed, she could then consider imposing a death sentence. Again, Ms. Smith responded that she did not know. At that point the judge interceded and dismissed the juror on *Witherspoon* grounds.

The defense attorney was allowed to present a hypothetical based upon this case and ask Ms. Smith if she could impose the death penalty, and she still remained uncertain. An overall reading of Ms. Smith's *voir dire* examination indicates that she would not be able to consider fairly the death penalty and it was not an abuse of the judge's discretion to cut off the questioning and dismiss the juror. The excusal of a prospective juror by the trial court, even on its own motion, 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). This assignment lacks merit.

B. The Exclusion of Ms. Suzanne Ballard

The defendant also argues that the trial court erred by excusing prospective juror Suzanne Ballard because of her sympathy toward mentally ill people. During her *voir dire* examination, Ms. Ballard stated that she worked with mentally handicapped adults, and that this work would affect the manner in which she viewed the evidence at trial, because from what she had seen of the defendant he appeared to be "a little bit along those lines." She stated that she would be more favorable to the defendant because of her work, and that she was not sure that she could be neutral and fair because of her feelings. The defense attempted to rehabilitate her regarding whether she could be sympathetic and yet weigh the evidence, but she continued to express doubts about whether she could be fair.

Although the defendant argues that the trial judge erroneously excused a juror for being sympathetic to the mentally ill, Ms. Ballard's responses during *voir dire* suggest more than sympathy. *Cf. Williams*, 96-1023, pp. 9-10; ___So. 2d at ___ (where prospective jurors would be more than sympathetic to youthful offender). Ms. Ballard's answers indicate that she could not be impartial, and that her decision as a juror would be heavily influenced by her feelings, notwithstanding the evidence presented. Again, the trial judge did not abuse his discretion in excusing her.

C. The Exclusion of Mr. Jesse Ghoram

The defense also argues that prospective juror, Jesse Ghoram, was unconstitutionally dismissed because his opposition to the death penalty was based upon religious beliefs. The defense provides no support for its claims. In any event, it is well established that the prosecution may exclude from a capital jury those are unable properly and impartially apply

the law to the facts of the case at the guilt or sentencing phase, regardless the basis of the inability. *Lockhart v. McCree*, 476 U.S. 162, 175-77, 106 S.Ct. 1758, 1766-67 (1986) (distinguishing exclusion based on racial, ethnic or other inherent characteristics from exclusion based on attitude toward law). *See also* La.C.Cr.P. art. 798; *State v. Ross*, 623 So. 2d 643, 644 (La. 1993). This assignment lacks merit.

D. An Alleged Disparate Racial Impact

Finally under this asignment, the defendant argues that *Witherspoon* challenges were unconstitutional because they had a disparate racial impact. In support of this novel argument the defense notes that while the jury pool was only 24% black, 56% of those excluded under Witherspoon were black. As noted in the preceeding section, a prospective juror may be challenged for cause if he or she is unable to follow the law and the instructions, regardless of the cause of the inability. *See id*. Accordingly, disparate impact is irrelevant where there are valid grounds for exclusion for cause. This argument is essentially a still-born *Batson* challenge. Where a prospective juror is excluded for cause, there is no chance for the defendant to make a *prima facie* case of discrimination because the court has already accepted a race-neutral reason for excluding the jurors. *Cf.* "Assignment of Error No. 20: The Batson Challenge."

