No. 09-

In The Supreme Court of the United States

SHEDRAN WILLIAMS
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

Whether the Petitioner's death sentence violates the Fifth, Sixth, Eighth, or Fourteenth Amendment where: (1) the Louisiana Supreme Court failed to provide meaningful appellate proportionality review; and (2) the jury did not determine beyond a reasonable doubt that death should be imposed.

PARTIES TO THE PROCEEDING

The Petitioner is Shedran Williams, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shedran Williams respectfully petitions for a writ of certiorari to review the Louisiana Supreme Court's judgment in this case.

OPINION BELOW

The Louisiana Supreme Court's opinion in *State v. Williams* is reported at __ So. 2d __, 2009 La. Lexis 2973, and is reprinted in the Appendix at Pet. App. A. The unpublished appendix to the Louisiana Supreme Court's opinion is reprinted in the Appendix at Pet. App. B. The Louisiana Supreme Court's denial of rehearing is reprinted at Pet. App. C.

JURISDICTION

The Louisiana Supreme Court's opinion was entered on October 20, 2009. That court denied Mr. Williams's timely petition for rehearing on December 11, 2009. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of

> life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury[.]

The Eighth Amendment to the United States Constitution provides, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Article 905.3 of the Louisiana Code of Criminal Procedure provides:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance

> exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Article 905.4 of the Louisiana Code of Criminal Procedure provides in pertinent part:

> A. The following shall be considered aggravating circumstances:
>
> (2) The victim was a fireman or peace officer engaged in his lawful duties . . . .
>
> (4) The offender knowingly created a risk of death or great bodily harm to more than one person.

Article 905.6 of the Louisiana Code of Criminal Procedure provides in pertinent part:

> A sentence of death shall be imposed only upon a unanimous determination of the jury.

Article 905.9 of the Louisiana Code of Criminal Procedure provides:

> The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Louisiana Supreme Court Rule 28 provides, in pertinent part:

> Rule 905.9.1 Capital sentence review (applicable to La.C.Cr.P. Art. 905.9)
>
> Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

> whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

STATEMENT OF THE CASE

Louisiana's capital sentencing scheme fails to provide the necessary safeguards to ensure that there is a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). Once a jury finds a capital defendant guilty and unanimously determines that one of the aggravating circumstances applies, it is free to impose death. No standard guides the jury's decision. Jurors can sentence a capital defendant to die based only on a preponderance of the evidence. Moreover, although the law requires the Louisiana Supreme Court to conduct proportionality review, the court does not meaningfully enforce this critical appellate protection against arbitrariness. Sentences handed down by unrestrained capital juries encounter no scrutiny when the Louisiana Supreme Court reviews them. This lack of authentic appellate proportionality review ensures that unconstitutionally disproportionate death sentences – like the Petitioner's – never fall.

The failure to engage in any meaningful proportionality review of death sentences in Louisiana creates a substantial risk that the death penalty in Louisiana will be administered in a

racially discriminatory fashion. In a Parish comprised of nearly half-a-million people – more than half of whom are white – the last 13 defendants to receive a death sentence in East Baton Rouge Parish are black.[1] All but one of the men currently condemned to death row are black. This stark irregularity warrants the attention of the state supreme court, which has a statutory and constitutional duty to ensure that Louisiana's death sentences are not influenced by race and other arbitrary factors. However, the Louisiana Supreme Court did not carefully scrutinize the appearance of race discrimination in this case. In fact, it regularly refuses to do so despite extensive briefing from capital defendants.

The Louisiana Supreme Court's cursory review of Petitioner's death sentence not only failed to account for the startling influence of race in East Baton Rouge Parish, but also failed to ensure that the sentence was proportionate to sentences imposed on similarly-situated defendants in comparable (or more aggravated) cases. The Court did not compare the facts of Mr. Williams's case to those of similar cases in which the defendant received a life sentence. Had it done so, it would have found a number of cases in which juries imposed life

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[1] East Baton Rouge Parish has a population of approximately 428,360. According to the U.S. Census Bureau, 51.8% of the population is white and 44.5% of the population is black. *See* State and County Quick Facts East Baton Rouge Parish, Louisiana, *available at*: http://quickfacts.census.gov/qfd /states/22/22033.html (last visited on January 10, 2010).

sentences for far more aggravated offenses. Nor did the Louisiana Supreme Court consider Mr. Williams's low IQ, although his diminished mental ability should inform the court's review of his culpability compared to defendants who received both life and death sentences for similar offenses. The Louisiana Supreme Court did not even perform the initial information-gathering from which it could fairly conclude that Petitioner's death sentence was proportionate.[2] The penalty is not proportionate in Mr. Williams's case and should be reversed.

Before Mr. Williams could be sentenced to death, Louisiana's statutory scheme required that: (1) the jury unanimously determines that a statutorily-defined aggravating circumstance exists; and (2) that the jury unanimously determines defendant should be sentenced to death. Under this scheme, the first finding must be made beyond a reasonable doubt; for the second finding, however, Louisiana law imposes no burden of proof. The law

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[2] Louisiana Supreme Court Rule 28 states:

> The district attorney shall file the memorandum . . . [that] shall include . . . a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

La. S. Ct. R. 28 §4. The State, however, rarely follows this rule. Moreover, the Louisiana Supreme Court neither enforces the rule, nor attempts to obtain the information independently.

provides no guidance to the jury on which of all death-eligible defendants should be executed. The lack of any standard permits invidious and perhaps unconscious attitudes concerning race to infiltrate the capital sentencing decision. This lack of a standard raises the risk that race and other arbitrary factors influence jury sentencing determinations.

Without a clear standard for the jury to employ, and with no meaningful oversight from the Louisiana Supreme Court, the death penalty's administration in Louisiana appears wanton and freakish. The important and recurring issues[3] presented in this petition merit this Court's attention.

LEGAL BACKGROUND

In *Furman v. Georgia*, 408 U.S. 238 (1972), this Court struck down as contrary to the Eighth

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[3] Petitioner believes that at least four separate petitions for *certiorari* presenting the issue of proportionality review were submitted and rejected by this Court last term. *See Fields v. Kentucky*, No. 09-5389 (*cert. denied* Oct. 20, 2009); *Furnish v. Kentucky*, No. 08-10046 (*cert. denied* Oct. 5, 2009); *Holmes v. Louisiana*, No. 08-1358 (*cert. denied* Oct. 5, 2009); *O'Kelly v. Hall*, No. 08-10451 (*cert. denied* Nov. 30, 2009). The lack of a 'beyond a reasonable doubt' standard for determining who should live and who should die was recently presented to this Court in *Anderson v. Louisiana*, No. 08-948 (*cert. denied* April 6, 2009) and *McLaughlin v. Missouri*, No. 08-822 (*cert. denied* April 6, 2009).

Amendment the majority of states' death penalty statutes. "Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Four years later, the Court approved Georgia's reconstituted death penalty scheme in *Gregg*. The *Gregg* Court approved the appellate review mechanism in the Georgia statute, which required the Georgia Supreme Court to independently review "the appropriateness of imposing the sentence of death in the particular case." *Id.* at 166.[4]

In *Pulley v. Harris*, 465 U.S. 37 (1984), the Court held that the comparative proportionality

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[4] Shortly after *Gregg*, the Court struck down Louisiana's mandatory death penalty statute in *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977). *Roberts (Harry)* is instructive to this case because there the Louisiana legislature had imposed a mandatory death sentence on all defendants convicted of killing a police officer. The Court in *Roberts (Harry)* noted that the mandatory Louisiana death penalty had been held unconstitutional in *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). But, *Roberts (Harry)* went on to prohibit the imposition of the death penalty on a defendant convicted of killing a peace officer when the jury could not meaningfully consider the mitigating circumstances. *Roberts (Harry)* did not address the question presented here – which asks whether the appellate court must conduct some meaningful review to ensure that the jury performs its function rather than merely ensures that every defendant convicted of killing a peace officer is sentenced to death.

review that Georgia provides is not "indispensable" to a constitutional death penalty scheme in California, but also reaffirmed *Furman*'s central holding that a death penalty scheme plagued by systemic inconsistencies is unconstitutional. 465 U.S. at 45. The Court emphasized that it "take[s] statutes as [it] find[s] them" and acknowledged that proportionality review might be constitutionally required if a state scheme failed to check against the arbitrary imposition of the death penalty. *Id.* at 51; *see also id.* ("there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review . . . .").[5] *Harris* did not answer the question presented here: whether Louisiana's scheme is so lacking in other checks on arbitrariness that it is unconstitutional without meaningful appellate proportionality review.

Last term, in a separate statement concerning the denial of *certiorari* in *Walker v. Georgia*, 129 S. Ct. 453 (2008), Justice Stevens observed that the "likely result" of an incomplete proportionality review would be "the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment." 129 S. Ct. at 457. Justice

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[5] Following *Harris*, a sharply divided Louisiana Supreme Court concluded that the Eighth Amendment does not require proportionality review in Louisiana. *See State v. Welcome*, 458 So.2d at 1252; *but see id.* at 1256 (Calogero, J., dissenting); *id.* at 1258 (Dixon, C.J., dissenting); *id.* at 1259 (Dennis, J., dissenting). Meaningful appellate review essentially ended in Louisiana at this point.

Stevens indicated that the Court's decision in *Gregg* "assumed that the [Georgia Supreme Court] would consider whether there were 'similarly situated defendants' who had not been put to death because that inquiry is an essential part of any meaningful proportionality review" and depended in "part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." *Id.* Although the petitioner in that case "did not raise and litigate these claims in state court," *id.* at 454, Mr. Williams did raise the issue below.

Louisiana's current death penalty scheme is modeled after the Georgia scheme approved in *Gregg*.[6] As set out, it in principle similarly relies on meaningful appellate review of all death sentences. *See* La. C. Cr. P. Art. 905.9 ("The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive.").[7] Though the

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[6] *See State v. Welcome*, 458 So.2d 1235, 1251 (1984) (noting that after the Court voided Louisiana's first post-*Furman* capital sentencing scheme in *Roberts*, 428 U.S. 325, the state legislature "set forth a new capital sentencing procedure that essentially followed the Georgia procedure approved in *Gregg*.").

[7] Louisiana Supreme Court Rule 28 provides for review that closely tracks Georgia's process, except the Georgia legislature has provided for an assistant and necessary staff to monitor all capital cases – a provision not observed in Louisiana. *See* Ga. Code Ann. §17-10-37.

Louisiana Supreme Court is required to review every death sentence to determine "whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," that review in practice does not fulfill *Furman*'s command to eliminate the substantial risk that the system will produce arbitrary and discriminatory death sentences.

Louisiana's inadequate proportionality review is not limited to this case. The Louisiana Supreme Court consistently fails to compare death sentences with other first-degree murder convictions where the jury imposed a life-sentence. Even the limited pool of cases that the court uses as a basis of comparison is often incomplete or inaccurate.[8] In any event, in over 30 years the Louisiana Supreme Court has only reversed one death sentence for excessiveness. *See State v. Sonnier*, 380 So.2d 1 (La. 1979). In that time, the court has reviewed approximately 142 capital sentences and upheld every single one as entirely proportionate.[9]

The Louisiana Supreme Court effectively relies upon the jury to ensure that a death sentence is measured and proportionate; the jury, however,

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[8] *See generally* Sarma et al., *Struck by Lightning:* Walker v. Georgia *and Louisiana's Proportionality Review of Death Sentences*, S.U. L. REV. (forthcoming 2010), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1330145.

[9] *Id.* at n.6.

ultimately relies on appellate review to ensure that death is reserved for the most culpable defendants. In this system, arbitrary death sentences have become inevitable. Mr. Williams's death sentence is a superlative example.

FACTUAL BACKGROUND

At about 10:00 p.m. on May 22, 2004, Shedran Williams, an African-American man, went to a Wal-Mart in East Baton Rouge to look for sheets for an apartment that his mother had gotten for him; at age 33, it was Mr. Williams's first attempt at independent living. A loss prevention officer stopped Mr. Williams after he finished purchasing some items from the store. R. 1929. He suspected that Mr. Williams had shoplifted two disposable cameras. R. 1923.

Lieutenant Wax, an off-duty police officer, was performing security work for the Wal-Mart. R. 1927. Lt. Wax helped the store employee confront Mr. Williams. R. 1930. A struggle ensued between Mr. Williams, the loss prevention officer, and Lt. Wax. R. 1930-31. The store's security cameras did not capture the attempted arrest and altercation. Witnesses testified, however, that during the attempted arrest Mr. Williams took Lt. Wax's gun from her and discharged it several times before he fled the scene. R. 1931. Lt. Wax was killed and two other civilians were injured in the encounter. R. 1932. Mr. Williams subsequently turned himself in to the police. R. 2313. Upon his arrest, Mr. Williams admitted to being in the Wal-Mart and to

be being stopped by the loss-prevention employee. He indicated that he did not recall the events that resulted in the victim's death, and informed the police that he had thrown the victim's gun into the river. R. 2448.

Mr. Williams was charged with first-degree murder. Defense counsel argued at trial that Petitioner's mental retardation precluded a death sentence. He also argued that Mr. Williams was unable to distinguish right from wrong at the time the crime was committed largely because he had an uncontrollable response when physically restrained. As defense experts testified, Mr. Williams had developed "a pattern of behavior, which occurs whenever someone attempts to forcibly restrain him." R. 2358. Mr. Williams's own testimony described the nature of the behavior: "Don't touch me. You can talk to me, but don't touch me." R. 2358-59. Defense expert Dr. Cenac explained that Mr. Williams could not recognize the unreasonableness of his fear of being restrained because his mental skills were akin to a child's:

> With adults capable of abstraction, adults can recognize that such fears are unreasonable. Children, on the other hand, who are more concrete in their thought processes, generally are not able to recognize that phobias are unreasonable. . . . [P]hobias seem reasonable to children. He [Shedran Williams] has no awareness that this

> [request that a police officer not touch him] is an unreasonable request.

R. 2359.

Dr. Cenac further testified that Mr. Williams suffered from an acute stress disorder. R. 2368. Cenac testified that Mr. Williams "has a tendency towards psychotic distortion. What that means is that under stress he doesn't reflect on things, he acts . . . and he doesn't hear what you're telling him." R. 2371. The doctor concluded:

> With reasonable medical certainty, based upon my direct examination, the medical record, and the review of the pertinent scientific literature, Shedran Williams was impaired in his capacity to comprehend and to comply with the verbal orders of the arresting store detective on the night of May 22nd, 2004. Shedran Williams has a diminished capacity to appreciate the consequences of his behavior . . . .

R. 2372. The jury rejected Mr. Williams's insanity defense and found him guilty of first-degree murder.

Significant evidence establishes Mr. Williams's diminished culpability. When Shedran was in first grade, his elementary school identified him as mentally retarded. R. 2347. Teachers continued to classify Shedran as a special education student throughout his schooling. *Id.;* R. 2366.

Intelligence tests conducted when Mr. Williams was 17 years old reflected that he had an IQ of 73. R. 2347. A local psychologist diagnosed him as mentally retarded at that time, and noted that Williams exhibited decreased intellectual efficiency, even in comparison to his very modest intellectual achievements. A defense expert testified at trial that this low IQ score means that "if there are a hundred people in a crowd, 97 people in that crowd will be more intelligent than Shedran Williams." R. 2351.

Mr. Williams's mental retardation diagnosis accords with his limited adaptive functioning. Dr. Cenac testified that Mr. Williams has "never been able to live independently." R. 2350. His attempts to apply his mental capacities to the most basic demands of everyday life result in repeated failure. R. 2351. This failure "follows from a life of being unable to solve day-to-day problems, being unable to remember [his] number address, being unable to remember what [his] rent is, not being able to pay [his] bills." *Id.*

Considering both his IQ and his inability to adapt his behavior to basic environmental demands, defense expert Cenac concluded that "[Shedran Williams] was mentally retarded at seventeen, [and] he is mentally retarded today." R. 2376.

Despite this extensive evidence of diminished capacity, the jury took less than seventy minutes to return a death sentence. The jury found two aggravating factors: (1) the victim was a peace

officer engaged in her lawful duties; and (2) the offender knowingly created a risk of death or great bodily harm to more than one person. *See* La. C. Cr. Proc. art. 905.4 (A)(2), (4).

On appeal, Petitioner challenged both the lack of a "beyond a reasonable doubt" standard to guide the jury's death-determination, and the sufficiency of Louisiana's appellate proportionality review. He argued that "[a]n adequate capital sentence review must compare the case in which a death penalty is imposed with similar cases in which a life sentence is imposed; analyze the existence of multiple aggravating circumstances or mitigating circumstances to determine whether the death penalty is appropriate in the particular case compared with other cases where it was not imposed; consider the potential influence of invidious factors such as the race of the defendant, race of the victim, or other arbitrary factors." Appellant's Capital Sentence Review Memorandum at 4.

The Louisiana Supreme Court affirmed Petitioner's conviction and death sentence. First, the Court found that no standard is needed to guide a jury when it decides whether to sentence defendant to life imprisonment or death. According to that court, *Ring* and *Apprendi* did not require the jury to make this finding "beyond a reasonable doubt." *See* Pet. App. B at 121-22a.

Moreover, the Louisiana Supreme Court found that "[b]ecause several of the salient features of the instant case make it similar enough to other death

sentences recommended by juries in the 19th JDC [East Baton Rouge Parish], we find defendant's sentence is not disproportionate to those cases." *See* Pet. App. A at 74a.

In his application for rehearing, Petitioner noted Justice Stevens's statement regarding the denial of *certiorari* in *Walker* and argued that the Louisiana Supreme Court's

> decision affirming the death sentence in this case demonstrates that the system Louisiana uses to determine which capital defendants should live and which should die is fundamentally and fatally flawed. Louisiana's statutory scheme neither sufficiently narrows the scope of offenders eligible for the death penalty, nor adequately channels the sentencer's discretion to ensure that only the most culpable defendants receive a death sentence. Without sufficient and meaningful appellate oversight, the specters of race and arbitrariness still loom over the administration of Louisiana's death penalty. This Court's purported "proportionality review" continues to overlook critical matters of constitutional significance, including: the vast number of similar cases in which death was not imposed; the prosecutor's disparate charging practices based on the race-of-the-

> victim, race-of-the-defendant, or both; and the defendant's mitigating circumstances.

Appellant's Application for Rehearing at 3.

On December 11, 2009, the Louisiana Supreme Court denied Petitioner's timely application for a rehearing. This Petition follows.

REASONS FOR GRANTING THE WRIT

"The specters of race and arbitrariness still loom over the administration of Louisiana's death penalty." Appellant's Application for Rehearing at 3. Justice Potter Stewart's concurring opinion in *Furman*, 408 U.S. at 309-10 (emphasis added), aptly describes Shedran Williams's death sentence:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of . . . murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a *capriciously selected random handful* upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. *See*

> *McLaughlin v. Florida*, 379 U.S. 184. But racial discrimination has not been proved, and I put it to one side. I simply conclude that *the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed*.

In East Baton Rouge Parish: 1/25 is the frequency with which an African-American man charged with the first-degree murder of a minority victim receives the death penalty; 1/2 is the frequency with which an African-American man charged with the first-degree murder of a white woman receives the death penalty; 0 is the frequency with which a white person receives the death penalty for killing a minority victim.

Even if these facts do not prove racial bias, sheer arbitrariness is evident. Between 1990 and 2008, at least 408 cases in East Baton Rouge Parish were charged as first-degree murder cases. Yet, since 1990, only 24 defendants have received a death sentence. East Baton Rouge Parish juries in at least 29 cases that reached the sentencing phase returned a sentence less than death. Additionally, 397 officers have died in the line of duty in Louisiana, with at least 70 killed by gunfire, and 16 by vehicular assault between 1976 and 2009.[10] This includes 16

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[10] *See* 'Search for Fallen Heroes' search results for inquiry based on State "Louisiana" and Years "1976 through 2009," *available at* http://www.odmp.org/search.php.

different officers who have died in the line of duty in Baton Rouge. Yet, the Louisiana Supreme Court only identified death sentences from the deaths of two different police officers.[11] The failure to consider literally hundreds of cases in which a police officer was killed and the offender did not receive a death sentence "creates an unacceptable risk that [the state supreme court] will overlook a sentence infected by impermissible considerations." *Walker*, 129 S. Ct. at 456.

The Eighth Amendment limits imposition of the death penalty to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (internal citations omitted). But, the Louisiana Supreme Court's proportionality review of Petitioner's death sentence could not plausibly measure whether his sentence is excessive: that court did not consider cases where a person convicted of first-degree murder received a life sentence, or even compare mitigating factors in its excessiveness analysis.

The inadequate proportionality review in Louisiana is especially problematic because there is no standard for the jury to use when it determines which defendants should be sentenced to death. While the Louisiana legislature requires that the jury make a determination – after it considers the

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[11] Each of these two cases involves two co-defendants.

aggravating and mitigating circumstances – that the defendant be sentenced to death, the statutory scheme does not require that this determination be made beyond a reasonable doubt.

This Court should grant review to consider whether the death penalty's administration in Louisiana – which does not require a standard for the death-determination and which does not provide meaningful proportionality review – violates the United States Constitution. These issues are well-preserved, and there are no vehicle impediments to this Court's review of the case.

I. THE EIGHTH AMENDMENT REQUIRES LOUISIANA TO ENGAGE IN PROPORTIONALITY REVIEW.

Pulley v. Harris is not a reason to deny *certiorari* here.[12] Louisiana, unlike California,

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[12] Indeed, *Harris* reiterated the *Gregg* Court's maxim that "each distinct system must be examined on an individual basis." 465 U.S. at 45. Moreover, since *Harris*, numerous commentators call for proportionality review as a means to achieve the consistency and fairness that continue to elude capital punishment schemes. *See, e.g.*, David Baldus et al., *Race and Proportionality Since* McCleskey v. Kemp *(1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143, 176 (2007) (praising New Jersey's extensive proportionality review for helping to reduce arbitrariness and discrimination in its administration of the death penalty); Evan J. Mandery, *In Defense of Specific Proportionality Review*, 65 ALB. L. REV. 883, 887-88 (2002) (explaining the need for proportionality review that considers as evidence of the violation of evolving standards of decency the

employs a "capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." *Harris*, 465 U.S. at 51. Proportionality review in Louisiana necessarily plays a vital role in stamping out the risk of arbitrariness and discrimination in capital sentencing. *See Gregg*, 428 U.S. at 205.

A. The Louisiana Supreme Court Conducted a Constitutionally Insufficient Proportionality Review in this Case.

The Louisiana Supreme Court's proportionality review was constitutionally deficient. The Court did not compare Petitioner's death sentence with other first-degree murder cases where a life sentence was imposed. For instance, the Court

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better treatment of similar defendants); THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY (2001), *available at* http://www.constitutionproject.org/manage/file/31.pdf (last visited March 8, 2010) at 27 ("Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, non-arbitrary, and even-handed fashion, to provide a check on broad prosecutorial discretion, and to prevent discrimination from playing a role in the capital decision-making process"); Ken Driggs, *The Most Aggravated and Least Mitigated Murders: Capital Proportionality Review in Florida*, 11 ST. THOMAS L. REV. 207, 272 (1999) (describing proportionality review as a successful tool in Florida for reducing the arbitrary and discriminatory nature of the death penalty).

made no effort to compare this single incident offense with the *Gillis* case. Sean Gillis, a white man, was sentenced to life imprisonment in East Baton Rouge for kidnapping, (in some instances) raping, killing and dismembering at least eight different women.[13]

In *Zant v. Stephens*, 462 U.S. 862 (1983), the Court concluded that Georgia's capital sentencing scheme satisfied the Eighth Amendment in substantial measure because of the Georgia Supreme Court's representation that its proportionality review "uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed." 462 U.S. at 880 n.19; *see also Gregg*, 428 U.S. at 205 n.56. As Justice Stevens observed, "[t]hat approach seemed judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court." *Walker*, 129 S. Ct. at 454-55. Nevertheless, Louisiana does not compare death sentences to death-eligible cases in which death was not imposed.

