No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID BROWN,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent,

APPENDIX TO APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

APPENDIX A: *State v. Brown*, 2018-KA-01999 (La. 09/30/21).

December 14, 2021

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE #037

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **30th day of September, 2021** are as follows:

BY Crichton, J.:

2018-KA-01999 STATE OF LOUISIANA VS. DAVID H. BROWN (Parish of Lafourche)

CONVICTIONS AFFIRMED; DEATH SENTENCES REVERSED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. SEE OPINION.

Retired Justice Jeannette Theriot Knoll, appointed Justice as hoc, sitting for Weimer, C.J., recused in case number 2018-KA-01999 only.

Retired Judge Frank Hardy Thaxton, appointed Justice ad hoc, sitting for Crain, J., recused in case number 2018-KA-01999 only.

Hughes, J., additionally concurs and assigns reasons.
Crichton, J., additionally concurs and assigns reasons.
McCallum, J., additionally concurs and assigns reasons.
Knoll, J., dissents in part and assigns reasons.

09/30/21

SUPREME COURT OF LOUISIANA

No. 2018-KA-01999

STATE OF LOUISIANA

VS.

DAVID H. BROWN

On Appeal from the 17th Judicial District Court, Parish of Lafourche

CRICHTON, J.[*]

A grand jury indicted defendant, David H. Brown, on three charges of first degree murder, and the State noticed its intent to seek the death penalty, designating several statutory aggravating circumstances. Following the close of evidence, a unanimous jury found defendant guilty as charged. Before the penalty phase of defendant's trial and following a hearing pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the trial court granted defendant's request to represent himself during the penalty phase. Defendant's request arose due to a conflict between the defendant and his lawyers about defense counsel's presentation of certain mitigating evidence. The jury subsequently returned a unanimous verdict of death on each count. This is defendant's direct appeal pursuant to La. Const. art. V, § 5(D).

In his appeal, defendant raises 82 assignments of error, including the trial court's ruling on defendant's request to proceed *pro se* during the penalty phase. For the reasons set forth herein, we find the trial court erred in allowing defendant to represent himself during the penalty phase and therefore vacate the sentences of

[*]Retired Justice Jeannette Theriot Knoll, appointed as Justice *ad hoc*, sitting for Weimer, C.J., recused in case number 2018-KA-1999 only. Retired Judge Frank Hardy Thaxton, appointed as Justice *ad hoc*, sitting for Crain, J., recused in case number 2018-KA-1999 only.

death. However, finding no merit to defendant's remaining challenges, we affirm his convictions and remand the matter to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of Sunday, November 4, 2012, Carlos Nieves ("Nieves") knocked on the door of Costin Constantin ("Constantin"), his neighbor in the Longueville Apartments in Lockport, Louisiana, located in Lafourche Parish. Nieves told Constantin that his apartment was on fire and that his wife and children were upstairs. Nieves and Constantin attempted to go upstairs but were unsuccessful due to the heat and smoke.

Police, firefighters, and paramedics arrived at the apartment shortly after 5:30 a.m. Firefighters discovered the bodies of Nieves's wife, Jacquelin Nieves, and their two daughters, Gabriela Nieves (age 7) and Izabela Nieves (age 18 months), in a bedroom upstairs. They were each pronounced dead at the scene. Jacquelin and Gabriela were both found naked from the waist down with their legs open, and Isabela was found wearing only a diaper. Each body appeared to have been stabbed several times. A knife wrapped in a pair of children's underwear was found on a mattress in the bedroom, and a blood-soaked white shirt with a dark stripe across the chest was also found at the scene.

The Lockport Police Department took Carlos Nieves into custody and transported him to the Lafourche Parish Sheriff's Office ("LPSO") Criminal Operations Center in Lockport. Investigators with LPSO interviewed Nieves and other residents of the apartment complex and learned that the previous day, Saturday, November 3, 2012, an all-day barbecue and watch party for an LSU football game had taken place outside of Constantin's apartment, which he shared with Adam Billiot. Billiot, Nieves, and defendant all attended the gathering.

Constantin, Billiot, and defendant were all employed at Bollinger Shipyards ("Bollinger"), where Billiot supervised defendant, a welder. On the day of the party,

between 11:30 a.m. and noon, Billiot had picked up defendant from Bollinger, where defendant resided in an employee bunkhouse.[1] Before arriving at the apartment complex, Billiot and defendant purchased food and alcohol from a grocery store and defendant purchased energy drinks at a gas station. Constantin, who had worked a night shift and went fishing that morning, arrived at the complex sometime in the afternoon and went to sleep shortly thereafter. Other residents at the apartments, including Nanette Barrios and her partner, Leroy Hebert, attended the party at various times throughout the day. Residents told investigators that defendant had also attended the party, wearing a white shirt with a stripe across the chest. As will be discussed below, a shirt matching this description was found at the crime scene.

During the game, Jacquelin, Gabriela, and Izabela returned to their apartment after having stayed at Jacquelin's mother's house the night before. While they did not attend the party, Carlos Nieves returned to his apartment and spoke with Jacquelin at some point. After the game, Nieves, Billiot, and defendant visited two bars, namely the Blue Moon in Lockport, then Da Bar in Raceland. After leaving Da Bar, they went back to the Blue Moon but left when they found it empty. They returned to Billiot's apartment around 2:00 a.m.

Shortly thereafter, defendant entered Barrios's apartment, which shared a common wall with the Nieves apartment. Nannette Barrios told investigators that defendant went into her son's bedroom upstairs, turned on the light, and asked him where Hebert was. Unable to find Hebert, defendant went back downstairs, where Barrios was sleeping, and touched her awake. Barrios screamed at defendant and told him to leave. Defendant walked back to Billiot's apartment and briefly spoke with Billiot, who then went upstairs to go to sleep.

[1] According to Lt. John Champagne's testimony at a pretrial hearing, the bunkhouse was a trailer consisting of separate rooms and a common kitchen.

Carlos Nieves testified that he returned to his own apartment and fell asleep on the sofa downstairs, waking only when smoke from the fire left him unable to breathe. Shortly thereafter, police, firefighters and paramedics arrived and began pulling the victims' bodies out of the apartment.

Around 11:00 a.m. the same day, police unsuccessfully attempted to locate defendant at the Bollinger bunkhouse but found him there when they returned around 4:00 p.m. An unidentified Hispanic man who answered the door of the trailer gave police permission to enter, and police entered defendant's room and found him asleep in his bed. Lt. John Champagne announced to defendant they were from LPSO and defendant complied when asked to step down from his bunk. Lt. Champagne placed defendant in handcuffs and told him that he was being detained but not under arrest, and advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). He told defendant investigators wished to speak with him about "an incident."

Detectives arrived at the bunkhouse eight to ten minutes later. Det. Baron Cortopossi again *Mirandized* defendant, and defendant asked the detectives if they thought he needed a lawyer. According to Det. Benjamin Dempster's testimony at trial, Det. Dempster responded, "Do you think you need a lawyer? We are talking to everybody that was at the apartments [sic] the night before, because we had a fire with some deaths." Police then transported defendant to the LPSO Criminal Operations Center, where he was *Mirandized* again and signed a waiver of rights form.

During an initial unrecorded interview, defendant told investigators that after the Barrios incident, he left the apartment complex and walked northbound along a nearby highway to Sunrise Fried Chicken but walked back to the complex when he saw it was closed. He said Billiot's door was locked when he returned, so he walked across the street from the complex and into a field, fell asleep in a shed, then went

home when he woke up. When defendant mentioned that he had been bitten by bugs in the shed, investigators asked him to roll up his sleeves, at which point they observed three bandages on his left arm covering most of a cut.[2] Defendant then rolled his sleeve down and again asked if he needed a lawyer. Det. Dempster asked defendant if he thought he needed a lawyer, to which defendant did not respond, and the interview ended.

Defendant remained in the interview room while investigators obtained and executed a search warrant of his residence. They located a garbage bag in a dumpster outside of the bunkhouse containing a dark t-shirt belonging to Carlos Nieves and a pair of blue jeans with a wallet inside, which contained two identification cards issued to defendant. After completing the search, investigators returned to the interview room where they again *Mirandized* defendant and conducted a second, recorded interview. During the second interview, investigators told defendant that witnesses who had seen him the previous day described him as having worn a white shirt with a stripe across it, and defendant indicated that he had worn such a shirt. Investigators then asked defendant if he wanted to explain why a shirt matching that description was found at the crime scene, at which time defendant requested a lawyer and the interview was terminated. Police arrested defendant and booked him on unauthorized entry of an inhabited dwelling and simple battery in connection with the Barrios incident.

On January 23, 2013, defendant was booked on three counts of first degree murder in connection with this case. On May 17, 2013, a grand jury indicted defendant on three counts of first degree murder. Defendant was arraigned on May 21, 2013 and pleaded not guilty. The same day, the State filed a notice of intent to

[2] A nurse who later treated defendant's cut at the hospital testified at trial that defendant told him he had cut his arm on a piece of tin at work. No one interviewed by the police could recall having seen a cut on defendant's arm the previous day, and video footage from Da Bar showed defendant without bandages on his arm.

seek the death penalty, designating the following statutory aggravating circumstances: (1) the offender knowingly created a risk of death or great bodily harm to more than one person; (2) the victim, Izabela Nieves, was under the age of twelve (12) years; (3) the victim, Gabriela Nieves, was under the age of twelve (12) years; (4) the offender was engaged in the perpetration or attempted perpetration of the aggravated rape of Jacquelin Nieves; (5) the offender was engaged in the perpetration or attempted perpetration of the aggravated rape of Gabriela Nieves; (6) the offender was engaged in the perpetration or attempted perpetration of cruelty to juveniles and/or second degree cruelty to juveniles concerning Izabela Nieves; (7) the offender was engaged in the perpetration or attempted perpetration of cruelty to juveniles and/or second degree cruelty to juveniles concerning Gabriela Nieves; (8) the offender was engaged in the perpetration or attempted perpetration of aggravated arson; and (9) the offenses were committed in an especially heinous, atrocious, or cruel manner.[3] La. C.Cr.P. art. 905.4(A)(1), (4), (7), (10).

Defendant filed over 100 pretrial motions, including, *inter alia*: motions to quash the indictment, motions to suppress evidence obtained from defendant's residence and person, a motion to suppress certain of defendant's statements made to police, a motion to recuse an assistant district attorney, motions relating to the constitutionality of the death penalty and portions of Louisiana's statutory death penalty framework, a motion in limine to bar admission of defendant's invocation of *Miranda* rights, a motion in limine related to other crimes evidence, motions for change of venue, a motion in limine to prohibit law enforcement witnesses from opining on the contents of video footage, and a motion to exclude unduly prejudicial

[3] On September 2, 2016, the State filed an Amended Answer to Bill of Particulars for Penalty Phase omitting the aggravating circumstances of perpetration or attempted perpetration of cruelty and/or second degree cruelty to juveniles concerning both Gabriela and Izabela.

photographs. The trial court held numerous pretrial hearings and ruled upon the motions. Both the State and defendant sought review of numerous rulings.[4]

Jury selection began on September 12, 2016, and concluded on October 23, 2016. Opening statements took place the following day, October 24, 2016. During its case-in-chief, the State called 27 witnesses, including Carlos Nieves, several witnesses who had come in contact with defendant in the day and/or night leading up to the murders,[5] first responders, investigating officers, crime scene technicians, and experts in the fields of arson investigation, forensic pathology, forensic DNA analysis, and blood pattern analysis. The State also called as a witness defendant's former sister-in-law, Lillian Brown, who was the victim of an aggravated battery committed by defendant in 1996.

Capt. Brian Tauzin of the State Fire Marshal's Office, who investigated the fire and was accepted as an expert in arson investigation, testified that the fire had been intentionally set. He testified that an ignitable liquid had been poured upstairs in the apartment, starting in the bedroom and trailing to the top of the stairs, and that the fire itself originated at the top of the stairs. Capt. Tauzin further stated that the "entire second story smelled of an obvious odor of gasoline." While no incendiary

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[4] *See, e.g., State v. Brown*, 14-1684 (La. App. 1 Cir. 2/10/15) (unpub'd) (granting in part and denying in part State's writ application seeking review of district court's ruling on motion in limine to bar admission of invocation of *Miranda* rights) (Holdridge, J., dissents and would deny the writ application), *writ denied*, 15-0878 (La. 6/19/15), 166 So.3d 998 (Weimer, J., recused; Hughes, J., additionally concurs and assigns reasons); *State v. Brown*, 16-0274 (La. 4/22/16), 192 So.3d 720 (granting writs and remanding for in camera review of each item filed by defendant ex parte and maintained under seal) (Knoll, J., dissents and assigns reasons; Weimer, J., recused; Crichton, J., additionally concurs and assigns reasons); *State v. Brown*, 16-1092 (La. App. 1 Cir. 9/8/16) (unpub'd) (finding no abuse of trial court's discretion in maintaining defense filings under seal after in camera inspection) (Crain, J., dissents and would grant the writ application), *writ denied*, 16-1685 (La. 9/13/16), 201 So.3d 240 (Knoll, J., would grant the stay and grant and docket the writ; Weimer, J., recused; Crichton, J., additionally concurs and assigns reasons).

[5] Nieves testified that defendant told him at one point during the day, "I'm going to go . . . f**k your wife[,]" which defendant downplayed as a joke before Nieves could respond. Nothing in the record suggests that defendant had met Jacquelin (or the children) before the offenses occurred.

Barrios testified to the incident that occurred in her apartment and stated that defendant made her feel uncomfortable while she was at the party. Another resident of the apartment complex, Madonna Seymour, testified that defendant had been "flirtatious" and "very vulgar" at the party and that she left after declining an invitation from him to have sex.

devices were found, a red gas can was found in the bedroom. The owner of that gas can, who lived near the apartment complex and next door to Accent Hair Salon, later identified it as missing from his boat on the morning of the offense.

During Det. Dempster's testimony, the State introduced surveillance footage from the evening of November 3 and early morning hours of November 4, including footage taken from the gas station visited by defendant from Da Bar and from Mid-South Technologies ("Mid-South"), located near the apartment complex. Footage from Mid-South depicted a person walking northbound from the complex parking lot at 2:24 a.m. and a person walking southbound into the parking lot at 3:39 a.m. It further showed: (a) a light illuminate in the upstairs master bedroom of the Nieves apartment at 5:03 a.m.; (b) a person walking from the complex and around Accent Hair Salon at 5:05 a.m.; (c) a person walking into the complex around 5:07 a.m.; (d) a glow of light appearing in the master bedroom at 5:08 a.m.; and (e) a person walking away from the complex and across the street into a field approximately one minute later. Additional surveillance footage from Emerald City Car Wash, located between the apartment complex and the Bollinger bunkhouse, depicted a person wearing a dark shirt and blue jeans walking toward the direction of the bunkhouse at 1:18 p.m. the same day.

Dr. Susan Garcia, who performed the autopsies of the victims and was accepted as an expert in forensic pathology, testified that Jacquelin suffered multiple stab wounds, including one to her vaginal and anal area, and died as a result of a stab wound to her collarbone. Jacquelin also had additional injuries to her vaginal and anal area consistent with blunt trauma. Dr. Garcia determined that Gabriela also suffered multiple stab wounds, but died as a result of smoke inhalation, having observed soot near her nostrils and in her lungs. Dr. Garcia stated that a stab wound that penetrated Gabriela's skull and entered her brain could have been fatal had she lived long enough. Gabriela also had injuries to her vaginal area consistent with

blunt trauma, including bruising and a small tear in her vaginal opening. Izabella suffered multiple stab wounds and died as a result of stab wounds to her chest and abdomen. Dr. Garcia also testified that each victim had stab wounds on their hands and/or arms characteristic of defense wounds.

David Cox,[6] a supervisor of the technical operations at the lab in the Jefferson Parish Sheriff's Office ("JPSO"), was accepted as an expert in forensic DNA analysis. He testified that DNA consistent with defendant's, in the form of blood, was found on the east wall of the stairs, the stairwell baseboard, the bathroom floor near the doorframe, the wall of the bedroom near the doorframe, and the white shirt found at the crime scene. DNA consistent with Jacquelin's was a "major contributor" to a DNA mixture in the form of blood found elsewhere on the white shirt. DNA consistent with defendant's was a "major contributor" to a DNA mixture in the form of blood found on both the handle and the blade of the knife. Specifically, Cox testified that the probability of finding that defendant's same DNA profile from a randomly selected individual other than defendant was one in greater than 100 billion.

The defense presented no witnesses during the guilt phase and rested on October 26, 2016. Following closing arguments and instruction from the trial court on October 30, 2016, a unanimous jury found defendant guilty as charged of three counts of first degree murder.

On October 31, 2016, after the conclusion of the guilt phase but before the penalty phase began, defense counsel alerted the trial court to an issue involving the scope of its representation of defendant. The trial court removed the jury from the courtroom, and during a closed session defendant informed the court that due to a dispute between himself and his counsel regarding the presentation of certain

[6] David Cox's official job title is "DNA Technical Leader."

mitigating evidence, he wished to waive his right to counsel and represent himself in the penalty phase of the trial. As discussed in greater detail below, on November 1, 2016, the trial court conducted a hearing pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and ultimately granted the defendant's request to proceed *pro se* during the penalty phase.[7]

The penalty phase was held on November 1, 2016. In its opening statement, the State argued that the evidence presented during the guilt phase demonstrated that the death penalty was warranted. Defendant declined to make an opening statement. The State presented victim impact testimony from Jacquelin's mother and father-in-law. Defendant presented no evidence or testimony. After the State's closing argument, and with no closing argument by defendant, the jury returned three verdicts of death, finding the following aggravating factors: (1) the offender was engaged in the perpetration or attempted perpetration of aggravated rape (counts one and two); (2) the offender was engaged in the perpetration or attempted perpetration of aggravated arson; (3) the offender knowingly created a risk of death or great bodily harm to more than one person; (4) the offense was committed in an especially heinous, atrocious, or cruel manner; and (5) the victim was under the age of twelve years old (counts two and three).

Defendant thereafter filed a motion for new trial under seal, asserting many of the arguments he sets forth in this appeal. After a hearing, the trial court denied the motion and all claims therein. Defendant was sentenced to death on June 22, 2018, and the trial court later denied his motion to reconsider sentence. Defendant timely filed this appeal.

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[7] In *Faretta*, the United States Supreme Court held that the Sixth Amendment implies a right of self-representation and thus determined that forcing a lawyer upon a person in criminal court deprives a defendant of his constitutional right to conduct his own defense. *Faretta,* 422 U.S. at 835, citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942). The Supreme Court held, however, that any such waiver of counsel must be knowing and intelligent, and a "'choice [] made with eyes open.'"

DISCUSSION

Defendant's primary argument on appeal is that the trial court violated his Sixth, Eighth, and Fourteenth Amendment rights by prohibiting him from limiting his counseled defense during the penalty phase of his trial. More specifically, prior to trial, defense counsel prepared a penalty phase defense that included, but was not limited to, evidence concerning the defendant's mother's abusive childhood. The defendant adamantly disagreed with the presentation of this evidence, indicating he wanted to protect his mother and not require her to relive her past. Following a *Faretta* hearing, the trial court ultimately granted defendant's waiver of his right to counsel during the penalty phase. For the reasons that follow, we find that ruling to be incorrect and, therefore, reverse defendant's sentences of death. However, defendant's convictions are upheld.

Penalty Phase Assignments of Error

Assignments of Error Nos. 1 and 2

In his first assignment of error, defendant asserts the trial court erroneously advised him that he did not have the right to limit the presentation of mitigating evidence at the penalty phase. In his second assignment of error, defendant argues that his invocation of his right to represent himself was unknowing, unintelligent, and involuntary, thereby invalidating his waiver. Because we find the defendant was misinformed by the trial court as to his Sixth Amendment right to limit the mitigation evidence presented during the penalty phase (relative to defendant's Assignment of Error No. 1), it necessarily follows that defendant's waiver was not knowing or intelligent and was involuntary (defendant's Assignment of Error No. 2). Accordingly, we agree the trial court erred in granting defendant's waiver of his right to counsel for the reasons set forth herein.[8]

[8]Defendant argues in his first assignment of error that the trial court gave him two choices – either to self-represent or to permit defense counsel to present the mitigation evidence to which he objected – and thus "forced" defendant to self-represent in violation of defendant's Sixth, Eighth,

The dispute regarding the presentation of certain mitigating evidence first arose at the conclusion of the guilt phase in a closed hearing on October 31, 2016. Defense counsel (Dwight Doskey) explained to the trial court that defendant was opposed to the presentation of any evidence concerning his mother. Doskey further stated that he explained to the defendant that his choices were either to allow counsel to present the best defense possible, pursuant to their ethical obligation to do so, or to discharge defense counsel. According to counsel, defendant had chosen the latter. Defendant then informed the court, "That's correct, Your Honor. Right now, I'd like to waive counsel and represent myself from here on out in the penalty phase." Defendant further explained:

> I came to this decision years ago. I've discussed this with Mr. Doskey. And I told him if we got to this phase, my feelings on it. I don't know if Mr. Doskey had thought, maybe, by then I would change my mind or he would be able to talk me out of it somehow. I'm not going to allow my mother to get on the stand . . . . I will not do it.
>
> What I will do is ask to represent myself. I will offer no mitigation, because the Defense has – I don't have an obligation to put up any evidence, any mitigating evidence. Defense is going to hear the State's case and then the Defense is going to rest. That is my plan, Your Honor. I understand the law. I understand what I'm obligated to do and my rights.