ASSIGNMENT OF ERROR NO. 17: The Excusal of Allegedly Impartial Jurors

The defendant argues in his seventeenth assignment of error that the trial court erred by failing to exclude jurors who could not be impartial — specifically, prospective jurors Faye LaCour and Lorraine Bossier. This assignment is moot, because defense counsel failed to exhaust his peremptory challenges. Even in a capital case, a defendant must show that he has used all of his peremptory challenges before he may successfully claim that an erroneous denial of a challenge for cause warrants reversal of his conviction. *State v. Mitchell*, 94-2078 (La. 5/21/96); 674 So. 2d 250, 254 (citing *State v. Cross*, 93-1189 (La. 6/30/95); 658 So. 2d 683). The defendant concedes in brief that he used only nine of his allotted peremptory challenges. However, he attempts to explain that he was faced with upcoming jurors who were far less palatable. The erroneous denial of a cause challenge forcing the defense to hoard its remaining peremptory challenges provides a theoretical means of avoiding the exhaustion requirement for showing prejudice. *See State v. Vanderpool*, 493 So. 2d 574, 575 (La. 1986).

But the record contains no support for counsel's bald assertion that the defense began hoarding its challenges in response to the cause rulings excluding jurors LaCour and Bossier.

ASSIGNMENT OF ERROR NO. 18: The Limits on the Defendant's *Voir Dire* Questioning

In this assignment of error the defendant argues that the trial court erred by restricting the kinds of questions which he could ask on *voir dire*. He contends that he was erroneously restricted from asking prospective jurors about whether they knew the cause of delusions, and what they thought it meant to say "madness is punishment in itself." He contends that this was important because the question was designed to delve into whether jurors really could contemplate the notion of the insanity defense.

Voir dire examination is broad in scope so that the defendant may determine the jurors' qualifications by testing their competency and impartiality, discover challenges for cause and intelligently exercise peremptory challenges. *State v. Hall*, 616 So. 2d 664 (La. 1993). Nevertheless, *voir dire* does not encompass unlimited inquiry into all possible prejudices of prospective jurors, including their opinions on evidence, or its weight, hypothetical questions, or questions of law that call for any prejudgment of supposed facts in the case. *State v. Burton*, 464 So. 2d 421, 425-26 (La. App. 1st Cir.), *writ denied*, 468 So. 2d 570 (La. 1985). As previously and amply noted, the scope of *voir dire* examination lies within the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a clear abuse of that discretion. *State v. Lee*, 559 So. 2d 1310, 1315-1316 (La. 1990).

To determine if an accused has been afforded sufficiently wide latitude on *voir dire* to uncover the basis for challenges for cause and information for intelligent exercise of peremptory strikes, a review of the trial court's rulings "should be undertaken only on the record of the *voir dire* examination as a whole." *State v. Hall*, 616 So. 2d 664, 668 (La. 1993) (citing *State v. Williams*, 457 So. 2d 610 (La. 1984)); *State v. Jackson*, 358 So. 2d 1263, 1266 (La. 1978).

Overall, the trial judge gave the defense considerable leeway in conducting *voir dire*. Although the court would not allow the defendant to ask prospective jurors specifically about the phrase "madness is punishment in and of itself," it did allow inquiriy into whether jurors could consider mental illness as a mitigating factor. Similarly, although the defendant was not allowed to ask about the jurors' knowledge regarding the causes of delusions, and whether

they were genetically determined, he was allowed to investigate jurors' attitudes about mental illness and the impact those attitudes might have on their deliberation in this case. Assuming for the sake of argument that the defendant's specific questions should have been allowed, when the *voir dire* is viewed as a whole these restrictions do not constitute reversible error.

ASSIGNMENT OF ERROR NO. 19: The Refusal to Conduct Individual *Voir Dire*

In this assignment of error the defendant contends that the trial court erred by denying individual *voir dire*. The trial court has discretion over the manner in which venireman are called and the scope of the *voir dire* examination, and there is no provision of law that requires individual *voir dire*. *State v. Copeland*, 530 So. 2d 526, 535 (La. 1988), *cert. denied*, 489 U.S. 1091, 109 S.Ct. 1558 (1989); *State v. Comeaux*, 514 So. 2d 84, 88 (La. 1987). The trial court does not err in refusing requests for individual *voir dire* without a showing of special circumstances. *Id*. The defendant must show there will be a significant possibility that individual jurors will be unable to serve because of exposure to potentially prejudicial material. *State v. David*, 425 So. 2d 1241, 1247 (La. 1093). The fact that a case is a capital case does not alone establish the existence of "special circumstances." *Copeland*, 530 So. 2d at 535; *Comeaux*, 514 So. 2d at 88; *State v. Wingo*, 457 So. 2d 1159, 1165 (La. 1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2049 (1985).