Simply comparing some cases in which the death penalty has been imposed does not constitute meaningful proportionality review "because without knowledge of the life-sentenced cases, a court would

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[13] *See* Joe Gyan, Jr. and Amy Wold, *Gillis gets life sentence*, BATON ROUGE ADVOCATE, Aug. 1, 2008, at 1A, *available at*: http://www.2theadvocate.com/news/26168149.html.

be unable to determine whether there is a 'meaningful basis' for distinguishing the death sentences it reviews from the 'many cases' in which lesser sentences are imposed." *In re Proportionality Review Project*, 161 N.J. 71, 84 (N.J. 1999) (internal citations omitted). "The [Court's] failure to acknowledge . . . any other cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations." *Walker*, 129 S. Ct. at 456 (statement of Stevens, J., respecting the denial of the petition for writ of *certiorari*).

Many Louisiana first-degree murder cases with aggravating circumstances similar to those the jury found here have resulted in life sentences. Juries have frequently sentenced to life individuals convicted of creating the risk of death or great bodily harm to more than one person.[14] The Louisiana

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[14] *See State v. Gilliam*, 827 So. 2d 508 (La. App. 2 Cir. 2002); *State v. Smith*, 740 So.2d 675 (La. App. 2 Cir 1999), writ denied, 785 So.2d 840 (La. 2001); *State v. Williamson*, 671 So. 2d 1208 (La. App. 2 Cir. 1996), writ denied, 679 So.2d 1380 (La. 1996); *State v. Johnson*, 665 So.2d 1237 (La. App. 2 Cir. 1995); *State v. Foy*, 439 So. 2d 433 (La. 1983); *State v. Forbes*, 362 So.2d 1385 (La. 1978); *State v. Stanfield*, 562 So.2d 969 (La. App 3 Cir. 1990); *State v. Lormand*, 771 So.2d 734 (La. App. 3 Cir. 2000); *State v. Brown*, 715 So.2d 566 (La. App. 3 Cir. 1998); *State v. Baudoin*, St. Martin Parish District Court Docket No. 97-181960 (1997); *State v. Wilson*, 631 So.2d 1213 (La.App. 5 Cir. 1994); *State v. Williams*, 871 So.2d 599 (La. App. 5 Cir. 2004); *State v. Harris*, 871 So.2d 599 (La. App. 5 Cir. 2004); *State v. Medford*, 489 So.2d 957 (La. App. 5 Cir. 1986); *State v. Deboue*, 496 So.2d 394 (La. App. 4 Cir. 1986); *State v. Butler*,

Supreme Court's cursory proportionality review is silent on the import of all these life-sentence cases.

B. The Louisiana Supreme Court's Proportionality Review Failed to Consider Mitigating Circumstances to Determine Whether Petitioner's Death Sentence is Appropriate.

The proportionality review conducted in Louisiana repeatedly fails to consider the mitigating circumstances unique to the capital defendant.[15]

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462 So.2d 1280 (La. App. 5 Cir. 1985); *State v. Thibodeaux*, 728 So.2d 416 (La. App. 3 Cir. 1998); *State v. Dean*, 487 So.2d 709 (La. App. 5 Cir. 1986), writ denied, 495 So.2d 300 (La. 1986); *State v. Coleman*, 756 So. 2d 1218 (La. App. 2 Cir., 2000); *State v. Vince*, 739 So. 2d 308 (La. App. 1 Cir. 1999) (jury deadlock resulted in life sentence); *State v. Shawn Smith*, 717 So. 2d 1209 (La. App. 4 Cir. 1998); *State v. Kendrick Howard*, 717 So. 2d 1209 (La. App. 4 Cir. 1998); *State v. Guillory*, 715 So. 2d 400 (La. App. 3 Cir. 1998); *State v. Rodriguez*, 822 So. 2d 121 (La. App. 1 Cir. 2002); *State v. Odom*, 760 So. 2d 576 (La. App. 2 Cir. 2000); *State v. Moore*, 412 So.2d 108 (La. 1982); *State v. Bibb*, 626 So.2d 913 (La. App. 5 Cir. 1993); *State v. Pascual*, 735 So. 2d 98 (La. App. 5 Cir, 1999).

[15] Recently, the Constitution Project observed that Louisiana's review failed to provide the constitutionally-required consideration of mitigating circumstances when it conducted its proportionality review. *See Amicus Curiae Brief for The Constitution Project*, *Holmes v. Louisiana*, No. 08-1358 (*cert. denied* Oct. 5, 2009) (noting that Louisiana failed to conduct the meaningful appellate review of mitigation that this Court described as appropriate in *Parker v. Dugger*, 498 U.S. 308 (1991), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).

Despite the forceful mitigating circumstances presented in this case,[16] the Louisiana Supreme Court made *no* effort to compare the mitigation presented by Mr. Williams to that offered in other capital cases.

C. All Five Cases that the Louisiana Supreme Court Cites to Demonstrate the Proportionality of Petitioner's Death Sentence Involve Black Defendants (Three of Whom Killed White Victims).

Shedran Williams is a black man. Vicki Wax was a white woman. The Louisiana Supreme Court's full analysis of the racial irregularities in the death cases in East Baton Rouge follows here:

> The victim, Lt. Wax, was a Caucasian female, who was 51 years old at the time of her death. Mr. Douget, the Wal-Mart loss prevention agent who was shot, was also Caucasian, while Mr. Wilson, the third victim shot, was an older African-American male. *Race does not appear to be a motivating factor in the shooting of Lt. Wax.* Defendant's jury was composed of two African-

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[16] *See* "Factual Background," *supra.* Mr. Williams has an IQ of 73 and was formally diagnosed as mentally retarded at the age of 17. *See* R. 2347. Indeed, he was labeled 'mentally retarded' in the first grade and was consistently placed in special education classes throughout his schooling. *See* R. 2347-51. As an adult, he was "unable to live independently." R. 2351.

> American females, eight Caucasian males, and two Caucasian females. The alternate juror was a Caucasian female. There has been no showing that defendant's capital trial was conducted with any racial taint.

Pet. App. A at 72a (emphasis added).

The State relied on five Louisiana Supreme Court cases to show that Petitioner's death sentence is proportionate. All five cases involved black defendants. Three of the five cases involved white victims. The Louisiana Supreme Court – without noting these troubling racial implications – regurgitated the same five cases supplied by the State when it upheld Petitioner's death sentence.

Even more troubling: 13 of 14 of the defendants currently on death row from East Baton Rouge Parish are black. 21 of 27 individuals sentenced to death row from the Parish since 1976 have been black.[17] These race-of-the-defendant disparities might not be surprising in a Parish with few white people, but East Baton Rouge Parish is over 50% white.

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[17] The courts have reversed the death sentences for five of the white defendants, while the sixth remains on death row despite being incurably insane. *See State v Perry*, 610 So. 2d 746 (La. 1992) (holding it unconstitutional under the state constitution to forcibly medicate someone to secure their execution).

Less obvious than these race-of-the-defendant effects, however, is the startling influence that the race-of-the-victim appears to have on the death penalty's operation. The State's Sentencing Review Memorandum revealed that no white defendant in East Baton Rouge Parish has ever been sentenced to death for killing a black defendant. As noted in the defendant's Application for Rehearing to the Louisiana Supreme Court, African-American men charged with first-degree murder of white victims have received death sentences in approximately 18% of cases (9 of approximately 50). In contrast, roughly 4% of cases involving African-American men charged with first-degree murder of African-American victims have resulted in death sentences (12 of approximately 300). Statistics thus reflect that an African-American defendant is four-and-a-half times more likely to be sentenced to death if he kills a white victim. Where black men have been charged with killing white women, nearly 50% of defendants were sentenced to death.

Justice Stevens explained how the race-of-the-victim effect creates a unique risk that the death penalty will be returned in an arbitrary fashion:

> The opinions in . . . *McCleskey* . . . make it abundantly clear that there is a special risk of arbitrariness in cases that involve black defendants and white victims. . . . Although there is some indication that those risks have diminished over time, at least the race-of-victim effect persists.

Walker, 129 S. Ct. at 455 (citing Baldus & Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1424-1426 (2004)).

D. The Louisiana Supreme Court Regularly Conducts an Inadequate Proportionality Review.

The Louisiana Supreme Court's proportionality review routinely fails to assess or compare the case in which a death penalty is imposed with the instances in which a life sentence is imposed under similar circumstances. *See, e.g.*, *State v. Anderson*, 996 So. 2d 973, 1018-20 (La. 2008); *State v. Legrand*, 864 So. 2d 89, 104-07 (La. 2003).

Nor does the court consider the factors that determine which defendants are the most culpable for their crimes. *See, e.g.*, *State v. Lacaze*, 824 So. 2d 1063, 1085 (La. 2002).[18] This is especially important

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[18] Other courts' proportionality reviews do consider mitigating circumstances. *See, e.g.*, *State v. Thompson*, No. E2005-01790-CCA-R3-DD (Tenn. Crim. App. 2007) (reversing death sentence of defendant with "long and documented history of mental illness"); *State v. Kemmerlin*, 573 S.E. 2d 870 (N.C. 2002) (setting aside death sentence as disproportionate under totality of circumstances, including presence of six mitigating factors); *State v. Papavvasas*, 170 N.J. 462 (N.J.2002) (setting aside defendant's death sentence based on comparison of defendant's mitigating and aggravating factors and those of defendants in the appropriate comparison group).

in cases such as this one, where the defendant's diminished culpability could have been overlooked or misperceived by the jury. As this Court has observed, a jury may see mental retardation and maladaptive behaviors as aggravating – rather than mitigating – circumstances.[19]

Furthermore, the Louisiana Supreme Court's proportionality review is arbitrary in its geographic scope. It employs an inter-district review in some cases and not others, without a consistently-articulated justification for the inconsistency. *See, e.g.*, Pet. App. A at 75a; *Holmes*, 5 So. 3d 42, 97 (La. 2008); *State v. Robinson*, 874 So. 2d 66, 89 (La. 2004); *State v. Weary*, 931 So. 2d 297, 325-26 (La. 2006); *State v. Davis*, 637 So. 2d 1012, 1031 (La. 1994).[20] These recurring defects demonstrate that

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[19] *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2004) ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* [*v. Lynaugh*, 492 U.S. 302 (1989)] demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.") (internal citations omitted).

[20] Importantly, the Louisiana Supreme Court does not enforce the rules necessary to enable it to conduct meaningful proportionality review. *See* La. S. Ct. R. 28. Here, for example, the State did not come close to providing a complete list of first-degree murder cases where a sentence was imposed. *See* La. S. Ct. R. 28 §4(b)(i) (requiring the State to produce "a list of each

the Louisiana Supreme Court regularly conducts an inadequate proportionality review.

II. THE LACK OF A "BEYOND A REASONABLE DOUBT" STANDARD VIOLATES *RING* & *APPRENDI* AND RESULTS IN THE ARBITRARY IMPOSITION OF DEATH SENTENCES IN VIOLATION OF THE EIGHTH AMENDMENT

The *Apprendi* and *Ring* decisions call into question the constitutionality of Louisiana's death penalty scheme. Under Louisiana law, the maximum punishment authorized for a conviction of first-degree murder and the finding of an aggravating circumstance is life without the possibility of parole. Therefore, the jury's finding that, after consideration of mitigating evidence, death should be imposed, necessarily increases the sentencing ceiling from life imprisonment to a death sentence. Thus, the Louisiana legislature drafted its capital sentencing statute in a manner that triggers Sixth and

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first degree murder case in the district in which sentence was imposed after January 1, 1976."). Nor did the State provide information about mitigating circumstances in any of the first-degree murder cases that it did list. *See* La. S. Ct. R. 28(4)(b)(ii) (requiring the district attorney to file a memorandum that includes "a synopsis of the facts in the record concerning the crime and the defendant in the instant case."). Without this critical information, the Louisiana Supreme Court simply cannot provide any capital defendant the check against arbitrariness required by the Constitution.

Fourteenth Amendment protections at each of its two steps.

Moreover, the unrivaled need for accuracy in the outcome of capital sentencing determinations underscores the need for this Court to step in and decide this issue. The Eighth Amendment limits death penalty's reach to the worst offenders who commit the worst crimes. *See Simmons*, 543 U.S. at 568. Only the beyond a reasonable doubt standard satisfies the Eighth Amendment's reliability demands and accurately signals to the sentencer the degree of seriousness society affixes to the culpability determination.

A. There is a Split in the Circuits on the Question of whether *Apprendi* Applies to the Jury's Death-Determination.

As detailed in recent petitions for certiorari in *Anderson v. Louisiana*[21], and *McLaughlin v. Missouri*[22], there is a split within the courts and legislatures concerning whether the finding that a defendant deserves the death penalty must be made beyond a reasonable doubt.[23] The *Anderson* petition

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[21] No. 08-948 (*cert. denied* April 6, 2009).

[22] No. 08-822 (*cert. denied* April 6, 2009).

[23] *See* ARK. CODE ANN. § 5-4-603 (Arkansas) ("jury [must] unanimously return written findings that . . . aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist . . . Aggravating circumstances justify a sentence of death beyond a reasonable

noted that four state courts of last resort require the beyond a reasonable doubt standard[24], while four federal circuits[25] and other courts do not.[26]

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doubt."); KAN. STAT. ANN. § 21-4624 (Kansas) (death penalty not imposed unless "by unanimous vote, the jury finds beyond a reasonable doubt . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist . . ."); OHIO REV. CODE ANN. 2929.03(D) (Ohio) (jury [must] unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors); OR. REV. STAT. § 163.150 (1)(c)-(d) (Oregon) (requiring life sentence unless proof beyond a reasonable doubt that, after considering "any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense and any victim impact evidence" that defendant should "receive a death sentence."); TENN. CODE ANN. 39-13-204 (g)(1)(B) (Tennessee) ("If the jury unanimously determines that a statutory aggravating circumstance [exists], but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the jury shall . . . sentence the defendant . . . to . . . life."); UTAH CODE ANN. 76-3-207 (5)(b) (Utah) ("death penalty shall only be imposed if . . . the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation."); WASH. REV. CODE ANN. 10.95.060 (Washington) (jury must be convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency).

[24] *See Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) (en banc) (a jury—rather than a three-judge panel—must "be convinced beyond a reasonable doubt that any mitigating factors did not outweigh the proven statutory aggravating factors."); *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) (*Apprendi* rule applicable to weighing determination because a "finding [that

no mitigation evidence outweighs aggravation evidence] is necessary to authorize the death penalty in Nevada."). The Connecticut and Wyoming Supreme Courts interpret their state statutes and constitutions to comply with *Apprendi* and *Ring*. *See State v. Rizzo*, 266 Conn. 171, 242 (2003) (finding "the jury must be instructed that its level of certitude be beyond a reasonable doubt when determining that the aggravating factors outweigh the mitigating factors . . ."); *Olsen v. State*, 2003 WY 46, 67 (Wyo. 2003) ("If the jury is to be instructed to "weigh" . . . *the burden of negating this mitigating evidence by proof beyond a reasonable doubt remains with the State*.") (emphasis added)).

[25] In *United States v. Mitchell*, 502 F.3d 931, 993 (9th Cir. 2007), the Ninth Circuit held, over the dissent of Judge Reinhardt, that the beyond a reasonable doubt standard does not apply at the weighing stage because "the weighing step is an equation that merely channels a jury's discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate." *Id*. Dissenting, Judge Reinhardt, underscored: "There is no doubt that the finding that aggravating factors outweigh mitigating factors increased Mitchell's maximum punishment [under the Federal Death Penalty Act]." *Id*. (citing 18 U.S.C. § 3593(e) ("whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death. . .")). "Absent this finding," Judge Reinhardt reasoned, "the maximum sentence the court could have imposed would have been life imprisonment without the possibility of release." *See also United States v. Sampson*, 486 F.3d 13, 31 (1st Cir. 2007) ("the requisite weighing [provision of the Federal Death Penalty Act] constitutes a process, not a fact to be found."); *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007) ("the jury's decision that the aggravating factors outweigh the mitigating factors is not a finding of fact [but rather] it is a 'highly subjective,' 'largely moral judgment' 'regarding the punishment that a particular person deserves."); *accord United States v. Barrett*, 496 F.3d 1079, 1107-1108 (10th Cir. 2007) (same).

B. *Ring* and *Apprendi* Should Apply to the Jury's Determination That a Death Sentence is Appropriate.

Ring and *Apprendi* should apply to the death-determination in Louisiana. The Fifth and Sixth Amendments require any finding that increases the maximum punishment possible to be proved beyond a reasonable doubt. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). This Court has held that "*any fact* that increases the penalty for a crime beyond the prescribed statutory maximum . . . must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476 (emphasis added). In *Ring*, the Court made clear that the beyond a reasonable doubt standard applies to a jury's finding of an aggravating factor in a capital trial's sentencing phase.

Louisiana Code of Criminal Procedure article 905.3 states unambiguously: "[a] sentence of death shall not be imposed unless the jury . . . after consideration of any mitigating circumstances, *determines* that the sentence of death should be imposed." (emphasis added). The plain meaning of the words "shall not" and "unless" establish that a death sentence may not be imposed without a jury

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[26] The petitions in *Anderson* and *McLaughlin* provide an in-depth discussion of which state courts do not require the jury to determine beyond a reasonable doubt that death is the appropriate punishment. The *Anderson* petition further notes that there is confusion in at least three states concerning *Ring*'s applicability to this determination.

determination that death is the appropriate punishment. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) (the "statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings"); *Apprendi*, 530 U.S. at 494 ("the relevant inquiry is one not of form, but of effect."). The *Apprendi* rule applies because the finding that death is the appropriate punishment elevates the maximum sentence available.

C. The Eighth Amendment Requires Heightened Accuracy When Defendants are Sentenced to Death.

The Eighth Amendment requires heightened accuracy and reliability in capital cases. Death determinations in Louisiana are not accurate because juries do not decide that the death penalty is appropriate beyond a reasonable doubt. Inaccuracy is aggravated by other features of the capital sentencing scheme.[27] At bottom, the Louisiana sentencing scheme imposes no safeguards to ensure that those who receive a death sentence are more culpable than those death-eligible defendants for whom the jury chose a life sentence.

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[27] This Court last considered Louisiana's capital sentencing scheme in 1988. *Lowenfield v. Phelps*, 484 U.S. 231 (1988). Since *Lowenfield*, Louisiana has drastically expanded the statutory aggravating circumstances available to the prosecution, while reducing limitations on other evidence that the jury may consider in making the death-determination.

Indeed, given the combined lack of standards and lack of proportionality review, this case looks as if we have arrived full circle at *Roberts v. Louisiana*, which involved the killing of a police officer.

CONCLUSION

There is no ambiguity in the decision below: in Louisiana, no standard guides the jury's decision to impose death.[28] The Louisiana Supreme Court believes as well that proportionality review is not required, and the only analysis the court undertakes is assuring itself that another defendant has been sentenced to death for the same charged offense. The constitutional concerns raised by these standardless procedures are squarely presented on this record. *See* Pet. App. A at 73a-75a; 121a-22a. No procedural impediments exist. Moreover, the conflict in the lower courts over *Apprendi*'s applicability to the culpability-finding is entrenched, and the respective holdings are often outcome-determinative in capital cases. Further percolation is unlikely to provide clarity or to ease the tensions below. This Court should resolve the issue here and now to ensure proportionality, non-discrimination, non-arbitrariness, and reliability in Louisiana's administration of the death penalty.

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[28] *Cf. Smith v. North Carolina*, 459 U.S. 1056 (1982) (Stevens, J., respecting the denial of the petitions for *certiorari*) (citing to *State v. Wood*, 648 P. 2d 71, 83 (Ut. 1982)).

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX A

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

SHEDRAN WILLIAMS

2007-KA-1407 (La. 10/20/09); 22 So. 3d 867.

SUBSEQUENT HISTORY: Rehearing denied by *State v. Williams*, 2009 La. LEXIS 3698 (La., Dec. 11, 2009).

PRIOR HISTORY: ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT, FOR THE PARISH OF EAST BATON ROUGE, HONORABLE MICHAEL R. ERWIN, JUDGE. *State v. Williams*, 959 So. 2d 894, 2007 La. LEXIS 1657 (La., 2007).

DISPOSITION: AFFIRMED.

JUDGES:* GUIDRY, Justice, et al;.

OPINION BY: GUIDRY, J.

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* Retired Judge Philip C. Ciaccio, assigned as Justice *ad hoc*, sitting for Justice Chet D. Traylor.

OPINION

On June 17, 2004, an East Baton Rouge Parish grand jury indicted defendant, Shedran Williams, for the May 22, 2004 first degree murder of Baton Rouge Police Lieutenant Vickie Wax, a violation of La. Rev. Stat. 14:30. Defendant entered a plea of not guilty at his arraignment on June 28, 2004. On June 21, 2005, defendant was allowed to change his plea to the dual plea of not guilty and not guilty by reason of insanity. Jury selection commenced on March 13, 2006, and was completed on March 17th. Trial then commenced on March 20, 2006. On March 22, 2006, the jury, having declined to find defendant was legally insane at the time of the offense, returned a unanimous verdict of guilty of first degree murder. The penalty phase of the trial began the following day on March 23rd. The same day the jury unanimously returned a sentence of death based on two of the three aggravating circumstances urged by the state: 1) the victim was a peace officer engaged in her lawful duties and 2) the offender knowingly created a risk of death or great bodily harm to more than one person. The jury rejected defendant's claim that he was mentally retarded by leaving the mental retardation verdict form blank. On May 25, 2006, the district court imposed the sentence of death by lethal injection in accordance with the jury's verdict.

Under La. Const. art. V, § 5(D), defendant now appeals his conviction and sentence of death asserting forty-five assignments of error. We address

the most significant of these errors in this opinion, and the remaining errors will be addressed in an unpublished appendix. After a thorough review of the law and the evidence, for the following reasons we affirm defendant's first-degree murder conviction and the imposition of the death sentence.

FACTS

On May 22, 2004, defendant, Shedran Williams, then 33 years old, was in the process of moving to a new apartment in Baton Rouge, having been released from prison at Winn Correctional Center approximately one month earlier. So that he would not miss work at Mr. C's Auto Shop, the salvage yard owned by his former stepfather, defendant enlisted the help of his cousin, Deangelo Hammond, and a friend, Jason Martin, to move his furniture for him. After Hammond and Martin finished moving defendant's furniture into his apartment, they went back to pick up defendant when he finished his work day because defendant did not have a car. To repay the favor, defendant asked Hammond to stop at a drug store so that he could buy them some beer and vodka. After that, defendant had a few more errands to run, including picking up two women to join them for a party. Finally, defendant wanted linens for his new bedroom suite, so he asked that they make one last stop at the Wal-Mart, located on the corner of Perkins Road and Acadian Throughway.