Although stating that this exchange with the defendant was not a *Faretta* hearing for purposes of waiver of counsel (but that such a hearing would occur the following day), the trial court confirmed that defendant was not under the effects of any

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and Fourteenth Amendment rights. While we agree the trial court erroneously assumed and advised defendant, as discussed herein, as to his Sixth Amendment right to direct the presentation of evidence in his penalty phase, we decline to address whether defendant's argument that the trial court's failure to correctly advise defendant amounted to an express ruling on this issue. Finding the trial court ultimately erred in granting defendant's waiver of his right to counsel following his erroneous instruction as to defendant's constitutional rights, we need not address defendant's construct of the trial court's error as set forth in his Assignment of Error No. 1. Nevertheless, because defendant's argument as to his unknowing, unintelligent, and involuntary waiver (his Assignment of Error No. 2) is intrinsically tied to the erroneous statements of law by the trial court as to his right to direct his counsel regarding the presentation of mitigating evidence (relative to his Assignment of Error No. 1), we address these assignments together.

medication that would alter his ability to understand.[9] Prior to breaking for the day, the trial court specifically informed the defendant that he was still represented by counsel.

The following morning, the trial court conducted a closed *Faretta* hearing. Defendant testified that he technically only received an eighth grade education. Although he attended school through the eleventh grade through a "Tabernacle Appraised" ("TAPS") program, which was not recognized by the Louisiana School Board, defendant was placed in the eighth grade when he returned to public school at 17 years old. Defendant confirmed he is able to read and write, and the trial court noted that it had observed him taking notes and asking his attorneys questions. Defendant also explained that he was not currently undergoing mental health treatment or taking mental health medication but that he had seen a psychiatrist as a juvenile for sniffing gasoline. He also testified that as a juvenile he had taken Wellbutrin and a second medication that he could not recall, but he ceased taking that medication after a short time because of its side effects.

The trial court asked defendant about the witnesses defense counsel intended to call during the penalty phase, and defendant responded that he only objected to his mother and his uncle Calvin, explaining that "[t]here's stuff that's in the past that I believe should stay in the past. And it took my mother many, many years to get over this. And to be drug back out, put in the newspaper – like I told you, I'm willing to accept death before I let my mother get on the stand." When further discussing the possibility of defendant representing himself, the following colloquy between the trial court and defendant ensued:

> DEFENDANT:
>
> > Well, Your Honor, this is my understanding of it. My understanding, through the *Witherspoon* process that we – you know, many weeks – is that I'm not obligated to put up a defense

[9] Defendant did inform the trial court that although he was not taking any "mental meds," he was taking several blood pressure pills a day, as well as medications for heartburn and allergies.

in mitigation. That I have to show no evidence. That the jurors have to consider both sides regardless if I produce any evidence.

THE COURT:
Right.

DEFENDANT:
And I want to defend myself because Mr. Doskey finds it a moral obligation on his part that he should put up the best defense.

THE COURT:
It's actually a professional obligation on his part.

DEFENDANT:
Professional obligation, also. Excuse me.

THE COURT:
He's required.

DEFENDANT:
To put up the best defense possible for me.

THE COURT:
Right.

DEFENDANT:
And he thinks that putting my mother up and my Uncle Calvin up is part of that defense, and that's where we disagree.

THE COURT:
Okay. But the thing about self-representation is you can't have it halfway.

DEFENDANT:
Well, this is my plan, Your Honor. My plan is being the law states that I have not – I don't have to put any defense up, I'm going to rest –

THE COURT:
Okay.

DEFENDANT:
– all through the process.

THE COURT:
Well, so let me get – I don't necessarily have to know your strategy, although, it is good to know. That's part of – that's going to be part of what I base my decision on, that you have a strategy. But if you're allowed – if I allow you to represent yourself, you can't change your mind and say, "Well, I want Mr. Doskey to call some of the witnesses and not all of the witnesses."

DEFENDANT:
Correct. I understand.

THE COURT:
Because if he's representing you, he's calling them.

DEFENDANT:
Well, that was the conflict. You see, I was willing – if he was willing to not put my mother and Uncle Calvin, we could of [sic] called anybody that he wanted besides that. But he's unwilling to do that, so this is the step that I have to take to protect my mother.

THE COURT:
But what I'm telling you is you can still call other witnesses if you wish to.

DEFENDANT:
I understand. I'm not – I don't think I can question a witness. You understand what I'm saying? I feel that I don't – I'm not saying have the skills, I just don't have – emotionally, I don't know how to question somebody – you know what I'm saying – in a situation like this. Because this – believe it or not, this is my first time going through a process like this. And, to me, the best thing that I can do is just rest, and then whatever the jurors decide, that's what they decide. What's important, right here, is my mother.

THE COURT:
Some other things you need to understand is that once the jury makes its decision, there's going to be a procedure called the "appeal process." First of all, if you represent yourself, you can't later ask for a new trial, because of the fact that I allowed you to represent yourself.

DEFENDANT:
Yes, sir.

THE COURT:
You can't – you'll be giving up any claim that you might have for ineffective assistance of yourself in representing –

DEFENDANT:
Correct.

THE COURT:
- ineffective self-representation, so to speak.

DEFENDANT:
Now, does that carry through to the guilt phase, also?

THE COURT:
The guilt phase is done.

DEFENDANT:
Right. So I don't waive anything on the guilt phase.

THE COURT:
We're talking about representation – you representing yourself, if it gets to that point. Whatever mistakes, whatever risk you take for representing yourself, whatever problems you cause for yourself is on you.

DEFENDANT:
Correct.

THE COURT:
As they say, you have to go into this with your eyes open.

DEFENDANT:
Yes, sir.

* * *

THE COURT:
Are you refusing the allow the Capital Defense team to represent you?

DEFENDANT:
I think the disagreement we have, yes, I would ask them to stand down.

The trial court informed defendant that he risked the jury not recognizing mitigation if it is not presented to them, and defendant replied, "I just feel this is the decision I have to make to protect my mother, and whatever consequences I have to suffer I'm willing to take that."[10]

In granting defendant's waiver of his right to counsel for the penalty phase, the trial court stated:

> According to *Faretta v. California*, Mr. Brown has the right to choose between the right to counsel and the right to represent himself when such a conflict arises. But he has to do so knowingly, intelligently, and without waver [sic]. As we discussed, he has to do so and understand the risk of self-representation and understand the benefits, potentially, of representation. Mr. Brown is aware – when we were in the guilty phase – Mr. Brown has been present for approximately six weeks of penalty qualification, and has summarized it, in his own words, as he has the right not to present anything if he chooses to.

[10] During the *Faretta* hearing, defense counsel listed several witnesses that were on standby and available to testify, including Mr. Billiot, Mr. Nieves, Dr. Cunningham, Dr. Piasecki, Jason Brown, and Calvin Dumas.

> The Court has informed him that even if the Court grants his right to self-representation, the witnesses are available for his presentation of whomever he chooses to. Mr. Brown has indicated that he understands, if he represents himself, it cannot be a basis for future issue with regard to that self-representation, such as seeking a new trial based on the penalty phase, because he represented himself, seeking an ineffective assistance of counsel for representing himself.
>
> He has sufficient mental abilities and understandings. He is not under any mental health treatment, nor has he demonstrated any lack of ability to understand what he's doing, when he's doing it, and throughout this process. In fact, he's demonstrated an extreme ability to control his own actions.
>
> The Court finds that Mr. Brown's waiver of his right to counsel for the remaining portion of the trial, including the penalty phase, is a knowing and voluntary decision having been fully informed of the benefits and the risks, and he has a full understanding of what he is doing. As I indicated to Mr. Brown, it is my view that it's a foolish decision, but it is not one that is contrary to the law in consideration of *Faretta v. California*. It is also – there was even a federal case, *State v.* – I'm sorry – *United States v. Lynn Davis* that discussed the judge's attempt to appoint a special defense counsel to come in and handle the penalty phase as a friend of the Court, which I can't do. It's beyond the scope of anything I can do.
>
> There are numerous state cases, among them: *State v. Bell*, *State v. Gregory Brown* that allowed and authorized self-representation in capital cases. I'm going to grant his right to represent himself.

After making its ruling, the trial court granted permission for defense counsel to remain seated beside defendant during the penalty phase.[11] The trial court also informed the jury at the beginning of the penalty phase that defendant had elected to represent himself for that portion of the trial.[12]

As stated above, defendant now argues in Assignment of Error No. 1 that the trial court erroneously forced him to choose between allowing defense counsel to introduce mitigation evidence concerning his mother or forego counsel at the penalty

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[11] Notably, the transcript reflects that the trial court stated he could "tell, from looking at counsel, that y'all are distressed by my decision as much as you're distressed by his decision." Moreover, after the trial court made this ruling, it asked the State, "Mr. Soignet. You all right?" The State responded: "No, sir."

[12] The court stated: "Ladies and gentlemen, I need to advise you of something before we get started. Mr. Brown has made the decision to represent himself for the remainder of these proceedings. At the request of his former counsel, I have allowed them to sit with him at counsel table."

phase altogether, resulting in a violation of his Sixth Amendment right to counsel. Defendant contends that he would have preferred to proceed with the assistance of counsel on the condition that this particular evidence not be introduced. Citing *McCoy v. Louisiana*, 584 U.S.__, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018) and *State v. Felde*, 422 So.2d 370 (La. 1982), defendant asserts his counsel's obligation during the penalty phase was not to put on what counsel perceived to be the best possible defense; instead, counsel's obligation was to honor defendant's wishes pursuant to his right to limit his penalty phase defense. In his Assignment of Error No. 2, defendant relatedly argues that his waiver of his right to counsel was constitutionally infirm. He reasons that the trial court's erroneous instruction as to his right to limit the mitigation evidence during the penalty phase rendered his waiver unknowing, unintelligent, and involuntary. Finally, defendant argues these errors were structural in nature[13] and require reversal of the penalty phase without the requirement of a showing of prejudice.

The Sixth Amendment expressly guarantees the accused in a criminal proceeding the right to have "the Assistance of Counsel for his defence." U.S. Const. amend. VI. "The 'core purpose' of the counsel guarantee is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" *U.S. v. Gouveia*, 467 U.S. 180, 188-89, 104 S.Ct. 2292, 2297-98, 81 L.Ed.2d 146 (1984), citing *United States v. Ash*, 413 U.S. 300, 309, 93 S.Ct. 2568, 2573, 37 L.Ed.2d 619 (1973). Furthermore, "the right to

[13] A "structural" error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991), *reh'g denied*, May 20, 1991. The United States Supreme Court has recognized structural errors only in a "very limited number of cases." *Johnson v. U.S.*, 520 U.S. 461, 468, 117 S.Ct. 1544, 1550, 137 L.Ed.2d 718 (1997), citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (a total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (lack of an impartial trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (unlawful exclusion of grand jurors of defendant's race); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (the right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (the right to a public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (erroneous reasonable-doubt instruction to jury).

counsel 'embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.'" *Gouveia, supra*, 467 U.S. at 189, 104 S.Ct. at 2298, citing *Johnson v. Zerbst,* 304 U.S. 458, 462–463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938). The right to counsel under Louisiana Constitution Article I, § 13 and the right to counsel under the Sixth Amendment are coextensive in scope, operation, and application. *State v. Carter*, 94-2859, p. 20 (La. 11/27/95), 664 So.2d 367, 382. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *State v. Brooks*, 452 So.2d 149, 155 (La. 1984).

The Sixth Amendment "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id.*, 422 U.S. at 819-20, 95 S.Ct. 2525 (footnote omitted). Nevertheless, an accused may elect to waive the right to counsel and represent himself.

The assertion of the right to self-representation must be clear and unequivocal, *see* U.S. Const. Sixth Amend.; La. Const. Art. I, § 13; *Faretta v. California*, 422 U.S. at 835, 95 S.Ct. 2541; *State v. Hegwood*, 345 So.2d 1179, 1181–82 (La. 1977), and the relinquishment of counsel must be knowing and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464–65, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1958); *State v. Strain*, 585 So.2d 540, 542–43 (La. 1991). This Court has stated:

> An accused has the right to choose between the right to counsel and the right to self-representation. *State v. Strain,* 585 So.2d 540, 542 (La.1991). . . . Whether the defendant has knowingly, intelligently, and unequivocably [sic] asserted the right to self-representation must be determined based on the facts and circumstances of each case. *See State v. Strain,* 585 So.2d 540, 542 (La.1991) (citing *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)).

State v. Bridgewater, 00-1529, p. 18 (La. 1/15/02), 823 So.2d 877, 894.

While the United States Supreme Court has expressly declined to "prescribe[] any formula or script to be read to a defendant who states that he elects to proceed without counsel," *Iowa v. Tovar*, 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004), the accused "should be made aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835, 95 S.Ct. 2541 (internal quotation and citation omitted). *See also United States v. Davis*, 269 F.3d 514, 518–19 (5th Cir. 2001) (noting that, although the court "has consistently required trial courts to provide *Faretta* warnings[,]" there is "no sacrosanct litany for warning defendants against waiving the right to counsel[,]" and district courts must exercise discretion "[d]epending on the circumstances of the individual case"). Accordingly, a trial court should "advise the accused of the nature of the charges and the penalty range, should inquire into the accused's age, education and mental condition, and should determine according to the totality of the circumstances whether the accused understands the significance of the waiver" by conducting "a sufficient inquiry (preferably by an interchange with the accused that elicits more than 'yes' and 'no' responses) to establish on the record a knowing and intelligent waiver under the overall circumstances." *Strain*, 585 So.2d at 542 (citing *Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948) and 2 W. LaFave & J. Israel, *Criminal Procedure*, 11.3 (1984)).

In order for such waiver to be knowing and intelligent, the trial court must necessarily provide an accurate description of the defendant's right to counsel that he or she is relinquishing. *See Strain*, 585 So.2d at 542-43. In this case, however, the trial court erroneously advised defendant he could not direct his counsel to limit the mitigation evidence presented during the penalty phase. For the reasons that

follow, we find this assertion is contrary to established principles embodied in the Sixth Amendment.

Implicit in the right to counsel is the accused's authority "to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983). However, certain other decisions, such as those relative to trial management, belong to counsel:

> As to many decisions pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney. Thus, decisions by counsel are generally given effect as to what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.

New York v. Hill, 528 U.S. 110, 115, 120 S.Ct. 659, 664, 145 L.Ed.2d 560 (2000) (internal quotations and citations omitted). This Court has held that "a defendant can limit his defense consistent with his wishes at the penalty phase of trial." *State v. Felde*, 422 So.2d 370, 395 (La. 1982), citing *Bishop v. State*, 95 Nev. 511, 597 P.2d 273 (1979). In *Felde*, the Court determined that defendant Felde, a prison escapee charged with first degree murder of a police officer, was mentally competent to stand trial and enroll as co-counsel, and had a "constitutional right to impose a condition of employment on his counsel." *Felde*, 422 So.2d at 395, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).[14]

In *State v. McCoy*, 14-1449 (La. 10/19/16), 218 So.3d 535, 564, *rev'd and remanded*, 584 U.S. ___, ___, 138 S.Ct. 1500, 1505, 200 L.Ed.2d 821 (2018), the trial court would not permit McCoy to replace his retained counsel on the eve of

[14] As a condition of employment, Felde instructed counsel not to attempt to obtain a verdict other than not guilty by reason of insanity or guilty of first degree murder with capital punishment. The Court concluded that adherence to this agreement did not result in ineffective assistance, finding defendant mentally competent to stand trial and possessing a constitutional right to impose a condition of employment on his lawyer.

trial, and his counsel conceded at the outset of trial that McCoy murdered his victims despite the fact that McCoy "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." While McCoy argued on appeal that the trial court erred in allowing defense counsel to concede guilt over his objection, defense counsel had repeatedly told the trial court that he believed honoring McCoy's wishes would result in a violation of his ethical duty to do the best he could to save McCoy's life. *McCoy*, 14-1449, p. 41, 218 So.3d at 566. This Court rejected McCoy's argument, categorizing the concession of guilt as a strategic and tactical choice and finding that "[c]onceding guilt, in the hope of saving a defendant's life at the penalty phase, is a reasonable course of action in a case in which evidence of guilt is overwhelming." *Id.*, 14-1449, p. 42, 218 So.3d at 566-67.[15]

The United States Supreme Court reversed and remanded, finding that the violation of the defendant's Sixth Amendment-secured autonomy was a structural error that is not subject to harmless error review, and holding that concession of guilt is a decision reserved for the defendant:

> Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact *are*. . . .
>
> Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as [counsel] did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. . . . When a client expressly asserts that the objective of "his defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and

[15] This Court also noted that while *Felde* did not endorse the premise "that trial counsel must adopt a capital client's unsupportable trial strategy *at the guilt phase*," it has "subsequently applied the *Felde* case to permit a capital defendant to instruct his appointed counsel not to present any mitigating evidence *in the penalty phase*." *State v. McCoy*, 14-1449, p. 39 (La. 10/19/16), 218 So.3d 535, 564, *rev'd and remanded*, 584 U.S. ___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018).

may not override it by conceding guilt.

McCoy v. Louisiana, 584 U.S. ___, 138 S.Ct. 1500, 1508–09, 200 L.Ed.2d 821 (2018). When later interpreting this decision, this Court opined that it is "broadly written and focuses on a defendant's autonomy to choose the objective of his defense." *State v. Horn*, 16-0559, p. 10 (La. 9/7/18), 251 So.3d 1069, 1075.

Our decision today comports not only with the United States Supreme Court's discussion of the Sixth Amendment in *McCoy*, and with our earlier decision in *Felde*, but also with our previous examination of proper waiver of a defendant's right to present mitigating evidence during the penalty phase. In *State v. Bordelon*, 07-0525, (La. 10/16/09), 33 So.3d 842, defendant was convicted of the first degree murder of his twelve-year-old stepdaughter. The sentencing hearing began with defense counsel informing the trial court that defendant had instructed him not to present a defense case in mitigation. After an extensive colloquy with defendant, the trial court determined the defendant made a knowing and intelligent waiver of his right to present mitigating evidence. This Court stressed that defendant's decision "implicated bedrock principles that have shaped evolving capital jurisprudence over the past 30 years," noting:

> A defendant in a capital case has the Sixth Amendment right to reasonably effective counsel "acting as a diligent, conscientious advocate for his life." *State v. Myles*, 389 So.2d 12, 30 (La. 1980) (on reh'g) (citations omitted). He also has an Eighth Amendment right to have his jury "consider and give effect to mitigating evidence relevant to [his] character or record or the circumstances of the offense." *Penry v. Lynaugh*, 492 U.S. 302, 327–28, 109 S.Ct. 2934, 2951, 106 L.Ed.2d 256 (1989). The sentencer in a capital case therefore must be allowed to consider "'as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Blystone v. Pennsylvania*, 494 U.S. 299, 304–05, 110 S.Ct. 1078, 1082, 108 L.Ed.2d 255 (1990) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)) (emphasis in original; footnote omitted). Thus, reasonably competent counsel acting as a diligent advocate for his client's life in a capital case must investigate, prepare, and present, even without the active cooperation of the defendant, relevant mitigating evidence at a capital sentencing hearing. *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360

(2005); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Id. at p, 34-35, 33 So.3d at 865. Nevertheless, the Court in *Bordelon* found the desired limitations on the defense were "self imposed" by defendant. *Id.* Relying upon *Felde*, the Court concluded that the defendant "had the capacity to make a knowing and intelligent waiver of his right to present mitigating evidence and that he did so explicitly during his colloquy with the trial judge at the outset of the sentencing phase." *Id*. at 36, 33 So.2d at 865. *See also Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d. 836 (2007) (upholding trial court's finding that defendant was unable to prove prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), based on his trial counsel's failure to investigate possible mitigating evidence where the record clearly established that defendant instructed counsel not to present any such evidence).