The defendant does not cite any particular prejudice to which the jurors were exposed by increasing the panel from three to six jurors. Although the questions regarding molestation were highly personal, the court allowed individual *voir dire* on that issue the entire time. Defendant's bare assertion that a panel of six prejudiced him is not sufficient to show that individual *voir dire* was warranted. This argument lacks merit.

ASSIGNMENT OF ERROR NO. 20: A *Batson* Challenge

In this assignment of error the defendant argues that the State was allowed to purge the jury of certain social and racial groups. Specifically, the defendant argues that the State improperly used peremptory challenges to exclude black jurors in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). The defendant relies on the fact that the jury panel was 76% white, but four out of seven of the State's peremptory challenges were against black jurors. Under *Batson*, a defendant must first establish a *prima facie* case of discrimination by showing facts and relevant circumstances which imply that the

prosecutor used his peremptory challenges to exclude potential jurors on account of race. *Batson*, 476 U.S. at 96-98, 106 S.Ct. at 1723-24. The prosecution then may offer a race-neutral reason for the challenge. *Id*.

Here, the defendant failed to preserve his complaint by objecting to the exclusion of black jurors during *voir dire* or at any time before the jury was empaneled and sworn, and so waived any claim based on it. *State v. Williams*, 524 So. 2d 746 (La. 1988). The defendant concedes that there was no objection at trial, but he argues that the *Batson* claim is preserved by the pre-trial motion in which he objected to the State using race as a basis for striking jurors. However, under *Batson*, an objection is necessary at the time of trial to allow the court to determine if the defense has made its *prima facie* case and to allow the prosecution to offer its racially neutral reasons. Here, because counsel did not object, the record does not indicate the composition of the jury panel. Thus, defendant can make no *prima facie* case, and the prosecution has no opportunity to rebut it with race neutral reasons for the use of peremptory challenges. Accordingly, this assignment lacks merit.

ASSIGNMENT OF ERROR NO. 22: The Refusal of the Police to Talk to the Defense

In his twenty-second assignment of error the defendant argues that the trial court erred when it prevented him from deposing personnel from the Calcasieu Parish Sheriff's Office who refused to speak to the defense based on unofficial department policy. The defendant noted that although the officers would not speak with his investigator, the police spoke with the district attorney's office and routinely turned over police reports.

Neither the state nor the defense may instruct its witnesses not to speak with opposing counsel; the choice belongs to the witness alone. *State v. Hammler*, 312 So. 2d 306, 309 (La. 1975). In *State v. Harris*, 367 So. 2d 322, 323 (La. 1979), the defendant filed a motion which alleged that a key state witness, Officer Taplin, refused to speak with the defense and the refusal impeded his defense. The motion argued that the officers refusal was based in part on the advice of the district attorney's office. At a hearing on the motion Officer Taplin admitted that he refused to speak with the defense, but stated that his decision not to speak with them was not on the advice of the district attorney's office. *Id*. In denying the defendant's motion, this Court noted that, "a witness may or may not speak with opposing

counsel and that determination shall be made by the witness alone, but the state may not deny the defense access to the witness." *Id.* at 324 (citing *Hammler*, 312 So. 2d 306).

Similarly, in the case at bar, the officers who refused to speak with the defense were not acting under the direction of the district attorney's office. The witness were entitled to speak or not speak with whomever they chose prior to trial. "The right to confront witnesses is a trial right, and attempts to employ it for pretrial discover[y] have been rejected." *Harris*, 367 So. 2d at 323. The defendant has not shown that his right to a fair trial was abridged, and this assignment lacks merit.