Defendant entered Wal-Mart and placed in his cart merchandise including pillows, sheets, and a comforter. After a while, Martin went inside the store to use the restroom and to see how much longer defendant's shopping was going to take. While in the store, Martin observed defendant hide two disposable cameras in his rear pants pocket underneath his shirt, and not wanting any part of what that action might portend, Martin returned to Hammond's SUV and told him that his cousin was "buying sixty dollars' worth of merchandise but he was stealing about twenty dollars' worth of merchandise."

Wal-Mart's loss prevention manager, Garrett Douget, also observed defendant concealing the cameras and suspected that he had witnessed a shoplifting. Douget was in plain clothes and followed defendant to the check-out counter, taking the place in line directly behind defendant.

As the clerk, Angela Ranson, began ringing up his purchases, defendant engaged her in flirtatious small-talk, complimenting her on her hair style and offering to bring her breakfast the following morning. Ranson noted that defendant decided not to purchase two items in his buggy, a cordless phone and some bar soap, and those items were set aside in the return bin. Simultaneously, Douget watched defendant's transaction and noted that the two disposable cameras were not among his purchases, because Douget could see the cameras in defendant's pocket as he leaned over to talk to Ranson.

Defendant persisted in trying to convince Ranson to give him her phone number even after he had completed his purchase.

Eventually, defendant proceeded to exit the store. After defendant had passed all possible points of sale without paying for the cameras, Douget confronted him in the store's vestibule. Douget identified himself as Wal-Mart security and asked defendant, "What about the items under your shirt there?" Defendant removed the cameras and handed them over saying, "I can explain that." When defendant offered to pay for the merchandise, Douget declined, and pointed for him to turn around and step back into the store to speak to the police officer on duty. Defendant turned and took one step toward the victim, Lieutenant Vickie Wax, a twenty-seven-year veteran Baton Rouge Police officer working security at Wal-Mart in full police uniform, but defendant then turned back to make a run for the exit, shoving his way past Douget.

Douget and Lt. Wax each grabbed one of defendant's arms and attempted to handcuff him, but only successfully secured the cuff on his left hand before a struggle ensued. Defendant knocked Lt. Wax to the floor and fell on top of her. Douget

landed on top of defendant, sandwiching defendant between himself and Lt. Wax.[1]

Stanford Wilson, a Wal-Mart customer, witnessed defendant striking the female officer and entered the fray to help. Lt. Wax called out, "He's got his hand on my gun." Moments later, defendant had removed Lt. Wax's gun from its holster and gained control of it. Douget stepped back and told defendant to "just get out of here." Defendant got up and yelled for everybody to "get back," and everyone obliged. Although the witnesses said there was no impediment between defendant and the exit door, defendant turned around inside the vestibule, pointed the gun at Lt. Wax and fired, striking her in the center of her forehead at her hairline. Lt. Wax fell face down on the floor and defendant shot her again, striking her in the center of her back. Defendant then shot Douget in the back as he was trying to get away. Defendant then shot Wilson twice, hitting him in the chest and neck. Defendant then fled the store.

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[1] At the time of her death, Lt. Wax was fifty-one years old, and her height was approximately five feet three inches. Douget estimated that at the time of this offense his height was six feet one inch or six feet two inches and his weight was between 260 to 270 pounds. According to defendant's booking sheet, at the time of his arrest on the instant offense his height was six feet one inch and he weighed 220 pounds.

Lt. Wax died almost immediately from her wounds. Wilson was in critical condition from his injuries, but survived. Douget's injury was painful, but not life-threatening.

In the meantime, Hammond, along with Martin and the two women, had driven away when they noticed defendant wrestling with the policewoman and the security guard, followed by the sound of gunshots. With his cousin gone, defendant ran into the Wal-Mart parking lot. The first vehicle he attempted to enter was occupied by twelve-year-old Bria Jenkins and her younger niece; however, they had locked the doors while Bria's mother was inside the store. Next to their car was a Chevy Corsica occupied by Karyn Garnett and Abraham Washington. Defendant accessed the backseat of their vehicle, pointed the gun he was still holding at them, and yelled, "Drive, drive or I'll kill you." Garnett and Washington fled from the vehicle. Defendant jumped into the driver's seat and sped off, hitting a parked car on his way. Defendant eventually abandoned the vehicle, which the police located some two hours after the incident.

Late into the night and the following day, detectives processed the crime scene, retrieving evidence and interviewing eyewitnesses. Items known to have been touched by the shooter, including the disposable cameras, the cordless phone box, and the abandoned Chevy Corsica were dusted for fingerprints. A fingerprint lifted from one of the cameras matched defendant's known prints in the

police data bank. From that, the police developed a six-person photo lineup, which included defendant's picture along with five fill-in photographs of men with similar features. On May 23, 2004, the police interviewed Garrett Douget in his hospital room and showed him the photo lineup. Douget positively identified defendant as the person who shot him, Lt. Wax, and a customer.[2] A warrant for defendant's arrest for the first degree murder of Lt. Vickie Wax issued on May 23, 2004. On May 24, 2004, Baton Rouge Police Department Chief Pat Englade received a call from defendant's stepfather that defendant wanted to turn himself in. Several uniformed officers arrived at the salvage yard auto parts business where defendant had worked for his stepfather and arrested defendant without incident. The officers advised defendant of his Miranda rights.[3] Thereafter, Chief Englade asked defendant

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[2] Additional identifications of defendant were made on May 24, 2004. Deangelo Hammond and Jason Martin each gave a statement to the police about the events of May 22nd and viewed the photo lineup, positively identifying defendant. Abraham Washington and Karyn Garnett also positively identified defendant from the photo lineup as the person who stole their Chevy Corsica at gunpoint. Wal-Mart employees Angela Ranson (check-out clerk), James Minor, and Lester Barbier also made positive identifications of defendant, as did Wal-Mart customers who witnessed the murder, Judge Kathleen Richey and Lee Gray. At trial, these witnesses again identified defendant as the shooter.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

what he did with the police officer's weapon, to which defendant replied that he "threw it in the river by one of the casinos."[4]

DISCUSSION

As defense counsel conceded to the jury in oral argument, the primary issue at the guilt phase of trial, as well as the penalty phase of trial, was defendant's "mental capacity" at the time of the offense. Defendant changed his plea to not guilty and not guilty by reason of insanity, and therefore sought to prove at trial that he was legally insane at the time he killed Lt. Wax and shot Mr. Douget and Mr. Wilson. What transpired at the guilt phase, however, was not simply testimony as to whether or not defendant was insane at the time of the offense, but also what diminished mental capacity he may have been experiencing at the time of the offense and whether he is mentally retarded, issues more properly presented to the jury in the penalty phase of the trial. However, neither party made any objection to taking the testimony of the expert witnesses for the defense and the state in this manner, i.e., entirely within the guilt phase of trial.

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[4] Several searches of the river were made to no avail; the murder weapon was not available at trial. Defendant's post-arrest statement turned out to be false, because on July 10, 2006, members of the New Orleans Police Department found Lt. Wax's .357 caliber revolver in a stolen vehicle in New Orleans.

Indeed, it was the defense that introduced defendant's expert's testimony at the guilt phase as to insanity, diminished capacity, and mental retardation. Though these issues were all addressed contemporaneously by counsel and the witnesses during the taking of the testimony, we point out that the jury was clearly and properly charged by the district court as to the distinct issues it was to determine at the guilt phase (insanity) and at the penalty phase (mental retardation and mitigating circumstances). Therefore, as discussed more fully below, we do not find the jurors were confused on the issues or the evidence before them. At any rate, with the understanding that the testimony of the defendant's expert encompassed insanity, mental retardation, diminished capacity, and mitigation, we will address the assignments of error concerning the not guilty by reason of insanity defense and the mental retardation defense in that order.

Plea of Not Guilty by Reason of Insanity

In assignment of error No. 27, defendant asserts he was legally insane at the time of the offense and argues the state presented no evidence upon which a verdict to the contrary could be supported.

Under La. Rev. Stat. 14:14:

> If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of

> distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility.

However, in Louisiana there is a legal presumption that the defendant is sane and responsible for his actions. La. Rev. Stat. 15:432; *State v. Poree*, 386 So.2d 1331 (La. 1979). Therefore, to overcome this presumption of sanity, the defendant has the burden of proving by a preponderance of the evidence that he suffered a mental disease or a mental defect which prevented him from distinguishing between right and wrong with reference to the conduct in question. La. Code Crim. Pro. art. 652; *State v. Armstrong*, 94-2950, pp. 4-5 (La. 4/8/96), 671 So.2d 307, 309; *State v. Silman*, 95-0154, p. 7 (La. 11/27/95), 663 So.2d 27, 32; *State v. Peters*, 94-0283, pp. 8-9 (La. 10/17/94), 643 So.2d 1222, 1225-26. Sanity is a factual matter for the jury, to be determined from all of the evidence, both lay and expert, along with circumstances surrounding the events and testimony relating to the defendant's behavior before, during, and after the crime. *State v. Price*, 403 So.2d 660, 663-64 (La. 1981); *State v. Claibon*, 395 So.2d 770, 772 (La. 1981); *State v. Roy*, 395 So.2d 664, 668-69 (La. 1981). A determination of the weight of the evidence is a question of fact that rests solely with the trier of fact, who may accept or reject, in whole or in part, the testimony of any witness, and if rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all of the evidence most favorable to

the prosecution must be adopted. *State v. Silman*, 95-0154, p. 12, 663 So.2d at 35.

In reviewing a claim for insufficiency of evidence in an action where the affirmative defense of insanity is raised, the appellate court, applying the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), must determine whether under the facts and circumstances of the case, any rational fact finder, viewing the evidence most favorably to the prosecution, could conclude, beyond a reasonable doubt, that the defendant failed to prove by a preponderance of the evidence that he was insane at the time of the offense. *State v. Peters*, 94-0283, p. 8, 643 So.2d at 1225; *State v. Armstrong*, p. 4, 671 So.2d at 309; *State v. Nealy*, 450 So.2d 634, 639 (La. 1984).

In the present case, defendant changed his initial plea of not guilty to the dual plea of not guilty and not guilty by reason of insanity. Accordingly, defendant bore the burden of establishing by a preponderance of the evidence that he suffered from some mental disease or defect on May 22, 2004, that rendered him incapable of distinguishing between right and wrong with regard to the killing of Lt. Wax and the shooting of Mr. Douget and Mr. Wilson. The defense theory was that defendant suffers from an acute stress disorder triggered by physical restraint and that he was rendered unable to distinguish right from wrong on the night of the offense when Mr. Douget and Lt. Wax confronted him. To carry that

burden, the defense called Dr. Louis Cenac, a board-certified psychiatrist, who examined defendant on March 10, 2006, for approximately three hours, and reviewed various documents and records provided by defense counsel, including those from Baton Rouge General Hospital's Chemical Dependency Unit (hereinafter, "BRGH-CDU"), records from correctional facilities in which defendant had been incarcerated, and police investigative reports of the instant offense and prior offenses.[5] Dr. Cenac [*15] opined that, at the time of the offense, defendant did not know right from wrong because he was suffering from a "specific phobia ... when you grab him, he will react." Based on this and prior incidents with law enforcement officers, which Dr. Cenac discussed in some detail, Dr. Cenac diagnosed defendant as suffering from a "kind of phobia, a specific fear, fear of being restrained." Dr. Cenac described the phobia as a recurrent pattern, "when you grab him, he reacts physically, violently, and he doesn't hear what you're telling him." In Dr. Cenac's view, "under

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[5] According to Dr. Cenac, the records, consisting of hundreds of pages, included psychological testing by Dr. Cary Rostow, records from BRGH-CDU, records of some of defendant's behavior in various correctional facilities, defendant's arrest record with twenty-one arrests, "statements from the various witnesses to these events," (apparently referring to the instant charges as well as previous arrests/convictions), police records, and "evidentiary records." Dr. Cenac obtained a personal and familial history, as well as defendant's educational history.

stressful conditions [defendant] demonstrates a predictable pattern of non-responsiveness to auditory commands and violence towards people who touch him." Dr. Cenac concluded defendant "was impaired in his capacity to comprehend and to comply with the verbal orders of the arresting store detective on May 22, 2004," and further, that defendant had "a diminished capacity to appreciate the consequences of his behavior" on that night.

On cross-examination, the prosecutor sought to undermine confidence in Dr. Cenac's testimony, though Dr. Cenac was to some extent able to parry the thrusts of the prosecutor in that regard. Confronted with defendant's records from the Hunt Correctional Center, Dr. Cenac conceded he had reviewed neither those records (which were not introduced in evidence and are the subject of other assignments of error) nor the records from Red River Treatment Center (which, the jury was informed, had been destroyed by the facility itself), but he offered to do so if they were made available. Dr. Cenac reiterated that the defendant did not know right from wrong the night of the shooting because he was reacting to being restrained. Acknowledging that it was important to look at what other people around defendant said about him, Dr. Cenac admitted that, other than defendant himself, he had not interviewed eyewitnesses and did not sit through their testimony at trial, except for the defendant's testimony. But Dr. Cenac pointed out that he had observed how jail personnel gave defendant a wide berth under a high level of security and that he had

read various police reports and statements of witnesses, all of which were compiled closer in time to past relevant events and, thus, were more trustworthy in his view. Although the prosecutor attempted to portray Dr. Cenac as holding stubbornly to his opinions in the face of the admission that he had not reviewed all of the materials he perhaps could have reviewed, Dr. Cenac nevertheless felt confident that he had made a valid mental evaluation of defendant based on the materials he had reviewed and conceded that, if the facts upon which an expert opinion is based are changed, then the opinion may of necessity change as well. Aside from his assessment that defendant was insane on the night of May 22, 2004, due to a particular phobia and stress disorder, Dr. Cenac cited no other medical diagnosis for insanity. As to whether he knew if defendant had ever been treated for a mental illness, Dr. Cenac noted that he could not answer that question because, as the prosecutor had just made known to him, not all of defendant's records had been made available for his review.[6]

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[6] Much of the state's cross-examination focused not on Dr. Cenac's opinion on defendant's sanity or mental status at the time of the offense, but on Dr. Cenac's diagnosis that defendant is mentally retarded, an issue discussed below. Notably, even defense counsel in closing arguments, ostensibly in an attempt to bolster his witness's credibility before the jurors, admitted that Dr. Cenac might have come across as "arrogant" and perhaps not likable.

Defendant also testified at the guilt phase and his testimony tended to advance the defense theory that he has a pattern of aversion to being touched, particularly by persons of authority. He related the details of an arrest made in 1993 or 1994 when he was in Don Carter Bowling Lanes in Baton Rouge and three uniformed police officers, all Caucasian males, approached to question him. Defendant described the officers as "really showing too much authority" and related that he and the officers "[got] into a little tussle" when one of them approached him. In addition, defendant described the instant offense at Wal-Mart starting because the "big white guy ... jammed me up." In the altercation that [Pg 12] ensued, defendant's "concern [was], man, what you touching me for, what you putting your hands on me for.... I'm just click, you know, some prejudice, I said some prejudice shit about to jump off, you know what I'm saying? I'm really like messed up about this man touching me, you know what I'm saying? ... Don't touch me ... what did you touch me for, don't touch me.... I'm not going to allow just anybody just to touch me."[7]

Although the defense argues there was no evidence introduced by the state to rebut Dr. Cenac's testimony, we find there was sufficient contradictory

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[7] Defendant's step-father, Michael Robinson, testified in the penalty phase that defendant did not like to be touched, and that arguments with him could escalate into a physical encounter if he did not calmly reason with defendant.

evidence upon which the jury could rationally rely in either rejecting Dr. Cenac's testimony as unconvincing or giving it little weight in the face of other evidence and testimony relating to the issue of insanity. First, Hammond, defendant's cousin, and Martin, his friend, testified to the surrounding events and defendant's behavior before, during, and after the crime. Both Hammond and Martin recalled moving defendant's furniture to his new apartment for him while he worked at his stepfather's salvage business on the day of the murder. According to their testimony, neither of them had any problem understanding defendant or communicating with him that day so that he understood them.[8]

Further, defendant's own testimony as to the events of May 22, 2004, tended to support a finding that he was not incapable of distinguishing right and wrong at the time of the offense. "I had went to work that day ... it was a good day, we was making a lot of money.... I was running the shop ... everything was going good ... just like normal little business things."

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[8] Likewise, Ranson, the Wal-Mart cashier who rang up defendant's purchases and with whom defendant struck up an extended conversation during the check-out, testified that defendant did not appear to be intoxicated, nor did she notice anything unusual or out of the ordinary about his demeanor. Similarly, when the prosecutor asked the Wal-Mart store detective, Douget, "Did you observe the defendant mumbling, stumbling, talking out of his mind, or anything of that nature," his response was, "No, sir."

Defendant was able to convince his cousin and a friend to move the furniture which his father had given him, "a brand new bedroom set," so that he would not need to take off work that day. Exhibiting an understanding of repaying a favor, defendant had wanted to do something nice for Hammond and Martin in exchange for what they had done for him. "It was a Saturday night, it was payday . . . I had made a little money . . . and I was going to show them a good time." So defendant had his friends stop by Rite-Aid, and he purchased some beer and some vodka for them. "I wanted to do it pretty nice for 'em." Next, defendant wanted to pick-up some women to "get a little party going on," and he was anticipating "maybe have a three-some or a five-some, or whatever [] I could lay around there and afford to do, that's what I wanted to do." Defendant further testified that he realized he needed some sheets, pillows and a comforter for his new bed, so he asked his cousin to stop by Wal-Mart, where he sought the assistance of a store clerk to select blue linens. During his testimony, he recalled rolling his basket through the store, "just trying to do the right thing." Defendant flirted with the Wal-Mart check-out girl, "I'm being polite ... I've got about three girls coming to my apartment, then I got like a little date ... me and a little chick, we made small conversation ... shoot my stick, you know what I'm saying, and trying to get her phone number."

Upon being confronted by Mr. Douget, the loss prevention associate, defendant further exhibited an awareness of distinguishing right from wrong. Mr.

Douget recalled that after defendant passed the last point of purchase without paying for the cameras, "I identified myself as Wal-Mart security and I asked for the merchandise back ... the cameras." According to Mr. Douget, defendant "absolutely" responded "clearly and intelligently:"

> He said 'okay.' He took them out and he handed them over. And he said, 'I can pay for them.' I said, 'No, that's okay.' I said, 'Let's just go back inside.' I pointed to Lieutenant Wax and I pointed back inside.

Tellingly, there came a moment during the incident when defendant had escaped from Lt. Wax, Mr. Douget, and Mr. Wilson, and thus was no longer being restrained or touched by anyone. Several witnesses testified that defendant stood up with the gun in his hand, that there was no obstruction or person between him and the exit door, that he was told by various people, including at least one who had not attempted to restrain him, to leave and to not shoot, but that he nonetheless aimed the gun and shot Lt. Wax two times, shot Mr. Wilson two times, and shot Mr. Douget once. One witness described the gun shots as not rapid gunfire but "like he was aiming." Thereafter, defendant exhibited full appreciation that the actions he had just taken were so serious that the only course left to him was to escape. As set forth above, defendant eventually obtained at gun point a vehicle in which he fled the scene. One of the occupants volunteered that the

man who entered their car with a gun and a handcuff dangling from his left hand looked "paranoid." When defense counsel tried to develop the "paranoid" assessment into something akin to insanity, the witness clarified that he meant, "He was looking like he did something wrong." Accordingly, all of the eyewitness accounts reasonably support the jury's apparent finding that defendant could distinguish between right and wrong on the night of May 22, 2004, and that he was not insane at the time of the offense.

Finally, in its rebuttal case, the state presented Dr. Donald Hoppe, a clinical psychologist, who had reviewed Dr. Cenac's report and who disputed Dr. Cenac's diagnosis of defendant suffering from "touch phobia," finding it "highly suspect." Dr. Hoppe testified that he had extensively researched the condition and found that such a diagnosis is very rare. He explained that the phobia, most frequently diagnosed in individuals who suffer from autism, has to be a long-standing pattern of persistent fear of touch that occurs in all situations. However, by defendant's own admission, Dr. Hoppe noted, he enjoyed sexual intimacy, including with multiple partners simultaneously, and he had on his own initiative hugged his cousin when they greeted. Dr. Hoppe found such behavior inconsistent with a diagnosis of a fear of being touched under the standard set forth in the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2002) (hereinafter, "DSM-IV"). Dr. Hoppe explained to the jury that "the

response to a phobic situation is always avoidance, never violence."

Although defendant now argues to this court that Dr. Hoppe apparently misunderstood Dr. Cenac's diagnosis of an "acute stress disorder" as one of "touch phobia," defense counsel did not elect to cross-examine Dr. Hoppe on any aspect of his testimony. Nor did counsel address Dr. Hoppe's testimony in his closing argument, except to point out that Dr. Hoppe did not interview defendant, a comment to which the State objected.[9] The jury in

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[9] The procedure for raising a claim of mental retardation is governed by La. Code Crim. Proc. art. 905.5.1(B), which requires a defendant raising such a claim to do so in writing within the time period for filing pretrial motions under La. Code Crim. Proc. art. 521 (all pretrial motions shall be filed within 15 days of arraignment). In the present case, the defense, though it did not do so within 15 days of arraignment, eventually gave notice to the state of the mental retardation claim when it provided the state with Dr. Cenac's report after voir dire had commenced, a delay that understandably raised the hackles of the state. However, the record shows that the parties and the trial court were apparently well aware that a claim of mental retardation was certain to be made by the defense, but the trial court eventually had to explain to the jury the defense's late timing in raising the claim. During the defense's closing argument at the penalty phase, counsel attempted to cast doubt on the credibility of the state's rebuttal expert, Dr. Hoppe, for not having examined defendant, which prompted the prosecutor's objection under La. Code Crim. Proc. art. 905.5.1(F). As a result, the court informed the jury how the procedure for claiming mental retardation had played out in this case, namely that the defense did not file timely notice that it would claim mental retardation.

this case, before deciding the factual issue of insanity, was required to make credibility determinations among the witnesses and to decide what weight, if any, to give the testimony of the expert witnesses. The trier of fact makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony of any witness; thus, a reviewing court may impinge on the "fact finder's discretion only to the extent necessary to guarantee the fundamental due process of law." *State v. Mussall*, 523 So.2d 1305, 1310 (La. 1988). Therefore, when viewing the evidence presented in the light most favorable to the prosecution, we find the jury's rejection of defendant's insanity claim based on a particular phobia, i.e., its conclusion that defendant did not prove by a preponderance of the evidence that he suffered from a mental disease or mental defect which rendered him incapable of distinguishing right and wrong at the time of the offense, was a rational determination, fully supported by the record. This assignment of error lacks merit.

Claim of Mental Retardation

In assignment of error No. 1, defendant urges that his death sentence violates the Eighth Amendment to the United States Constitution because he proved by a preponderance of the evidence that he is mentally retarded and, therefore, he is ineligible for capital punishment under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

In *Atkins*, the Supreme Court held that execution of mentally retarded persons constitutes an excessive punishment, and thus violates the Eighth Amendment of the United States Constitution. See also *State v. Williams*, 01-1650 (La. 11/1/02), 831 So.2d 835. Thereafter, the legislature enacted La. Code Crim. Pro. art. 905.5.1(A), which mandates that no person who is mentally retarded shall be subjected to a sentence of death and sets forth the procedure to be used when a capital defendant raises a claim of mental retardation. To prevail on his claim, the defendant has the burden of proving mental retardation by a preponderance of the evidence. La. Code Crim. Pro. art. 905.5.1(C)(1). The legislature has set the standard for mental retardation as:

> a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

La. Code Crim. Pro. art. 905.5.1(H)(1). This standard implicitly incorporates the definition of mental retardation set out in La. Rev. Stat. 28:381(28) (significant subaverage general intellectual functioning "existing concurrently with deficits in adaptive behavior . . . manifested during the developmental period"), and is equivalent to the standard articulated in the DSM-IV. Both standards

require a two-pronged finding of: significant subaverage intellectual function and significant limitations in adaptive functions; and both require an onset age under 18 years, because mental retardation is by definition a developmental disorder that must manifest itself at the developmental stages of life.[10]

General intellectual functioning is defined by the intelligence quotient (IQ) obtained by assessment with one or more of the standardized, individually administered intelligence tests. Id. Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately two standard deviations below the mean). Id. "'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70." *Atkins*, 536 U.S. at 309, 122 S.Ct. at 2245, n.3 (quoting DSM-IV, pp. 42-43). There is a measurement error of approximately 5 points in assessing IQ, depending on the test used; therefore, mental retardation can be diagnosed in individuals

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[10] According to the DSM-IV, the essential feature of mental retardation is significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. DSM-IV, p. 41.

with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. DSM-IV, pp. 41-42.