Other jurisdictions have similarly held that a capital defendant's right to instruct his counsel not to present mitigating evidence encompasses the right to limit the amount and/or type of mitigating evidence counsel may present. In *Boyd v. State*, 910 So.2d 167 (Fla. 2005), *as revised on denial of reh'g* (June 16, 2005), *cert. denied*, 546 U.S. 1179, 126 S.Ct. 1350, 164 L.Ed.2d 63 (2006), the Florida Supreme Court found that defense counsel did not err in honoring Boyd's wishes to limit the presentation of mitigating evidence in the penalty phase where additional evidence, including testimony from Boyd's mother, was available. In rejecting Boyd's argument on appeal that his trial counsel was obligated to decide what evidence was to be presented in the penalty phase, the court stated the following:

> [A] defendant possesses great control over the objectives and content of his mitigation. Whether a defendant is represented by counsel or is proceeding pro se, the defendant has the right to choose what evidence, if any, the defense will present during the penalty phase.
>
> The record provides extensive support to substantiate that Boyd understood his rights and understood the consequences of his choice to present only the testimony of his pastor and himself. Boyd was

> exercising his right to be the "captain of the ship" in determining what would be presented during the penalty phase. Therefore, we hold that the trial court correctly allowed Boyd to make a knowing and voluntary decision as to what testimony was to be presented in mitigation.

Id. at 189–90 (citations omitted). *See also Ramirez v. Stephens*, 641 Fed.Appx. 312, 327 (5th Cir. 2016) (holding trial counsel did not render ineffective assistance when they stopped their mitigation case at defendant's request after having called his father as a witness the day before, finding that defendant's directions were "entitled to be followed"); *Shaw v. State*, 207 So.3d 79, 116 (Ala. Crim. App. 2014), *cert. denied*, 137 S.Ct. 828, 197 L.Ed.2d 71 (2017) (finding trial court correctly allowed defendant to limit his counsel's presentation of mitigating evidence at the penalty phase); *State v. Monroe*, 827 N.E.2d 285, 299-301 (Ohio 2005) (finding trial court was not required to hold a hearing on defendant's competency to waive his right to present mitigating evidence where defendant merely limited the amount of mitigating evidence his counsel could present on his behalf, including a prohibition on testimony from his family members, as opposed to waiving his right to present any mitigating evidence at all, and that defendant was entitled to limit the presentation of mitigating evidence); *State v. Roscoe*, 910 P.2d 635, 650 (1996) (finding trial court properly granted defendant's pro se motion to exclude certain mitigating evidence, stating that "[d]eference is especially appropriate under the circumstances before the trial court in this case, where the client's request involves a strong privacy interest"); and *People v. Lang*, 782 P.2d 627, 653 (1989), *abrogated on other grounds by People v. Diaz*, 345 P.3d 62 (2015) (finding defense counsel did not provide ineffective assistance where it honored defendant's request not to call grandmother as a penalty phase witness, as requiring counsel to present certain mitigating evidence over defendant's objection "would be inconsistent with an attorney's paramount duty of loyalty to the client and would undermine the trust, essential for effective representation, existing between attorney and client" and

"imposing such a duty could cause some defendants who otherwise would not have done so to exercise their Sixth Amendment right of self-representation").

We also find guidance in a Utah capital case that presented a similar issue. In *State v. Maestas*, 299 P.3d 892 (Utah 2012), after defendant Maestas's counsel had already presented some mitigating evidence in the penalty phase, Maestas requested the court to allow him to proceed *pro se* because of his objection to defense counsel's insistence on introducing additional mitigating evidence. The court instructed defense counsel to discuss Maestas's concerns with him and to attempt to reach a mutual agreement in how to proceed. After discussing the matter with Maestas, defense counsel informed the court that it still intended to introduce the evidence at issue:

> Specifically, defense counsel explained that Mr. Maestas did not want to present "any unflattering or negative history about his family." But counsel responded, "[T]hat is simply not something that we can abide given our responsibilities under the [C]onstitution to provide effective representation and . . . relevant mitigating evidence in this matter." Counsel further stated, "[W]hether or not we're going to put on specific evidence, that's our call to make. That's not Mr. Maestas'[s] decision." Accordingly, counsel reported, "We're at an impasse. He does not want us to use everything we have. We are planning to use everything we have."

Id. at 956. However, rather than permit Maestas to dismiss his counsel and proceed *pro se*, as the trial court did in the instant case, the court instead prohibited defense counsel from introducing any mitigating evidence in violation of Maestas's wishes, finding that he was entitled to direct his own defense. The court determined that a waiver of counsel could not be voluntary under the circumstances, as "defense counsel's insistence on presenting evidence that contravened Mr. Maestas's wishes placed him in a position where he felt he had to waive counsel in order to prevent the evidence to which he objected from coming forward." *Id*. at 956. Defense counsel abided by the court's instruction and explained to the jury during closing arguments that "certain mitigating evidence had not been presented at Mr. Maestas's

request 'because it was so terrible, and so horrifying, and so upsetting to him and his family, that he would rather face a death sentence than have you hear what kind of life and background he came from.'" *Id*. at 957.

On appeal, the Utah Supreme Court found that the trial court did not violate Maestas's right to counsel in granting his request to waive his right to present further mitigating evidence, stating the following:

> Like other decisions that a represented defendant has the right to make, such as the decision to plead guilty to an offense or testify in the proceedings, the decision to waive the right to present mitigating evidence is not a mere tactical decision that is best left to counsel; instead, it is a fundamental decision that goes to the very heart of the defense. Mitigating evidence often involves information that is very personal to the defendant, such as intimate, and possibly repugnant, details about the defendant's life, background, and family. As such, like other decisions reserved for the defendant, the decision not to put this private information before the jury is a very personal decision. Additionally, like the decision to testify or plead guilty, the decision not to present mitigating evidence may be very significant to the outcome of the proceedings. Moreover, it would make little sense to allow defendants to incriminate themselves by testifying or to forgo a trial and plead guilty to an offense, but bar them from waiving the presentation of mitigating evidence in the penalty phase. For these reasons, the decision to waive the right to present mitigating evidence is a 'fundamental decision[] regarding the case' that falls under the defendant's 'right to control the nature of his or her defense.'
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> . . . .
>
> Thus, because the Sixth Amendment is meant to protect the control a defendant has over his or her own case, we decline to interpret the amendment as limiting a defendant's "right to control the nature of his or her defense" when that defendant is represented by counsel. Accordingly, a defendant's right "to choose how much—if any—mitigating evidence is offered" applies to represented defendants as well. We therefore conclude that the Sixth Amendment does not mandate that defense counsel present mitigating evidence over the wishes of a represented defendant.

Id. at 959–61 (citations and footnotes omitted).

In this case, the record reflects that during the *Faretta* hearing the trial court made several incorrect statements of law to defendant in regards to his right to limit counsel, informing defendant that defense counsel was "required" to present all the mitigating evidence that counsel believed would make the best case in defense's

favor. Based upon the jurisprudence cited herein, we find this to be an erroneous interpretation of defendant's Sixth Amendment rights. In *McCoy*, the Supreme Court specifically found that a capital defendant is permitted to instruct his appointed counsel not to present any mitigating evidence in the penalty phase, and thus, the purported obligation cited by the trial court does not exist under these circumstances.[16]

Because the trial court erroneously informed defendant that he was not entitled to limit his counsel's presentation of mitigating evidence during the penalty phase, we find defendant's waiver unknowing and unintelligent in violation of his Sixth Amendment rights. *See Strain*, *supra*. In short, the trial court's error necessarily prevented defendant from waiving his right to counsel "with eyes open." *Faretta*, 422 U.S. at 835, 95 S.Ct. 2541. [17]

The record also makes clear that defendant's decision to represent himself in the penalty phase was based solely on the dispute with counsel and defendant would have proceeded with the assistance of counsel throughout the penalty phase had the dispute been resolved in his favor. He stated: "I was willing – if he was willing to not put my mother and Uncle Calvin, we could of [sic] called anybody that he wanted besides that. But he's unwilling to do that, so this is the step that I have to take to protect my mother."

The trial court and defendant's colloquy evinces that the trial court's erroneous description of defendant's Sixth Amendment rights placed defendant into

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[16] While the *McCoy* decision was decided after the trial court's ruling in this case, *McCoy* is rooted in long-standing principles embodied in the Sixth Amendment. Moreover, the trial court had the benefit of both the *Felde* and *Bordelon* decisions, as discussed herein, and thus was not without relevant jurisprudence to guide its ruling, despite the trial court indicating it was "kinda muddy on the law."

[17] To be clear, we do not hereby mandate that in every case a defendant must be informed of these rights before validly waiving the right to counsel. *See United States v. Davis*, 269 F.3d at 518–19 (5th Cir. 2001). Where a defendant is affirmatively *misinformed* by the trial court of the right being waived, however, it is clear that defendant's waiver cannot be deemed constitutionally valid.

the untenable position of having to choose between relinquishing the critical decisions regarding the presentation of certain penalty phase mitigation evidence or entirely discharging his legal representation. Thus, defendant's subsequent waiver of counsel was also involuntary, as he was "forced to make a choice between representation that would compromise his autonomy or no representation at all." *State v. Clark*, 12-0508, p. 9 (La. 6/28/19), 285 So.3d 414, 419-20, *reh'g denied*, 12-508 (La. 9/6/19), 278 So.3d 364, *cert. denied*, 141 S.Ct. 272, 208 L.Ed.2d 37 (2020) (finding the *Faretta* colloquy adequate, defendant made a knowing and intelligent waiver of counsel, and thus, no violation of defendant's Sixth Amendment rights); *see also State v. Maestas*, 299 P.3d 892, 957 (Utah 2012).

In light of this, we find the trial court's ruling in this instance to be a structural error not subject to harmless error review, as the violation of defendant's "protected autonomy right was complete when the court allowed counsel to usurp control of an issue within [defendant's] sole prerogative":[18]

> Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural;" when present, such an error is not subject to harmless-error review. Structural error affects the framework within which the trial proceeds, as distinguished from a lapse or flaw that is simply an error in the trial process itself. An error may be ranked structural, we have explained, if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest, such as the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt.

McCoy, 138 S.Ct. at 1510 (internal quotations and citations omitted).

In sum, defendant's waiver of counsel was not, and could not have been,

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[18] *See Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (holding that harmless error involves the inquiry into not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.)

knowing, intelligent, or voluntary because the trial court misinformed defendant during the *Faretta* hearing as to his Sixth Amendment rights to direct his legal representation.[19] Thus, for the reasons set forth above, we find this portion of defendant's second assignment of error has merit, reverse the defendant's sentences of death and remand to the trial court for a new penalty phase.[20] [21]

Other Penalty Phase Assignments of Error

Defendant has assigned additional errors in the penalty phase of trial; including, *inter alia*, he was denied counsel during an overnight recess before his *Faretta* hearing; his Eighth Amendment right was violated by receiving the death penalty; the jury was given a constitutionally inadequate sentencing instruction and

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[19] Defendant also asserts in Assignments of Error Nos. 2 and 3 that the *Faretta* hearing failed to adequately resolve questions regarding his competency and urges this Court to adopt a higher standard for assessing competency to self-represent at the penalty phase of a capital trial. However, we are unpersuaded by defendant's arguments in this regard and, further, because of the remedy afforded to defendant, we pretermit any discussion of these assertions.

[20] Defendant also asserts that neither the trial court nor his defense counsel advised him of the possibility of hybrid representation or standby counsel and that the court instead told him that "the thing about self-representation is you can't have it halfway."

A trial court may appoint standby counsel to a self-represented defendant, even over defendant's objection, "to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals." *McKaskle v. Wiggins*, 465 U.S. 168, 184, 104 S.Ct. 944, 954, 79 L.Ed.2d 122 (1984). Standby counsel may participate in the trial as long as their participation does not "seriously undermine the defendant's appearance before the jury in the status of one representing himself." *Id*., 465 U.S. at 187, 104 S.Ct. at 956. A trial court may also allow a defendant to act as his own co-counsel under "hybrid representation" and may require such a defendant "to conduct portions of the trial entirely in his own right, or may permit the defendant to act in tandem with counsel during cross-examination of witnesses and closing argument to the jury." *State v. Carter*, 10-0614, p. 24 (La. 1/24/12), 84 So.3d 499, 519. However, an indigent defendant has "no constitutional right to be both represented and representative[,]" and the decision to permit hybrid representation rests solely within the discretion of the trial court. *Id.* (internal quotation omitted). Thus, while the trial court in this instance was not required to make such an appointment, the failure to inform the defendant of these options did not invalidate the *Faretta* hearing.

[21] Defendant further argues his invocation was equivocal, as it was based on dissatisfaction with his current counsel, as opposed to a general desire to self-represent. As set forth above, the transcripts of both the *Faretta* hearing and the closed hearing reflect that defendant was adamant in his decision to self-represent, did not waiver on the issue, and that he expressed his desire to represent himself clearly to the court multiple times. At various times during the hearings, defendant stated "[r]ight now, I'd like to waive counsel and represent myself from here on out in the penalty phase"; "[w]hat I will do is ask to represent myself"; "And I want to defend myself because Mr. Doskey finds it a moral obligation on his part that he should put up his best defense." While we tend to agree that such statements are unequivocal, this issue is pretermitted by our ruling that defendant's waiver was invalid on other grounds.

verdict form; the jury was told by the State they could not consider mercy as a mitigating factor at all; and the jury failed to determine beyond a reasonable doubt that the punishment of death was appropriate. However, these assignments of error are pretermitted by this Court's reversal of defendant's death sentence and remand for a new penalty phase. It is therefore unnecessary to address them, as they do not impact the result of the guilt phase of defendants' trial. Our disposition likewise obviates the requirement that we review defendant's sentence for excessiveness. La. C.Cr.P. art. 905.9.

We now turn to defendant's assignments of error as they relate to the guilt phase of his trial.

Guilt Phase Assignments of Error

Assignment of Error No. 6

Defendant argues the trial court erred in failing to issue a case-specific ruling justifying the use of onerous restraints at trial, namely a leg brace and a shock device. While defendant concedes there is no indication that these devices were visible to the jury, he nonetheless claims that they caused him physical pain and anxiety and influenced his ability to express himself throughout the proceedings, thus resulting in prejudice.[22]

Ordinarily, a defendant before the court should not be shackled, handcuffed or garbed in any manner destructive of the presumption of his innocence or destructive of the dignity and impartiality of the judicial proceedings. *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L. Ed. 2d 353 (1970); *State v. Wilkerson*, 403

[22] Defendant also asserts the restraints interfered with his ability to self-represent in the penalty phase, in that he was unable to move throughout the courtroom in the same manner as the State. He further claims that the trial court erred in failing to inform him during the *Faretta* hearing of the effects the restraints might have on his ability to self-represent and in failing to limit the movement of the State in an effort to reduce prejudice to defendant. However, because of the remedy afforded defendant concerning his penalty phase, we pretermit discussion of this portion of this assignment of error.

So.2d 652 (La. 1981). However, exceptional circumstances may require, in the discretion of the trial court, the restraint of the prisoner for reasons of courtroom security or order or when the prisoner's past conduct reasonably justifies apprehension that he may attempt to escape. *Wilkerson*, *supra*; *State ex rel. Miller v. Henderson*, 329 So.2d 707, 712 (La. 1976). To find reversible error, the record must show an abuse of discretion by the court resulting in clear prejudice to the accused. *Wilkerson*, 403 So.2d at 659. *See also, State v. Holliday*, 17-1921, p. 25-26 (La. 1/29/20), __ So.3d __.

Defendant did not contemporaneously object to the use of restraints, and thus failed to adequately preserve this claim for review. *See* La.C.Cr.P. art. 841; *State v. Wessinger*, 98-1234, p. 20 (La. 5/28/99), 736 So.2d 162, 181 (superseded by statute on other grounds) (scope of review in capital cases is limited to alleged errors that are contemporaneously objected to). In any event, although it is undisputed that the court failed to make an individualized determination as to the necessity of restraints,[23] defendant fails to show that he was prejudiced by the presence of the restraints. As noted above, nothing in the record suggests that the restraints were visible to the jury.[24] Additionally, defendant provides no proof, beyond his own claims made only after trial, that the restraints affected his demeanor throughout the proceedings. *See State v. Odenbaugh*, 10-0268, p. 67 (La. 12/6/11), 82 So.3d 215, 258 (rejecting similar claim for lack of evidence). Defendant also fails to show that the restraints affected his ability to defend himself, particularly when the record demonstrates that he elected not to present any evidence or testimony during the

[23] During a hearing on a post-trial motion, defense counsel noted that "there was no ruling as to the necessity of the restraints," in objection to a proffered report of defendant's indictment prior to trial for conspiracy to commit aggravated escape on June 24, 2016.

[24] The trial court stated upon ruling on the motion for new trial that the restraints "were completely out of the sight and vision of the jury" and that defendant "was not presented to the jury in shackles in any manner at any time and in any way."

penalty phase for reasons wholly unrelated to his restraints. Accordingly, we find this claim lacks merit.

Assignment of Error No. 7

Defendant asserts that the trial court erroneously denied his pretrial motion[25] to exempt his mother from its sequestration order during the guilt phase of the trial. He argues that her sequestration during the guilt phase served no legitimate purpose, as the defense only intended to call her as a penalty witness, and there was no risk that she would alter her testimony based on what she observed during the guilt phase.[26]

In a criminal trial, "an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *In re Oliver*, 333 U.S. 257, 272, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948). The statutory sequestration rule is contained in La. C.E. art. 615(A):

> On its own motion the court may, and on request of a party the court shall, order that the witnesses be excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case with anyone other than counsel in the case. In the interests of justice, the court may exempt any witness from its order of exclusion.

This Court has stated that "[t]he purpose of sequestration is to assure a witness will testify as to his own knowledge." *State v. Trahan*, 576 So.2d 1, 11 (La. 1990), *on reh'g* (Mar. 8, 1991). The sequestration rule is intended "to prevent witnesses from being influenced by the testimony of earlier witnesses" and "to strengthen the role

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[25] In his original motion, defendant averred that his mother, Judy Brown Corteau, attended virtually every hearing in the case, without incident, and had never been cautioned by the court at any time. Furthermore, defendant argues, while defendant is entitled to have other family members attending the proceedings in order to assure that a fair trial is taking place, no one else had volunteered to do so. Thus, defendant argued that the interests of justice should allow for exemption of his mother from the sequestration order.

[26] Defendant also asserts that the absence of his family members in the courtroom may have influenced the jury's sentencing determination. However, because of the remedy afforded defendant herein regarding his penalty phase, we pretermit any discussion of other penalty phase assignments of error.

of cross-examination in developing the facts." *State v. Castleberry*, 98-1388, p. 28 (La. 4/13/99), 758 So.2d 749, 772. In reviewing sequestration errors, courts "will look to the facts of the individual case to determine whether the violation resulted in prejudice to the defendant." *State v. Lewis*, 367 So.2d 1155, 1158 (La. 1979) (overruled on other grounds by *State v. Shelton*, 92-3070 (La. 7/1/93), 621 So.2d 769).

We find defendant's mother did not fall into any of the enumerated exceptions to the sequestration rule, as stated in Article 615(B), which extends through both phases of the trial:[27]

> This Article does not authorize exclusion of any of the following:
>
> (1) A party who is a natural person.
> (2) A single officer or single employee of a party which is not a natural person designated as its representative or case agent by its attorney.
> (3) A person whose presence is shown by a party to be essential to the presentation of his cause such as an expert.
> (4) The victim of the offense or the family of the victim.

As the State notes in brief, there is no evidence to suggest that the jurors were aware of his mother's absence during the guilt phase. Importantly, the trial court lifted the sequestration order once defendant, acting *pro se*, released all defense witnesses at the outset of the penalty phase,[28] and his mother was allowed in the courtroom for

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[27] *See* La. C.Cr.Pr. art. 905.1(A) (providing that an order of sequestration shall remain in effect until the completion of the sentencing hearing).

[28] Following the *Faretta* hearing, the defendant stated that he "would like to let the Court know that he is not calling any witnesses, and he would like to have the witnesses released from their sequestration. . . And allow my mother in court, please." After some discussion with counsel regarding what witnesses were present, the following exchange took place between the defendant and the trial court:

THE COURT:	Okay. Mr Brown, if I release those people from sequestration, they cannot be, then, called by you when it's your turn. Do you understand?
DAVID BROWN:	I understand.
THE COURT:	Is it still your desire to release all of the witnesses or only your mother?
DAVID BROWN:	I'm going to release all of them, sir.

the remainder of the trial. Accordingly, we find this assignment of error to be without merit.