ASSIGNMENT OF ERROR NO. 23: The Denial of Some Pre-Trial Motions

In this assignment, the defendant argues that the trial court erroneously denied his motion to dismiss the indictment because of discrimination in the selection of the grand jury foreman. He also argues that the indictment should be dismissed for lack of a preliminary hearing,

A. The Alleged Discrimination in the Selection of the Grand Jury Foreman

The defendant moved to quash the indictment on grounds of discrimination in the selection of grand jury forepersons. Although the defendant preserved this issue for appeal by filing his pre-trial motion, the defendant — a white male — lacks standing to raise equal protection or due process claims challenging the exclusion of blacks and women from serving as grand jury foreman. *State v. Campbell*, 95-824 p. 2 (La. 10/2/95), 661 So. 2d 1321, 1322-23 (*per curiam*) (defendant claiming an equal protection violation in the selection of grand jury foreman must be of the same race or identifiable group as those allegedly excluded), *cert. denied*, __ U.S. __, 116 S.Ct. 1673, 134 L.Ed.2d 777 (1996). In addition, discrimination in the selection of a grand jury foreman does not threaten a defendant's due process rights because the foreman's job is essentially clerical. *Hobby v. United States*, 468 U.S. 339, 344-45, 104 S.Ct. 3093, 3096, 82 L.Ed. 2d 260 (1984). *See also State ex rel. Williams v. Whitley*, 629 So. 2d 343 (La. 1993) (Marcus, J., dissenting) Accordingly, this assignment lacks merit.

B. The Lack of a Preliminary Hearing

In his next argument, the defendant contends that the trial court erred when his motion for preliminary hearing was erroneously denied. However, this prosecution was initiated by

grand jury indictment. Consequently, the existence of a preliminary examination rests with the discretion of the trial judge. La.C.Cr.P. art. 292. Here, the trial judge did not abuse his discretion in denying a preliminary hearing. Moreover, the primary function of a preliminary hearing is to determine whether probable cause exists to hold the accused in custody. *State v. McCloud*, 357 So. 2d 1132, 1134 (La. 1978). A conviction renders the question of probable cause moot in the absence of specific prejudice. *State v. Washington*, 363 So. 2d 509, 510 (La. 1978). In this case, the defendant fails to show prejudice; thus, this assignment lacks merit.

C. Some Alleged Discovery Violations

The defendant argues that the prosecution resisted many of his discovery requests. Discovery rules are intended to eliminate unwarranted prejudice arising from surprise testimony and evidence, to permit the defense to see the State's case, and to allow proper assessment of the strength of its evidence in preparing for a defense. La.C.Cr.P. art. 716 *et seq.*; *State v. Statum*, 390 So. 2d 886, 890 (La. 1980), *cert. denied*, 450 U.S. 969, 101 S.Ct. 1489 (1981). The defendant specifically notes in his argument that, "[w]hile some of the violations will come to light in post-conviction, when the public records shield drops from the prosecution's non-disclosure, Mr. Langley objects to the limited discovery now to preserve his rights." In his argument, the defendant specifically mentions only his request for rap sheets, but does not specify what other information the State failed to provide and has not shown how he was prejudiced.

The defense has a right to the rap sheets of the state's witnesses. *See State v. Miles*, 569 So. 2d 972 (La. 1990); *State v. Laird*, 551 So. 2d 1310 (La. 1989). Assuming that there was a discovery violation, the State's failure to comply with discovery rules does not bring automatic reversal; prejudice must be shown. *State v. Schrader*, 518 So. 2d 1024, 1031-32 (La. 1988); *State v. Sweeney*, 443 So. 2d 522, 527 (La. 1983). The defendant has failed to show that any of the State's witnesses had criminal rap sheets and has not specifically alleged any other discovery violations. Accordingly, this assignment lacks merit.