Adaptive functioning or behavior refers to how effectively an individual copes with common life demands and how well he meets the standards of personal independence expected of someone in his particular age group, sociocultural background, and community setting. Id., p. 42. Adaptive functioning is determined from independent sources, such as teacher evaluations and educational, developmental, and medical histories, and/or through the application of scales designed to measure adaptive functioning or behavior. Id.

Psychological, social and medical conditions that may be considered but that "do[] not necessarily constitute mental retardation" are listed in La. Code Crim. Pro. art. 905.5.1(H)(2). The list includes: behavioral disorders; difficulty in adjusting to school; emotional disturbance; environmental, cultural, or economic disadvantage; learning disabilities; lack of educational opportunities; mental illness; personality disorders; sensory impairments; and a temporary crisis situation; all of which were presented by the defense in this case. La. Code Crim. Pro. art. 905.5.1(H)(2)(b), (d), (e), (g), (i), (k), (o), (p), and (r). And in *Atkins*, the United States Supreme Court suggested factors to consider for the determination of mental retardation:

> Clinical definitions of mental retardation require not only sub-

> average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption [*32] from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318, 122 S.Ct. at 2250-51.

In light of the standard articulated in *Jackson v. Virginia, supra*, for reviewing the sufficiency of the evidence, we find that, to sustain a sentence of

death in which mental retardation is at issue pursuant to La. Code Crim. Proc. art. 905.5.1, the court, viewing the evidence in a light most favorable to the prosecution, must determine that a rational trier of fact could have concluded that the defendant did not prove by a preponderance of the evidence that he is mentally retarded under Art. 905.5.1. We applied this standard in our recent decision in *State v. Lee*, 05-2098 (La. 1/16/08), 976 So.2d 109, wherein we considered the defendant's claim that he had carried his burden of proving mental retardation by a preponderance of the evidence. Based on the expert and lay testimony presented to the jury in that case, we concluded "[t]he jury's unanimous decision that defendant is not mentally retarded, and thus that he failed to carry his burden of proof, is neither irrational nor arbitrary." *Lee*, 05-2098, pp. 58-59, 976 So.2d at 147. With that standard in mind, we turn to the evidence presented to support the defendant's claim of mental retardation.

Under Art. 905.5.1(C)(1), "[t]he jury shall try the issue of mental retardation of a capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the judge." In the present case, the mental retardation issue was tried to the jury at the penalty phase.[11] However, as noted above, the

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[11] As to the claim of mental retardation, the trial court during the penalty phase instructed the jury as follows:

defense's mental health expert, Dr. Cenac, testified at the guilt phase on the issue of mental retardation, as well as on the issues of insanity and diminished capacity. The defense introduced Dr. Cenac's expert report at the penalty phase, along with the introduction by the state of the evidence and testimony presented at the guilt phase.

Thereafter, the trial court read to the jurors the diagnoses listed in La. Code Crim. Proc. art. 905.5.1(H)(2)(a) through (s). Finally, the court instructed the jury: "If you unanimously find, by a preponderance of the evidence, that the defendant has proven that he is mentally retarded, this

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> A defendant who is mentally retarded may not be subjected to the death penalty. In determining whether the defendant is mentally retarded, you should consider all of the evidence presented bearing on the defendant's mental condition, including the testimony of experts and other witnesses, and the conduct and actions of the defendant.
>
> The defendant must prove his claim of mental retardation by a preponderance of the evidence. Mental retardation is a disability.
>
> Mental retardation is a disability characterized by significant limitations in both intellectual functioning and adaptive behavior, as expressed in conceptual, social, or practical adaptive skills. The onset must occur before the age of eighteen years.

determination shall serve as a bar to the sentence of death in this case, further deliberations are not necessary. However, should you fail to unanimously find that the defendant is mentally retarded, you may consider any evidence regarding his mental condition as a mitigating circumstance in your consideration of proper sentence in this case."

Dr. Cenac expressed to the jury his opinion that the defendant is mildly mentally retarded. He initially noted the records he had reviewed and summarized defendant's medical and family backgrounds, including a history of alcoholism and violence. Dr. Cenac explained that the diagnosis of mental retardation is not just a number score, referring to IQ, but includes a finding of inadaptability, i.e., whether the person is capable of adapting to society's norms and expectations. He first noted that defendant was diagnosed as mentally retarded in first grade, had been enrolled in special education classes since, and in 7th or 8th grade was admitted to the BRGH-CDU for possible cocaine use. At BRGH-CDU, Dr. Cary Rostow, a psychologist whom Dr. Cenac knew well and with whom he had previously worked, evaluated defendant at the age of seventeen and prepared a report, which Dr. Cenac reviewed. According to that report, Dr. Rostow found defendant to have an IQ of

approximately 73, categorizing him as mildly mentally retarded.[12]

Dr. Cenac reiterated that a diagnosis of mental retardation, however, is not just a number score but also includes the finding of inadaptability. He described defendant's history as exemplifying a pattern of inadaptability, present throughout his life, such that defendant is "essentially inadaptable." Dr. Cenac then reviewed defendant's educational history, noting the many different schools defendant attended but at which he did not succeed. Dr. Cenac related that defendant was released from the BRGH-CDU program early because he could not comprehend or function in the program, according to a report prepared by Dr. Leon Bombet, a pediatrician. Defendant's criminal history commenced from when he was ten years old, for being a runaway, and eventually totaled some twenty-one arrests for various offenses. Dr. Cenac extensively covered seven of these arrests in both his

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[12] Dr. Rostow's report, which was not introduced in evidence but is part of the trial record, is dated June 22, 1988, and defendant's date of birth is September 30, 1970; therefore, defendant was seventeen years of age at the time of the testing. Dr. Rostow conducted a battery of tests on defendant, including the Wechsler Adult Intelligence Scale - Revised (hereinafter, "WAIS-R"). With a full scale IQ of 73, defendant's IQ placed him in the DSM-IV category of mild mental retardation, according to Dr. Rostow's report.

report and trial testimony.[13] The circumstances of these arrests, according to Dr. Cenac, revealed that many of them came about or escalated in seriousness because of defendant's fear of being touched, his inability to think in the abstract, and his inability to hear and comprehend what others are saying to him in stressful situations. Dr. Cenac identified defendant as exhibiting a "repetitive pattern of being predictably unpredictable when challenged."

Dr. Cenac noted that, as further evidence of inadaptability, defendant has never been able to live independently, cannot remember his own address, relies on others to solve his problems, and learns by rote or by hand rather than verbally or through abstract reasoning; in other words, he has "concrete thought processes." Rather than adapt to his limitations, Dr. Cenac explained, defendant uses a defense mechanism of omnipotence; he is grandiose and possesses an inflated self-esteem, as exemplified by defendant's own testimony that he held a favored position in the family and did not have to pay bus

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[13] Dr. Cenac observed that in discussing these violations of the law with defendant, he adopted a vernacular such as "remanded on a prior charge," which the witness found "startling" because those were terms attorneys would use. Dr. Cenac believed that defendant understood what was transpiring in the courtroom. "He can assist [] his attorney in his defense. He understands what a counsel is, he understands the role of the judge. He understands the role of the jury. He understands the difference between the prosecuting and defense attorneys."

fares because people liked him. In discussing defendant's "ambivalence" as a result of wanting to "do right" but also to do "what the streets wanted," Dr. Cenac noted that, while defendant might express his intention to "do right," he does not have the brain power to even rent an apartment, and the only suitable employment for him would be working for a relative. Although Dr. Cenac acknowledged defendant had attended Camelot Career College, which defendant considered a program one passes just for attending class, Dr. Cenac pointed out that the school was not comparable to a university; people like defendant should be taught and could learn to do things by rote, such as in a restaurant-like environment.

Based on the results of the tests done by Dr. Rostow and other evidence, Dr. Cenac, citing the DSM-IV, made a multi-axial diagnosis including mental retardation. On the first axis, how a person presents at a point in time, Dr. Cenac found defendant to have poly substance abuse, but without psychological addiction due only to his periods of incarceration, a specific situational-type phobia of violently reacting to touch or being grabbed, and an acute stress disorder, resulting in some impairment of consciousness and awareness. On the second axis, which is a longitudinal view of personality and adaptability, Dr. Cenac noted defendant has mild mental retardation and meets all the criteria for anti-social personality disorder ("not planful," behavior is predicated on stimulus, and transgresses the rights of others). On the third axis, which

pertains to physical causes, Dr. Cenac stated defendant had a period of brain trauma at the age of seven, which can be associated with personality change and decreased intelligence. As to the fourth axis, the state of the person's current stress disorders, Dr. Cenac stated defendant was under moderate to severe stress due to the fact he was facing the possibility of capital punishment. Finally, as to the fifth axis, the current level of adaptive functioning, Dr. Cenac opined that defendant was functioning quite poorly.

Dr. Cenac further stated that defendant has a tendency toward psychotic distortion, in that when under stress he does not reflect on things, instead he acts. Based on the observations of correctional officers and police officers who had dealt with defendant, Dr. Cenac explained that, under stressful conditions, defendant demonstrates a predictable pattern of non-responsiveness to auditory commands and violence towards people who touch him. Dr. Cenac opined that defendant was impaired in his capacity to comprehend and comply with the verbal orders of the arresting store detective on the night of May 22, 2004, and that he had a diminished capacity to appreciate the consequences of his behavior that night.

The state's cross-examination exposed, and Dr. Cenac conceded, that in arriving at his expert opinion regarding defendant's mental status, he may not have reviewed all of defendant's records, though he did review "every word" of those provided to him

by defense counsel. Dr. Cenac was impressed that defense counsel had provided him with the entire defense file, something he had not previously encountered. Nonetheless, Dr. Cenac on cross-examination revealed that he had focused primarily upon the results of one out of the four IQ tests defendant had undergone, namely Dr. Rostow's 1988 evaluation.[14] Dr. Cenac could not recall having reviewed the 1996 record from Hunt Correctional Center, but, as noted above, he offered to review those and any other records the state would provide. When advised by the prosecutor that defendant had been tested four times and that his IQ had been going up each time, Dr. Cenac opined that such progression demonstrates "a practice [e]ffect." In keeping with the tone of the exchange between the prosecutor and the witness, the prosecutor announced that the defense expert "clearly [] didn't review all pertinent records." Defense counsel admitted, "I don't have the Hunt records or [Dr. Cenac] would have had 'em."[15] The absence of all of

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[14] The first IQ test was conducted in the school setting some years before 1988; the second test was upon admission to BRGH-CDU in 1988; a third test was at Hunt Correctional Center in 1996; and a fourth IQ test was also administered at Hunt Correctional Center in 1999.

[15] The subpoena returns show that the subject records were made available to defense counsel well in advance of trial. Although the state had obtained all of the records from the Department of Corrections [hereinafter "D.O.C."], and informed defense counsel of that fact, even offering the defense a copy, counsel preferred that "even if the state provided what they

the IQ tests from Dr. Cenac's review led the prosecutor to suggest that the defense expert was basing his diagnosis of mild mental retardation on testing that occurred eighteen years previous. Dr. Cenac confirmed, "That is correct." Dr. Cenac stressed, however, that defendant was mentally retarded at the age of seventeen and he was still retarded at the age of thirty-five, his age at the time of trial. Although Dr. Cenac refused to reconsider his diagnosis even after learning that he had not reviewed all of defendant's records, he noted that his professional opinion was based on the records he was actually provided and that such a professional opinion could necessarily change if the underlying information changed.

The Hunt Correctional Center records, the subject of much of defendant's argument to this court, include two clinical screening reports, one from 1996 and the other from 1999, by that correctional center's psychology department upon defendant's incarcerations at that facility. The Hunt

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said is the entire D.O.C. record [,] we want it to come from D.O.C." The trial court noted to counsel that he and the defendant could request the records themselves directly from the D.O.C. Elsewhere, it appears from the record that the trial court also received the D.O.C. records, and, after reviewing them, stated it would give a copy to the defense and place another copy in the record. Thereafter, defendant was permitted to change his plea to not guilty and not gulity by reason of insanity. Eventually, defense counsel indicated to the court that all discovery motions had been satisfied.

records were not introduced in evidence at trial, but they were made part of the trial record through the State's subpoena under La. Code Crim. Proc. art. 66, as the defendant concedes in brief. In the 1996 report, defendant's performance on the Test of Nonverbal Intelligence (hereinafter, "TONI") indicated his "[i]ntelligence is estimated to be within the 72 to 78 range." In the 1999 report, defendant's performance on the second edition of the TONI indicated that his "[i]ntelligence is estimated to be within the 73 to 77 range."

The prosecutor also brought out the fact that, not only were the records reviewed incomplete, but the interviews Dr. Cenac conducted in formulating his mental status determination of defendant also appeared equally limited, because he had interviewed no one other than the defendant. Dr. Cenac interviewed none of the eyewitnesses present at Wal-Mart who could attest to defendant's behavior as they observed it at the time of the shooting; moreover, Dr. Cenac elected not to sit in the courtroom to hear the eyewitness testimony to learn the relevant conduct of defendant during the offense because to have done so would have meant he would have had to cancel appointments with patients. Consequently, Dr. Cenac had no opinion with respect to the earlier testimony regarding how normal defendant's behavior had been just prior to the crime. However, Dr. Cenac stated that he had reviewed the police reports and the statements of the witnesses, which he believed more accurately

reflected the events because they had been prepared more closely in time to those events.

The state's rebuttal expert, Dr. Hoppe, a clinical psychologist, challenged Dr. Cenac's finding of mild mental retardation as being contrary to the standards set forth in the DSM-IV because defendant's lowest IQ test score was 73, and even that falls outside the threshold of 70 and below. Dr. Hoppe initially stated that the standard for mental retardation is very clear and longstanding. He explained that first and foremost is an IQ less than 70, and then second the person must be shown to have a failure to develop adaptation or life skills. Here, Dr. Hoppe noted, the only data he had seen placed defendant's IQ above 70; therefore, "right off the bat, that throws the whole retardation thing out, it doesn't meet the established criteria." He continued:

> And that, that's every piece of data I saw and everything I heard testified to today, places his IQ above the scientific cut-off for that diagnosis. So there is absolutely no debate. He cannot be mentally retarded, given the IQ scores that have been presented here and the ones that were made available to me. It's just impossible, it doesn't meet the scientific criteria.

Dr. Hoppe also disputed Dr. Cenac's assessment of inadaptability by inviting the jurors to recall defendant's own testimony:

> I was certainly struck by the apparent resourcefulness of the defendant when he testified, in response to his own attorney's questions. He, his demeanor changed drastically when he [the prosecutor] began to question him.... He is very resourceful. He may not have a lot of book-smarts but this man, by his own admission, is very street-smart. And that's a type of adaptive behavior. He could talk all about what brands of vodka to buy to impress people. He knew about application and credit reports to sign a lease. He was able to talk about a valid driver's license at Enterprise, to rent a car. This is not something you hear from someone who is mentally retarded. This man is well aware of what society requires and expects. He doesn't comply with it. But failure to comply with societal expectations is different from the inability to comprehend or understand societal expectations.

Dr. Hoppe further found a lack of trustworthiness in Dr. Cenac's diagnosis because he had "based his entire diagnosis of mental retardation on Dr. Rostow's report, which is incorrect." Dr.

Hoppe explained that, while he heard Dr. Cenac say that defendant could not think abstractly, he looked specifically at the test scores recorded by Dr. Rostow and the highest score was for abstract thinking. Although this score was still below average, Dr. Hoppe explained, the score for abstract thinking was not in the deficient range but in the borderline range, and was one of defendant's strengths.

Defendant's trial testimony and his apparent demeanor on the stand supports the jury's finding that he was not mentally retarded. The testimony tends to show the defendant's ability to communicate (he could comprehend and respond to questions appropriately); his ability to recall past events from his childhood, his schooling, and all of his arrests and incarcerations; his ability to understand and anticipate the reactions of others; and his ability to learn from experience. See *Atkins*, 536 U.S. at 318, 122 S.Ct. at 2250-51. Indeed, defendant exhibited a self-awareness that he was a product of the streets -- "I'm used to what I was raised up into my hood." -- and that he had learned to survive in that arena. For example, defendant explained to the jury how cars could be rented in exchange for drugs; that he could afford to have his apartment cleaned for $ 20, "a little drug here and there, you can get somebody to pay you;" and that he did not even have to pay to ride the bus as long as he knew the driver.

Defendant also informed the jury that on the day of the shooting, he was working at his former stepfather's salvage business. He explained to the

jury that as part of his job, he would compare another company's price versus his price and try to "underbid" his competition to sell the parts. At the time of the offense, defendant claimed, he was making anywhere from $ 100 to $ 800 per day, and was saving some of that money. A rational jury could have concluded that defendant exhibited some measure of intelligence and sufficient adaptive skills to survive in the environment of his choice. Defendant's testimony, particularly with respect to his adaptive skills, if accepted by the jury, tended to negate a reasonable likelihood that he qualified as mentally retarded. The jury heard no further evidence of mental retardation at the penalty phase, although counsel argued for such a finding in closing argument ("What you have here is a child in a man's body."), and attempted to cast doubt on Dr. Hoppe's testimony by noting he had not interviewed the defendant.

Applying the *Jackson v. Virginia* standard to the instant case, we find, based on our thorough review of the record evidence, that the jury's unanimous decision that defendant failed to prove mental retardation by a preponderance of the evidence was not irrational, as it was fully supported by the record. We find the jurors had sufficient evidence on which to conclude the defendant failed to show "significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills." La. Code Crim. Proc. art. 905.5.1(H)(1). See *State v. Lee*, 05-2098, p. 59, 976 So.2d at 147. It was within the

jury's wide purview to make credibility determinations and decide the weight of the expert testimony. See *State v. Mussall*, 523 So.2d at 1310. While the determination of whether a defendant is mentally retarded is inherently an intensively factual inquiry, we do not find the jury acted either irrationally or arbitrarily in unanimously deciding that this defendant is not exempt from capital punishment based on a claim of mental retardation. See *State v. Lee*, 05-2098, pp. 58-59, 976 So.2d at 147.

Alleged Errors in Testimony of State's Expert Witness

In assignments of error Nos. 2 and 14, defendant alleges Dr. Hoppe, the State's expert witness, misstated the law on mental retardation when he testified that there is an IQ cut-off of 70. Thus, defendant contends the jury's sentence of death violates the Eighth and Fourteenth Amendments to the United States Constitution. Defendant avers Dr. Hoppe incorrectly testified that an IQ score over 70 precluded a diagnosis of mental retardation, because Louisiana law does not specify a numerical cutoff. He quotes Dr. Hoppe's testimony:

> Something that keeps getting talked about here is this issue of mental retardation. There is a very clear standard for mental retardation. It has been around for over a hundred years. It is the one and only standard that we

> have. And it is that there be, first and foremost, an I.Q. of less than seventy. And then, in addition to that, that the person is shown to have a failure to develop adaptation, you know, to develop life-skills. But, first of all, you have to establish an I.Q. of less than seventy, beginning before the age of eighteen.

We find defendant's claim is without merit. First, defense counsel made no objection to Dr. Hoppe's testimony, nor did counsel cross-examine the witness to expose to jurors what the defendant now alleges were the witness's erroneous statements of the law. Second, while La. Code Crim. Proc. art. 905.5.1 does not specify a threshold IQ score for a finding of mental retardation, the Supreme Court in *Atkins* noted that "'[m]ild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70." *Atkins*, 536 U.S. at 309, n.3, 122 S.Ct. at 2245, n.3 (quoting DSM-IV, pp. 42-43). Thus, the DSM-IV itself, relied upon and referenced by Dr. Hoppe and, to some extent, Dr. Cenac, indicates that an IQ of 70 marks a potential threshold for mild mental retardation. Indeed, Dr. Cenac on cross-examination agreed that the DSM-IV so provided.[16]

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[16] Additionally, defendant's full scale score of 73 on the WAIS-R, with a margin of error of four points, possibly places his actual IQ at some number approximately equal to or below 70. For example, in *State v. Williams*, 01-1650, pp. 23-24 n.26 (La. 11/1/02), 831 So.2d 835, 853-54 n. 26, we observed that "an

At any rate, while we are careful to point out that neither our legislature nor our jurisprudence has set forth a specific IQ score for determining intellectual functioning in the capital sentencing context, this court, like the *Atkins* Court, has recognized that mental health experts and the medical literature have acknowledged an IQ of 70 as "the line demarcating mild mental retardation." See *State v. Anderson*, 06-2987, p. 16 (La. 9/9/08), 996 So.2d 973, 989; *State v. Williams*, 01-1650, pp. 23-24, 831 So.2d at 853-54 ; *State v. Dunn*, 01-1635, p. 28 (La. 11/1/02), 831 So.2d 862, 885. Accordingly, in the testimony of Dr. Hoppe, a clinical psychologist who referenced the DSM-IV cited in Atkins, we detect nothing that would preclude the jury from rationally relying on his testimony.

Moreover, as both Dr. Cenac and Dr. Hoppe explained, intellectual functioning is but one prong of the mental retardation equation: adaptive skills must also be considered in the analysis. "A low I.Q. score, alone, does not equate to a finding of mental retardation." *State v. Campbell*, 06-0286, p. 25 (La.

IQ of 70 could range from 66 to 74 assuming an SEM [standard error of measurement] of 4." Yet, defense counsel in this case did not question either his own expert witness or the State's expert witness about a standard error of measurement with regard to IQ scores in general, and certainly not with respect to the defendant's IQ score of 73 as reported by Dr. Rostow and relied upon by Dr. Cenac, to demonstrate to jurors that an IQ score of 73 could fall within the borderline range.

5/21/08), 983 So.2d 810, 829. Although defendant cites jurisprudence from various federal and state court decisions in which the threshold for the intellectual functioning prong has ranged between 70 and 75, he omits any discussion of the adaptive skills prong, which must also be considered in making a determination of mental retardation. As we determined earlier in this opinion, there was sufficient evidence upon which the jury could have reasonably found that the defendant failed to prove he also lacked adaptive skills, even if his IQ fell within the borderline range. Defendant's own testimony demonstrated a range of adaptive skills by which he had parlayed his street education to a relatively high level. In the face of this testimony from defendant, as well as that of Dr. Hoppe, the jury evidently made a credibility determination and found Dr. Cenac's assessment of defendant's claimed inadaptability unconvincing. Because we conclude there was no demonstrable error in Dr. Hoppe's testimony as to assessing intellectual functioning, and because there was another basis on which the jury could have reasonably found that defendant failed to prove mental retardation, we do not view the jury's apparent credibility determinations as irrational, and thus we find no violation of the defendant's constitutional rights.