Assignment of Error No. 10

Defendant avers the trial court erred in precluding his presentation of an intoxication defense. On September 6, 2016, six days before jury selection began, the State filed a Motion to Preclude Defense Based upon Mental Condition and to Exclude Evidence of Same. In its memorandum in support of that motion, the State argued that defendant failed to provide timely notice of its intent to introduce evidence relating to a mental disease or defect, including voluntary intoxication, as required by La. C.Cr.P. art. 726.[29] The defense filed an opposition arguing that it provided timely notice of its intent[30] in its Third Response to State's Request for Discovery, which was filed under seal on December 8, 2014.[31] The issue was addressed at a hearing on September 9, 2016, and the trial court granted the State's motion, stating, in part, that that defendant did not "satisfy[] the requirements set

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> THE COURT: Okay. Then I have – we've had our discussion as to the ramifications of that, earlier, and I'm not going to repeat that. Then I will release your witnesses from their sequestration subpoena.
>
> * * *

[29] La.C.Cr.P. art. 726 provides the following:

> A. If a defendant intends to introduce testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall not later than ten days prior to trial or such reasonable time as the court may permit, notify the district attorney in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other orders as may be appropriate.
>
> B. If there is a failure to give notice as required by Subsection A of this Article, the court may exclude the testimony of any witness offered by the defendant on the issue of mental condition.

[30] In addition to the time requirement set forth in La.C.Cr.P. art. 726(A), the Trial Scheduling Order No. 10, signed by the court on November 6, 2014, ordered defendant to provide notice to the State "of any intent to use testimony at trial about whether the defendant had the mental state required for the offenses charged, no later than 2 p.m. on December 8, 2014." This was an extension of a previous deadline of November 7, 2014.

[31] Jury selection concluded on October 23, 2016, and opening statements took place the following day, October 24, 2016.

forth in 726 invoking the affirmative defense of intoxication" and that it was "not even close to notice of intent to offer that type of evidence, testimony, or otherwise in the notice provided by the Defense."

Defendant asserts that pursuant to La. R.S. 14:15(2),[32] he was entitled to present evidence of intoxication to negate specific intent.[33] He argues the court erroneously determined he failed to timely provide sufficient notice of his intent to present such a defense, and therefore its ruling precluding an intoxication defense was likewise erroneous. He also asserts that even if his notice of intent was insufficient, the court's sanction was grossly disproportionate. Defendant further argues the trial court erred in limiting defense counsel from confronting witnesses regarding intoxication and drug use, namely, in questioning witnesses about the type or quantity of alcohol consumed,[34] and in failing to instruct the jury regarding intoxication where the State presented evidence that defendant had been drinking

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[32] "Where the circumstances indicate that an intoxicated or drugged condition has precluded the presence of a specific criminal intent or of special knowledge required in a particular crime, this fact constitutes a defense to a prosecution for that crime." R.S. 14:15(2).

[33] In his brief to this Court, defendant provides the following factual background regarding his use of drugs and alcohol leading up to the murders:

> But for the court's erroneous rulings, the jury would have learned that, between 6 a.m. and noon on November 3, Mr. Brown split a 12-pack of beer with Costin Constantin and Adam Billiot, took a Roxicodone pill, purchased and consumed, along with Constantin and Billiot, several large energy drinks, a bottle of Jägermeister, a fifth of Absolut Vodka, and four cases of beer. Beginning at noon and continuing through the LSU game that evening, David Brown drank four energy drinks mixed with nearly all of the bottle of Jägermeister, half the bottle of vodka, and two cases of beer (approximately 48 beers), took ten Roxicodone pills, two Lithium pills, and smoked approximately $40 worth of marijuana. After LSU lost to Alabama, Mr. Brown drank beer and mixed drinks at two bars, and then after arriving back at the apartment complex at around 1:45 a.m., continued to drink. By 2:40 a.m. David Brown was "drunk, dead, blackout." Appx. 310.

Note, however, that defendant attributes the quote "drunk, dead, blackout" to Adam Billiot's police interview, which clearly reflects that Billiot was referring to himself, not defendant: "I was drunk, dead, blackout sleep, you know."

[34]Pursuant to the State's objection during cross-examination of Carlos Nieves, the trial court ruled that it would allow witness testimony as to the fact that defendant and others were drinking at certain times or places, but nothing beyond that, such as the types or quantities of alcohol consumed.

before the jury.

The purpose of La. C.Cr.P. art. 726 is to "eliminate unwarranted prejudice which could arise from surprise testimony." *State v. Trahan*, 576 So.2d 1, 6 (La. 1990). Under art. 726, intoxication is an "other condition" bearing on the issue of whether the defendant had the mental state for the offense charged. *Id.* Although defendant argues the State was aware of evidence of intoxication, and thus would not have been "surprised" by the introduction of such evidence, we find the State would have been prejudiced by the introduction of such evidence simply by being unaware that it would be required to prepare a response to this defense. *See id.* ("Without such notice, the state had no way to prepare expert testimony to explain the blood alcohol levels and put them into proper perspective.").

With regard to the purported notice of intent, the defense's December 2014, discovery response advised the State that it *may* rely on an intoxication defense, but that it had not decided to do so, stating the following:

> Based solely on the information and documents provided by the State in its discovery response, the Defense notifies the State that it may rely on the Intoxication Defense as provided by La. R.S. 14:15(2). The Defense has not decided to do so and it does not have knowledge of an expert opinion supporting that defense. But, since the State's evidence raises that defense as a possibility, the Defense provides this notice.
>
> The Defense continues its investigation of Mr. Brown's mental functioning. As of this time, it does not possess sufficient information or evidence on which to base a mental disease/defect defense.

Furthermore, the defense later denied having provided notice of intent to present an intoxication defense in its Objection to State's Motion and Order for Medical Examination of Defendant by State's Expert, filed February 2, 2016, in which it stated the following:

> Under Louisiana law and jurisprudence, notice must be given when a defendant intends to introduce testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged. The jurisprudence has indicated that this relates to intellectual disability precluding the formation of specific intent, intoxication, and other condition[s] such

> as a battered spouse defense or intoxication. . . . The Defense in this case plans to raise no such mental condition defense either at the guilt phase or penalty phase, and accordingly has given no such notice.

When ruling on said motion, the trial court acknowledged as follows:

> The Court will note that there are specific notice requirements during the guilt phase when the Defense intends to assert legal defenses, and those notice requirements are not applicable. . . . The testing with regard to the assertion of a defense of intellectual disability has not been brought to bear. That's not the subject of the reports. That's not the defense asserted.

Based on the foregoing, we find the trial court did not abuse its discretion in determining the defense's discovery response did not constitute sufficient notice for the purposes of La. C.Cr.P. art. 726, nor did the trial court abuse its discretion in excluding testimony as to the type and quantity of alcohol consumed. *See State v. Gibson*, 93-0305, pp. 9–11 (La. App. 4 Cir. 10/13/94), 644 So.2d 1093, 1098–99 (finding trial court acted within its discretion in prohibiting introduction of evidence concerning intoxication defense where defense counsel did not file written notice of its intent to present such a defense until the morning of trial); *State v. Gipson*, 427 So.2d 1293, 1297–98 (La. App. 2 Cir. 2/22/83) (finding that trial court did not err in prohibiting defendant from providing testimony relative to intoxication beyond indicating that he had "a few mixed drinks" because of his failure to provide prior notice of intent to present an intoxication defense per art. 726). Accordingly, we find this assignment of error without merit.

Assignment of Error No. 11

In this assignment of error, defendant asserts the trial court erred in allowing the introduction of "other crimes" evidence, in violation of his right to due process and a fair trial. Specifically, defendant claims the court erred in permitting the State to introduce evidence of (1) an aggravated battery against his former sister-in-law, Lillian Brown; (2) his work release identification card; and (3) the incident at Nanette Barrios's apartment, discussed *supra*.

On March 24, 2014, the State filed a notice of intent to present evidence concerning the aggravated battery conviction and the Barrios incident, and, after a *Prieur*[35] hearing on April 25, 2014, the trial court deemed evidence of both acts admissible. On May 20, 2016, the State provided an additional notice of intent regarding defendant's work release identification card, as it "indirectly" referenced another crime, and, after an additional *Prieur* hearing on August 25, 2016, the trial court found the card admissible.

Louisiana Code of Evidence article 404(B)(1) provides that courts generally may not admit evidence of other crimes or bad acts to show that a defendant is a man of bad character who acted in conformity with his bad character. However, the State may introduce evidence of other crimes or bad acts if it has established an independent relevant reason, namely, to show the defendant's motive, opportunity, intent, or preparation, or if the evidence relates to conduct constituting an integral part of the act or transaction that is the subject of the present proceeding. La. C.E. art. 404(B)(1). The State is required to give notice of its intent to offer the evidence, and the court will conduct a hearing to determine whether its probative value outweighs its prejudicial effect. La. C.E. art. 403; *State v. Prieur*, 277 So.2d 126, 130 (La. 1973); *State v. Hatcher*, 372 So.2d 1024, 1033 (La. 1979).

A trial court's ruling on the admissibility of other crimes evidence will not be disturbed absent an abuse of discretion. The erroneous admission of other crimes evidence is subject to a harmless-error review. *See State v. Johnson*, 94-1379, p. 19 (La. 11/27/95), 664 So.2d 94, 102. An error in the admission of other crimes evidence is not harmless unless a reviewing court determines that "the verdict actually rendered was surely unattributable to the error." *Id.*, 94-1379, p. 18, 664

[35] *State v. Prieur*, 277 So.2d 126, 130 (La. 1973).

So.2d at 102 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)).[36]

Aggravated Battery of Lillian Brown

In 1996, defendant was visiting the home of his then-sister-in-law, Lillian Brown (now Lillian Scott),[37] and propositioned her for sex. When she refused, he stabbed her in the neck, climbed on top of her, and repeatedly stabbed her face and neck area. He was charged with attempted second degree murder and pleaded guilty to a reduced charge of aggravated battery in 1997, receiving an 18-month prison sentence.

At the *Prieur* hearing in this matter, the State argued this offense was admissible under La. C.E. art. 404(B) as relevant to show intent and motive and under La. C.E. art. 412.2 as a crime involving sexually assaultive behavior,[38] as defendant was "spurned by these women" and "becomes angry, resorts to violence and the use of a knife and repeatedly stabbing these particular women." The trial court determined that the aggravated battery conviction was relevant to prove motive, intent, and identity, because the State would show that defendant wanted to

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[36] This Court has "long sanctioned the use of other crimes evidence to show modus operandi, as it bears on the question of identity, when the prior crime is so distinctively similar to the one charged, especially in terms of time, place, and manner of commission, one may reasonably infer the same person is the perpetrator in both instances." *State v. Garcia*, 09-1578, pp. 56–57, 108 So.3d 1, 39–40 (citing *State v. Lee*, 05-2098, pp. 44–45 (La. 1/16/08), 976 So.2d 109, 139). In so holding, however, the Court has cautioned that the identity exception must be limited to cases in which the crimes at issue are genuinely distinctive in certain respects, or else risk having the rule "swallowed up with identity evidence exceptions." *State v. Bell*, 99-3278, p. 5 (La. 12/8/00), 776 So.2d 418, 421 (citing George W. Pugh et al, *Handbook on Louisiana Evidence Law*, Official Comments to Article 404(B), cmt. 6 (1988)).

[37] Throughout the record and the briefs from both parties, Lillian Brown is alternatively referred to as "Lillian Brown" and "Lillian Scott." For purposes of this opinion, she is referred to as "Lillian Brown," or simply "Lillian."

[38] La. C.E. art. 412.2(A) provides in pertinent part:

> When an accused is charged with a crime involving sexually assaultive behavior . . . evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior . . . may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.

have sexual contact with both women (Lillian and Jacquelin), and that defendant was a "sexual person to the extent that he wants to have sex with people other than somebody that he's married to or that he is romantically involved with[.]" The court further determined the prejudicial effect of this evidence would be mitigated by the fact that Lillian's wounds were not fatal and that, after stabbing her, defendant assisted her in seeking medical attention. However, despite finding the conviction admissible, the trial court found that this offense did not constitute sexually assaultive behavior for purposes of La. C.E. art. 412.2.[39]

Defendant argues the similarities between this prior offense and the charged offense were insufficient to prove identity by establishing defendant's modus operandi and that it was inadmissible to prove motive. Defendant further asserts that remarks made by the State during closing arguments in both the guilt phase and penalty phase indicated the evidence was admitted only to show that he had a propensity to commit crimes, stating that defendant "didn't get his way with Lillian, and he stabs her in the upper body multiple times," and that he "was a violent man. By 2012, he had matured into a killer."

Given the trial court's vast discretion in this regard, we find the trial court did not err in determining the probative value of this prior offense outweighed its prejudicial effect under La. C.E. art. 403. We agree the behavior exhibited by defendant in both cases is strikingly similar in that he reacted violently to two adult female victims who refused his sexual advances in the same manner by arming himself with a knife and stabbing both in the neck. While defendant is correct that this evidence did not establish a modus operandi, the trial court did not abuse its discretion in finding the aggravated battery was relevant to establish defendant's motive and intent. Furthermore, even if the trial court erred in admitting the prior

[39] The trial court specifically stated: "I do not find that the incident involving Lillian Brown constitutes sexually assaultive behavior. I do not believe that the facts of that incident constitute sexually assaultive behavior."

offense, the evidence of defendant's guilt in this case is sufficiently overwhelming to render this error harmless. *See State v. Johnson*, 94-1379, p. 17 (La. 11/27/95), 664 So.2d 94, 102 (holding that the introduction of inadmissible other crimes evidence results in a trial error subject to harmless error analysis). This assignment of error is without merit.

Work Release Identification Card

At the *Prieur* hearing on this issue, the State explained that defendant's work release identification card was one of two identification cards found in a garbage bag in a dumpster outside of defendant's residence and that it sought to submit the work release identification card as proof that the other items found in the bag, including Carlos Nieves's shirt and a pair of blue jeans, had been placed there by defendant. The trial court ruled the card was admissible, finding its probative value outweighed its prejudicial effect. Defendant sought writs on this ruling at the court of appeal, followed by this Court, both of which were denied. *State v. Brown*, 16-1259 (La. App. 1 Cir. 9/30/16) (unpub'd), *writ denied,* 16-1792 (La. 10/6/16), 207 So.3d 400 (Weimer, J., recused).

Defendant asserts the work release identification card was cumulative in light of his state identification having also been found in the bag and thus had little probative value in terms of proving identity while having the significant prejudicial effect of conveying to the jury that defendant had an unexplained prior conviction. However, we find defendant fails to show a clear abuse of the court's discretion in its ruling, and even if the court did err, such an error was harmless for the reasons stated above. *See State v. Bordenave*, 95-2328, p.4 (La. 4/26/96), 678 So.2d 19, 21 (trial court has broad discretion in weighing the probative versus prejudicial value of evidence under La.C.E. art. 403).

Nanette Barrios Incident

During the *Prieur* hearing on this issue, the State argued that defendant's entrance into Nanette Barrios's apartment without her consent and touching her awake was admissible as *res gestae* evidence, asserting that it occurred in the apartment next door to the victims' only a few hours before they were murdered. The State contended that without the ability to mention this incident, there would be "a hole in the State's case as to the whereabouts of the defendant at a very crucial time in this case approximately two hours before" the murders. The trial court agreed the incident was admissible, finding that it constituted an integral part of the transaction that was the subject of the case and that it was relevant to show opportunity. The court further determined that La. C.E. art. 412.2 was inapplicable because there was insufficient evidence to conclude that defendant committed sexually assaultive behavior while in Barrios's apartment or that he intended to do so.

Defendant argues that the State would have been capable of presenting a complete chain of events without mentioning the incident and that the State used this incident solely to portray defendant as "bad" or "scary." He further asserts that because witnesses testified (and video footage showed) that defendant left the apartment complex following the incident, the trial court erred in determining that the incident was probative of opportunity. We disagree.

This Court has long approved of the introduction of other crimes evidence, both under the provisions of former La. R.S. 15:448 relating to *res gestae* evidence and as a matter of integral act evidence under La.C.E. art. 404(B), "when it is related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it." *State v. Brewington*, 601 So.2d 656, 658 (La. 1992). A close connexity on time and location is viewed by the courts as "essential" to the *res gestae* exception. *State v. Haarala*, 398 So.2d 1093, 1097 (La. 1981); *see also* 1 *McCormick on Evidence*, § 190, p. 799 (4th ed., John

William Strong, ed., 1992) (other crimes evidence may be admissible "[t]o complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings.") (footnote omitted). The *res gestae* or integral act doctrine thus "reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness." *Old Chief v. United States*, 519 U.S. 172, 187, 117 S.Ct. 644, 653, 136 L.Ed.2d 574 (1997). The test of integral act evidence is not simply whether the state might somehow structure its case to avoid any mention of the uncharged act or conduct but whether doing so would deprive its case of narrative momentum and cohesiveness, "with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict." *Id.*

We find that here, because defendant's unauthorized entry into Barrios's apartment was in such close temporal and physical proximity to the charged offenses, the State could not have presented an accurate narrative of events leading up to the murders without acknowledging it. Accordingly, the trial court did not err in admitting this incident as an integral act, and this assignment of error without merit.

Assignment of Error No. 12

Defendant claims that the trial court deprived him of his right to present a defense through a series of erroneous rulings: (1) excluding evidence pointing to Carlos Nieves as the perpetrator; (2) preventing the defense from impeaching Carlos Nieves; (3) preventing the defense from confronting Lillian Brown; and (4) precluding the defense from calling expert witnesses to challenge the State's scientific evidence. We will address each of these in turn.

Evidence pointing to alternate suspect

Defendant argues he was erroneously prevented from presenting a defense pointing to Carlos Nieves as an alternative suspect. Specifically, he states that the defense intended to introduce evidence that Nieves suffered from a mental illness, was having an affair, had recently acquired a large sum of money, and had told his wife and children to leave the apartment the night before they were murdered. At trial, when the defense attempted to impeach Nieves's testimony denying marital problems during its cross-examination of Costin Constantin, the State objected on hearsay and relevancy grounds. The trial court sustained that objection.[40] Defendant argues this information was "crucial" and that the jury was entitled to determine the credibility of the State's witnesses. Defendant also urges that the trial court unfairly permitted the State to ask Constantin on redirect what Nieves told him on the day of the murders, declining to find the statements irrelevant or hearsay.[41]

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[40] The defense asked Constantin whether he was aware that Nieves's marriage was not going well, to which he replied, "They kinda argue." The defense then asked Constantin to read an excerpt from his police interview to refresh his recollection of what he told the police regarding their marriage, and the defense further inquired as to what Nieves told him about his marriage. When the State objected to this line of questioning, the defense told the court that its purpose was to contradict Nieves's earlier testimony, in which he denied having marital problems.

[41] The following exchange took place towards the conclusion of cross-examination of Costin Constantin:

> Q: When you were telling the detective this particular statement what Carlos told you, okay, what else did Carlos tell you besides everybody up there was dead? Read that statement. What else did he tell you? Read that paragraph.
> A: "He say, man, my apartment's – it's on fire. Everybody's dead up there. Come on, Bro'. Man, I'm telling you everybody's . . . Jacquelin car is outside, is not gone to work. Everybody's dead, I can't breathe. I'm try to get up there, I can't breathe. Help me out. I'm call 9-1-1 . . . already. So, okay I'm gon' go upstair, I'm try . . . but I can't breathe."
> Q: Did he appear to be upset?
> A: Did he?
> Q: Did he appear to be upset?
>
> MR. CUCCIA: Objection your honor. I didn't – that's outside the scope of the cross-examination.
> MR. MORVANT: He's asking him what did he say.
> THE COURT: Overruled.
> MR. CUCCIA: Note my objection for the record, please.
> THE COURT: Yes, sir.

The trial court also later declined a request by defense counsel to re-cross examine Costantin, noting that the court found the State's questioning of the witness on redirect was in direct response to the questioning brought out on cross-examination as to what was said and, further, that it was appropriate in the context of the entire answer.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the present trial, offered in evidence to prove the truth of the matter asserted." La.C.E. art. 801(C). Hearsay is inadmissible unless it falls within an exception. La.C.E. art. 802. Defendant does not argue, much less show, that an exception to the hearsay rule was applicable to the statements Nieves allegedly made to Constantin regarding the state of his marriage and thus fails to show the trial court erred in sustaining the State's objection.

Our review of the record reveals that the defense had the opportunity to present these allegations during its cross-examination of Nieves. The following colloquy took place between defense counsel Mr. Cuccia and Carlos Nieves:

> CUCCIA:
>
> Now, did I understand correctly that Jacquelin and the girls did not stay at that apartment the night before?
>
> NIEVES:
>
> No. The night before, they – she had slept at her mom's house.
>
> CUCCIA:
>
> Is it true that at that time, you and Jacquelin were having some marital problems?
>
> NIEVES:
>
> I wouldn't say marital problems. I mean, we had, you know, common problems, but –
>
> CUCCIA:
>
> Did you tell anyone that you were planning to leave her?
>
> NIEVES:
>
> Planning to leave her? No.
>
> CUCCIA:
>
> Did you tell anyone that you had told her to leave the apartment?
>
> NIEVES:
>
> No.
>
> CUCCIA:
>
> When – you referred to an incident when Jacquelin had returned during the – on the 3rd, that you went in and spoke with her.
>
> NIEVES:
>
> Right.