ASSIGNMENT OF ERROR NO. 24: The CAPITAL SENTENCING REVIEW

In his twenty-fourth assignment of error the defendant asks this Court to review the record to determine whether the death sentence was imposed arbitrarily or due to passion or prejudice. This review is accomplished through this Court's Capital Sentencing Review.

Under La.C.Cr.P. art. 905.9 and La.S.Ct. Rule 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, the Court considers whether the jury imposed the sentence under the 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.

The district judge has submitted a Uniform Capital Sentence Report and the Department of Corrections had submitted a Capital Sentence Investigation Report. In addition, the State filed a Sentence Review Memorandum.

A. The Factual Background

The Uniform Capital Sentence Report and the Capital Sentence Investigation Report indicate that defendant is a white male born on September 11, 1965. The defendant was 26 years old at the time of the offense. He has never been married and does not have any children. Defendant is the sixth of seven children born to Alcide Joseph Langley and Bessie Edna Coley Langley. His parents married in 1957, and between 1958 and 1963 they had five children. In early 1964 the family was moving from California to Louisiana. While driving through Arizona, they were involved in a single car accident when the family vehicle hit a bridge at high speed. The oldest child, Oscar Lee was decapitated, and Vickie, the youngest of the five, was also killed instantly. Bessie, Ricky's mother was thrown from the car, suffered numerous broken bones, and spent several days in a coma. She came out of the coma after four days, but was hospitalized for several weeks. Upon returning to Louisiana she continued to receive medical care at Charity Hospital. She was admitted for long periods of time and was encased in a body cast. She received a wide variety of medications during this period including Atropine, Vistaril, Librium, Demerol, Morphine, Chloral Hydrate, Codeine, Dibex, Chloromycetrin, Phenobarbital, Fergan, Seconal, and Inferon. In addition, she smoked and she would consume alcohol to help with the pain. When Mrs. Langley complained that her body cast was too tight the doctors discovered that she was pregnant.

Against the advice of her doctors she would not abort the fetus and while pregnant she continued receiving many of the aforementioned medications. There is no record of any problems evident at birth.

Because of his mother's medical condition the defendant was raised by his Aunt and Uncle, Ronnie and Linda Coley, only occasionally visiting his mother, until he was eight or nine years old. The defendant had a speech defect (articulation) and stuttered as a child. In 1977, when the defendant was twelve, he began to show signs of emotional disturbance. He appeared to talk to his dead brother, Oscar Lee, and at times claimed to be Oscar Lee. Occasionally, according to the defendant, Oscar Lee would "possess" him. In school, the defendant frequently claimed to be Oscar and was referred to mental health counseling. The defendant was an average to poor student and dropped out of school while repeating his 9th grade year.[15] He has an IQ between 70 and 100 which places him in the "medium" intelligence range.

A psychiatric evaluation reveals that defendant suffered from a schizotypal personality disorder, pedophilia and dysthymia (chronic depression). There was contradictory medical testimony at trial as to whether the defendant also suffered from intermittent psychotic episodes, and organic brain impairment. In addition, evidence was presented at trial that he suffers from a disease known as pica, which causes adults to eat non-nutritive substances such as rocks or dirt. Although the defendant pled not guilty and not guilty by reason of insanity, a psychiatric evaluation performed by a sanity commission indicates that the defendant was able to distinguish right from wrong at the time of the offense, was able to adhere to the right and was capable of cooperating in his defense. The defendant's sister testified that the family believes he had been abused, but family members do not know by whom or when the abuse occurred.

The Capital Sentence Investigation report indicates that the defendant has been arrested and convicted on two previous occasions. He was arrested by the Allen Parish Sheriff's Office on June 30, 1984, for crime against nature for molesting a seven-year-old boy. He

[15]He completed his GED while in jail.

pled guilty to attempted crime against nature and, on May 23, 1985, was sentenced to 30 months in the Department of Corrections, suspended, three years active probation.