Motion for Recess to Review the Hunt Correctional Center Records

The Hunt Correctional Center records, which contained the results of the 1996 and 1999 IQ tests,

figured prominently in the State's cross-examination of Dr. Cenac and are the subject of a number of assignments of error.[17] In assignment of error No. 12, defendant asserts the district court erred in denying his motion for a one-hour recess to allow Dr. Cenac the opportunity to review the Hunt Correctional Center records when the prosecutor confronted the witness during cross-examination with the results of these other IQ tests.

La. Code Crim. Proc. art. 708 defines a recess as "a temporary adjournment of a trial or hearing that occurs after a trial or hearing has commenced." A motion for recess is evaluated by the same standards as a motion for a continuance. *State v. Warren*, 437 So.2d 836 (La. 1983). A motion for continuance may be granted in the discretion of the court if there is any good ground therefor. La. Code. Crim. Proc. art. 712. The decision to grant or deny a recess lies within the discretion of the trial court and

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[17] Defendant argues the TONI scores from testing conducted at Hunt Correctional Center in 1996 and 1999, see n. 14, supra, are not inconsistent with a finding of mental retardation, but fall within the borderline range. Alternatively, defendant contends a TONI test, administered in a group setting and lasting about fifteen minutes, is not a full scale IQ test like the WAIS-R, given individually and lasting a number of hours. Thus, he argues the TONI scores should not have been compared to or discussed alongside the WAIS-R score, nor should the TONI scores have been used in a forensic setting. Defendant's other assignments of error involving the Hunt records are discussed below.

will not be overturned absent an abuse of that discretion. *State v. Hampton*, 98-0331 (La. 4/23/99), 750 So.2d 867, 877. Where the defense, at the time the motion was made, did not make a showing of a compelling reason for granting a recess, it cannot be said the trial court abused its discretion by refusing the recess. *State v. Richmond*, 284 So.2d 317, 326 (La. 1973).

We find no abuse of the trial court's discretion in the denial of the defendant's motion for recess to review the Hunt Correctional Center records. As previously set forth, any defendant in Louisiana who claims mental retardation as a bar to capital punishment has the burden of proving the claim by a preponderance of the evidence. La. Code Crim. Proc. art. 905.5.1(C)(1). Thus, it was incumbent upon the defense to ensure that its mental health expert, who was to testify in support of the defendant's claims of insanity and mental retardation, was fully cognizant of and had reviewed all necessary and available documents concerning the defendant's mental health status. The trial court evidently found no compelling ground for granting the recess, nor do we find that defense counsel established such at the time of the motion.

In this case, the record establishes that the defense had ample opportunity before trial commenced on March 20, 2006, to secure the Hunt Correctional Center records, that a copy of the Hunt records was placed in the trial record, and that defense counsel declined the State's offer of a copy of

the records it had received from the Department of Corrections (hereinafter, "D.O.C."). At a hearing on April 6, 2005, nearly one year before trial, defense counsel advised the court that he had not obtained all of defendant's records from the D.O.C., even though he had caused a subpoena to issue. The trial judge attempted to expedite the process by instructing counsel that he could easily obtain defendant's records and that it would take "however long it takes to drive up to D.O.C. and back, probably, or a phone call . . . you know you can get those records yourself through [defendant] requesting them. They don't have to be issued through a subpoena by the court." Defense counsel indicated he would do so. The court, though it denied the defendant's request to change his plea, set a subsequent hearing for counsel to report on the status of developing his case as to defendant's mental status, including the plea of not guilty by reason of insanity.

At the May 5, 2005 hearing, defense counsel indicated he could not obtain some of the D.O.C. records, but the State was "pretty certain" that it had been provided with all the records. Defense counsel declined the State's offer of a copy of the D.O.C. records, indicating he wanted the records from the D.O.C. The trial court again denied the defendant's request to change his plea on the basis that the defense had not provided a psychological report, which defense counsel claimed was due to lack of funds and because he did not have all the records. The State again indicated it would provide

the defense with a copy. At a hearing on May 12, 2005, counsel indicated he had funds to hire a psychiatrist, while the trial court stated it now was in possession of the D.O.C. records, would review them, and provide a copy to counsel. Then, on June 21, 2005, the trial court reviewed the D.O.C. records and stated it would provide the defense with a copy and place a copy in the record. The defendant was allowed to enter an insanity plea without objection, and the trial court set a new trial date. Finally, on September 15, 2005, defense counsel indicated that all discovery motions had been satisfied.

Although the trial record does not reflect whether the defense ever independently obtained the Hunt Correctional Center records, the record does show the State, and the trial court as well, did obtain the D.O.C. records for the defendant, and that these records were in fact offered to trial counsel, who declined to take the copy offered by the State, preferring instead to secure them himself. There is no doubt that the trial record contains a copy of the Hunt records, as defendant concedes in this court. The possible omission of the Hunt records from the mental health records provided to Dr. Cenac came to light during the state's cross-examination of Dr. Cenac, who responded to the State's query that he had not seen the Hunt records, prompting defense counsel to state: "I have Winn Correctional, D.O.C. records and everything else, but, to my knowledge, I don't have the Hunt records or [Dr. Cenac] would have had 'em." Defendant and his counsel could have readily obtained the Hunt records, apparently

declined the copy offered by the State, could have reviewed the copy placed in the trial record, or may have even been provided with a copy by the trial court. Therefore, we find no abuse of discretion in the trial court's denial of the motion to recess to allow Dr. Cenac to review the Hunt records.[18]

Alleged Prosecutorial Misconduct

In assignments of error Nos. 3 through 11 and 13, defendant contends pervasive prosecutorial misconduct resulted in an unfair trial and an unreliable and arbitrary imposition of the death penalty. Defendant argues the prosecutor unlawfully impugned Dr. Cenac's credibility by misstating the facts, mischaracterizing his testimony and questioning him on IQ test scores that were not properly introduced at trial. Defendant asserts the credibility of Dr. Cenac was pivotal to the defense, because defendant's claims of insanity, mental retardation, and mitigating circumstances turned on whether the jurors believed Dr. Cenac's testimony on

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[18] As noted previously, the defense introduced Dr. Cenac's testimony on mental retardation in the guilt phase of trial, even though the issue is properly presented, and was in fact decided, in the penalty phase. There is no indication the defense sought to recall Dr. Cenac in the penalty phase, so that he might give an updated opinion with the benefit of the Hunt Correctional Center records. Accordingly, there is no showing the district court's denial of the motion for recess was erroneous.

these issues. Essentially, he contends the prosecutor overstepped all reasonable bounds of propriety, comparing the prosecutor's conduct here to the misconduct of the government attorney in *United States v. Berger*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). He further contends the trial court failed to take any steps to cure those errors. For the reasons below, which address defendant's arguments in turn, we find no merit to these assignments of error.

Improper Comments By Prosecutor Regarding the Hunt Correctional Records

Defendant argues the prosecutor made misstatements regarding the contents of the 1996 Hunt Correctional Center records during his cross-examination of Dr. Cenac and again during his closing argument. Particularly, defendant faults the prosecutor for making misleading references to the highest score from the 1996 TONI, which yielded intelligence test results in the "72 to 78 range." Defendant claims the prosecutor "mischaracterized the facts contained in these documents" when he cross-examined Dr. Cenac, and caused Dr. Cenac to appear to jurors as stubborn, defensive, or evasive. He further complains the Hunt records were never introduced into evidence, and that it was, therefore, error for the prosecutor to reference them.

Much of defendant's argument turns on his assertion that the prosecutor made specific reference to the "high" score of 78 from the 1996 TONI during

his cross-examination of Dr. Cenac, and then repeated that misleading reference during closing argument. However, the transcript reveals the prosecutor did not refer to the score of 78 during his cross-examination of Dr. Cenac, though he did make reference to that score of 78 during closing argument in the guilt phase.[19] This IQ [Pg 39] score was not

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[19] The following reproduced portion of the State's closing argument at the guilt phase contains the language to which defendant points:

> Dr. Cenac comes in here and gave some absolutely amazing testimony. The first thing we know is that Dr. Cenac didn't agree with the legal definition of what insanity is, right from wrong. 'I don't use that standard, but I'm going to go ahead and tell y'all stuff anyhow. When it comes to mental retardation I choose to reject that standard as well. I know it's suppose[d] to be 70. I know that the test in 1988 showed that Shedran was at least a 73 I.Q., but I just chose to disregard that, because I am the doctor,' despite the fact, as Dr. Hoppe told you that field of expertise clearly requires that the I.Q. be 70. It is a required factor that must be found to determine mental retardation. So, as Dr. Hoppe said, 'Clearly that's out. He's wrong. He just chooses the wrong standards.' But it even gets worse than that. When questioned about the I.Q. I showed Dr. Cenac in 1996 the defendant's I.Q. was approximately 78. Didn't change his opinion at all.

Additionally, at the penalty phase, the State made the following argument of which defendant also complains:

admitted in evidence; therefore, the reference to the score of 78 arguably fell outside the bounds of proper argument. La. Code Crim. Proc. art. 774.[20] However, defense counsel did not contemporaneously object to the reference to this score during the State's closing argument.[21] Because defense counsel voiced no

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> When trying to determine mental retardation? There were two issues: I.Q. below 70, of which there apparently has been no evidence introduced to show that. And, and/or, depending on what expert you choose to believe, if you believe Cenac, the DSM-4 that Dr. Hoppe referred to is meaningless, that you can disregard his requirements, if you so choose. That you can say that an I.Q. of 73 would make someone mentally retarded. But we know, clearly, the defendant's intelligence was even higher than that, based upon the evidence presented to us.

[20] Argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. La. Code Crim. Proc. art. 774. The argument shall not appeal to prejudice, and the state's rebuttal shall be confined to answering the argument of the defendant. *Id.*

[21] Defendant presents his complaint about the prosecutor's closing argument within his discussion of an assignment of error regarding the prosecutor's cross-examination of Dr. Cenac when the Hunt records came to light, which prompted a defense objection to cross-examining Dr. Cenac with a document the defense did not have. We do not find that trial counsel's objection to cross-examination during the defense case-in-chief preserved the alleged error stemming from direct reference to the Hunt test score made during

objection during the portions of the State's closing arguments about which defendant now indirectly complains, any error in the guilt phase was not preserved for appellate review. La. Code Crim. Proc. art. 841.[22] Further, with regard to the penalty phase argument, we do not find the prosecutor exceeded the scope of proper argument in generally referencing the existence of scores higher than 73, because Dr. Hoppe testified as to having reviewed IQ scores for the defendant that were higher than 73, i.e., that such scores existed, and the defense chose

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closing argument in the absence of a contemporaneous objection. La. Code Crim. Proc. art. 841.

[22] Under La. Code Crim. Proc. art. 841, "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence." This requirement of a contemporaneous objection applies in capital cases both in the guilt phase, *State v. Taylor*, 93-2201 (La. 2/28/96), 669 So.2d 364, and the penalty phase, *State v. Wessinger*, 98-1234 (La. 5/28/99), 736 So.2d 162, 180-81 (noting the court retains its independent duty under La. Const. art. I, § 20 (1974), La. Code Crim. Pro. art. 905.9, and La. Sup. Ct. Rule 28 to determine whether the sentence imposed is constitutionally excessive, by carefully examining the record for evidence of passion, prejudice, or arbitrary factors that could have caused the death penalty to be imposed). Thus, a capital murder defendant who does not make a contemporaneous objection to allegedly improper statements of the prosecutor, so as to afford the trial court the opportunity to remedy the error with either a mistrial or an admonition, has failed to preserve for appellate review any claim that the prosecutor exceeded the scope of proper argument. See *State v. Wessinger*.

neither to object to his testimony nor to cross-examine him.

Furthermore, we find no prejudicial error in the State's references to the Hunt Correctional Center records in the cross-examination of Dr. Cenac. Although defendant argues the prosecutor referenced facts outside the record, primarily the TONI scores contained in the Hunt records, we find the Hunt records were the subject of proper cross-examination.

The State in the present case was entitled to cross-examine defendant's mental health expert for being unaware, or for possibly having ignored, the 1996 and 1999 intelligence tests administered subsequent to defendant's 1988 WAIS-R test, which had yielded a full-scale IQ of 73. The State's question to Dr. Cenac as to whether he had considered the intelligence testing performed on defendant at Hunt Correctional Center was within the scope of proper cross-examination, because the prosecution has the right to rebut the evidence adduced by the defense. See *State v. Constantine*, 364 So.2d 1011, 1013 (La. 1978); see generally La. Code Evid. art. 611(E). Throughout the testimony of Dr. Cenac, the defense sought to present a picture of defendant as mildly mentally retarded, in the absence of a contemporaneous IQ test of defendant, by relying exclusively on the WAIS-R test administered eighteen years before defendant's trial. The State was entitled to inquire into the defense expert's bases for making his assessment, including whether

he had considered testing administered more recently than the 1988 test on which he had relied. On cross-examination, the questioner "has traditionally been allowed to impeach, or discredit, the witness." *State v. Draughn*, 05-1825, pp. 47-48 (La. 1/17/07), 950 So.2d 583, 616 (quoting *State v. Robinson*, 01-0273, p.6, (La. 5/17/02), 817 So.2d 1131, 1135). Moreover, under La. Code Evid. art. 607(D)(1), "[e]xtrinsic evidence to show a witness'[s] bias, interest, corruption, or defect of capacity is admissible to attack the credibility of a witness." Therefore, the State was entitled to use the Hunt records as extrinsic evidence to discredit the testimony of Dr. Cenac, particularly with respect to the apparently incomplete sources upon which he had based his opinion of mental retardation. Defendant, via his claim of mental retardation, had placed his intellectual functioning at issue; therefore, the prosecutor's targeted questioning of the defense expert about more recent IQ testing was proper under La. Code Evid. art. 611(B), because a witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

Even if defendant could show that the higher TONI scores obtained in 1996 and 1999 have diminished significance when considered alongside his 1988 WAIS-R full scale IQ score of 73, see n. 17, *supra*, the prosecutor presented the Hunt records to Dr. Cenac, and without referencing a numerical score, informed the expert that defendant had been tested four times and that his scores had increased

with every test. As discussed above, Dr. Cenac was able to explain that such an increase in testing scores was likely the result of a "practice [e]ffect," and thus did not necessarily change his opinion that the defendant had mild mental retardation. Furthermore, regardless of whatever tests on intellectual functioning were presented, those results were only one part of the mental retardation evaluation, with the other part being adaptive skills, and we have previously determined the jury could have reasonably found on the evidence that the defendant had failed to prove inadaptability in life skills.

Improper Cross-Examination of Defense Witness

We next turn to defendant's assertion that the State during cross-examination of Dr. Cenac "made unduly prejudicial comments about his credibility." Further, he claims that the prosecutor repeatedly interrupted Dr. Cenac and became argumentative with the witness. We have addressed some of defendant's arguments previously, and do so again below. We find no merit to his claims that the prosecutor, though forceful in his cross-examination of Dr. Cenac, engaged in prosecutorial misconduct requiring reversal of the conviction and a new trial.

The State's questions to Dr. Cenac were clearly intended to expose what the State reasonably believed were weaknesses in the witness's direct testimony. Defendant points to the following colloquy during cross-examination as evidencing the

prosecutor's line of improper questioning and comments:

> A. He met the criteria for mental retardation.
>
> Q. And that criteria is what?
>
> A. As I explained to you, he had - he was tested by a psychologist, he had I.Q. in the appropriate range, and he had mal-adaptive --
>
> Q. My question is: What is that appropriate range?
>
> A. Your Honor, --
>
> Q. Is it not seventy or below and he tested at 73 in 1988 -

At that point, defense counsel objected to the prosecutor interrupting the witness, to which the prosecutor retorted: "He knows how to move away from a question when he wants to." The trial judge overruled the defense objection and ordered the witness to answer the question. Again, the prosecutor questioned Dr. Cenac on the criteria he had employed for diagnosing mental retardation:

> Q. My understanding, my review of the literature is that range has to be

> seventy and below, is that a true statement or an incorrect statement?
>
> A. It says that in the DSM-IV. However, if you would read the next two sentences, it says that the clinician makes the determination, based on a pattern of inadaptability of the patient. And Dr. Rostow, in his initial, which was the second testing, made the diagnosis initially, of mental retardation. I saw him, he'd made that at seventeen, I saw him at aged thirty five. Nothing changed, he was mentally retarded at seventeen, he's mentally retarded today.
>
> Q. So the answer was, it is seventy but you get to choose a different number, if you so desire --

The trial court again overruled defense counsel's objection.

Contrary to defendant's refrain, the prosecutor did not mischaracterize Dr. Cenac's testimony. Dr. Cenac's desire to focus on the inadaptability prong rather than the IQ test scores and intellectual functioning necessitated the prosecutor to question the witness more specifically, as the transcript reveals. To the extent that the prosecutor "undermined Dr. Cenac's credibility by making it seem like the doctor had arbitrarily and

unprofessionally concluded that the defendant is mentally retarded," as defendant now argues, that is the purpose of effective cross-examination and did not constitute prosecutorial misconduct.

Improper and Prejudicial Character Comments

Defendant next complains the State, in its guilt phase rebuttal argument, made an "improper and prejudicial comment about the number of times [] defendant had been arrested." Specifically, the prosecutor invited the jury: "[L]et's examine Shedran, who's been arrested more times than probably everyone in this whole courtroom; in the court building maybe." Defendant further asserts the prosecutor asked improper questions of the defense expert, made improper comments during the guilt and penalty phases regarding defendant's future dangerousness, and voiced his opinion that death was the appropriate penalty on facts outside of the record. We find no reversible error with regard to these comments and questions by the prosecutor.

Defense counsel failed to preserve the claims by raising a contemporaneous objection when the prosecutor made the comments above. La. Code Crim. Proc. art. 841; *State v. Wessinger*, supra. In any event, notwithstanding the procedural bar, a review of the claims reveals that they are baseless, because defendant's arrest record as well as his present and possible future dangerousness were introduced to the jury by the defendant's own witness, Dr. Cenac, as well as the defendant's own

testimony. Thus, the prosecutor's comments do not fall outside the scope of proper closing argument as they were reasonably restricted to the evidence admitted, to the lack of evidence, and to conclusions of fact that may be drawn therefrom. La. Code Crim. Proc. art. 774.

With regard to defendant's prior arrests, during Dr. Cenac's direct examination, defense counsel framed the question to his expert witness: "You mentioned that he had 21 arrests, I believe on his rap sheet." Dr. Cenac went on to summarize defendant's criminal history of convictions, detailing seven of the prior arrests. Defendant himself admitted to having been arrested several times. Given that defendant opened the door to his criminal record by taking the stand, and his expert specifically detailed in his direct examination a number of arrests occurring before defendant's arrest for the murder of Lt. Wax, we find nothing in the State's guilt phase rebuttal argument exceeded the scope of proper closing argument. La. Code Crim. Proc. art. 774.

Similarly, we find no merit to the claim that the prosecutor posed improper questions to Dr. Cenac on cross-examination about defendant's "dangerousness," or, during the State's closing argument, improperly referred to Dr. Cenac's observations on the defendant's dangerousness. Specifically, defendant argues that, by asking, "So what you're telling the ladies and gentlemen of the jury is that he's a very dangerous person?", the State

introduced improper evidence of bad moral character and other crimes, wrongs or acts under La. Code Evid. art. 404(B), thereby requiring reversal.

The context in which the state's question was posed demonstrates that the defense expert initiated the discussion of defendant's dangerousness. The prosecutor had been asking about various jobs defendant was able to hold down, notwithstanding his purported mental limitations, including lawn maintenance work and completing a course study at the culinary arts institute that led defendant to search for a job as a cook. The State asked Dr. Cenac if that information would color his opinion:

> A. I think he's capable of doing many jobs in a kitchen environment. And I think that's a good location for that percentage of our population, who can do repetitive work like that. It's a good idea, [*75] to place him in such a position, save for the fact that there are knives.
>
> Q. So what you're telling the ladies and gentlemen of the jury is he's a very dangerous person?
>
> A. I think he's an extraordinarily dangerous person.

> Q. And the only way to - there is no way to insure prison guards' safety, is that correct?
>
> A. I think there's a high risk for officers....

Defense counsel remained silent and voiced no objection to the candid remarks and responses that defendant's own expert yielded on cross-examination. Dr. Cenac brought up the notion of dangerousness when he pondered that defendant would be suited to kitchen work, except for the access to knives, i.e., dangerous weapons. Contrary to defendant's assertions, the prosecutor's follow-up question to Dr. Cenac was neither exploitive nor improper.[23]

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[23] Dr. Cenac had previously discussed before jurors the defendant's dangerousness, if somewhat indirectly. At the outset of his direct testimony, as an introduction to his opinion regarding defendant's fear of being touched or grabbed, he recalled his three-hour jailhouse meeting with defendant: "Most remarkably ... Mr. Williams, unlike any other prisoner that I have seen over the years, at the East Baton Rouge Parish Prison, was dressed in a different uniform.... His behavior was restricted by ankle cuffs, handcuffs, and there was a chain around his waist. Unlike any other prisoner, when we walk the hallways, the officers were careful to order all doors locked before he was allowed to enter a hallway. All other prisoners were ordered away from him, two officers accompanied us at all times.... The security level was the greatest that I have seen...."

Thereafter, the State was entitled to argue dangerousness in its closing arguments, because testimony to that effect had been admitted at trial. La. Code Crim. Proc. art. 774. In its guilt phase rebuttal argument, the prosecutor told the jury: "Dr. Cenac was right that he is extremely dangerous, because he is, in fact, a hard core criminal." In its penalty phase rebuttal argument, the prosecutor argued: "His own expert tells you [defendant is] an extremely dangerous man." We do not construe anything in the prosecutor's brief remarks as a "tactic of turning the defense expert's testimony against defendant." The prosecutor's statements did not exceed the bounds of La. Code Crim. Proc. art. 774.

Defendant further asserts the prosecutor's theme of defendant's future dangerousness in his penalty phase rebuttal argument interjected an arbitrary factor into the jury's sentencing determination. Specifically, defendant points to the following passage as prejudicial:

> What will protect anyone in prison? What will protect the other inmates? There is nothing. Actually, I was wrong. There is one thing that will protect the other people, his death. That's the only thing that will protect the world from [defendant].

While a prosecutor may not advert to his own opinions as to the appropriateness of the penalty at

the sentencing stage of a capital case, *State v. Kaufman*, 304 So.2d 300, 306-07 (La. 1974), he will avoid interjecting an arbitrary factor into the proceedings by basing his comments on the same evidence that jurors have also heard and may evaluate for themselves. Here, the jurors had been well-versed in defendant's outbursts of rage, not only by the eyewitnesses to the murder of Lt. Wax, but also from defendant himself, who admitted on the stand to getting into "tussles" with law enforcement. At the penalty phase, defendant's step-father also testified that defendant could become out of control when angered. Additionally, his own mental health expert pronounced him "extraordinarily dangerous" and questioned the safety of any prison personnel surrounding him. With this background, jurors would not have been surprised or shocked to hear that the State's prosecution team favored the death penalty as to defendant, and certainly the State had alerted jurors as early as voir dire that it would be asking for such a verdict. The instant record shows clearly that the prosecutor's remark about defendant's death being the only way to protect other people from him referred to the evidence presented and did not merely express the prosecutor's personal opinion based on information not disclosed to the jurors. Furthermore, we do not find that the prosecutor's comment interjected an arbitrary or prejudicial factor into the penalty phase deliberations. Accordingly, we find no merit to these arguments.