CUCCIA:

> And at that time, you made some comment about, "This is not a bathhouse"?

NIEVES:

> Yes. I told that – I said that to Adam [Billiot], because me and Adam was sitting outside. And I fussed. I said, "I'm going to have to go talk to her," you know? "She needs to know what she's doing. She's not staying here," you know, what? Just to go talk to her and see what's going on.

CUCCIA:

> Okay. I had a little trouble understanding. Let me make sure I understood what you said. That you said that you were talking to Adam, and you had to go inside to see if Jacquelin was going to stay there?

NIEVES:

> No. I said I was talking to Adam. And when she came there, I said, "I'm gonna go" – "I'm gonna go talk to Jacquelin and see what's going on," you know? Because she didn't stay there the night before. You know, she didn't tell me anything. I didn't say that I was going to kick her out or anything like that. No.

CUCCIA:

> Right. But when you spoke to her, is my understanding correct that you said something to her along the lines of, you know, "This isn't a bathhouse"?

NIEVES:

> Yes. That's what I – I just was asking her. I said, you know, "You come in" – cause she was taking a shower for work. You know, we had talked a little bit. And I was, like, "Man, you know, what's up? You're coming in, you know, take a bath and whatever and you just leave," you know? Just talking to her, you know, trying to talk with her. That's all.

This exchange was the extent of the defense's attempt to ask Nieves about any of the issues defendant now alleges his trial counsel intended to present. Additionally, with respect to defendant's observation that the trial court permitted Constantin to testify as to what Nieves told him on the morning of the murders,[42] we find the trial court did not err in admitting this testimony, which falls under the excited utterance exception, *see* La.C.E. art. 803(2), as he made these statements while Nieves's

[42] *See* Note 41, *supra*.

apartment was on fire with his wife and children inside. Accordingly, we find this assignment of error without merit.

Confronting Lillian Brown about prior sexual relationship with defendant

Defendant argues that during cross-examination of Lillian Brown, the trial court impeded the defense's attempt to distinguish the aggravated battery against her, discussed *supra*, from the charged offense. Specifically, the defense sought to confront her regarding her long-standing romantic relationship with defendant, which he alleges began when he was twelve years old and she was an adult. This relationship continued until defendant was over eighteen and Lillian was a grown woman, and included consensual sexual activity on the day defendant married another woman. The trial court sustained the State's objection to this line of questioning, finding that there was "nothing to indicate that the previous consensual acts prior to this incident are in any way relevant to the inquiry." We find this ruling to be in error.

Defendant asserts that evidence regarding Lillian's previous sexual relationship with defendant was admissible under the exception to the Rape Shield Law set forth in La. C.E. art. 412(A)(2)(b), which provides that when an accused is charged with a crime involving sexually assaultive behavior, evidence of the victim's past sexual behavior is not admissible except for "[e]vidence of past sexual behavior with the accused offered by the accused upon the issue of whether or not the victim consented to the sexually assaultive behavior." The trial court found that this exception only applies to victims in a main demand, and not to witness testimony, and thus deemed it inapplicable in this instance.[43] Defendant further

[43] The trial court stated in its oral ruling:

> Well, I will point out that 412 relates to the victim's past sexual behavior as it relates to an accused. Which would be the actions in a main demand, not the actions of a witness, which, I believe, a witness's relationship and acts – I do not think 412(A)(2)(b) or any other provision of 412 is the vehicle by which these questions become relevant. The issue is whether they're relevant as attacking or supporting

argues that it was admissible as a means of discrediting Lillian under La. C.E. art. 607(C).[44]

Defendant cites jurisprudence in support of his argument that La. C.E. art. 412 applies to the testimony of all witnesses who were victims of the accused, and not only the victim in the main demand.[45] Notably, however, defendant was not accused of sexually assaultive behavior toward Lillian, and, as discussed *supra,* the trial court in the instant matter found no evidence of sexually assaultive behavior against her when ruling on the admissibility of her testimony. Consequently, we find La. C.E. art. 412 is inapplicable for that reason alone.

However, we do find this evidence was admissible under La. C.E. art. 607(C) as it was a denial of his ability to confront a witness against him. *See also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ."); La. Const. Art. I, § 16 ("An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf."). Moreover, having affirmed the trial court ruling admitting the prior aggravated battery of Lillian Brown, we find defendant was constitutionally entitled to explore Lillian's credibility and the nature of their prior relationship. Therefore, we find the trial court erred in determining that his alleged prior sexual relationship with Lillian lacked relevancy and disallowing confrontation of Lillian about that

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> the credibility under 607. . . .But the door that you're trying to open under 412 is inapplicable to this situation.

[44] "Except as otherwise provided by legislation, a party, to attack the credibility of a witness, may examine him concerning any matter having a reasonable tendency to disprove the truthfulness or accuracy of his testimony." La. C.E. art. 607(C).

[45] *See State v. Hernandez*, 11-0712 (La. App. 5 Cir. 4/10/12), 93 So.3d 615, *writ denied sub nom. State ex rel. Hernandez v. State*, 12-1142 (La. 9/28/12), 98 So.3d 834 (finding La. C.E. art. 412 applicable where defendant sought to elicit testimony from a witness regarding allegations of sexual abuse against other individuals).

relationship. However, because of the overwhelming evidence against defendant in this case, we also find such error by the trial court harmless.

Erroneous exclusion of defense experts

Defendant also asserts that the trial court erroneously sanctioned the defense for failure to produce expert reports pursuant to discovery requests from the State. On August 9, 2016, the State filed a Motion to Compel Discovery or in the Alternative Preclude Expert Testimony, which provided that defendant had previously been granted leave of court to submit certain evidence to George Shiro for nondestructive DNA testing, and that although such testing had been completed, the State had not received the results of this testing, nor had it received an expert report from Shiro. The State also claimed that it had not received an expert report from Dr. Dan Krane despite the defense having named him as an expert witness it intended to call at trial, noting that the discovery deadline for the disclosure of this information had expired.

At the hearing on this motion on August 15, 2016, the defense argued that the State's motion was premature, as the defense did not possess any expert reports from Shiro or Dr. Krane that it intended to use at trial at that time. The defense did not concede that it would not later call them as witnesses. The defense further revealed that it had received a third DNA report from the Jefferson Parish Crime Lab in April 2016, that it "recently realized" that the report set forth a finding that an item of evidence indicated the presence of DNA from two men, and that it was currently attempting to have its own expert analyze this item prior to trial. Noting that the defense had this information in their possession since April of 2016, that jury selection was set to begin in one month, and that the court had ordered the defense

to produce all discovery to the State months ago, the trial court granted the State's motion and excluded the testimony of Shiro and Dr. Krane.[46]

Defendant asserts that no discovery violation occurred, as defense counsel had no obligation to produce expert reports when no such reports existed. Defendant claims that the court's sanction was thus unwarranted and prejudicial, as it prevented him from presenting potentially exculpatory evidence. In response, the State argues that because the defense told the trial court that it had no expert reports from either witness that it intended to use at trial, and because nothing in the record indicates that either witness was prepared to offer expert testimony regarding exculpatory evidence, the court's ruling was not a "sanction" but an acknowledgment that the defense had no test results or reports from them that it intended to use at trial.

Pursuant to La.C.Cr.P. art. 725, a defendant must disclose to the state any "results of reports, or copies thereof, of physical and mental examinations and of scientific tests or experiments, made in connection with the particular case, that are in the possession, custody, control, or knowledge of the defendant, and intended for use at trial." Moreover, if the defendant intends to call the witness who prepared the report as an expert, the report must include "the witness's area of expertise, his qualifications, a list of materials upon which his conclusion is based, and his opinion and the reason therefor." *Id*. Under La.C.Cr.P. art. 729.5(A), which permits sanctions for discovery violations, "the court may order such party to permit the discovery or inspection, grant a continuance, order a mistrial on motion of the defendant, prohibit the party from introducing into evidence the subject matter not

[46] Specifically, the trial court stated the following:

> As many times as we've been to court on motions to compel that I have refrained from granting for the reason of, "It's too early. It's premature. We're still working on it," until it was about, maybe, six months ago, maybe, less, we had gotten to the point where I had ordered you to turnover [sic] everything. And it's really disheartening or surprising that what was done with regard to the production of all of this evidence is now, last week, purporting to have this new information.

disclosed, or enter such other order, other than dismissal, as may be appropriate." Reversal is warranted only where there is an abuse of discretion by the trial court and resulting prejudice to the defendant. *See State v. Bourque*, 96-0842, p. 15 (La. 7/1/97), 699 So.2d 1, 11.

We find the exclusion of testimony from Shiro and Dr. Krane was a permissible sanction under La. C.Cr.P. art. 729.5(A), in light of the circumstances set forth by the trial court in its ruling. *See* Note 46, *supra*. Furthermore, not only does defendant fail to establish that the trial court abused its discretion in this ruling, he also does not show that the evidence at issue was indeed exculpatory, thereby failing to demonstrate any prejudice from that ruling. Accordingly, this assignment of error is without merit.

Assignment of Error No. 13

Defendant asserts the trial court violated his rights to due process, an impartial jury, a fair trial, and a reliable sentencing hearing when it allowed the State to overwhelm the jury with prejudicial and cumulative photographs.

Crime Scene/Autopsy Photographs

Prior to trial, the defense moved to exclude 30 crime scene and autopsy photographs, asserting that they were gruesome and unduly prejudicial. The trial court addressed the motion at a hearing on July 19, 2016, and again on August 3, 2016, and ultimately deemed 19 of the photographs admissible.

Defendant argues that the trial court erred in allowing the State to admit these photographs, contending they were irrelevant because he did not dispute the manner or cause of death, nor did he dispute that an arson had occurred. He also did not dispute that two victims were nude from the waist down when they were discovered, or that the victims were intentionally stabbed. Defendant argues that while he contested the allegation that Gabriela Nieves had been raped, as discussed in Assignment of Error No. 14, *infra*, a close-up photograph of her genitalia that was

shown to the jurors could not have reasonably aided their determination of this issue. He further asserts that because the pathologist prepared contemporaneous diagrams of the wounds of each victim, the photographic evidence was unnecessary and served no purpose other than to inflame the jurors.

Even when the cause of death is not at issue, the State is entitled to the moral force of its evidence, and postmortem photographs of murder victims are generally admissible to prove corpus delicti, to corroborate other evidence establishing cause of death, location, placement of wounds, or positive identification of the victim. *State v. Letulier*, 97-1360, pp. 17–19 (La. 7/8/98), 750 So.2d 784, 794–95; *State v. Robertson*, 97-0177, p. 29 (La. 3/4/98), 712 So.2d 8, 32; *State v. Koon*, 96-1208, p. 34 (La. 5/20/97), 704 So.2d 756, 776; *State v. Maxie*, 93-2158, p. 11 n.8 (La. 4/10/95), 653 So.2d 526, 532. Photographic evidence will be admitted unless it is so gruesome as to overwhelm the reason of the jurors and lead them to convict the defendant without sufficient evidence: specifically, when the prejudicial effect of the photographs substantially outweighs their probative value. *State v. Broaden*, 99-2124, p. 23 (La. 2/21/01), 780 So.2d 349, 364 (citing *State v. Martin*, 93-0285, pp. 14–15 (La. 10/17/94), 645 So.2d 190, 198); *State v. Perry*, 502 So.2d 543, 558–59 (La. 1986).

The photographs taken outside of the crime scene show the deceased bodies of a woman and two small children, each with multiple stab wounds, covered in soot, and partially undressed. The photographs taken during the autopsies show close-up images of wounds, including those to the genitalia of a woman and a small child. We find that while the photographs are graphic and disturbing, given the strength of the evidence against defendant, it is unlikely the jurors found him guilty based on any inflammatory nature of the photographs. *See State v. Holliday*, 17-1921, p. 72 (La. 1/29/20), __ So.3d __ (finding no error in the trial court's admission of autopsy

photographs of the child victim, given the strength of the evidence against him). Consequently, defendant fails to show reversible error in this regard.

Family Photographs

During the guilt phase of defendant's trial, the State showed a family photograph of the victims to Jacquelin Nieves's mother, who confirmed their identities, and the photograph was thereafter published to the jury. The State then attempted to show additional family photographs to its following witness, Carlos Nieves, for identification purposes. The defense objected to these photographs as cumulative in light of the previous identification of the victims. The trial court overruled the objection and permitted the State to show two family photographs to Nieves and to publish them to the jury.

In this assignment of error, defendant asserts the trial court erred in allowing the State to introduce the second set of photographs, as their prejudicial effect outweighed their probative value. He argues that the State's intention was not to prove the identities of the victims but to appeal to the emotions of the juror and to dispel any suspicion that Nieves was the perpetrator. However, even if this was the case (and defendant presents no evidence that it was), we do not find that showing three family photographs of the victims to the jury during the guilt phase was so prejudicial that it constituted reversible error. As such, we find no merit to this assignment of error.

Assignment of Error No. 14

In this assignment of error, defendant argues that the evidence presented at trial failed to establish beyond a reasonable doubt that he committed aggravated rape against Gabriela Nieves. He states in brief that "the sum of the physical evidence of rape of Gabriela amounted to a superficial injury to the external vagina, weak positive results for acid phosphatase from the oral and rectal swabs, and a weak positive result for prostate specific antigen from the rectal swab. There was no

evidence of penetration." He contends that the invalid aggravating factor of aggravated rape of a child inserted an arbitrary factor into the proceedings and rendered his death sentence unreliable. In response, the State argues that defendant ignores other evidence demonstrating that Gabriela had been raped, including that she was found naked from the waist down with her legs open, and that a pair of children's underwear was found covered in blood and wrapped around a knife at the crime scene.

Dr. Susan Garcia, who performed the autopsies of all three victims, testified on direct examination that Gabriela had suffered a laceration and bruising to her genital area. She elaborated as follows:

> Q. And that is considered to be some form of trauma?
>
> A. Yes. That is definitely some type of trauma.
>
> Q. And could that be consistent with attempted [penile] – attempted [penile] penetration?
>
> A. It's consistent with blunt trauma to that area. I can't tell you what did it.

On cross-examination, Dr. Garcia clarified that the laceration was located on Gabriela's vaginal opening and that Gabriela's hymen was intact. When asked whether blunt trauma could be caused by "any type of" object, Dr. Garcia responded, "Could be – it could be a penis. It could be a finger. It could be a hand. It could be many things. It's not a stick. I would not expect to see – I would expect to see more injury if it had been a foreign object that had sharp edges to it."

David Cox, who tested the sexual assault kits for Jacquelin and Gabriela, testified on direct examination that Gabriela's oral swab produced a positive result for acid phosphatase ("AP") which is found in high amounts in seminal fluid and in low amounts in other bodily fluids. He further testified that her rectal swab produced a positive result for AP as well as prostate-specific antigen ("PSA"), which likewise is found in high amounts in seminal fluid and in low amounts of other bodily fluids.

He also testified that neither AP nor PSA were detected on her vaginal swab. On cross-examination, he confirmed that the oral swab returned the lowest possible positive result for AP and a weak positive for PSA. He also confirmed that no spermatozoa were detected on any of Gabriela's swabs.

In evaluating the sufficiency of the evidence to support a conviction, a reviewing court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Captville*, 448 So.2d 676, 678 (La. 1984). The trier of fact makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony of any witness. *State v. Mussall*, 523 So.2d 1305, 1311 (La. 1988); *State v. Rosiere*, 488 So.2d 965, 969 (La. 1986).

At the time of the offense in this case, La. R.S. 14:30(A)(1) defined first degree murder as the killing of a human being when the offender had specific intent to kill or to inflict great bodily harm and was engaged in the perpetration or attempted perpetration of certain enumerated offenses, including aggravated rape. Under the former La. R.S. 14:42(A)(4), aggravated rape was defined as anal, oral, or vaginal sexual intercourse deemed to be without the lawful consent of the victim because the victim is under the age of thirteen years.

Although defendant highlights the weakness of the evidence presented in support of the aggravated rape of Gabriela, his argument ignores the fact that the State alleged three additional aggravating factors upon which to base a conviction of first degree murder against Gabriela, namely, defendant was engaged in the perpetration or attempted perpetration of aggravated arson, that he had specific intent to kill or to inflict great bodily harm upon more than one person, and the fact that Gabriela was under twelve (12) years old when she was killed. The record reflects

that the jury likely relied on all four factors in finding defendant guilty, as it unanimously found the presence of each of them as aggravating circumstances at sentencing. Furthermore, even if this Court were to find that the supporting evidence was insufficient to support the jury's conclusion that defendant was engaged in the perpetration or attempted perpetration of aggravated rape against Gabriela, it would not warrant reversal. *See State v. Wright*, 01-0322, pp. 12–16, 22–23 (La. 12/4/02), 834 So.2d 974, 985–87, 992 (finding insufficient evidence that the victim's injuries had been caused by a penis, and thus that the killing had taken place during the perpetration or attempted perpetration of aggravated rape, but that reversal of first degree murder conviction was unwarranted where victim was also under 12 years old, and that the state's failure to prove this aggravating factor did not inject an arbitrary factor into the proceedings warranting reversal of death sentence).[47]

Defendant also asserts that the trial court erred in denying its proposed jury instruction that the perpetration or attempted perpetration of aggravated rape requires penetration (or attempted penetration) by a penis. The proposed instruction read as follows: "When the rape involves vaginal or anal intercourse, any sexual penetration, however slight, is sufficient to complete the crime. It is not enough to merely prove that penetration occurred. The evidence must prove beyond a reasonable doubt that the penetration was by a penis. Emission is not necessary." During a jury charge conference on this particular issue, the trial court ruled that the "criminal jury instructions and the Legislature has not [seen] fit to include this particular language in its determination as to what the proper charge should be" and that the court's own "definition tracks the treatise and will remain as is." Defendant

[47] This Court has held on numerous occasions that the failure of one or more statutory aggravating circumstances does not invalidate others, properly found, unless introduction of evidence in support of the invalid circumstance injects an arbitrary factor into the proceedings. *See, e.g., State v. Wessinger*, 98-1234, p. 16 (La. 5/28/99), 736 So.2d 162, 192; *see also State v. Letulier*, 97-1360, p. 25 (La. 7/8/98), 750 So.2d 784, 799.

argues that the trial court was required to give this instruction pursuant to La.C.Cr.P. art. 807, which provides that a "requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given." Defendant urges the trial court's failure to instruct the jurors as to this requirement may have led them to convict based on evidence of genital injury alone.[48] We disagree.

Failure to give a requested jury instruction constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. *State v. Marse*, 365 So.2d 1319, 1322 (La. 1978); La.C.Cr.P. 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."). We find that here, as discussed above, the jury unanimously found the existence of multiple aggravating factors supporting this conviction. Accordingly, while the proposed instruction does not appear incorrect, *see Wright*, *supra*, and while the trial court did not otherwise instruct the jury on this point (*see* Note 48, *supra*), defendant fails to show prejudice or any reversible error. Consequently, we find this assignment of error without merit.

Assignment of Error No. 15

Defendant argues in this assignment of error that his Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated by the introduction of his custodial statements at trial. Before trial the defense filed a motion to suppress all statements made by defendant to law enforcement, which the trial court denied after a hearing

[48] The court ultimately instructed the jury regarding sexual intercourse as follows: "Sexual intercourse is deemed to have taken place, even though emission did not occur. Any anal or vaginal sexual penetration, however slight, is sufficient."

on April 25, 2014. Defendant contends that the State was erroneously permitted to introduce the following statements at trial: (1) defendant asking detectives if they thought he needed a lawyer when they arrived at his residence; (2) defendant asking detectives if he needed a lawyer after they saw the bandages on his arm during his first police interview; and (3) defendant's second police interview, which was recorded and played for the jury.

Fruits of an unlawful arrest

Defendant asserts that his detention beginning at his residence and continuing at the sheriff's office, discussed *supra*, constituted an unlawful arrest, such that any statements made throughout his detention should be suppressed as fruit of the poisonous tree. He argues that law enforcement improperly entered the trailer, as they did so without a warrant, without defendant's consent, and in the absence of exigent circumstances. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). He further avers that law enforcement "claimed no probable cause" at this time and that, even if they did have probable cause to effect an arrest, their failure to obtain an arrest warrant was inexcusable. Defendant also argues that being *Mirandized* did not cure this violation.