On June 19, 1986, the defendant was arrested by the FBI in Indianapolis, Indiana, and was charged as a fugitive from Georgia for the crime of sodomy and theft by taking. He was accused of molesting a six-year-old girl in Conyers, Georgia. On September 26, 1986, he pled guilty to attempted crime against nature and theft by taking (for stealing a car from the girl's mother). He was sentenced to serve concurrent ten-year and five-year sentences in the Georgia Department of Corrections. The defendant was paroled from the Georgia Department of Corrections on June 25, 1990, with an expiration date of June 18, 1996. According to Gerald Horsley, Office Manager for the Conyers Parole Office, the defendant violated parole shortly after his release, and a warrant was issued for his arrest on September 24, 1990. The Lake Charles District Probation and Parole Office responded to a Request for Emergency Reporting Instructions sent by Georgia officials by contacting the defendant at his parent's home in Iowa, Louisiana, on September 21, 1991. The Lake Charles District Office continued to informally supervise the subject for Georgia from that date until the subject changed residences without notifying them about two months prior to the instant offense. The defendant's parole warrant issued on September 24, 1990 is still active.

B. Passion, Prejudice, and Other Arbitrary Factors

Defendant contends that the trial court's ruling pertaining to his inability to enter an unqualified plea of guilty to first degree murder and a number of the trial judge's rulings regarding the admissibility of mitigating evidence, most notably, the videotape of the defendant's interview with Dr. Ware, resulted in the impermissible curtailing of defendant's right to present mitigating evidence. As discussed above, the trial court's ruling was correct on the merits, and the evidence was properly excluded. In addition, a review of the record does not suggest that defendant's sentence was the result of passion, prejudice, or any other arbitrary factors.

C. Aggravating Circumstances

At trial the State argues one aggravating circumstance: that the victim was under the age of twelve. The jury found the existence of this circumstance. The testimony provided by

the victim's mother, Lorilei Guillory, corroborated by introduction of her son's birth certificate, fully established that the victim was under the age of twelve when murdered.

D. The Proportionality Review

Although the federal Constitution does not require a proportionality review, *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871 (1984), comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell*, 561 So. 2d 692 (La. 1990). This Court, however, has vacated only one capital sentence on the ground that it was disproportionate to the offense and the circumstances of the offender, *State v. Sonnier*, 380 So. 2d 1, 7-8 (La. 1979), although it effectively decapitalized another death penalty reversal on other grounds. *See State v. Weiland*, 505 So. 2d 702, 708 (La. 1987) (on remand, the state reduced the charge to second degree murder and the jury returned a verdict of manslaughter).

This Court reviews 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. *State v. Sonnier*, 380 So. 2d 1 (La. 1979).

It was determined that the defendant could not receive an impartial trial by jury in Calcasieu Parish, and venue was changed to East Baton Rouge Parish. Jurors in the Nineteenth Judicial District Court, which comprises East Baton Rouge Parish, have recommended imposition of the death penalty on approximately thirteen occasions.

In *State v. Jones*, 474 So. 2d 919 (La. 1985), *cert. denied*, 476 U.S. 1178, 106 S.Ct. 2906, 90 L.Ed. 2d 992, *reh'g denied*, 478 U.S. 1032, 107 S.Ct. 13, 92 L.Ed. 2d 768, *stay denied*, 501 U.S. 1267, 112 S.Ct. 8, 115 L.Ed. 2d 1093 (1968), the defendant abducted an eleven year old victim after breaking into her home. The defendant had been dating the child's mother. The defendant took the child to a wooded area, beat, raped and finally strangled her. The jury found the killing had occurred during an aggravated rape and had been committed in an especially heinous manner. Given the scarcity of comparable cases in East Baton Rouge Parish, it is appropriate for this Court to look beyond the judicial district in which the sentence was imposed and conduct the proportionality review on a state-wide basis.