Trial Court's Rulings Compounded the Prosecutorial Misconduct

In addition to the denial of the motion to recess to review the Hunt records, a claim we have previously addressed, defendant argues the trial judge erroneously overruled various defense objections during the State's cross-examination of Dr. Cenac. As discussed previously, the prosecutor commented that Dr. Cenac might have been evasive: "He knows how to move away from a question when he wants to. . .." Elsewhere, when the Hunt records were presented to Dr. Cenac on cross-examination, the prosecutor responded to defense counsel's motion to recess as follows: "There's no need. Clearly, he didn't review all pertinent records. So his opinion stands on what he --." In defendant's view, the entire episode regarding the Hunt records tarnished Dr. Cenac's credibility in the eyes of the jurors.

We find no abuse of the trial court's broad discretion in overruling defense counsel's objections to the State's cross-examination of Dr. Cenac. See La. Code Crim. Proc. art. 17. The inherent power of the court includes the "duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done." Id. Although defendant argues these comments further served to impugn unfairly Dr. Cenac's credibility, we find no reversible error has been demonstrated. As we have previously explained, the trial court did not abuse its discretion in denying the motion to recess. Further,

we do not find that the prosecutor's comments on Dr. Cenac's testimony merit reversal. The record reveals that when the trial court denied the defense's objection and motion for a one-hour recess, the prosecutor moved on and asked Dr. Cenac no additional questions about the Hunt records. Under these circumstances, we find no abuse of the trial court's broad discretion in overruling defense counsel's objections.

Prosecutor Propounded State's Rebuttal Expert's Misstatements of the Law

Defendant reiterates the same claims he made with regard to the State's expert's testimony, but does so this time from the perspective that the State committed prosecutorial misconduct by allowing its rebuttal expert, Dr. Hoppe, to misstate the law of mental retardation with respect to an IQ cutoff at 70. Because we detect nothing in the testimony of the State's expert that would preclude the jury from rationally relying on that testimony, we find no merit to the defendant's arguments here regarding prosecutorial misconduct.

Capital Sentence Review

Under La. Code Crim. Proc. art. 905.9 and La. Sup. Ct. Rule 28, this court reviews every sentence of death imposed by Louisiana courts to determine if it is unconstitutionally 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. *State v. Lee*, 05-2098, p. 59, 976 So.2d at 147.

The Department of Public Safety and Correction submitted a Capital Sentence Investigation Report (hereinafter "CSIR"). See La. Sup. Ct. Rule 28 § 3(b). In addition, the district court judge filed the Uniform Capital Sentence Report (hereinafter "UCSR") required by La. Sup. Ct. Rule. 28 § 3(a). The State filed a Sentence Review Memorandum, and the report of defendant's mental health expert, Dr. Cenac, was introduced into evidence during the penalty phase.

Those documents, along with defendant's guilt phase testimony, as well as the penalty phase testimony of defendant's relatives, indicate that defendant, Shedran Williams, is an African-American male, born on September 30, 1970, in Baton Rouge, Louisiana, to the marital union of Sammy and Catherine Williams.[24] Defendant's parents divorced when he was young, and between the ages of three through seventeen, defendant

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[24] Defendant's father was employed for 30 years as a security guard at corrections facilities including Elayn Hunt Correctional Center and Louisiana Training Institution. Defendant's mother worked at Baton Rouge General Hospital.

drifted back and forth between the two households, depending on which parent could manage him for the time being. His father remarried and had two other sons; defendant's mother lived for a time with Charles Stirgus, the owner of Mr. C's Auto, and they had two sons. In 1992, defendant's mother married Michael Robinson, and stayed married to him until her death in June 2004.

Defendant lived most of his life in Baton Rouge. As a special education student, he was educated in various public schools before eventually dropping out. While incarcerated at Winn Correctional Center, defendant earned a certificate in food services, which reflected that he completed the course with a 2.35 grade point average.

Defendant's employment history is sporadic. By his own account, he worked at Sports Academy on Plank Road in the summers during high school. In 1990, he enrolled in the Job Corps in Ozark, Arkansas, but was discharged after two or three months for drinking alcohol and using drugs. At the time of his arrest on the instant offense in May 2004, defendant had been employed at his stepfather's business, Mr. C's Auto on Airline Highway in Baton Rouge, for approximately three weeks.

Defendant never served in the military. He never married but admitted to fathering one daughter, whose age was estimated at fourteen years at the time of defendant's trial in 2006. Defendant stated that his child lives with her mother and that

he has no contact and pays no support for her. Defendant declined to comment on whether he had fathered additional children.

Early on, defendant began abusing alcohol and drugs. He testified that his "favorite drug of choice is powdered cocaine." In 1988, when he was seventeen years old, defendant overdosed on cocaine and his mother sent him to BRGH-CDU for treatment. He stayed only one week of the 45-day program, but while there, underwent a comprehensive neuropsychological evaluation by Dr. Rostow, which yielded a full-scale IQ of 73 on the WAIS-R.

In a 1988 report, the BRGH-CDU assessed defendant's personality as "habitual, maladaptive methods of relating, behaving, thinking and feeling." Likewise, eighteen years later, Dr. Cenac's report reflected the following assessment of defendant's personality:

> He is impulsive and fails to plan ahead. He makes decisions without forethought, and, without consideration for the consequences to others. He has a pattern of aggressive irritability.... His behavior is consistently irresponsible. He shows no remorse, other than to provide the rationalization that he could not have shot the police officer as he did not have a gun.

According to the UCSR, although defendant had no juvenile criminal record, his lengthy adult criminal history began at age eighteen. Seven incidents were detailed extensively at trial by Dr. Cenac. Dr. Cenac's report also included a "sample" of infractions defendant amassed while incarcerated in DOC. All of these incidents demonstrate a propensity for violence and anti-social behavior.

The 35-year-old defendant testified at the guilt phase of his capital trial, and in so doing, undercut his defense of mental retardation. His testimony revealed a street-savvy drug abuser who was skilled at manipulation of others and possessed an outsized ego, explained by Dr. Cenac as a defense mechanism. His testimony demonstrated a resentment of authority, and revealed that he felt like the world was out to get him whenever he got into trouble rather than own up to responsibility for his actions.

At the penalty phase, the defense presented two witnesses: defendant's father, Sammy Williams, and his stepfather, Michael Robinson. Sammy Williams was also interviewed by probation and parole after defendant's capital sentencing and expressed that "Shedran had a good childhood and I tried to make a good life for him." However, in his testimony, defendant's father admitted that defendant got in with the wrong crowd. Like his father, defendant's stepfather was also a corrections officer at Hunt Correctional Center. As a former military man, Robinson tried to motivate and mentor

defendant but his efforts did not yield success, only disagreements: "Shedran didn't like me to tell him about the rules within the house." Robinson testified that defendant has a "high temper, like angry, he wanted just to have his way, he just wanted to have mostly control of certain things . . . just wanted to come in and take control of everything."

On May 25, 2006, the court imposed the sentence of death, as unanimously recommended by the jury.

Passion, Prejudice, and Other Arbitrary Factors

The first degree murder of Lt. Vickie Wax occurred on May 22, 2004, and following jury selection, trial commenced on March 20, 2006, just under two years after the crime was committed. Because the victim was a Baton Rouge Police Officer, killed in the line of duty, the incident garnered much publicity at the time of the offense.

Although the defense moved for a change of venue, that motion was ultimately denied and the parties were able to conduct voir dire successfully and seat a jury of 12, plus one alternate juror, without encountering a prospective juror who indicated that pre-trial publicity was so widespread as to affect his/her ability to render a fair and impartial decision. Although several prospective jurors were generally aware of the news surrounding defendant's case, during voir dire, no one indicated he or she was unduly prejudiced by reports of

defendant's crime and had reached a fixed opinion of his guilt. Trial counsel never reurged the motion for change of venue throughout jury selection.

The victim, Lt. Wax, was a Caucasian female, who was 51 years old at the time of her death. Mr. Douget, the Wal-Mart loss prevention agent who was shot, was also Caucasian, while Mr. Wilson, the third victim shot, was an older African-American male. Race does not appear to be a motivating factor in the shooting of Lt. Wax. Defendant's jury was composed of two African-American females, eight Caucasian males, and two Caucasian females. The alternate juror was a Caucasian female. There has been no showing that defendant's capital trial was conducted with any racial taint.

In previous argument, defendant cited various instances in which prosecutorial misconduct allegedly interjected arbitrary factors into the proceedings. However, as we have previously found, these claims are without merit and do not require reversal. We do not find anything in the record to support a finding that the defendant's conviction and sentence of death were the result of passion, prejudice, or other arbitrary factors.

Aggravating Circumstances

The state relied on three aggravating circumstances under La. Code Crim. Proc. art. 905.4(A), and the jury returned the verdict of death, agreeing that two aggravating circumstances were

supported by the evidence: the victim was a peace officer engaged in her lawful duties and the offender knowingly created a risk of death or great bodily harm to more than one person. La. Code Crim. Proc. art. 905.4(A)(2) and (4). All eyewitnesses to the shooting attested to the fact that Lt. Wax was dressed in full police uniform, and Chief Englade informed the jurors that Lt. Wax had served on the police force for 27 years. In addition, the jury heard testimony from the two surviving victims who were also shot by defendant. The jury's finding of two aggravating circumstances was fully supported by the evidence; consequently, his death sentence is firmly grounded on the finding of those two aggravating circumstances.

Proportionality

Comparative proportionality review is a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell*, 561 So.2d 692, 710 (La. 1990); *State v. Wille*, 559 So.2d 1321, 1341 (La. 1990); *State v. Thompson*, 516 So.2d 349, 357 (La. 1987). This court, however, has set aside only one death penalty as disproportionately excessive under the post-1976 statutes, finding, inter alia, a sufficiently "large number of persuasive mitigating factors." *State v. Sonnier*, 380 So.2d 1, 9 (La. 1979).

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. *Sonnier*, 380 So.2d at 7.

Since 1976, jurors in the 19th Judicial District Court (hereinafter, "19th JDC"), which comprises East Baton Rouge Parish, have recommended imposition of the death penalty on approximately twenty-six occasions, including the current case. Because several of the salient features of the instant case make it similar enough to other death sentences recommended by juries in the 19th JDC, we find defendant's sentence is not disproportionate to those cases. See, e.g., *State v. Broadway*, 96-2659 (La. 10/19/99), 753 So.2d 801 (defendant and co-defendant Kevan Brumfield shot and killed police officer escorting grocery store manager who was making a night deposit); *State v. Brumfield*, 96-2667 (La. 10/20/98), 737 So.2d 660 (defendant and co-defendant Henri Broadway shot and killed police officer escorting grocery store manager who was making a night deposit); *State v. Wessinger*, 98-1234 (La. 5/28/99), 736 So.2d 162 (defendant shot and killed two people, and injured two people during the course of an armed robbery at a restaurant); *State v. Taylor*, 93-2201 (La. 2/28/96), 669 So.2d 364 (during armed robbery in a restaurant where defendant had previously been an employee, he shot and killed one employee and shot and permanently disabled and paralyzed another); *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So.2d 1278 (defendant

broke into the victims' home, armed himself with a kitchen knife, and stabbed the two elderly victims to death) (convictions reversed and sentences vacated; trial court erred in failing to sustain defendant's challenge for cause to an objectionable juror), after remand, *State v. Robertson*, 97-0177 (La. 3/4/98), 712 So.2d 8 (first degree murder convictions and death sentences affirmed).

This court, where appropriate, will look beyond the 19th JDC and conduct the proportionality review on a statewide basis. Cf. *State v. Davis*, 92-1623, pp. 34-35 (La. 5/23/94), 637 So.2d 1012, 1030-31. In the fairly rare instance that peace officers have been killed in the line of duty in Louisiana, besides *Broadway* and *Brumfield*, *supra*, this court has observed that juries have imposed capital punishment for that special circumstance under La. Code Crim. Proc. art. 905.4(A)(2). See *State v. LaCaze*, 99-0584 § 1/25/02), 824 So.2d 1063 (brother and sister shot along with off-duty police officer working security detail at family-owned restaurant); *State v. Frank*, 99-0553 (La. 1/17/01), 803 So.2d 1 (same). Based on our review and comparison of these cases, we do not find that the defendant's sentence of death is disproportionate under the circumstances of this case.

DECREE

For the reasons assigned herein, the defendant's conviction and death sentence are affirmed. This judgment becomes final on direct

review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial court shall, upon receiving notice from this court under La. Code Crim. Proc. art. 923 of finality of direct appeal, and before issuing the warrant of execution, as provided by La. Rev. Stat. § 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under La. Rev. Stat. § 15:147; and (2) to litigate expeditiously the claims raised in that application, if filed in the state courts.

AFFIRMED

APPENDIX B

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

SHEDRAN WILLIAMS

2007-KA-1407 (La. 10/20/09); 22 So. 3d 867.

UNPUBLISHED APPENDIX

PRE-TRIAL

Assignment of Error 42

Defendant, complains for the first time in this court that the trial court's appointment of his attorneys was improper because it violated the American Bar Association (ABA) Guidelines and La. Rev. Stat. 15:142, also known as the Louisiana Public Defender Act of 2007.[1]

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[1] Notably, defense counsel in the present case were appointed in 2004, and La. Rev. Stat. 15:142 was not enacted until 2007, by Acts 2007, No. 307, § 1, and became effective August 15, 2007. Consequently, the law defendant claims the trial court violated had not been enacted at the time of defendant's trial. At the time the trial court appointed counsel to represent defendant, La. Rev. Stat. 15:145 was the governing

On June 28, 2004, defendant was arraigned, at which time he notified the Court that he could not afford to retain counsel. On July 7, 2004, at a status hearing, the court appointed the public defender's office, which provided two attorneys to represent defendant: Author Joiner and Susan Hebeti. In addition, the court appointed Bill Hecker, who accepted the appointment.[2] Defendant complains the trial court's appointment of Bill Hecker contravened the Louisiana Public Defender Act's goal to ensure "that the public defender system is free from undue political and judicial interference and free ofconflicts ofinterests. " La. Rev. Stat. 15: l42(B)(2). However, except for his bald assertion, defendant has briefed no specific allegations that Hecker was laboring under a conflict of interest or that his appointment was tainted by undue influence.[3] Under these

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law which stated that the trial court could employ whatever procedure it deemed necessary to satisfy La. Code Crim. Pro. art. 512. Former La. Rev. Stat. 15:145(B)(1)(a) and (b), repealed by Acts 2007, No. 307, § 11, effective August 15, 2007.

[2] According to the Uniform Capital Sentence Report (hereinafter, "UCSR"), at some point after July 13, 2005, Susan Herbert was relieved as co-counsel.

[3] Defendant points to Hecker's multiple failures to appear for the hearing on the motion for new trial he filed on defendant's behalf, prompting the trial court to order a disciplinary committee to initiate a complaint against Hecker. When counsel finally appeared, he vocally expressed his displeasure at the trial judge's actions, withdrew from the case, and handed in his bar card "withdrawing from the practice of

circumstances, we find defendant fails to state a claim worthy of relief.

Assignment of Error 28

Defendant claims the trial court erroneously denied his motions aimed at securing a fair trial. Addressed individually below, none of the court's rulings resulted in reversible error.

Motion for a Transcript of the Grand Jury Proceedings

Before trial, defendant filed a motion to obtain a transcript of the grand jury

proceedings, or alternatively, to dismiss the indictment.[4] Over defense objection, the trial court denied defendant's motion for a transcript of the grand jury proceedings.

As a general matter, a defendant is not entitled to production of a transcript of a secret

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law in Louisiana." Although the bar card is contained in the box of exhibits filed in the instant appeal, Hecker's status on the court's bar roll is shown as "Active."

[4] The pleading filed by trial counsel was a pro forma motion, and raised generalized claims, none of which articulated a particularized showing specific to defendant's case in support of disclosure of the secret grand jury proceedings.

grand jury proceeding against him, even for use at trial in conducting cross-examination. La. Code Crim. Pro. art. 434; *State v. Peters*, 406 So.2d 189, 190-91 (La. 1981). However, the rule of secrecy is not absolute. In some situations justice may require that discrete segments of grand jury transcripts be divulged for use in subsequent proceedings. *State v. Trosclair*, 443 So.2d 1098, 1l02-03 (La. 1983).

Thus, a trial court may act upon a specific request stated with particularity and review grand jury transcripts in camera to determine if information contained therein is favorable to the accused and material to guilt or punishment. *Trosclair,*443 So.2d at 1103; *Peters*, 406 So.2d at 191. The parity seeking disclosure bears the burden to show a compelling necessity for breaking the indispensable secrecy of grand jury proceedings. He must show that, without the material, his case would be greatly prejudiced or that an injustice would be done. *Trosclair*, 443 So.2d at 1103; *State v. Ates*, 418 So.2d 1326, 1328-29 (La. 1982).

In the present case, trial counsel gave no compelling reason for disclosure other than admitting, "I really wanted to get a tape of what the prosecutor said." Given the scant showing made, we find no abuse of the trial court's discretion in denying defendant's request to pierce the veil of the grand jury's secrecy.

Motion for a Change of Venue and Failing to Reconsider the Motion When it Became Clear in Voir Dire that the Case had Extensive Pretrial Publicity

Before trial, defense counsel filed a motion for change of venue because of the significant news media coverage surrounding Lt. Wax's murder. The state filed an answer to that motion arguing that the motion was premature as the defense had made no showing that it would be impossible to seat an impartial jury in East Baton Rouge Parish.

A defendant is guaranteed an impartial jury and a fair trial. La. Const. art. 1,§ 16; *State v. Brown*, 496 So.2d 261,263 (La. 1986); *State v. Bell*, 315 So.2d 307 (La. 1975). To accomplish this end, the law provides for a change of venue when a defendant establishes that he will be unable to obtain an impartial jury or a fair trial at the place of original venue. *Bell*, 315 So.2d at 309; *Rideau v. Louisiana*, 373 U.S. 723,83 S.Ct. 1417, 1419-20, 10 L.Ed.2d 663 (1963). The defendant bears the burden of showing actual prejudice. *State v. Vaccaro*, 411 So.2d 415,424 (La. 1982); *State v. Adams*, 394 So.2d 1204,1207 (La. 1981); *State v. Williams*, 385 So.2d 214,216 (La. 1980); *State v. Felde*, 382 So.2d 1384 (La. 1980). "Whether defendant has made the requisite showing of actual prejudice is "a question addressed to the trial court's sound discretion which will not be disturbed on appeal absent an affirmative showing of error and abuse of discretion." *State v. Wilson*, 467 So.2d 503,512 (La. 1985); see also *Vaccaro*, 411 So.2d at 424.

Changes of venue are governed by La. Code Crim. Pro. art 622, which provides:

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

Several factors are pertinent in determining whether actual prejudice exists, rendering a change in venue necessary, including: (1) the nature of pretrial publicity and the degree to which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (3) the length of time between the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the

prospective jurors on voir dire. *Brown,* 496 So.2d at 263; *Bell*, 315 So.2d at 311. "The length to which the trial court must go in order to select jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality." *Murphy v. Florida*, 421 U.S. 794, 802-03, 95 S.Ct. 2031, 2037, 44 L.Ed.2d 589 (1975).

In the present case, the trial court held a hearing on various pretrial motions on January 20,2005, including defendant's motion for change ofvenue. Counsel argued that publicity in this case was extensive because the law enforcement officer victim "was known and loved by so many people in this town ... there's hardly any segment of society in this town that this victim did not touch their lives, and touch in a good way." In denying the motion as premature, the court reflected:

> All right, on the motion to change venue, I've been around the criminal justice system here for twenty-five years .... I know in Betty Smothers' trial that there was a death penalty and it got as extensive or more extensive coverage than this did, and they were able to [seat] the jury, and that trial has, the finding of that jury has been upheld by the Louisiana Supreme Court.... Probably at the time no case had received more coverage, press coverage, in this town than when Yoshi Hattori was shot. And that case resulted in a

> not guilty verdict for the defendant. And, of course, I don't guess any trial has received more coverage than Derrick Todd Lee, ever in the history of East Baton Rouge Parish. And they sat and picked a jury in that trial.... If it gets to the point where we can't pick a jury because of that publicity, then we'll deal with it at that time. But right now, I think the proper ruling would be that I'll deny the motion for change of venue and keep it here.

Thereafter, the parties were able to conduct voir dire and successfully seat a jury of 12, plus one alternate juror, without encountering a single prospective juror who indicated that pre-trial publicity was so widespread as to affect his/her ability to render a fair and impartial decision.[5] Trial counsel never reurged the motion for change of venue throughout jury selection. Based on these circumstances, we find defendant has failed to demonstrate any actual

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[5] In his brief, defendant points to specific instances in which prospective jurors indicated they had seen news reporting at the time of the murder. However, none had formed a fixed opinion as to the guilt or innocence of defendant, and all indicated that, if chosen, they would base their decision on the evidence as presented in court and not from the information they learned through the media. Except for Milton, none of the individuals cited in counsel's examples served on the jury.

prejudice by holding his capital trial in East Baton Rouge Parish. This claim is without merit.

Motion for Anonymous Jury

Before trial, counsel filed a motion for anonymous jury relying on *United States v. Edwards*, 303 F.3d 606, 613 (5th Cir. 2002). Following a hearing, the trial court denied the motion on grounds that both the state and federal constitutions provide that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." The trial judge reasoned as follows:

> The case you cite ... about Edwin Edwards having a closed jury and the Fifth Circuit, or anonymous jury and the Fifth Circuit agreeing with it, I find reprehensible. But I also find that there was a difference in reasoning for that. They didn't want Edwin Edwards to influence the jury, the federal government. That's why they had an anonymous jury in that matter. But the federal government was afraid that they couldn't convict Edwin Edwards without an anonymous jury.... And as long as I'm sitting in this seat, there will be no such thing as an anonymous jury....

The judge based his decision on his 25 years of experience, both as a prosecutor and as a judge, having participated in some high profile cases in which jury anonymity was not an issue. Moreover, the judge found such a motion akin to a motion for change of venue, and just as he had with that motion, he ruled that he was denying it at this point, but if a fair and impartial jury could not be selected, he would revisit the issue. After the judge denied the motion, counsel gave notice of intent to seek writs in the First Circuit, which the First Circuit denied. *State v. Williams*, 06-0226 (La. App. 1 Cir. 2/16/06).

We find no abuse of discretion in the trial court's denial of defendant's motion for an anonymous jury. Notably, the parties were able to select, without incident, twelve jurors and one alternate, whose names appear in the record.

Trial Court's Refusal to Authorize Individual Sequestered Voir Dire on Publicity Issue Deprived Defendant of a Fair Tribunal, and Prevented Him from Eliciting Information Relevant to Cause Challenges and the Change of Venue

The defense filed a motion for individual sequestered voir dire. Following a hearing, the trial court denied the motion, opining that questioning four to six prospective jurors at a time has "worked in the past, we'll see if it'll work this time." Counsel did not object, but acquiesced in the ruling, stating, "As far as the individual sequestered jury, I don't have a problem with that, judge." Accordingly, the

issue was not preserved for appellate review in the absence of a contemporaneous objection. La. Code Crim. Pro. art. 841 (A); *State v. Wessinger*, 98-1234, p. 20 (La. 5/28/99), 736 So.2d 162, 180-81; *State v. Taylor*, 93-2201, p. 7 (La. 2/28/96), 669 So.2d 364, 368-69.