Defendant did not raise this ground in his original motion to suppress, nor did he argue the issue during the hearing on that motion. He also did not he raise any contemporaneous objections to these statements at trial.[49] As such, defendant cannot raise this claim for the first time on appeal.[50] *See* La.C.Cr.P. art. 841(A); La.C.E.

[49] When ruling on the motion to suppress, the trial court noted that the "sole attack on the statements . . . is that the officers did not fully advise the defendant of his constitutional rights because they did not advise him of the real reason why he was being interrogated, and because of that, the defendant failed to make a decision that was in his best interest."

[50] As noted above, defendant was initially arrested after the conclusion of the second interview on November 4, 2012, for unauthorized entry of an inhabited dwelling and simple battery in connection with the Barrios incident, and he was not arrested in connection with the instant matter until January 23, 2013.

art. 103.[51] *See also State v. Taylor*, 93-2201, pp. 4–7 (La. 2/28/96), 669 So.2d 364, 367–69 ("[T]he contemporaneous objection rule contained in [La. C.Cr.P. art. 841(A) and [La. C.E. art. 103], does not frustrate the goal of efficiency. Instead, it is specifically designed to promote judicial efficiency by preventing a defendant from gambling for a favorable verdict and then, upon conviction, resorting to appeal on errors which either could have been avoided or corrected at the time or should have put an immediate halt to the proceedings.").

Nevertheless, the erroneous admission of a confession or inculpatory statement is trial error subject to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991). In this case, due to the overwhelming evidence of defendant's guilt, any error in the admission of these statements was harmless.

Failure to fully advise defendant of the reason for his detention

Defendant argues the statements in which he asked detectives if he needed a lawyer were inadmissible because they were made after law enforcement failed to inform him of the true nature of the investigation. Defendant asserts that telling him they were investigating "a fire with some deaths" was a "far cry" from informing him that they were investigating an arson and triple homicide. In support, he cites La. Const. Art. I, § 13 and La.C.Cr.P. art. 218.1, each of which provide in part that

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[51] La. C.Cr.P. art. 841(A) provides:

> An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.

La. C.E. art. 103 provides in pertinent part:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [w]hen the ruling is one admitting evidence, a timely objection or motion to admonish the jury to limit or disregard appears of record, stating the specific ground of objection . . . .

"[w]hen any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention[.]"

When ruling on the motion to suppress, the trial court found that the officers fulfilled their duty in advising defendant of the reason for his detention, even if the reason may not have been "artfully stated[,]" especially when they clarified that they were investigating a fire and the deaths of three people. The trial court ultimately found no misrepresentation occurred, as the officers were not required to go so far as to tell defendant that they suspected him of murder.

Based upon our review of the record, we find the trial court's ruling in this regard correct. Police are afforded some degree of trickery during an interrogation, *see Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 1425, 22 L.Ed.2d 684 (1969) (finding misrepresentations are relevant but do not make an otherwise voluntary confession inadmissible), and defendant does not show that the failure of law enforcement to specify that the deaths were being treated as homicides rendered his statements invalid. Furthermore, as noted above, any such error was harmless.

Inquiries about the right to counsel

Defendant argues that the first two statements at issue were unduly prejudicial, as they were neither relevant nor probative and were impermissibly used as substantive evidence of guilt. Det. Dempster testified as to the first statement as follows: "As soon as [Det. Cortopassi] finished advising [defendant] of his rights, the defendant asked us if we thought he needed a lawyer. When he asked that, I asked him, 'Do you think you need a lawyer?'" Det. Dempster testified as to the second statement as follows:

> We were speaking with the defendant, and he said he went sleep [sic] in a field that night. After he left the apartments, he crossed the street and went sleep in a field. So he said he had some bites on him – some bug bites. So we asked to see his right arm, so he raised his sleeve up to his elbow. And it looked like somebody that would of [sic] slept in a

> field, the type of bites he had on him. So we asked to see his left arm. And as he's raising his left arm, he gets about halfway up his forearm, and we see the bottom of Band-Aids. So he stops at the Band-Aids, he looks at us, and he says, "So, guys, do I need a lawyer?" And I said, "You tell us, David. Do you think you need a lawyer?"

Det. Warren Callais also testified as to the second statement, stating that defendant looked down at his sleeve, pulled it down, looked back at the detectives and asked, "So, guys, do I need an attorney now?" While defendant does not claim that he invoked his right to counsel when he made these statements, he nonetheless argues that he was inquiring into his right to counsel, and that an inquiry into a constitutional right cannot be used to draw an inference of guilt.

Again, defendant did not raise this ground in his motion to suppress or at the hearing on that motion, nor did he contemporaneously object to these statements at trial, and thus, he has waived this claim. Nonetheless, we find defendant's statements were equivocal and therefore, did not invoke his right to counsel. *See Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994). Further, the statements did not constitute an inquiry into the particulars of his right to counsel, but rather, he was asking the officers for their opinions or impressions of his situation. However, even if these statements were improperly introduced and admitted, we find any such error to be harmless, as demonstrated above.

Response to Det. Dempster

During his second police interview, after defendant admitted to having worn a shirt with a stripe across the chest the day before, Det. Dempster asked him, "There's any way you wanta [sic] explain to me how that shirt was found in the bedroom?" Defendant responded, "I didn't know. I want a lawyer if that's how y'all coming down. I want a lawyer right now." The detectives then immediately terminated the interview.

Prior to trial, defendant filed a motion in limine seeking to exclude this question and answer. After a hearing on October 13, 2014, the trial court granted the motion, relying on *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) to find this segment of the interview "insolubly ambiguous." The trial court further found that its introduction would present "extreme prejudice" to defendant, as there would be no way to avoid a comment on the exercise of his *Miranda* rights.[52] The court further noted that the State would still have the ability to present the shirt as evidence, to explain to the jury that it was found covered in blood at the crime scene, and that witnesses told detectives that defendant was wearing a shirt matching its description.

The State sought review of this ruling in the First Circuit, which granted in part and denied in part. *State v. Brown*, 14-1684 (La. App. 1 Cir. 2/10/15) (unpub'd) (Holdridge, J., dissents and would deny the writ application). The court of appeal distinguished this case from *Doyle* in that defendant had not remained silent but waived his *Miranda* rights and spoke to the police. The appellate court reversed the trial court's ruling insofar as it omitted the last question and defendant's answer "I

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[52] In finding that cross-examination of defendants, who were *Mirandized* at the time of arrest, as to why an exculpatory story was told for the first time at trial violated due process as to defendants' postarrest silence, the United States Supreme Court in *Doyle* stated:

> Despite the importance of cross-examination, we have concluded that the Miranda decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights, see *Michigan v. Tucker*, 417 U.S. 433, 443-444, 94 S.Ct. 2357, 2363-2364, 41 L.Ed.2d 182 (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. See *United States v. Hale*, [422 U.S. 171, 177, 95 S.Ct. 2133, 2137, 45 L.Ed.2d 99, (1975)]. Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976) (internal footnotes omitted).

didn't know[,]" finding that this exchange did not "inappropriately reference his subsequent invocation of the right to counsel" and that there was "no indication that a jury would draw an inappropriate inference regarding the defendant's right to remain silent if this question and the defendant's answer are allowed." *Id*. However, the panel found that the trial court properly excluded the remainder of defendant's answer in which he specifically invokes his right to counsel, and left this portion of the ruling undisturbed. Defendant sought writs in this Court, which denied the application. *State v. Brown*, 15-0878 (La. 6/19/15), 166 So.3d 998 (Weimer, J., recused; Hughes, J., additionally concurs and assigns reasons).

Defendant now argues that the trial court erred in allowing the jury to hear Det. Dempster's last question and his answer "I didn't know." However, we find defendant fails to show error in the court of appeal's ruling on the issue and fails to show resulting prejudice, despite his argument alleging that his invocation of his rights turned into substantive evidence of his guilt. Defendant also claims that the trial court erred in permitting Det. Dempster to state, after the recorded interview had been played for the jury, "[a]t that point, the defendant terminated the interview."[53] However, Det. Dempster did not elaborate as to the reason defendant terminated the interview and thus made no direct reference to the invocation of his right to counsel. We therefore find no merit in this assignment of error.

Assignment of Error No. 16

In this assignment of error, defendant asserts that his constitutional rights were violated by the introduction of evidence seized without probable cause. Specifically, defendant argues that the affidavit accompanying the applications for search warrants of his person and residence was defective in that it failed to establish

[53] Notably, however, defense counsel conceded at the hearing on the motion in limine that the jury could be told that defendant terminated the interview himself. While defendant argues in his brief that the court of appeal's ruling "clearly superseded" that stipulation, we do not find this argument compelling.

probable cause, omitted material facts, and made material misrepresentations. He argues the affidavit was primarily based on information regarding his involvement in the Barrios incident, as opposed to information regarding his involvement in the commission of first degree murder. He further asserts that the information contained therein did not create a reasonable belief or sufficient nexus that defendant's person or residence contained evidence of a violation of first degree murder. Defendant argues that omissions and misrepresentations in the affidavit regarding the Barrios incident were willfully made and that, even if they were not, they were nonetheless material, as the affidavit does not establish probable cause when retested. As a result, defendant urges, the trial court erred in failing to suppress the evidence seized pursuant to these warrants.[54]

The affidavit at issue contained the following pertinent information:

1) The Lockport Police Department was dispatched around 5:25 a.m. on November 4, 2012, in response to a reported fire.
2) The incident was reported by Carlos Nieves, Jr., who advised that his apartment was on fire and that he could not get to his wife and children upstairs.
3) Upon arrival of the police, Nieves was in the courtyard of the apartment complex and repeated that his wife and children were upstairs.
4) Fire department personnel located three victims upstairs and brought them outside.
5) EMS at the scene told police that all three victims appeared to have been stabbed.
6) Nieves related the following information to detectives:
   a.) David Brown visited the apartment complex on November 3, 2012.
   b.) On the night of November 3, 2012, Nieves, Brown, and Adam Billiot went to the Blue Moon Lounge in Lockport and Da Bar in Raceland.
   c.) After they returned to the apartment complex in the early morning of November 4, 2012, Brown was seen exiting the apartment of Nieves's next-door neighbor, Nanette Barrios, who was "hollering at Brown telling him not to touch her again."
7) Detectives learned through investigation that Brown was at the apartment complex in the early morning hours of November 4, 2012.
8) Detectives made contact with Barrios, who related the following information to them:
   a.) Brown entered Barrios's residence in the early morning of November

[54] Defendant filed a pretrial motion to suppress evidence seized at his residence, as well as a motion to suppress evidence seized from his person. After a hearing on April 25, 2014, the trial court determined that the affidavit contained a "substantial basis" on which a magistrate could find probable cause and therefore denied the motions.

4, 2012, and "grabbed her."

b.) Barrios ordered Brown to leave her residence and not to come back.

c.) Barrios later discovered that her cell phone was missing from her apartment.

9) Detectives made contact with Brown at his residence and requested that he accompany them to the Lafourche Parish Sheriff's Office Criminal Investigations Division in Lockport.

10) Once at the sheriff's office, detectives noticed that Brown had a "small cut to his lip, right eye (with swelling) and a cut on the inside of his left forearm."

11) Detectives observed three "band aids" covering most of the cut on Brown's left forearm.

12) Upon questioning by detectives, Adam Billiot advised that he did not remember seeing any cut on Brown's forearms.

Probable cause exists when the facts and circumstances within an affiant's knowledge and of which he has reasonably trustworthy information are sufficient to support a reasonable belief that a crime has been committed and that contraband or evidence of a crime will be found at the place to be searched. *State v. Davis*, 92-1623, pp. 14–15 (La. 5/23/94), 637 So.2d 1012, 1022; *State v. Byrd*, 568 So.2d 554, 559 (La. 1990). A magistrate must make a common sense and non-technical decision as to whether, given information contained in the affidavit, there is a "fair probability" that evidence of a crime will be found in the place to be searched. *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). A reviewing court simply ensures that the magistrate had a "substantial basis" for concluding that probable cause existed. *Id*., 462 U.S. at 238–39, 103 S.Ct. at 2332.

We find that a magistrate could reasonably connect the observation of multiple cuts on defendant to the apparent stabbings of victims in the apartment complex defendant had visited shortly before they were found. Thus, the information set forth in the affidavit provided a substantial basis upon which a magistrate could find a fair probability that evidence of first degree murder would be found on defendant's person and in his residence.

Regarding defendant's claim that the affidavit was based on omissions or misleading information, an affidavit is presumed to be valid, and the defendant has the burden of showing by a preponderance of the evidence that the affidavit contains false statements. *Franks v. Delaware*, 438 U.S. 154, 156, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978); *State v. Brannon*, 414 So.2d 335, 337 (La. 1982); *State v. Ogden*, 391 So.2d 434, 439 n.7 (La. 1980); *State v. Wollfarth*, 376 So.2d 107, 109 (La. 1979). Once the defendant has shown the affidavit contains false statements, the burden shifts to the state to prove the veracity of the allegations in the affidavit. If the court finds that the affidavit contains misrepresentations, it must decide whether they were intentional. *State v. Smith*, 397 So.2d 1326, 1330 (La. 1981); *State v. Fairbanks*, 467 So.2d 37, 39–40 (La. App. 4 Cir. 1985). If the court finds that the misrepresentations were intentional, the search warrant must be quashed. *Smith*, 397 So.2d 1326, 1330. On the other hand, if the court finds that the misrepresentations were inadvertent or negligent, the inaccurate statements should be excised and the remaining statements tested for probable cause. *State v. Lee*, 524 So.2d 1176, 1181 (La. 1987).

Here, defendant does not claim the affidavit contained false statements, but rather that it omitted or mischaracterized relevant facts, known to detectives at the time, which demonstrated that his actions in Barrios's apartment were "not sinister" and did not bear any resemblance to the suspected murders. Specifically, he points to the fact that he and multiple witnesses told detectives that he entered Barrios's apartment to look for her partner, Leroy Hebert, and that no one accused him of taking anything from Barrios's apartment. However, defendant does not show that the inclusion of these details would have made an appreciable difference, particularly where the affidavit did not allege that defendant had a sinister motive when entering Barrios's apartment. Even absent these details, and absent any information as to defendant's actions while inside Barrios's apartment, the affidavit

contained a substantial basis to support a finding of probable cause for unlawful entry. Therefore, the trial court did not err in finding that the evidence obtained in connection with the search warrants was admissible. This assignment of error is without merit.

Assignment of Error No. 17

Defendant avers the improper questioning of Detective Dempster prejudiced his right to a fair trial. Before the surveillance footage from Mid-South Technologies was shown to the jury, Det. Dempster indicated that a portion of the footage showed a person walking away from the apartment complex. The State then asked him if he could see "anybody returning," and he responded, "Yes. About 5:07. The video starts at 5:05, a couple of minutes later, after the person walks one way going south, the person – [.]" Defense counsel interrupted the testimony and—out of the hearing of the jury—objected to the use of the word "returning," arguing that it implied that the person who left the apartment complex was the same person later seen entering the complex. The court agreed that the use of the word "returning" was inappropriate and sustained the objection.[55] However, when the State resumed questioning and asked Det. Dempster generally what was depicted in the footage, he said, "A person walking from the apartment past Accent Hair from the parking lot of the apartment and returning a short time later." Defense counsel immediately moved for a mistrial on this basis. The trial court denied the motion, finding that a mistrial was unwarranted and that an admonishment to the jury would be sufficient. Before questioning resumed, the trial court admonished the jurors to disregard any speculation given by Det. Dempster "about what the video purports to show" and explained that they should judge the content of the video for themselves.

[55] Defendant filed a pretrial motion in limine to prohibit law enforcement from opining as to the content of video recordings introduced during their testimony at trial. The trial court denied the motion but reserved defendant's right to re-urge this object on a question-by-question basis at trial.

Defendant asserts that this admonishment was insufficient and that the trial court erroneously denied his motion for a mistrial. Under La.C.Cr.P. art. 771, when a witness makes a remark during trial that is "irrelevant or immaterial and of such a nature that it might create prejudice against the defendant," the trial court shall promptly admonish the jury to disregard the remark. La.C.Cr.P. art. 771 further provides that upon motion of the defendant, the court "may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial." The denial of a mistrial will not be disturbed absent an abuse of discretion. *State v. Givens*, 99-3518, p. 12 (La. 1/17/01), 776 So.2d 443, 454. The record here supports the trial court's ruling denying the motion for a mistrial, as the court's admonishment was sufficient to cure the error. This assignment of error is without merit.

Assignment of Error No. 18

Defendant asserts the trial court erred in denying his Motion for Change of Venue and that pretrial publicity, including statements made by public officials, prejudiced the venire and prevented him from receiving a fair trial. He also argues that the demands of sequestration resulted in the exclusion of "wage earners" from the jury, which in turn resulted in a violation of his right to a jury of a fair cross-section of the community, as the jury did not reflect "the broad socio-economic spectrum existing in Lafourche Parish."

Defendant filed a Motion for Change of Venue on September 5, 2014, roughly two years before jury selection began, citing pretrial publicity. In support of his motion, he attached several newspaper articles, online comments from the public on those articles, and two press releases from the Lafourche Parish Sheriff's Office. The trial court denied the motion at a hearing on October 13, 2014, finding that defendant had made no showing of the extent of prejudice in the collective mind of the community.

On October 5, 2016, about three weeks into jury selection, defendant filed a Renewed Motion for Change of Venue. He adopted his original motion and further argued the claim that the required sequestration of jurors had forced the court to exclude venire members for economic hardship pervasive in the community, which in turn decimated the venire in such a way that it could not represent a fair cross-section of the community. After a hearing on October 14, 2016, nearly five weeks into jury selection, the trial court again denied the motion with respect to the publicity issue, stating "I think it was clear through the pretrial publicity aspect of the voir dire that there was—that had not a significant impact on the pool of jurors who were brought to the court. That had more to do with people who were living in the area and who knew or had some relation to the parties." The court also denied the motion with respect to the sequestration issue, finding that the remaining venire represented a fair cross-section of the community and noting, "[w]e have people who are employed. We have people who are wage earners. We have people who are hourly. We have people who are salaried. We have CEOs. We have retirees. We have pensioners and self employed."

A defendant is guaranteed an impartial jury and a fair trial. La Const. Art. I, § 16; *State v. Brown*, 496 So.2d 261, 263 (La. 1986); *State v. Bell*, 315 So.2d 307 (La. 1975). To 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.2 663 (1963). Changes of venue are governed by La. C.Cr.P. art. 622, which provides in part:

> 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.

That being said, "a defendant is not entitled to a jury entirely ignorant of his case and cannot prevail on a motion for change of venue merely by showing a general level of public awareness about the crime." *State v. Lee*, 05-2098, p. 33 (La. 1/16/08), 976 So.2d 109, 133. Whether a defendant has made the requisite showing of actual prejudice sufficient to warrant a change of venue 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." *Id.*

Only rarely will prejudice against a defendant be presumed. *See State v. David*, 425 So.2d 1241, 1246 (La. 1983) ("[U]nfairness of a constitutional magnitude will be presumed in the presence of a trial atmosphere which is utterly corrupted by press coverage or which is entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of the mob."). Otherwise, the defendant bears the burden of showing actual prejudice. *State v. Vaccaro*, 411 So.2d 415 (La. 1982); *State v. Adams*, 394 So.2d 1204 (La. 1981); *State v. Williams*, 385 So.2d 214 (La. 1980); *State v. Felde*, 382 So.2d 1384 (La. 1980). Several factors are pertinent in determining whether actual prejudice exists, rendering a change in venue necessary: (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. Moreover, courts have examined the number

of jurors excused for cause for having fixed an opinion as another gauge of whether prejudice exists in the public mind. *State v. Clark*, 02-1463, p. 18 (La. 6/27/03), 851 So.2d 1055, 1071.

Defendant now argues that 44 prospective jurors, or more than 25% of the venire excused "after hardships," were dismissed on the basis of pretrial publicity alone. However, this figure is misleading for several reasons. Notably, it was taken from the figure provided in defendant's re-urged motion for change of venue, which was filed before an additional 700 jury subpoenas were issued and another approximately 150 people were added to the venire, which had previously consisted of approximately 370 people. Additionally, the 25% figure provided in the re-urged motion for change of venue included not just those excused due to pretrial publicity but also those excused due to "knowledge of the case from other sources, and personal connection to persons involved in the case." Thus, when considering a total of 44 jurors from the perspective of the full 370-person venire, or those "before hardships," this only accounts for about 12% of the venire. This Court has held that where exposure to media coverage results in 11% of a venire removed for bias, this "does not even approach a threshold showing of community-wide prejudice." *State v. Magee*, 11-0574, p. 25 (La. 9/28/12), 103 So.3d 285, 306. Even putting aside the fact that his raw numbers do not accurately reflect the final venire composition, defendant's proposed 25% figure still falls short of demonstrating prejudice. *See Lee*, 05-2098, pp. 33–34, 976 So.2d at 133–34 (motion for change of venue properly denied where trial court excused 32% of jurors for cause due to their exposure to publicity or opinions of the case). Therefore, we find defendant fails to show that the trial court abused its discretion in denying a change of venue.