State v. Davis, 92-1623 (La. 5/23/94), pp. 34-35, 637 So. 2d 1012, 1030-31. A state-wide review of cases reflects that jurors find the death penalty appropriate in cases in which the victim is a young child.[16] All of these offenses, however, involve the commission of another underlying offense, aggravated rape, with the exception of *Deboue*, in which the murders were committed during an aggravated burglary, and *Connolly*, where the State argued that the victim died during the course of an aggravated rape, but the evidence arguably did not support a finding of that circumstance beyond a reasonable doubt.

In this case, no accompanying sexual offense was proved. The absence of such an underlying crime is not critical, however. *Cf. State v. Lavalais*, 95-0320, pp.59-61 (La. 11/25/96), 685 So. 2d 1048. 1059 (although juries have favored life sentence for contract killing, death is not disproportionate penalty for same offense). The State presented evidence that the defendant choked the victim until he appeared dead. When the defendant heard noises coming from the victim's body, he garrotted the victim with nylon line to ensure that he was dead and to stop the noises. The defendant pulled the line as hard as he could for as long as

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[16]In *State v. Loyd*, 489 So. 2d 898 (La. 1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1984, 95 L.Ed.2d 823, *reh'g denied*, 483 U.S. 1011, 107 S.Ct. 3244 (1987), the twenty-five-year-old white defendant kidnaped, raped and drowned a three-year-old white female victim. The defendant had one prior conviction for misdemeanor theft, a steady work history, two years of college, and had been honorably discharged from military service. On October 29, 1993, the sentence was vacated by the U.S. 5th Circuit on grounds of ineffective assistance of counsel at penalty phase. The State was ordered to sentence the defendant to life imprisonment or retry the sentencing phase. That prosecution is now underway. *See State v. Loyd*, 96-1805 (La. 2/13/97) (commutation instruction mandated by La.C.Cr.P. art. 905.2(B), 1995 La. Acts No. 551, may apply to the defendant's re-sentencing penalty trial although it was not in effect at the time of the offense).

In *State v. Brogdon*, 457 So. 2d 616 (La. 1984), *cert. denied*, 471 U.S. 111, 105 S.Ct. 2345, 85 L.Ed.2d 862, *reh'g denied*, 473 U.S. 921, 105 S.Ct. 3547, 87 L.Ed.2d 670 (1985), the nineteen-year old white defendant and a seventeen-year-old accomplice repeatedly raped an eleven-year-old white female then tortured her by beating her with a brick, shoving sharp objects into her vagina, and cutting her with a broken bottle. The defendant was borderline mentally retarded and was under the influence of alcohol at the time.

In *State v. Copeland*, 530 So. 2d 526 (La. 1988), *cert. denied*, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860, *rehearing denied*, 490 U.S. 1077, 109 S.Ct. 2092, 104 L.Ed.2d 655 (1989), the defendant and his co-perpetrator repeatedly raped an eleven-year-old boy over the course of several hours then shot him several times. *See also State v. Brooks*, 505 So. 2d 714, *rev'd*, 94-2438 (La. 10/16/95), 661 So. 2d 1333.

In *State v. Deboue*, 552 So. 2d 355 (La. 1989), *cert. denied*, 498 U.S. 881, 111 S.Ct. 215, 112 L.Ed.2d 174, *reh'g denied*, 498 U.S. 993, 111 S.Ct. 541, 112 L.Ed.2d 550 (1990), during the course of an aggravated burglary, the defendant slashed the throats of his six and eleven-year-old victims allowing them to drown in their own blood.

In *State v. Connolly*, 96-1680 (La. 7/01/97), the defendant slashed the throat of his nine-year-old victim who was found alive in a pool of blood but died soon thereafter. The State argued that the victim was sexually abused based upon the dilation of his anus, but no other evidence supported the claim.

he could. He then tied the line in a knot and stuffed a dirty sock into the victim's mouth. This evidence of the method of the crime, coupled with the fact that the victim was six years old leads to the conclusion that death is not a disproportionate penalty in this case. Consequently, in light of a review of the cases, the sentence is not disproportionate.