At any rate, the claim is without merit. Defendant has failed to demonstrate special circumstances that would warrant individualized questioning. See *State v. Bourque*, 622 So.2d 198,224 (La. 1993); *State v. Copeland*, 530 So.2d 526, 535 (La. 1988). During jury selection, counsel made only one request to question a prospective juror individually, and that was with respect to Brett Milton, after he revealed he had formed an opinion at the time of the murder from media exposure, but stated that he could "put it aside and listen to the facts in the case." When counsel made the request, juror Milton had been questioned extensively. Moreover, at that point, the panel which had started at six had been whittled down by cause challenges leaving only two prospective jurors in the box. The court denied counsel's request, "There's only two people in here, I don't think we need to worry about questioning anybody individually.... You can question him all you want, though ... but I don't think it needs to be individual questioning."

Under the circumstances, we find no abuse of the trial court's discretion in denying the defense motion for individual sequestered voir dire.

VOIR DIRE

Assignments of Error 16-22

In these assignments of error, defendant complains that errors permeating voir dire deprived defendant of a fair trial and an impartial jury.

Juror Milton was Removable for Cause Because He Indicated that He Would Always Impose the Death Sentence on the Facts of the Case and Would Not Consider Any Statutory Mitigating Factors

Juror Milton's Presence on the Sentencing Jury Prejudiced Defendant's Right to an Impartial Jury

A trial court is vested with broad discretion in ruling on challenges for cause and its rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State v. Cross*, 93-1189, pp. 6-7 (La. 6/30/95), 658 So.2d 683,686-87; *State v. Robertson*, 92-2660 (La. 1114/94),630 So.2d 1278, 1280. Prejudice is presumed by a trial judge when a challenge for cause is denied erroneously by a trial court and the defendant ultimately exhausts his peremptory challenges. *State v. Robertson*, 92-2660 at 3-4,630 So.2d at 1280; *State v. Ross*, 623 So.2d 643, 644 (La. 1993). An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. *State v. Cross*, 93-1189, p. 6, 658 So.2d at 686; *State v. Bourque*, 622 So.2d at 225. "[A] challenge for cause should be

granted, even when a prospective juror declares his ability to remain impartial , if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably implied." *State v. Jones*, 474 So.2d 919,936 (La. 1985). Even in capital cases, this court has held that failure to exhaust all peremptory challenges by the defense bars review on appeal. See *State v. Campbell*, 06-0286, p. 71 (La. 5/21108), 983 So.2d 810,856 ("[A]n erroneous ruling on a challenge for cause which does not deplive a defendant ofone of his peremptory challenges does not provide grounds for reversing his conviction and sentence. A defendant thus must use one of his remaining peremptory challenges curatively to remove the juror or waive the complaint on appeal, even in a case in which he ultimately exhausts his peremptory challenges. ").

In the present case, defendant did not exhaust his peremptory challenges in selecting the panel of 12 petit jurors, but exercised only 10 of his 12 peremptory challenges. Consequently, while the presumption of prejudice is barred to the defense, defendant argues this court should nevertheless review the denial of the cause challenge as to Milton because he has demonstrated prejudice in that the juror ultimately sat on the jury which sentenced defendant to death, and as such, defendant has met the requirements of La. Code Crim. Pro. art. 921 ("A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect

substantial rights of the accused. "). See *State v. Vanderpool*, 493 So.2d 574,575 (La. 1986).[6] Under *Vanderpool*, a defendant who has not exhausted must show prejudice from a ruling denying a challenge for cause, e.g., that he had to hoard his remaining peremptories at the cost of accepting a juror he would have excluded. *Id.*

In the present case, at the time he was chosen, Mr. Milton became the eleventh juror selected.[7] At

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[6] Defendant cites *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.C!. 2222, 2229-30, 119 L.Ed.2d 492 (1992), for the proposition that based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, "a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." Accordingly, he claims that, because Milton actually sat on the sentencing jury that imposed the sentence of death, the prejudice threshold of La. Code Crim. Pro. mi. 921 has been me!. However, defendant's reliance on *Morgan* presupposes that the one objectionable juror, Milton, was never rehabilitated. As discussed below, the record of Milton's voir dire as a whole does not support that view. Because Milton did give balanced responses sufficient for the judge to deem that he could be fair and impartial, defendant cannot state a claim for prejudice under *Morgan*.

[7] However, in the subsequent round, the state exercised two backstrikes, leaving Milton in the number nine spot. The panel of six that followed Milton was reduced by two cause challenges, one each by the state and the defense, leaving four prospective jurors to undergo general voir dire. When given the opportunity to challenge peremptorily any of the four panelists

that point, the defense had two peremptory challenges remaining, but elected not to exercise one of them to remove Milton. No hoarding argument can be made because, contrary to defendant's assertion, the defense remained free to backstrike Milton, or any other provisionally selected juror, up to the end of jury selection.[8] Consequently, similar to *Vanderpool*, we find the defendant has failed to demonstrate prejudice from the court's denial of his cause challenge of Milton.

Nevertheless, even assuming trial counsel had exhausted all of his peremptory challenges, our review of Milton's voir dire responses reveals that his views on capital punishment would not prevent him from honoring his oath as a juror. The proper

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questioned in the panel after Milton, the defense exercised no peremptories. Consequently, the four individuals were all selected, the first three became jurors, and the fourth became the alternate. Under these circumstances, there is no indication in the record that trial counsel elected to forego challenging Milton to hoard his peremptory challenges in light of the fact that the defense concluded voir dire with the same two peremptory challenges it had at the time Milton was selected.

[8] Defendant repeatedly argues the trial court "disbanded the right to backstrike jurors." However, his statement that he "did not have the option to back-strike Juror Milton ... because the trial court disbanded the right to back-strike jurors" is not supported by the record. Contrary to defendant's assertions here, the defense was fully empowered to backstrike Milton up to and until the jury was sworn, but elected not to do so. *See* discussion, *infra*.

standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770,20 L.Ed.2d 776 (1968) (holding that a prospective juror who would vote automatically for a life sentence is properly excluded); see also *Wainwright v. Witt*, 469 U.S. 412, 424,105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). In a "reverse-*Witherspoon*" context, the basis of the exclusion is that a prospective juror "will not consider a life sentence and ... will automatically vote for the death penalty under the factual circumstances of the case before him.... " *Robertson*, 92-2660, p. 8, 630 SO.2d at 1284. Jurors who cannot consider both a life sentence and a death sentence are "not impartial," and cannot "accept the law as given ... by the court." La. Code Crim. Pro. art. 797(2),(4); *State v. Maxie*, 93-2158, p. 16 (La. 4110/95), 653 So.2d 526,534-35. In other words, if a prospective juror's views on the death penalty are such that they would "prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths," whether those views are for or against the death penalty, he or she should be excused for cause. *State v. Taylor*, 99-1311, p. 8 (La. 1117/01), 781 So.2d 1205, 1214.

Milton's Witherspoon Voir Dire

Brett Milton, a 39-year-old white male, was questioned on March 16, 2004, the fourth day of voir dire. Voir dire in this case was conducted in groups of six persons, and as with every preceding panel of six, Milton's group first heard an extensive voir dire by the judge in which he explained first degree murder and the possible responsive verdicts and penalties, bifurcation, aggravating and mitigating circumstances, qualification of jurors, sequestration, and unanimous verdicts. After that, the judge conducted the Witherspoon inquiries, and Milton was questioned last. When questioned by the judge, Milton stated he believed in the death penalty and would automatically vote for the death because he believed in an eye-for-an-eye. After the judge gave Milton several examples of instances in which mitigating factors would preclude capital punishment, Milton indicated he would be able to take into consideration any of the mitigating factors and weigh them into his decision without automatically voting for the death penalty. Milton's responses to the prosecutor's questions indicated he was inclined to return a sentence of death, but that he had no problem considering mitigating factors. Defense counsel gave various hypotheticals including the killing of a police officer, and Milton indicated he would favor the death penalty. However, upon further questioning by the court, Milton stated he would try to weigh the mitigating circumstances and he agreed that there were situations wherein the death penalty would come into play but that there could be extenuating or

mitigating circumstances in which he might not impose the death penalty.

At the selection session, the state challenged four of the six panelists for cause based on *Witherspoon*, which the trial court granted with no defense objection. Thereafter, the defense issued a challenge for cause as to Milton and gave reasons. The prosecutor countered: "I believe he said he could follow the procedures, listen to the circumstances, consider the mitigating factors and then decide. 1 do tend to agree he may be somewhat predisposed to the death penalty, but that's not the standard at this point." The judge denied the defense challenge for cause as to Milton based on his own interaction with the juror and the responses he gave that led the court to determine that Milton would not automatically vote death. The court then released the four jurors for whom the court granted the state's cause challenges and resumed general voir dire of the two remaining prospective jurors, including Milton.

While Milton's answers suggested a strong inclination toward capital punishment, he also tempered his views with an understanding that a balanced approach would be required to participate as a capital juror. This court has upheld denials of challenges for cause in such situations. See, e.g., *State v. Anderson*, 062987, pp. 35-36 (La. 9/9/08), 996 So.2d 973,1000-01 (juror's belief in "eye for an eye" did not trigger cause challenge when responses as a whole were fair and balanced); *State v. Lucky*,

96-1687, p. 6 (4/13/99), 755 So.2d 845, 850 (denial of cause challenge upheld for juror who stated that the mitigating evidence would have to be substantial for juror to recommend life sentence). That a juror has personal predispositions towards the death penalty does not render him unfit for service on a capital jury if he is nevertheless willing to consider both aggravating and mitigating circumstances in reaching a sentencing verdict on the basis of the evidence presented at trial. *State v. Higgins*, 03-1980, pp. 30-31 (La. 4/1/05), 898 So.2d 1219, 1238; *State v. Lucky*, 96-1687, pp. 7-8, 755 So.2d at 850. That being the case, we find no abuse of discretion in the trial court's denial of the challenge for cause as to Milton.

Milton's General Voir Dire

Milton acknowledged that he had seen news reports on television at the time of the offense but indicated that if chosen as a juror, he would base his decision on the evidence presented in court rather than on what he had heard at the time of the offense. After showing the jurors the names on the witness list anticipated to testify at trial, Milton indicated that he recognized the name of the chief of police, but otherwise had no relationship with him. Milton also recognized the name of Officer Joel Patterson and stated that he knew him from seeing him approximately once a month at "bike night" at Harley Davidson, where Milton's wife worked as marketing director and Officer Patterson served as the rider's education instructor. Nevertheless,

Milton indicated this knowledge of the potential witness would in no way affect his ability to listen and evaluate his testimony fairly

The state explained the ramifications of defendant's dual plea of not guilty and not guilty by reason of insanity: should the need for a sentencing phase arise, the evidence introduced at the guilt phase on insanity may then be considered as mitigation under La. Code Crim. Pro. alt. 905.5(e). Milton indicated he understood.

Additionally, Mr. Milton acknowledged he had two friends who had been victims of drive-by shootings in Ascension Parish, and one friend who was stabbed in a fight in East Baton Rouge Parish. As for his limited knowledge of police officers, and that the present case involved the death of a police officer, Milton felt that "would make it a little more real ... you could put yourself in their shoes if you know'em." Still, he could put those sentiments aside and weigh the evidence as presented.

The defense questioned Milton about his exposure to pretrial publicity, and he confirmed that he had initially formed an opinion based on what he saw on television about the incident a few years back but assured that he "could put it aside and listen to the facts in the case."

Counsel queried Milton one last time, and thereby bolstered Milton's rehabilitation:

> Q. You understand that even if you vote for guilty in the guilt phase, and they prove one aggravating circumstance, you don't automatically have to vote for death, do you understand that?
>
> A. Yes, I do.
>
> Q. And could you consider mitigating factors before, if you feel like death was warranted you could do that. If not, you could vote for life?
>
> A. Correct, yes.

Milton concluded his general voir dire by acknowledging to counsel that deciding a man's fate was an awesome responsibility and he would "take that very seriously."

Thereafter, at the selection session, defendant re-urged the challenge for cause as to Milton, this time basing it on his general voir dire responses, especially his association with police officers. The trial court denied the challenge and Milton became the ninth juror selected. At that point, the defense had two peremptory challenges remaining, but did not exercise one to remove Milton.

Based on our review of Milton's voir dire responses as a whole, and the trial court's candid assessment from Milton's responses that he would not automatically vote death, we find no abuse of

discretion in the court's denial of this challenge for cause. See *State v. Lee*, 93-2810, p. 9 (La. 5/23/94), 637 So.2d 102, 108 (A trial judge is accorded broad discretion in ruling on cause challenges because he or she "has the benefit of seeing the facial expressions and hearing the vocal intonations of the members of the jury venire as they respond to questioning by the parties' attorneys. ").

This Court Should Not Extend Its Jursprudential Rule that A Defendant Waives His Right to Complain About the Denial of a Cause Challenge When He Subsequently Accepts the Challenged Juror Although He Has a Remaining Peremptory Challenge in the *Witherspoon* and Reverse-*Witherspoon* Contexts

Defendant suggests this court should do away with the "strike or waive" rule. In defendant's view, the "1983 amendment [to La. Code Crim. Pro. art. 800] is rendered meaningless by requiring the defense to strike each juror who has been subject to a defense challenge for cause." However, the waiver rule prohibits defendants from complaining on appeal about a defect that they basically allowed to occur at trial without taking contemporaneous action. As noted previously, this court has repeatedly held that failure to exhaust all peremptory challenges by the defense bars review on appeal in the absence of a showing of actual prejudice. *See, e.g., State v. Campbell, supra*. Defendant posits no legitimate grounds for overruling these longstanding precedents in the context of the present case,

because his argument rests on two erroneous premises: 1) the trial court actually erred in denying the cause challenge as to Milton; and 2) the trial court "disbanded" backstrikes and thereby deprived the defense of the option of removing Milton at any subsequent point injury selection. However, as discussed above, the trial court did not err in denying the cause challenge as to Milton, despite the juror's strong predisposition toward the death penalty, and, as discussed elsewhere, the trial court ultimately did not bar either side from exercising backstrikes.

Because defendant has failed to demonstrate that voir dire errors deprived him of a fair trial, these claims warrant no relief.

Assignment of Error 28

Defendant asserts the judge's comment that Adolf Hitler was sitting on the bench tainted the trial with bias against racial minorities and mentally retarded individuals, resulting in an unfair trial, an unreliable and arbitrary imposition of the death penalty, and a violation of defendant's due process and equal protection lights.

Trial counsel failed to object to any portion of the colloquy between the attorneys and the judge in which the judge made the Adolf Hitler remark. Thus, the issue was not properly preserved for appellate review. La. Code Crim. Pro. art. 841(A); *State v. Wessinger*, supra; *State v. Taylor*, supra. In any

event, our review Of that portion of voir dire reveals absolutely no judicial bias or prejudice on the trial judge's part. Defendant's allegations lack any support in the record; therefore, we find his claim lacks merit.

Assignment of Error 23-24

Defendant urges the trial court improperly disbanded backstrikes, curtailed reverse-Witherspoon questioning, prohibited the use of hypothetical questions, and denied individually sequestered voir dire - depriving defendant of an adequate voir dire and the intelligent exercise of peremptory challenges.

The Power to Back-Strike Jurors Cannot Be Disbanded Unilaterally by the Court Without Offending the Right to the Discretionary Use of Twelve Peremptory Challenges Guaranteed by the Louisiana Constitution

Defendant complains the trial court's termination of backstrikes in his capital trial compromised jury selection. This claim is not supported by the record, because as previously explained the trial judge did not disband backstrikes, but only briefly and temporarily threatened as much, and in the span of just a few transcript pages had cooled on the notion altogether and rescinded the initial order.

Backstriking is a party's exercise of a peremptory challenge to strike a prospective juror after initially accepting him. La. Code Crim. Pro. art. 795(B)(l) states that "peremptory challenges shall be exercised prior to the swearing of the jury panel." Thus, as a matter of the jurisprudence, a juror temporarily accepted and sworn in accordance with La. Code Crim. Pro. art. 788 may be challenged peremptorily before the swearing of the jury panel in accordance with La. Code Crim. Pro. art. 790. *State v. Watts*, 579 So.2d 931 (La. 1991). However, "there is no constitutional right to backstrike, only a statutory right," *State v. Hailey*, 02-1738, p. 9 (La. App. 4 Cir. 9/17/03),863 So.2d 564, 569, writ denied, 04-0612 (La. 2/18/05), 896 So.2d 20; therefore, the erroneous denial of the right to backstrike is subject to harmless error analysis, *State v. Taylor*, 93-2201, p. 26, 669 So.2d at 378.[9]

In the instant case, on the second day of voir dire, the parties confirmed with the judge that

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[9] Defendant's reliance on La. Code Crim. Pro. art. 799.1 is misplaced and his assertion that the article was "adopted prior to the trial of this matter," is incorrect. La. Code Crim. Pro. art. 799.1 was enacted as part of the regular legislative session in 2006. The Louisiana Constitution is clear that, unless otherwise specified, the effective date of a law enacted during the regular session is August 15th of the year of the session. Accordingly, because the legislature did not specify an effective date, Art. 799.1 went into effect on August 15,2006, or some five months after defendant's capital trial. Consequently, Art. 799.1 lends no support to the present issue.

backstrikes would be allowed up to the twelfth juror, "once we get twelve, that's it." On the third day of voir dire, the trial judge momentarily dispensed with the option to backstrike jurors after counsel removed by backstrike Bradley Hebert, a juror who had been provisionally accepted two days earlier. When defense counsel could not articulate a race neutral reason for excusing Hebert, revealing that he had no idea who the juror was, thereby lending support for the state's Batson claim, the judge ordered that no more backstrikes would be allowed for either side. Defense counsel responded, "I have no problem with that. No backstrikes is fine with the defense." After the moment had passed, the judge stated, "We'll continue jury selection. I at least got a rise enough out of you to get the rest of the backstrikes done for the night. Certainly we will continue [with backstriking] tomorrow, .because the law requires that I do." Indeed, the transcript of proceedings for the following day establishes that backstrikes were permitted, even if neither the court nor defense counsel particularly favored them.

Furthermore, the transcript establishes that backstrikes were available to both sides and employed up to the conclusion of jury selection, as revealed in the colloquy that transpired on the fifth and final day ofvoir dire, after the last panel had yielded just enough jurors to complete a panel of twelve plus one alternate:

> REPORTER'S NOTE: Bench conference ends. This matter continued as follows:

The Court: All right. Now, peremptory challenges? All right. All four [jurors] have been accepted. The back two -

Mr. Stockstill: That's fine.

The Court. It's been two backstrikes, would put it back to eight.

Mr. Stockstill: I understand. I have no problem with it, but I think - Clerk: Your honor, I'm sorry. Two backstrikes would be -

The Court: Well, nine.

Mr. Stockstill: Correct.

The Court: All right, then that would mean Mr. Guerin and Mr. Quebedaux are accepted?

Mr. Stockstill: Three out of four. I'm willing to bet that the defense did not understand the system.

The Court: That's why we're talking about it.

Mr. Hecker: No, sir. We understood your system.

Mr. Stockstill: Okay.

The Court: All right. Then all four of them are accepted?

Mr. Joiner: Yes sir.[10]

Clerk: So we'll have -

The Court: That's right, and that's all we're going to have. We have one, two, three, makes twelve, and Ms. King would be an alternate.

Mr. Stockstill: We just have the one alternate.

The Court: We'll have a jury and one alternate.

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[10] The defense concluded voir dire with two peremptory challenges remaining, the same two available at the time the defense elected not to challenge Milton peremptorily. For whatever reason, defendant now asserts the defense finished voir dire with "one" peremptory left over. The assertion is not supported by the record. In fact, the statement is at odds with the comment only three pages earlier in defendant's brief that "[a]t the time Juror Milton was challenged for cause, the defense had only two peremptory challenges remaining.... " Nevertheless, defendant argues that he "was forced to either use his remaining peremptory to strike Milton and gamble on those yet to come, or to save the strike." Defendant's rendition is not supported by the record, because the defense had not one but two peremptory challenges remaining.

> Mr. Hecker: That's fine. The defense has no objection to that.

The judge released the jurors, and afterwards, he and defense counsel conversed about the names of the jurors just removed by backstrike. Even at that point, counsel never urged a backstrike as to Milton, nor at any intervening point prior to the swearing of the jury panel in accordance with La. Code Crim. Pro. ali. 790. Our review of the record convinces us the trial court did not prohibit the lawyers' use of backstrikes and that statutory right remained in force throughout voir dire. We find no merit to defendant's claims otherwise.

Restrictions Placed on Reverse-*Witherspoon* Questioning, Including the Categorical Prohibition on Hypothetical Questions, Deprived Defendant of an Adequate Voir Dire

Defendant next asserts the trial court improperly restricted the scope of voir dire. We find no merit to his claim.

As a general matter, an accused in a criminal case is constitutionally entitled to a full and complete voir dire examination. La. Const. art. 1, § 17(A). The purpose of voir dire is to determine the qualifications of prospective jurors by testing their competency and impartiality and to assist counsel in articulating intelligent reason for exercise of cause and peremptory challenges. *State v. Stacy*, 96-0221, p. 5 (La. 10/15/96),680 So.2d 1175, 1178; see also

State v. Burton, 464 So.2d 421, 425 (La. App. 1st Cir.), writ denied, 468 So.2d 570 (La. 1985). The scope of voir dire is within the sound discretion of the trial judge and his rulings will not be disturbed on appeal absent a clear showing of an abuse of discretion. *State v. Hamilton*, 92-1919, pp. 6-7 (La. 9/5/96), 681 So.2d 1217, 1222. 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 a full voir dire. La. Const. art. 1, § 17(A); La. Code Crim. Pro. art. 786; *State v. Maxie*, 93-2158, pp. 15-16,653 So.2d at 534-35; *State v. Hall*, 616 So.2d. 664, 668-69 (La. 1993); *State v. Lee*, 559 So.2d 1310, 1316 (La. 1990). Review of a trial judge's rulings on voir dire should be accomplished by examination of the whole record to determine whether sufficiently wide latitude was afforded the defendant in examining prospective jurors. *Burton*, 464 So.2d at 425.

Here, voir dire was in its fourth day when the trial judge requested the parties expedite their inquiries. Defense counsel posed to the three panelists under consideration at the time a "theoretical" using the exact aggravating circumstances the state had given notice it would rely upon, and asked if the jurors understood. All replied affirmatively, and the judge interjected that he had already instructed on aggravating and mitigating circumstances extensively in his own voir dire, and for counsel to move on, yielding the following exchange at the bench:

> Mr. Joiner: Well, judge, just for the record, I would like to read them anyway. I think that the law say (sic) I have a right.
>
> The Court: I've read them to them, they understand it, they've said that under oath.... They know what they are and they understand how to apply them.
>
> * * *
>
> Mr. Joiner: For the record, Arthur Joiner, I represent Shedran Williams and I would like to object to the court's -
>
> The Court: Note the objection, overrule it.
>
> Mr. Joiner: Restricting my questions -
>
> The Court: Note the objection, overrule it, that's it.