Regarding defendant's second claim, defendant fails to explain how "retired persons and others with a fixed income, persons whose jobs paid them during jury service, persons with sufficient leave time, persons whose spouses could cover both

the family expenses and the household duties, and persons with savings" all necessarily share a similar socioeconomic status, nor does he show that wage earners are a "distinctive" group in the community.[56] Furthermore, we do not find the record supports defendant's assertion that this group was underrepresented in the venire.

Finally, defendant does not sufficiently demonstrate that this was an issue unique to Lafourche Parish such that a change of venue would have been helpful. *See State v. Lee*, 05-2098 (La. 1/16/08), 976 So.2d 109 (denying motion to change venue, finding defendant failed to show the existence of pretrial publicity was such that it would color the jurors' voir dire responses to the point of making them unreliable and that he was therefore deprived of his right to trial by a fair and impartial jury). Consequently, we find no merit in this assignment of error.

Assignment of Error No. 19

Defendant asserts that the trial court impermissibly and unconstitutionally limited the scope of defense counsel's voir dire examination of jurors. He argues that various rulings sustaining State objections during voir dire prevented the defense from adequately examining prospective jurors regarding their ability to remain fair and impartial, to give meaningful effect to mitigating evidence,[57] or to

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[56] To make a prima facie showing of a violation of the fair cross-section requirement, the defendant must show: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979).

[57] La.C.Cr.P. art. 905.5 provides as follows:

> The following shall be considered mitigating circumstances:
>
> (a) The offender has no significant prior history of criminal activity;
> (b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;
> (c) The offense was committed while the offender was under the influence or under the domination of another person;
> (d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;
> (e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

consider mercy if no mitigating evidence was presented.[58]

Defendant asserts that the trial court continued to sustain objections preventing his trial counsel from questioning prospective jurors as to whether they would automatically vote for the death penalty in the event that no mitigating evidence was presented. He further argues that these rulings deprived him of effective use of his peremptory strikes, which were eventually exhausted, requiring reversal of his conviction and sentence.

The purpose of voir dire is to determine the qualifications of prospective jurors by testing their competency and impartiality and to assist counsel in articulating intelligent reasons for exercising cause and peremptory challenges. *State v. Stacy*, 96-0221, p. 5 (La. 10/15/96), 680 So.2d 1175, 1178. The standard for determining whether a prospective juror may be excluded for cause because of his views on capital punishment is whether his 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); *State v. Sullivan*, 596 So.2d 177 (La. 1992), *rev'd on other grounds*, *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

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

(f) The youth of the offender at the time of the offense;
(g) The offender was a principal whose participation was relatively minor;
(h) Any other relevant mitigating circumstance.

[58] Defense counsel sought writs on this issue from the appellate court, *State v. Brown*, 16-1227 (La. App. 1 Cir. 9/20/16) (unpub'd) (Higginbotham, J., concurs, finding no abuse of discretion in the trial court's ruling), and this Court, *State v. Brown*, 16-1737 (La. 9/21/16) (unpub'd) (Weimer, J., recused), both of which denied writs without comment.

for the death penalty under the factual circumstances of the case before him . . . ." *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So.2d 1278, 1284.[59] 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.C.Cr.P. art. 797(2), (4); *State v. Maxie*, 93-2158, p. 16 (La. 4/10/95), 653 So.2d 526, 534–35. In other words, if a prospective juror's views on the death penalty, as indicated by the totality of his responses, 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. 1/17/01), 781 So.2d 1205, 1214; *State v. Hallal,* 557 So.2d 1388, 1389–90 (La. 1990).

Although the accused is entitled to full and complete voir dire as set forth in La. Const. Art. I, § 17,[60] the scope of counsel's examination rests within the sound discretion of the trial judge, and voir dire rulings will not be disturbed on appeal absent a clear abuse of that discretion. La.C.Cr.P. art. 786; *State v. Cross*, 93-1189, pp. 6–7 (La. 6/30/95), 658 So.2d 683, 686–87; *State v. Robertson*, 92-2660, pp. 3-4 (La. 1/14/94), 630 So.2d 1278, 1280. The right to a full voir dire does not afford the defendant unlimited inquiry into possible prejudices of prospective jurors, such as their opinions on evidence or its weight, hypothetical questions, or questions of law that call for prejudgment of facts in the case. *State v. Ball*, 00-2277, p. 23 (La. 1/25/02), 824 So.2d 1089, 1110. Rather, Louisiana law provides that a party interviewing a prospective juror may not ask a question or pose a hypothetical which

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[59] The "substantial impairment" standard applies to reverse-*Witherspoon* challenges. In *Morgan v. Illinois*, 504 U.S. 719, 738–39, 112 S.Ct. 2222, 2234–35, 119 L.Ed.2d 492 (1992), the Supreme Court held that venire members who would automatically vote for the death penalty must be excluded for cause, reasoning that any prospective juror who would automatically vote for death would fail to consider the aggravating and mitigating circumstances and thus violate the impartiality requirement of the Due Process Clause. *Id.* at 728, 112 S.Ct. at 2229. The *Morgan* Court adopted the *Witt* standard for determining if a pro-death juror should be excused for cause.

[60] La. Const. Art. I, § 17 provides in pertinent part: "The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily."

would demand the juror's pre-commitment or pre-judgment as to issues in the case. *Id. See also, e.g.*, *State v. Williams*, 230 La. 1059, 1078, 89 So.2d 898, 905 (1956) ("It is not proper for counsel to interrogate prospective jurors concerning their reaction to evidence which might be received at trial."); *State v. Smith*, 216 La. 1041, 1046–47, 45 So.2d 617, 618–19 (1950) ("[H]ypothetical questions and questions of law are not permitted in the examination of jurors which call for a pre-judgment of any supposed case on the facts."); *Ball*, 00-2277, p. 23, 824 So.2d at 1109–10 (trial court correctly forbids questions the evident purpose of which is to have prospective juror pre-commit himself to certain views of the case). *See also State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (1989) ("Jurors may not be asked what kind of verdict they would render under certain named circumstances."); *Jahnke v. State*, 682 P.2d 991, 1000 (Wyo. 1984) (court properly refused questions which were "patent requests to obtain the reaction of potential jurors to the appellant's theory of defense."), *vacated on other grounds*, *Vaughn v. State*, 962 P.2d 149, 151 (Wyo. 1998).

While this Court's jurisprudence clearly provides that counsel may not detail the circumstances of the case and then ask jurors to commit themselves to a particular verdict in advance of trial, the Court has held that a juror who knows enough about the circumstances of the case to realize that he or she will be unable to return a sentence of death is not competent to sit as a juror, although the juror may also express an abstract ability to consider both death and life sentences. *State v. Williams*, 96-1023 (La. 1/21/98), 708 So.2d 703;[61] *State v. Comeaux*, 514 So.2d 84

[61] In *Williams*, this Court held that "when a potential juror indicates his or her attitude regarding the mitigating circumstances would substantially impair his or her ability to return a death penalty, then that juror is properly excludable for cause," and found further that, after a full reading of voir dire, two prospective jurors who initially indicated theoretical support for the death penalty "could not have returned a death verdict because of the defendant's age," and were therefore unfit to serve on a capital jury. Specifically, one juror indicated she "would have a very hard time saying [the death penalty] was appropriate," and that it would "'bother' her to return a death verdict against an 18-year-old defendant." The other expressed few reservations about the death penalty in general, but later indicated that "'. . . if they're young, to me, I think they should get life, not the death penalty.'" *Williams*, 96-1023, pp. 8–10, 708 So.2d at 712–14.

(La. 1986). Thus, counsel must tread carefully while seeking to elicit whether a prospective juror is capable of remaining impartial in the case at hand to the extent that counsel makes any references to what he anticipates the evidence will show. *State v. Holliday*, 17-1921, p. 35 (La. 1/29/20), __ So.3d __.

Additionally, this Court has held that the accused's right to exercise his challenges intelligently may not be curtailed by the exclusion of non-repetitious voir dire questions which reasonably explore a juror's potential prejudices, predispositions, or misunderstandings relevant to the central issues of the case. *State v. Duplessis*, 457 So.2d 604, 606 (La. 1984), citing *State v. Monroe*, 329 So.2d 193 (La. 1976). However, a trial judge in a criminal case has the discretion to limit voir dire examination, as long as the limitation is not so restrictive as to deprive defense counsel of a reasonable opportunity to probe to determine a basis for using challenges for cause and for the intelligent exercise of peremptory challenges. *Id.*, citing *State v. Williams*, 457 So.2d 610 (La. 1984). Therefore, when a defendant asserts that he has been deprived of his constitutional right to a full and fair voir dire, the reviewing court must examine the entire voir dire in order to determine that issue. *Id.* Restrictions on counsel's necessarily repetitive questions aimed at eliciting those attitudes towards legal principles which will play a significant role at trial require close scrutiny and invite reversal. *See State v. Hall*, 616 So.2d 664 (La. 1993); *State v. Duplessis*, 457 So.2d 604 (La. 1984).

In support of his claim that defense counsel was restricted in its voir dire examination, defendant relates the following incidents occurred during voir dire:

1) Defense counsel asked Susan Arceneaux and Angela Barbera whether they could give "meaningful consideration" to defendant's voluntary intoxication defense. The trial court sustained the State's objection to these questions, ruling that it was inappropriate to ask about voluntary intoxication as opposed to involuntary intoxication.

2) Defense counsel asked Anthony Dale Guidry for his feelings regarding sentencing if the defendant was found guilty as charged,

and he responded, "Death." The defense then asked whether mitigating circumstances would "matter" to him, and the State objected. The court sustained the objection, finding that defense counsel was asking him to lock himself into a position.

3) Defense counsel asked John Lagarde whether he could give "meaningful consideration to whether or not [a defendant] was relatively young at the time of the offense[,]" and the State objected. The trial court allowed the defense to proceed, but expressed concern about providing hypothetical facts. Before voir dire resumed, the court advised the venire that the law requires them to give meaningful consideration to mitigating circumstances.

4) The State objected during defense counsel's questioning of George Theriot about his feelings regarding the death penalty. The trial court sustained the objection and rejected defense counsel's suggestion of rephrasing the question as follows: "What might be some of the things that you would consider or want to consider to make you lean towards life? What might be some of the things that would make you lean toward death?"

Our review of the record reveals that defendant's descriptions of these incidents are misleading. Specifically, regarding Susan Arceneaux, defense counsel asked her the following question immediately prior to the State's objection:

> So some people will tell me, okay, if you get to the second phase at all, you've already decided a person may have been drunk or at least have drunken alcohol, the person may have used pills, but they still knew what they were doing. And then some people tell me, "But you know, Mr. Doskey, when I read that thing there about – and you've just explained to me, Mr. Doskey, I've got to consider that – if I consider it all, I've got to consider it in the defendant's favor, in this hypothetical case we're talking about."
>
> Some people look at me and say, "But you know what, taking a pill or taking a drink, that's his choice. That was his choice." And they say, "I know what the law says about that. I know what the law says about that, but there's just no way I can follow that law and consider it, even the slightest bit." Or, in fact, "I'm going to consider it against him because he was the one who decided to take that pill or take that drink." How do you feel about that, Ms. Arceneaux? Could you consider it – if you consider it at all, consider it for him? Well, you don't actually have a choice whether you're going to consider it at all. You've got to give significant meaningful consideration.

Arceneaux responded, "No. I believe everybody has the, you know, control of their own intent, you know, I mean – [.]" The State interrupted, and a discussion was held

out of the hearing of the venire during which the State objected to the defense eliciting "definitive answers to hypothetical questions[.]" The defense responded that it did not believe it had mentioned specifics but that it was only trying to determine whether the jurors understood that "whatever consideration they give [mitigating circumstances], it's got to be in favor of the Defense and not against the defendant." The trial court stated that the defense was entitled to make this determination but should avoid "getting into the quantifying and the actual types of substances ingested." The defense then asked the court whether there would be a problem with using the word "voluntary" in connection with intoxication, and the State argued that telling the venire that defendant was voluntarily intoxicated would be improper. The court responded as follows:

> But that was not Mr. Doskey's question. Mr. Doskey asked them to consider intoxication, and [Ms. Arceneaux] said it made a difference to her if it was voluntary. I think he's entitled to ask her what that means as a follow-up to her response, because that's a response – the juror is the one that put that out there, not Mr. Doskey. And as long as Mr. Doskey knows that the general idea for any of the other ones, after you explore that issue with her, is that, you know, we're not going to be quantifying, we're not going to be talking about levels of intoxication. I really don't want to get – she's the one that introduced voluntary. I mean, I don't think it's appropriate to suggest whether it's voluntary or involuntary by counsel.
>
> If they bring it up, you can ask them what that means, and why it affects their – why does that – the point is, "Why does that affect your decision and how is it going to affect your ability to consider the mitigation in Mr. Brown's favor?"

Defense counsel noted its objection and stated that it would limit the questions in accordance with this ruling.

When voir dire resumed, defense counsel immediately asked Arceneaux to expand on what she said about whether she could "consider it in a defendant's favor if he was voluntarily intoxicated." The following colloquy ensued:

> ARCENEAUX:
>
> > Mr. Doskey, I'm used to dealing with facts, and I really feel – and I'm a nurse. I've seen a lot of people in a lot of conditions, but that was their choice, so the outcome of what happened to

them, whether it'd be in a hospital setting or anywhere else, they chose to drink, they chose to do drugs. I don't consider that to be an excuse.

DOSKEY:

All right. Now you understand, of course – and this is really the very same way Mr. Morvant said, there's no right or wrong answer for this. I understand that – what your position is. So even if the Judge were to instruct you, even if the DA were to get back up here after I've talked to you and said – tell you, "Well, the law says that you should consider" – and let me quote the words of the statute. If the Judge or the district attorney were to tell you, again, that the law says, at the time of the offense – if you determine as a juror, as an individual, that the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of – go down there – of intoxication, I think what you're telling me is that, "Even if I was told that, in my heart of my heart, I don't believe that. I don't think that I could do that."

ARCENEAUX:

I would consider it as part of the deliberation, but I have considered that many, many times in my life. And you're correct, my decision about that is that that was a choice that that individual made.

DOSKEY:

Okay. I don't want to beat this and nor – I'm sure, nor do you either. So what you're saying is you could consider it – you're saying, "Not really. That's a policy issue with me and I've already decided that policy issue"?

ARCENEAUX:

Right, and that's only one of the things that would – "

The State interrupted and asked to approach, and an off-the-record discussion was held. Defense counsel then resumed questioning, but abandoned its questioning of Arceneaux and turned its attention to Angela Barbera. The defense asked Barbera how she felt about the subject, and the following colloquy occurred:

BARBERA:

I personally do not believe that intoxication is an excuse. I can consider it, but I have not seen anybody who could do anything – not that they wouldn't remember it, but I feel like you know what you're doing. If you're not knowing what you're doing then you're falling down. I mean, I don't –

DOSKEY:

Okay. If you get to that second phase, again, it will only be because you, as a juror, even if you have heard evidence of any

sort of intoxication, you will have decided that the person still knew what they were doing, meant to do it, and, in fact, did it. The mitigator, which is not a defense – it's important to realize that mitigation is not a defense. Mitigation is a reason not to give the death penalty or a reason to give life, either way you want to view it. But mitigation, in this circumstance, talks about not whether you knew what you were doing, but talks about the ability to appreciate that what you're doing is criminal or to go ahead and follow the law. It's a lower standard, you understand that?

BARBERA:

I understand that we have to consider that.

DOSKEY:

Okay. And the question is, have you already made up your mind that you can't consider it? In other words, forget what the law – forget the law says that you should consider – should be able to consider it. What I'm trying to find out about is you're feeling that – not, "Oh, yeah, if the Judge tells me I can reset my brain and go ahead and do it," because then the question is: Are you really going to reset your brain? The question is: Are you going to be able to go ahead and follow the Judge's instructions fairly? And it doesn't mean you're a bad person if you can't. It just means you've got a different life experience.

BARBERA:

I can follow instructions, and I understand exactly what you're saying.

At the conclusion of the defense's questioning of that panel, the court addressed the off-the-record discussion that took place between questioning of Arceneaux and Barbera on the subject of intoxication. The State had again raised an objection arguing that the defense provided a hypothetical regarding voluntary intoxication. The defense, in turn, again argued that it did not go into specifics, and that it was attempting to determine whether the jurors would treat voluntary intoxication differently from involuntary intoxication. The trial court ultimately ruled as follows:

With regard to the objection as to further questioning on the issue of mitigation, the issue of consideration of the issue of intoxication had been addressed with Ms. Arceneaux at length. I don't think it was ever even put in the context of involuntary intoxication. They heard – Ms. Barbera, actually, both – from their representations to the Court, both being RN's, were dealing with the results of voluntary intoxication. They both indicated, numerous times, their consideration. I think the

> attempt, at the point that it was stopped, was – it had gotten to the point where there was going to be a quantification, almost, of how much consideration would you give? Questions were asked would they consider it in the defendant's favor as a mitigating circumstance. I believe they both answered affirmatively, and the objection is noted, but overruled.[62]

Given the above, it does not appear the trial court prevented defense counsel from asking Arceneaux or Barbera whether they could consider intoxication as a mitigating circumstance. To the contrary, the trial court's ruling was favorable to the defense in this respect. Furthermore, the record indicates that Arceneaux and Barbera were clearly referring to voluntary intoxication when commenting on the issue, and defendant does not explain how distinguishing between voluntary and involuntary intoxication would have been helpful to the defense in determining their ability to consider intoxication.

Additionally, the following colloquy took place between defense counsel and prospective juror Anthony Dale Guidry:

> DOSKEY:
>
> If you found that somebody had deliberately committed this crime, knew what he was doing, meant to do it, no legal defenses at all, do you think like –
>
> GUIDRY:
>
> Death.
>
> DOSKEY:
>
> I'm sorry?
>
> GUIDRY:
>
> Death penalty.
>
> DOSKEY:
>
> – life imprisonment without parole simply wouldn't be enough, would it?
>
> GUIDRY:
>
> With the circumstances – one, you know – had one person died, I would of [sic] said, probably, life. Two people died, I'm battling with it. Three people died, somebody knew – had intent to do that. You know, whether they were drunk – I drank a lot in

[62] The trial court denied the defense's subsequent challenges for cause as to both Arceneaux and Barbera.

> my life myself, never made me want to kill nobody. You know? And you know, I would definitely go with the – I would definitely go with the death penalty.
>
> DOSKEY:
>
> It probably wouldn't matter to you if they had had a bad childhood at all, would it?
>
> GUIDRY:
>
> We all had bad childhoods.
>
> DOSKEY:
>
> Okay. And if it was their first crime?
>
> GUIDRY:
>
> I'd probably –

The State objected, arguing that defense counsel was asking Guidry to commit to a position based on hypotheticals. The court sustained the objection, stating:

> I think the last questions that were asked of Mr. Guidry went beyond the scope of what is allowed when asking him to specifically make the decisions about how he would vote if he had already rejected intoxication. "Oh, and what about a bad childhood?"; "Oh, and what about" – those are specific topics. Your questions need to be couched in terms of whether he can consider – give those consideration as a mitigating factor.

The defense then asked the trial court whether it could frame questions as follows: "They have found him guilty, beyond a reasonable doubt, of this crime. Now, given that, would you meaningfully consider – [.]" The court responded:

> Perfect. That's perfect. 'Will you consider the mitigating factors of intoxication, even though you found him guilty in spite of some intoxication?' That's fine. 'Will you give it meaningful consideration?' But when you asked them to lock themselves in on a decision based on intoxication, I'm going to sustain that objection every time.

Again, we find the court's ruling here favorable to defendant to the extent it ruled that defense counsel could ask prospective jurors whether they would meaningfully consider mitigating circumstances. Defendant shows no error in the trial court's determination that defense counsel's questioning of Guidry exceeded the scope of permissible voir dire. Guidry was ultimately removed for cause upon joint motion.

Regarding the questioning of John Lagarde, also discussed below, when asked by the defense whether he could give meaningful consideration to whether the person who committed this crime was relatively young at the time of the offense, he responded, "No, sir." The State objected, arguing that it improperly presented a hypothetical, and that it was misleading in that "you've got a defendant sitting there who looks, at least, in his mid-thirties," such that a venire member would predictably respond negatively to that question when looking at defendant. The trial court responded by allowing the defense to proceed with questioning, but before allowing the defense to proceed, the court advised the venire that jurors are required to give "meaningful consideration" to mitigating circumstances and that these questions were being asked in order to determine whether they could do so. Thus, we find it is not clear, nor does defendant explain, how this ruling negatively impacted the defense's voir dire.