After selections were made on that panel and before the next panel was brought in, the judge informed the parties that they needed to pick up the pace. The court gave the following guidance as to how the next panel would be conducted:

> The Court: In the next panel that comes up, I'm going to go over everything in detail with them. I will question them

about everything there is to question them about and I'll explain everything that there is in the law. Thereafter, the only thing that will be allowed is questions like: Did you understand the concept of reasonable doubt? Yes. Did you understand the concept of presumption of innocence? Yes. If they say that, and I've explained it to them, we don't need forty minutes' worth of I used to be living in Vernon Parish or I used to fly an airplane, or I used to do this or I used to do that, 'I' is not what jury selection is about. Jury selection is about picking twelve people who are fair and impartial in this trial. I can't imagine the number of times I've heard y'all use the word 'I." And then go off - you went three-and-one-half minutes, because I timed it, without asking a question. Just 'I' did this and 'I' did that. That's not jury selection. That's beating your own back. Patting your own self on the back, telling everybody how smart you are, I've done this all my life. We don't care about that, we care about putting twelve people in this jury box who are fair and impartial, who are legally competent jurors, that's what we care about. And that's what we're going to do from now on, from now on, in jury selection.

Although defendant broadly claims the trial judge issued "a blanket prohibition on the use of hypothetical questions," that assertion is without support in the record. Moreover, his claim that the jurors were deprived of practical questions which would force them to demonstrate their knowledge of how to apply mitigating factors is also not supported by the record. Each panel was instructed thoroughly on mitigation by the court, the defense, and the prosecution. The judge observed, "I can't imagine anybody thinking so far that they've been shortchanged in voir dire ... I'm just telling you how to get there a lot quicker."

A fair reading of the voir dire record as a whole reveals the only restrictions on voir dire the judge issued were with respect to counsel's unstructured, personalized vignettes. The judge's limitations were not 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. Instructing counsel to limit voir dire to asking relevant questions does not abridge any right. We find nothing presented in this assignment of error demonstrates an abuse of the trial court's discretion over the scope of voir dire.

Assignment of Error 25

Defendant challenges La. Code Crim. Pro. art. 798, which provides for Louisiana's death qualification procedure, as facially unconstitutional

because it violates his right to an impartial jury, unfairly leads to a death-prone jury, and deprives him of a fair cross-section of the venire available to non-capital defendants. However, La. Code Crim. Pro. art. 798 was drafted to conform to the constitutional requirements set forth in *Witherspoon v. Illinois*, supra (holding that a prospective juror who would vote automatically for a life sentence is properly excluded). Accordingly, this Court has repeatedly rejected the claim that the Witherspoon qualification process results in a death-prone jury. *State v. Robertson*, 97-0177, pp. 19-20 (La. 3/4/98), 712 So.2d 8, 25-26; *State v. Sullivan*, 596 So.2d 177, 186-87 (La. 1992); *State v. Bates*, 495 So.2d 1262, 1272 (La. 1986); *State v. Ford*, 489 SO.2d 1250, 1259 (La. 1986); *State v. Ward*, 483 So.2d 578, 582-83 (La. 1986); *State v. Jones*, 474 So.2d 919,927 (La. 1985); *State v. James*, 431 So.2d 399, 402 (La. 1983). We find nothing in the instant appeal warrants revisiting this longstanding principle of law.

Assignment of Error 26

Defendant argues that an unlawful off-the-record exchange between juror Steven Watterson and the judge violated defendant's right to be present at every stage of tria1.[11] Defendant claims

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[11] Steven Watterson became the jury foreperson. Watterson was questioned in panel B and indicated that he was a 37-year-old Caucasian male. He revealed that he has a close friend in the FBI, that he was a victim of a car burglary five

the trial court violated his right to be present at all important stages of the proceedings by conducting an ex parte communication with juror Watterson as to whether he could continue serving on the jury once informed that his grandmother was dying.

Trial counsel voiced no objection at the time the claimed communication occurred, and thus, waived appellate review. La. Code Crim. Pro. art. 841 (A); *State v. Wessinger, supra; State v. Taylor, supra*. In fact, upon learning of the action the judge had undertaken when notified of the grave condition of Watterson's grandmother, trial counsel endorsed the judge's course of action, responding, "I don't have any problem with that." This assignment of error lacks merit.

GUILT PHASE & PENALTY PHASE

Assignment of Error 34

Defendant asserts the jury determination of his *Atkins* claim after the guilt phase and during the penalty phase, as specifically provided for in La. Code Crim. Pro. art. 905.5.1(C)(l), is unconstitutional, because it enables the jury to hear irrelevant and prejudicial evidence. In defendant's view, placing the mental retardation determination

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years · beforehand, and that he is a civil attorney. Watterson was accepted as a juror on the first day of voir dire.

in conjunction with the sentencing phase undermines the jury's ability to decide impartially whether defendant is mentally retarded.

In *Atkins v. Virginia*, 536 U.S. 304,122 S.Ct. 2242,153 L.Ed.2d 335 (2002), the Supreme Court held that the execution of a mentally retarded offender violates the Eighth Amendment prohibition against cruel and unusual punishment. However *Atkins* expressly left to the states "'the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Atkins*, 536 U.S. at 317, 122 S.Ct. at 2250 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17,106 S. Ct. 2595, 2605, 91 L.Ed.2d 335 (1986)). In the wake of *Atkins*, the legislature added La. Code Crim. Pro. art. 905.5.1 to the Code of Criminal Procedure, 2003 La. Acts 698, specifying that a jury serve as the factfinder on the question of mental retardation during a capital sentencing hearing. La. Code Crim. Pro. Art. 905.5.1(C)(1) provides: "The jury shall try the issue of mental retardation of a capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the judge." In *State v. Turner*, 05-2425 (La. 7/10/06), 936 So.2d 89, this court upheld the constitutionality of La. Code Crim. Pro. art. 905.5.1 generally, and, specifically, its jury provision.

In the present case, the defense during the guilt phase introduced essentially all of its evidence to support the claim of mental retardation. The jury

determined that defendant failed to prove he is mentally retarded, and that determination was made at the penalty phase, as statutorily mandated. La. Code Crim. Pro. art. 905.5.1 (C)(l). In the same proceeding, the jury was able to evaluate the mental retardation question as a full exemption to capital punishment as well as consider evidence of retardation as a mitigating circumstance. Defendant has failed to demonstrate any error.

Assignments of Error 35-40

Defendant contends the trial court administered improper guilt phase and penalty phase jury instructions. Specifically, defendant argues the trial court gave improper instructions pertaining to reasonable doubt at the guilt and sentencing phases. He also claims the trial court should have instructed the jurors that a single vote for life would have resulted in a life sentence without parole. Further, he suggests to this court that the jurisprudence mandating the court issue a commutation instruction should be reversed. Finally, he argues the trial court erred in giving instructions concerning mitigating circumstances.

Trial counsel did not properly preserve for appellate review any of the issues discussed below. La. Code Crim. Pro. art. 841(A); *State v. Wessinger, supra; State v. Taylor, supra.* In any event, assessing the claimed errors individually, each fails on the merits.

The Reasonable Doubt Instruction Contained an Impermissible Articulation Requirement that Was Not Harmless in this Case

First, defendant cites *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), and *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 162 L.Ed 339 (1990), to support his claim that the trial court's reasonable doubt instruction contained an "impermissible articulation requirement" which shifted the burden of proof to the defense. The trial court gave the following instruction:

> While the state must prove guilt beyond a reasonable doubt, it does not have to prove guilt beyond all possible doubt. Reasonable doubt is a doubt based on reason and common sense, and is present, when, after you have carefully considered all the evidence, you cannot say that you're firmly convinced of the truth of the charge. A reasonable doubt is not a mere slight misgivings or a possible doubt. You may say [it] is self defining; it's a doubt that a reasonable person could entertain; it's a simple doubt.

In *Cage,* the United States Supreme Court held unconstitutional an instruction which "equated a reasonable doubt with a 'grave uncertainty' and 'actual substantial doubt.'" *Cage*, 111 S.Ct. at 329.

Conversely, the instruction in this case, the first two sentences of which, track verbatim the proposed charge on reasonable doubt in the Louisiana Judge's Criminal Bench Book, Vol. I, § 3.03 (1993), and did not include any terms that would mislead the jury. Unlike the instruction in Cage, the trial judge's charge does not overstate the degree of reasonable doubt required by the Due Process Clause. In addition, according to the United States Supreme Court's re-examination of its reasonable doubt jurisprudence undertaken in *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), and this Court's implementation of Victor in *State v. Smith*, 91-0749 (La. 5/23/94), 637 So.2d 398, the instruction in the instant case did not allow the jury to convict without satisfying the reasonable doubt requirement. Thus, we find the instruction does not violate any of defendant's constitutional rights.

The Trial Court Failed to Instruct the Jury that a Single Vote for Life Resulted in a Life Sentence Without the Possibility of Parole

Defendant complains the trial court failed to inform the jury that a "single vote" for a life sentence would result in the imposition of a term of punishment of life imprisonment without benefit of parole. However, a review of the penalty phase instructions reveals that the court in fact charged the jury as follows:

> All twelve of you must agree on a verdict before it is a valid verdict.... A

> sentencing determination of death or life imprisonment requires that all twelve of you agree on that penalty. If, after careful and conscientious effort to agree on a penalty. you find that you are unable to reach a unanimous agreement as to the death penalty. the law requires that a sentence of life imprisonment at hard labor without benefit of probation. parole, or suspension of sentence be imposed. (emphasis added).

This instruction comports with La. Code Crim. Pro. art. 905.6 ("A sentence of death shall be imposed only upon a unanimous determination of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall render a determination of a sentence of life imprisonment without benefit of parole, probation, or suspension of sentence."), and art. 905.8 ("If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without benefit of parole, probation, or suspension of sentence."). Therefore, the trial court's failure to articulate specifically that a "single vote" for life would result in a life sentence could not have misled the jurors into misunderstanding the consequences of their votes at the penalty phase. *See State v. Jones*, 474 So.2d at 936 n.17 ("[T]he prudent course for the trial judge is to give an outset instruction that the jury's failure to agree unanimously will result in an automatic sentence of life imprisonment without benefit, while at the same time instructing the jury

of its duty to deliberate diligently with the view of reaching a unanimous recommendation if at all possible. ").[12]

In addition, defendant also complains the penalty phase verdict form and concomitant jury instruction placed the burden of proving mitigation and the propriety of a life sentence upon defendant. In defendant's view, the verdict form limited the jury's consideration of mitigation to that "offered" by the defendant, and the court's instruction left the jurors with the impression that they must find mitigating circumstances unanimously, before considering them, citing *Mills v. Maryland*, 486 U.S. 367,108 8.Ct. 1860, 100 L.Ed.2d 384 (1988).

A review of the penalty phase verdict forms used in the instant case with respect to the sentencing determination reveals that they both track verbatim the language of La. Code Crim. Pro.

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[12] Defendant suggests the instructions, as given without the "single vote" language, risked jurors "not considering" evidence of mental retardation because of the unanimity requirement. Notwithstanding defendant's unsupported allegation, the jurors unanimously rejected defendant's claims of mental retardation in accordance with *Atkins v. Virginia* and La. Code Crim. Pro. art. 905.5.1(C), and nothing presented suggests that in reaching this determination the jurors then negated those deficiencies as part of their mitigating circumstances consideration. Following their penalty phase verdict, the jury was polled and all subscribed to the death sentence as being their verdict.

Art. 905.7.[13] Notwithstanding defendant's claims to the contrary, nothing in the record suggests the jury was misled by the statutory language used in the verdict form and, accordingly, defendant fails to show that the form introduced an arbitrary factor into the jury's deliberations. Furthermore , at the penalty phase, the defense presented two mitigation witnesses, relied on the testimony of Dr. Cenac from the guilt phase, and introduced in evidence Dr. Cenac's report at the penalty phase. As such, the defense did "offer" mitigating evidence. Moreover, the trial court instructed the jurors that "[y]ou are not limited only to those mitigating circumstances which are defined. You may also consider any other relevant circumstance, which you feel should mitigate the severity of the penalty to be imposed." We find defendant has failed to demonstrate that the language used in the penalty phase verdict form shifted the burden to the defense. See *State v. Manning*, 03-1982, p. 72 (La. 10/19/04), 885 So.2d 1044, 1106 (rejecting the same argument).

Furthermore, the jury instruction in the instant case is unlike that of *Mills*.[14] A fair reading

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[13] A separate form as to mental retardation was presented to the jury, in compliance with La. Code Crim. Pro. art. 905.5.1.

[14] 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

of the trial court's instructions at the close of the penalty phase reveals that the judge instructed the jurors that, as to the aggravating circumstances advanced by the state, any finding must be unanimous and beyond a reasonable doubt. The instruction on mitigation did not include such a burden. The broad language used by the judge, particularly as contrasted with the rigid standards pronounced with reference to aggravating circumstances, adequately guided the jury on the manner in which mitigation evidence was to be considered. Additionally, defendant makes no showing that the jurors mistakenly applied the wrong burden in their deliberations as to mitigation.

The Trial Court's Commutation Instruction Invited the Jury to Decide a Capital Defendant's Sentence on the Basis of Arbitrary and Speculative Factors in Violation of Defendant's Rights Under the Eight and Fourteenth Amendments

Defendant avers the trial court's commutation instruction invited the jury to decide his sentence on the basis of "arbitrary and speculative factors" in violation of his rights under the Eighth and

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final part, the jury weighed the aggravating against the mitigating circumstances. ld., 108 S.C!. at 1870-74. 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.

Fourteenth Amendments. In addition, defendant suggests this court reconsider its ruling in *State v. Loyd*, 96-1805 (La. 2/13/97), 689 So.2d 1321.

The trial court's instruction comports with the language of La. Code Cril11. Pro. art. 905.2(B). Moreover, in Loyd, the court held that "Louisiana's instruction is an even-handed one which accurately informs jurors that a death sentence as well as a life sentence remains subject to executive revision." *Lovd*, 96-1805, p. 18,689 So.2d at 1331. This court has previously rejected this same argument, see *Wessinger*, 98-1234 at 34-35,736 So.2d at 190. We likewise reject it here.

The Trial Court's Instructions on Mitigating Circumstances Improperly Focused the Jury's Attention on Facts that Mitigated the Offense Rather than on Facts that Mitigated the Punishment

Defendant asserts the statutory mitigating circumstances recited by the trial court focus almost exclusively on defendant's character at the time of the crime as opposed to other evidence that would mitigate in favor of a life sentence, such as remorse, mercy, or cooperation with the authorities.

The trial court read verbatim the statutory mitigating circumstances as they appear in La. Code Crim. Pro. ali. 905.5. Included among them was the catch-all "[a]ny other relevant mitigating circumstance." La. Code Cril11. Pro. art. 905.5(h). Defendant makes no showing that the trial court

excluded evidence of remorse and cooperation with the authorities at the penalty phase or that the instructions somehow prevented the jury from considering any evidence that would mitigate in favor of a life sentence.

The Trial Court Failed to Instruct the Jury that it Needed to Find that Death was the Appropriate Punishment "Beyond a Reasonable Doubt"

Finally, defendant claims the trial court's failure to instruct jurors as to the appropriate standard to apply to their sentencing decision, namely, that they must unanimously detem.ine beyond a reasonable doubt that death is the appropriate punishment, violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). However, *Ring* requires only that jurors find beyond a reasonable doubt all of the predicate facts which render a defendant eligible for the death sentence, after consideration of the mitigating evidence. *Id.*, 536 U.S. at 609, 122 S. Ct. at 2443.

While defendant now argues that *Ring* should extend such a requirement to the ultimate sentence as well as the predicate facts, neither *Ring*, nor Louisiana jurisprudence for that matter, requires the jurors to reach their ultimate sentencing determination beyond a reasonable doubt. *State v. Koon*, 96-1208, p. 27 (La. 5/20/97), 704 SO.2d 756, 772-73 ("Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating against aggravating circumstances, one

against the other, according to any particular standard. ")(citations omitted). This court rejected the same argument in *State v. Anderson*, 06-2987, p. 61, 996 So.2d at 1015, and we do so again. In conclusion, we find no merit to defendant's claims concerning purportedly erroneous jury instructions.

Assignment of Error 15

Defendant alleges the trial court improperly denied his motion for new trial based on his claim that the state's post-trial discovery of the murder weapon constituted newly discovered evidence. Defendant argued that the absence of the murder weapon precluded him from presenting his defense of "automatic pilot," which counsel termed as "a widely known psychiatric and psychological term," which was brought on "in a threatening situation" and resulted in his inability to hear shouts from people telling him to "just leave" the Wal-Mart. Further, in the new trial motion, defendant averred he did not remember firing the gun.[15] Crucial to presenting such a defense, in defendant's view, was that the handgun should have been examined by

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[15] Defendant's specific trial testimony on the issue was, "I don't know anything about the shooting or anything like that."

experts with respect to its trigger pull, firing mechanism and recoil.[16]

Under La. Code Crim. Pro. art. 851 (3), a court "shall grant a new trial whenever . . . [n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty." *State v. Knapper*, 555 So.2d 1335, 1339 (La. 1990). A ruling on a motion for a new trial rests within the sound discretion of the trial judge. *State v. Quimby*, 419 So.2d 951, 960 (La. 1982). In ruling on the motion, "[t]he trial judge's duty is not to weigh the evidence as though he were a jury determining guilt or innocence, rather his duty is the narrow one of ascertaining whether there is new material fit for a new jury's judgment." *State*

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[16] The state had the gun tested and provided the defense with the results of the trigger pull examination in open court on September 20, 2007, as well as filing a copy in the court record. The defense sought to conduct its own independent testing; however, the state police were unwilling to release the weapon to the defense's Texas expert unless the defense paid for one of its troopers to accompany the hand gun out of state to maintain a proper chain of custody. For his part, the expert in Texas insisted that he needed six to eight weeks to test the weapon in that state, as he was unable (or unwilling) to travel to Baton Rouge for that purpose and was, in any event, unwilling to conduct the tests in the presence of a state agent.

v. Prudholm, 446 So.2d 729, 736 (La. 1984). More recently, this court observed:

> The scope of the trial judge's duty toward the motion for a new trial based upon the new evidence must be kept in mind. It was not for him to determine the guilt of [another alleged suspect] or the innocence of [the defendant]; it was not for him to weigh the new evidence as though he were a jury, determining what is true and what is false. The judge's duty was the very narrow one of ascertaining whether there was new material fit for a new jury's judgment. If so, will honest minds, capable of dealing with evidence, probably reach a different conclusion, because of the new evidence, from that of the first jury? Do the new facts raise debatable issues? Will another jury, conscious of its oath and conscientiously obedient to it, probably reach a verdict contrary to the one that was reached on a record wholly different from the present, in view of evidence recently discovered and not adducible by the defense at the time of the original trial?

State v. Watts, 00-0602, p. 7 (La. 1/14/03), 835 So.2d 441, 447(internal footnote omitted) (quoting *State v. Talbot,* 408 So.2d 861, 885 (La. 1980». The trial court's denial of a motion for new trial will not be

disturbed absent a clear abuse of discretion. *State v. Maize*, 94-0736, p.15 (La. App. 1 Cir. 5/5/95), 655 So.2d 500, 517, writ denied, 95-1894 (La. 12/15/95), 664 So.2d 451.

In the present case, the state argues the discovery of police-issued service revolver of Lt. Wax did not constitute newly discovered evidence, because defendant was the last person to possess the weapon and his knowledge of the gun's whereabouts was not newly discovered evidence gained after the trial. When asked by Chief Pat Englade "what did you do with that police officer's weapon," defendant made a post-arrest statement on May 24,2004, responding to the effect that he had thrown the gun in the river near a casino. That statement, however, turned out to be incorrect, because on July 10, 2006, members of the New Orleans Police Department found the .357 caliber revolver in a stolen vehicle in New Orleans. In any event, the state argues, defendant knew what he had done with the weapon after this crime and his failure to locate or produce the gun underscores his failure to exercise reasonable diligence in retrieving the gun.

Evidence that the gun had an unusually easy trigger pull seems to have only the most attenuated relevance to the question of defendant's specific intent to kill in the context of the defense that he asserted at trial, insanity. Defendant does not show how the trigger pull of the weapon was remotely relevant to his claim, not that he shot the gun accidently, but that he had fallen into a kind of

cataleptic trance in which he performed a complex series of behaviors without conscious volition as evidenced by his purported lack of memory of the shots he had fired at close range into his victims.[17] Consequently, he has not established that the post-trial discovery of the murder weapon was material to the issues decided at trial, and would have changed either the jury's verdict of guilt or its subsequent sentence of death. Nine eyewitnesses testified to defendant's commission of this crime. Moreover, defendant's claim that he lost the sense of hearing as part of his mental confusion before the shooting was negated by Judge Richey's testimony in which she recalled that defendant turned and looked back at her after she shouted, "Don't shoot," a response mechanism that negates his theory of automation. Under these circumstances, we discern no abuse of the trial court's broad discretion in denying defendant's motion for new trial based on newly discovered evidence.

MISCELLANEOUS

Assignment of Error 41

Defendant contends the short form indictment charging him with first degree murder was

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[17] The instant facts do not support a claim of accidental discharge, because defendant pulled the revolver's trigger six times and all six shots struck his three intended targets.

constitutionally deficient because the necessary elements to expose him to the death penalty, i.e., the aggravating circumstances, were not the subject of grand jury consideration and were not charged in the indictment, which in defendant's view violated the decision of *Ring v. Arizona*, supra.

Presumably, defendant refers to the observation in *Ring* that "'[u]nder the Due Process Clause of the Fifth Amendment and the notice and jury)' trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" *Ring*, 536 U.S. at 600,122 S.Ct. at 2439 (quoting *Jones v. United States*, 526 U.S. 227,243, n.6, 119 S.Ct. 1215, 1224, 143 L.Ed.2d 311 (1999); see also *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000).

However, in the present case, defendant never filed a motion to quash the indictment. Consequently, the claim raised herein is procedurally barred, as the time for testing the sufficiency of an indictment or bill of information is before trial by way of a motion to quash or an application for a bill of particulars. *State v. Thibodeaux*, 98-1673, p. 18 (La. 9/8/99), 750 So.2d 916, 930 (citing *State v. Gainey,* 376 So.2d 1240, 1243 (La. 1979). A post-verdict attack on the sufficiency of an indictment should be rejected unless the indictment failed to give fair notice of the

offense charged or failed to set forth any identifiable offense. *Id.* (citing *State v. Williams*, 480 So.2d 721, 722, n.l (La. 1985»; see also *State v. Storms*, 406 So.2d 135 (La. 1981). Because trial counsel failed to file a motion to quash so as to test the sufficiency of the state's bill of indictment, defendant waived any claim based on the allegedly defective indictment.

Assignment of Error 43

Defendant avers the denial of a public execution violates the Eighth Amendment, challenging specifically the "secrecy" attendant to modem executions under La. Rev. Stat. 15:569(B) ("Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room. ").

In the 19th century, executions in the United States became private events and moved from the public square to inside prison walls. *Furman v. Georgia*, 408 U.S. 238,297,92 S.Ct. 2726, 2756, 33 L.Ed.2d 346 (1972) (Brennan, l, concurring) ("No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.").

Under these circumstances, defendant has failed to assert a claim worthy of relief.

Assignments of Error 44-45

Defendant argues the aggregation of error in both the guilt phase and the penalty phase of the trial cannot be considered harmless and requires reversal of his conviction and sentence. However, our review of all of defendant's assignments failed to uncover reversible error. This court has pointed out that, "the combined effect of the incidences complained of, none of which amounts to reversible error [does] not deprive the defendant of his right to a fair trial." *State v. Copeland*, 530 So.2d at 544-45 (quoting *State v. Graham*, 422 So.2d 123, 137 (La. 1982). Because there is no cumulative prejudicial impact, nor is there a denial of due process, we find no merit to these claims.

APPENDIX C

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

SHEDRAN WILLIAMS

State v. Williams, 2007-KA-1407 (La., Dec. 11, 2009); 2009 La. LEXIS 3698.

Rehearing Denied.