Finally, with respect to George Theriot, the State objected to the defense's question, "If you were there and you had found somebody guilty of committing one of these crimes, what would be the most important thing for you to know in deciding whether you give life or death?" In sustaining the objection, the court stated that "asking to commit to a decision as to what Mr. Theriot thinks is the most important factor in whether he decides is asking him to, basically, make a decision on a particular mitigating circumstance or any other fact. And you're trying to make him make a judgment when facts aren't presented." Defense counsel then proposed rephrasing the question to, "What might be some of the things that you would consider or want to consider to make you lean towards life? What might be some of the things that would make you lean towards death?" The court rejected this proposal, stating:

> I believe that asking them to suggest what you need to present to them in the penalty phase is problematic. It's as problematic as asking them to name, "What is the most important thing for you?" And it's as

> problematic as asking them to make decisions on hypotheticals. So I don't know beyond that. I don't accept the one about, "What's the most important to you?" You can explore other issues with them in a way to try to get into this, but asking them to tell you what's important to them on that particular issue is not the question that I believe is appropriate.

We conclude that these incidents, as well as the voir dire transcript as whole, do not demonstrate that the trial court impermissibly restricted questioning by defense counsel, nor do they show that the defense was rendered incapable of adequately assessing the ability of venire members to give meaningful consideration to mitigating evidence. Rather, the record reflects that the trial court's rulings were consistent with jurisprudence on the issue. Accordingly, we find no merit in this assignment of error.

Assignment of Error No. 20

In this assignment of error, defendant argues the trial court erred in denying his challenges for cause against jurors who would automatically vote for the death penalty (those who were not "death qualified"), as well as jurors who were "substantially mitigation impaired." Generally, the grounds on which a juror may be challenged for cause are set forth in La. C.Cr.P. art. 797 and La. C.Cr.P. art. 798.[63]

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[63] La. C.Cr.P. art. 797 provides:

> The state or the defendant may challenge a juror for cause on the ground that:
> (1) The juror lacks a qualification required by law;
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
> (3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict;
> (4) The juror will not accept the law as given to him by the court; or
> (5) The juror served on the grand jury that found the indictment, or on a petit jury that once tried the defendant for the same or any other offense.

La. C.Cr.P. art. 798 provides:

> It is good cause for challenge on the part of the state, but not on the part of the defendant, that:
> (1) The juror is biased against the enforcement of the statute charged to have been violated, or is of the fixed opinion that the statute is invalid or unconstitutional;
> (2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it known:

In applicable part, a juror may be challenged if the juror lacks a qualification required by law, if the juror is not impartial, whatever the cause of his partiality, and if the juror will not accept the law as given by the court. La. C.Cr.P. art. 797.

A trial court is vested with broad discretion in ruling on challenges for cause, and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State v. Cross,* 93-1189, p. 7 (La. 6/30/95), 658 So.2d 683, 686. Prejudice is presumed when a trial court erroneously denies a challenge for cause and the defendant ultimately exhausts his peremptory challenges. *State v. Robertson,* 630 So.2d 1278, 1280 (La. 1994). Further, an erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. *Cross,* 93-1189, p. 6, 658 So.2d at 686. "[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. Hallal,* 557 So.2d 1388, 1389–90 (La. 1990).

Here, defendant exhausted his peremptory challenges and therefore need only show that the trial court abused its discretion by denying his challenges for cause. *Robertson,* 630 So.2d at 1281. For reference in the discussion below, jurors were asked to rate themselves on a scale of one to five, five being an inability to vote for the death penalty under any circumstances and one being an inability to consider a life sentence under any circumstances.

Willingness to consider mitigating circumstances

(a) That he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him;
(b) That his attitude toward the death penalty would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath; or
(c) That his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or
(3) The juror would not convict upon circumstantial evidence.

Defendant argues the trial court erred in denying his cause challenges against two venire members, Chad Ordoyne and John Lagarde,[64] because their responses indicated that they would not be willing to consider certain mitigating evidence.

Chad Ordoyne. Defendant argues that Ordoyne's statements during voir dire as a whole disqualified him from jury service because he was predisposed to vote for the death penalty and would not consider intoxication evidence as mitigation. When the State asked Ordoyne to rate himself on the scale provided above, the following colloquy occurred:

> ORDOYNE:
> I would say probably No. 2. It would all depend on the circumstances and evidence. I mean, if it proves that he did it and took lives, and lives of children, I'm sorry, my opinion is he don't deserve –
>
> MORVANT:
> But you would still – are you telling me –
>
> ORDOYNE:
> I would still listen to all evidence – all circumstances.
>
> MORVANT:
> You would still consider the evidence that the Defense would present to you?
>
> ORDOYNE:
> Yes, sir.
>
> MORVANT:
> You would want to hear it?
>
> ORDOYNE:
> Yes.
>
> MORVANT:
> Okay. So you would be a person who favors the death penalty, but you would sit there and listen, and you could impose – you're not telling me you're blocking out giving a life sentence at all?
>
> ORDOYNE:
> No. I'm not blocking it out.
>
> MORVANT:
> You feel strongly about the death penalty, but you would listen

[64] The defense later used peremptory strikes against both Ordoyne and Lagarde.

to the evidence, and if you felt a life sentence was warranted, you could do it?

ORDOYNE:
Yes, I could.

MORVANT:
And even if – let me give you a scenario. Even if, at the end, the Defense decided that they're not going to present any mitigating evidence to you? And, again, I know it's kind of an unfair question in a way because you haven't heard anything. I guess what I'm asking: Would you still keep an open mind and then make a decision based upon all the evidence that you've received as to whether or not you would give the death penalty or life in prison?

THE COURT:
Before you answer that, let me just tell you, the Defense does not have a burden of proof. They don't have to prove anything to you. The final issue lies with you as to whether – your decision is whether you can consider life and death, no matter what's been shown. If you can never consider life, then that's a different answer.

ORDOYNE:
Yes, sir.

THE COURT:
But if you're expecting to be shown something, the Defense does not have to show you anything. The decision for you is: Can you still consider life even if nothing is shown?

ORDOYNE:
Yes, sir. I can still consider life.

MORVANT:
You follow where we're at?

ORDOYNE:
Yes. Yes, sir.

Later, the defense asked the venire members how they felt in general about life imprisonment without parole as a punishment for first degree murder. Immediately after another venire member answered, "Life in prison would be just as bad as the death penalty, but they would still have their life[,]" Ordoyne stated, "That's how I feel. A life sentence is terrible and you'd have a lot of time to think about it, but if a person's proven guilty to intently take somebody else's life, I'm

sorry, you don't get that chance to breathe either." Defense counsel then asked, "Okay. As far as you're concerned, that's where it stands?" and Ordoyne replied, "Pretty much. I mean, it's – truthfully, if he intently done it and all evidence showed that he intended – you got to listen to all the evidence. But if you took a life intently just doing it because you wanted to do it. I'm sorry, that's my opinion."

The defense challenged Ordoyne for cause and the trial court denied the challenge, ruling as follows:

> The Court was able to make personal observations of Chad Ordoyne and his responses to the questions posed by the Court and by counsel for the State and counsel for the defendant. Mr. Ordoyne responded to questions from the Court that he could choose death; he could also choose life. In response to questions regarding mitigation, he indicated that he can consider all the mitigating factors. He did indicate if the case was due – he made a positive statement, depending how you look at it, that for certain types of cases he would choose death; but at the same time, he also considered – stated that he could, also, choose life under certain circumstances.
>
> He could not be called upon in this case – and he was not one who said he could only consider death no matter what. I will – I find that his feelings in favor of the death penalty do not substantially impair his ability to follow the law, as instructed, and to follow his oath. The Defense challenge for cause is denied.

During guilt-phase voir dire, defense counsel asked the venire generally whether any of them had any experience with heavy drinking, either personally or with family or friends. Ordoyne indicated that he drank heavily when he was younger and said, "I mean, when you do bad things on alcohol and drugs, that's your problem. You chose to do it, you gotta suffer the consequences." The following colloquy ensued:

> CUCCIA:
>
> > Okay. So let me make sure I understand. And, again, you know, you've always been pretty clear in what your statement is, that in a situation where someone has voluntarily chosen to drink and gotten so drunk that their behavior changes – as Ms. Robbins had experienced –
>
> ORDOYNE:
>
> > He's responsible for his behavior, because he chose to get that way. He chose to start drinking violently. That was his choice.

CUCCIA:
Right.

ORDOYNE:
He was in his right mind.

CUCCIA:
And – when he picked it up.

ORDOYNE:
That's right.

CUCCIA:
And so no matter what effect it may have had on –

ORDOYNE:
He's responsible for it.

CUCCIA:
Responsible, not only from the standpoint that – now, we're talking about culpability – right now, we're talking about the idea of the guilt-phase thing. As far as an idea that, maybe, the punishment he should get for it should be lessened because of the intoxication.

MORVANT:
Excuse me.

ORDOYNE:
No.

MORVANT:
Wait just – excuse me –

CUCCIA:
Should not be.

MORVANT:
Excuse me. Can we approach?

The defense again challenged Ordoyne for cause, arguing that he indicated that he would not consider intoxication as a mitigating factor. Noting that it had considered Ordoyne's responses as to his ability to consider the evidence presented and to apply the law, the trial court denied the challenge for cause.

With regard to Ordoyne's predisposition toward death, defendant asserts that this Court has reversed a conviction under similar circumstances, citing *State v.*

Maxie, 93-2158, pp. 15–24 (La. 4/10/95), 653 So.2d 526, 534–38. In *Maxie*, the court vacated a first degree murder conviction and death sentence because the trial judge erroneously denied a defense challenge for cause against a venire member who, though she said she "could listen" to mitigation evidence, responded negatively when asked if her "mind [was] open to both the death penalty and life imprisonment" if the penalty phase was reached and felt death the only appropriate punishment "[o]nce the crime guilt is established." *Id.*, 93-2158, pp. 15–24, 653 So.2d at 534–38.

As discussed above, in ruling on a challenge for cause, the trial court is vested with broad discretion and its ruling will be reversed only when the voir dire record as a whole reveals an abuse of discretion. *Cross*, 658 So.2d at 686–87; *Robertson*, 630 So.2d at 1280. A prospective juror should be excluded if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witherspoon*, *supra*; *Wainwright*, 469 U.S. at 424, 105 S.Ct. at 852. 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. C.Cr.P. art. 797(2), (4); *Taylor*, 99-1311, p. 8, 781 So.2d at 1214; *Maxie*, 93-2158, p. 16, 653 So.2d at 534–35. Yet the trial court's refusal to disqualify a prospective juror does not constitute reversible error or an abuse of discretion if, after further examination or rehabilitation, the juror demonstrates willingness and ability to decide the case fairly according to the law and evidence. *State v. Howard*, 98-0064, p. 7 (La. 4/23/99), 751 So.2d 783, 795; *Robertson*, 630 So.2d at 1281. Thus, a prospective juror who simply indicates a personal preference for the death penalty need not be stricken for cause. *State v. Tate*, 01-1658, pp. 17–18 (La. 5/20/03), 851 So.2d 921, 936; *State v. Lucky*, 96-1687, p. 6 (La. 4/13/99), 755 So.2d 845, 850. Additionally, a trial judge "makes personal observations of potential jurors during the entire voir dire[,]" and a reviewing court should give

"great deference to the trial judge's determination and should not attempt to reconstruct voir dire by microscopic dissection of the transcript in search of magic words or phrases that automatically signify the juror's disqualification." *State v. Broaden*, 99-2124, p. 13 (La. 2/21/01), 780 So.2d 349, 359.

While Ordoyne's responses appear to indicate a predisposition for the death penalty, he stated during penalty-phase voir dire that he would be willing to consider the evidence and circumstances, that he would not "block out" a life sentence, and that he "can still consider life." We note that the trial judge was in the best position to determine whether Ordoyne would discharge his duties as a juror, and Ordoyne's responses taken as a whole do not clearly indicate that his views would substantially impair his ability to "render an impartial verdict according to the law and evidence" or to "accept the law as given to him by the court" under La. C.Cr.P. art. 797(2), (4).[65]

With regard to his willingness to consider intoxication evidence as mitigation toward a life sentence, Ordoyne's answers are ambiguous because he never clearly stated that he was unwilling to consider intoxication as mitigating evidence in the penalty phase. While Ordoyne responded "no" to what appears to be defense counsel attempting to clarify this point, he never provided a definitive answer.

A juror must be allowed to consider, and may not refuse to consider, "'as a mitigating factor, any aspect of a defendant's character or record and any of the

[65] *See also Broaden*, 99-2124, pp. 11–12, 780 So.2d at 358 (cause challenge properly denied for juror who was not unwilling to consider a life sentence and would not automatically vote for the death penalty); *Lucky*, 96-1687, p. 6, 755 So.2d at 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); *State v. Miller*, 99-0192, pp. 18–19 (La. 9/6/00), 776 So.2d 396, 408 (prospective jurors who expressly agree to consider both life and death sentences and to consider any mitigating evidence are not properly excused for cause); *State v. Chester*, 97-2790, p. 14 (La. 12/1/98), 724 So.2d 1276, 1285 (no abuse of discretion for denying cause challenge for juror who stated that "in an appropriate case" she could return a life sentence); *State v. Hart*, 96-0697, pp. 7–11 (La. 3/7/97), 691 So.2d 651, 656–58 (approving denial of cause challenge against juror who believed that the death penalty for an intentional killing "ought to be the law," but agreed to abide by the judge's instructions and to consider both life and death sentences).

circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Blystone v. Pennsylvania*, 494 U.S. 299, 304–05, 110 S.Ct. 1078, 1082, 108 L.Ed.2d 255 (1990) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)).[66] The United States Supreme Court has stated that any prospective juror who fails to consider the evidence of aggravating and mitigating circumstances violates the impartiality requirement of the Due Process Clause and should be removed for cause. *Morgan v. Illinois*, 504 U.S. 719, 734–39, 112 S.Ct. 2222, 2233–34, 119 L.Ed.2d 492 (1992). Jurors "may determine the weight to be given relevant mitigating evidence" but "may not give it no weight by excluding such evidence from their consideration." *Eddings v. Oklahoma*, 455 U.S. 104, 114–15, 102 S.Ct. 868, 877, 71 L.Ed.2d 1 (1982).

This Court has instructed, "[w]hile a juror has the discretion to assign whatever weight the juror deems appropriate to any aggravating and mitigating circumstance established by the evidence, the juror must be willing to consider mitigating evidence relevant to the character and propensities of the defendant[,]" and "[t]here is a significant difference between a prospective juror's agreeing to consider mitigating evidence and the juror's determination of the importance of that evidence." *State v. Miller*, 99-0192, pp. 8–9 (La. 9/6/00), 776 So.2d 396, 402–03 (footnote and emphasis omitted). *See also Sawyer v. Whitley*, 945 F.2d 812, 822 (5th Cir. 1991) ("Under the Louisiana scheme, therefore, a rational juror conceivably could choose to give no weight to any of the mitigating factors and impose the death penalty so long as it has found, beyond a reasonable doubt, the existence of a single aggravating circumstance.").

[66] *See also Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 761, 139 L.Ed.2d 702 (1998) ("The sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence").

The difference between a juror who will not consider a mitigating circumstance and one who will accord that circumstance little or no weight is a very fine line. *Cf. Ward v. Whitley*, 21 F.3d 1355, 1364 (5th Cir. 1994) (Politz, C.J.) ("There is a fine line between the argument that a statutory mitigating circumstance merits no weight in the jury's ultimate decision and the argument that the mitigating circumstance should not be considered or is not mitigation. The former is permissible under Louisiana law; the latter is not."). In this instance, we note that Ordoyne expressly indicated during penalty-phase voir dire that he would consider all evidence and circumstances, and the record supports the trial court's finding that Ordoyne would apply the law as instructed without being substantially impaired by his own views. Accordingly, we find this claim does not warrant reversal.

John Lagarde. As discussed above, John Lagarde indicated that he could not give meaningful consideration to the "relative youth" of the offender as a mitigating circumstance. Defense counsel challenged Lagarde for cause on this ground, as well as others discussed *infra*, and the court denied the challenge, finding that Lagarde's ability to follow the law as instructed was not substantially impaired by his views. We find the record supports this finding, as Lagarde rated himself a three on the above-referenced scale and stated he would "have to weigh all the facts" before making a determination as to life or death. Regardless, because defendant was ten days shy of his 35th birthday at the time of the offense, it cannot reasonably be said that the "youth of the offender" was a relevant mitigating circumstance in this matter.

Willingness to consider a life sentence

Defendant also asserts the trial court erred in denying his cause challenges as to Rab Bruce, Michael Eschete, and Kevin Trosclair, forcing him to use peremptory strikes against them. He asserts that these venire members were substantially impaired because they repeatedly made statements indicating that the defense would have to prove mitigating circumstances in order for them to consider a life sentence.

Specifically, defendant points to a portion of the voir dire transcript, spanning several pages, in which defense counsel spoke to all three venire members. Defense counsel asked Trosclair if mitigating evidence was "something that somebody would have to show" him in order to consider life, to which he responded affirmatively, and whether he could still choose a life sentence if "they couldn't demonstrate mitigating circumstances" to him, and Trosclair responded, "then I believe in the death penalty." Defense counsel then asked Bruce if his vote "would be a death penalty unless the Defense could demonstrate to [him] why the death penalty was not appropriate[,]" and Bruce replied, "Correct." Bruce elaborated that the sentence should be the death penalty "unless the evidence – there's some, you know, circumstance through the evidence, that dictates that there was mitigating circumstances that shouldn't be – the person shouldn't be put to death." Defense counsel then said, "That would be up to the Defense to go ahead and show that[,]" and Bruce said, "Right." Eschete stated that he "somewhat agree[d]" with Bruce, explaining that he "would lean more towards the death penalty if all of the potential evidence that the DA showed that was proven to [him] and [he] thought it was without a doubt and the Defense didn't have any kind of issues or contradictory information[,]" in which case he "would think that the death penalty would be more of an appropriate sentence."

The trial court then intervened and explained to the venire panel that the defense does not have to prove anything to them and that they can find mitigating circumstances by looking at the facts of the case even if the defense does not present them. The court then asked Eschete if he could consider life and death even if the defense does not show anything, and he said, "Yes." Out of the presence of the venire, the State requested the trial court provide an instruction directly to Bruce and Trosclair that the law does not require the defense to present evidence and that they would be required to decide the case based upon the evidence that they have in front

of them at the time. The court agreed instead to give the instruction general to the venire panel.

In reviewing the vior dire transcript as a whole, we find it more likely these venire members were experiencing momentary confusion as to the burden of proof as opposed to expressing an unwillingness to consider a life sentence. As explained in further detail below, the totality of their responses indicated they were each willing to follow the law as instructed and to give meaningful consideration to the evidence presented.

Rab Bruce. When prompted by the State, Bruce rated himself "somewhere between the two and the three" on the scale, explaining, "I think I listen to people and I think I'm open, number one. But the nature of the crime, any – would favor a harsher penalty, in my opinion, if he's guilty. Only if he's guilty." The State said, "And you haven't heard anything yet[,]" and he added, "No. I haven't heard anything. I'm just saying if it would favor all of the things that you would actually vote or – in the guilty phase to go to the guilty piece in this case, then, you know, then I think – then you'll have to prove to me, again, with the mitigating – [.]" The State interrupted him and said, "And I have to prove. The Defense doesn't have to prove anything to you[,]" and Bruce replied, "Right. Right[,]" and continued, "That he deserves the penalty, but – so, like I said, I am an open person. I think I could listen to both sides, and I could really, you know – [.]" The State then told the venire panel generally that the defense does not have to prove anything, specifically telling them that if the defendant is found guilty, and the State presents aggravating circumstances, and "the Defense says, 'We're not presenting anything,' still, your role is to give consideration to what you have before you make any decision." Bruce replied, "Correct."

Later, when defense counsel asked Bruce if he could meaningfully consider a life sentence where he found a defendant guilty of murdering and raping a woman,

murdering and raping a seven-year-old, and murdering a one-year-old, and where the defense presented no mitigating circumstances, Bruce replied that he could, but admitted that "it probably will not land on that[.] The court and Bruce then had the following exchange:

> THE COURT:
>
> I just have – the question, really, is: Is the nature of the crime such that you're unable to consider mitigating circumstances and the facts that are presented to you? If you're prevented from doing that, based on the circumstances of this case, that's one question. But you cannot consider mitigating circumstances because of the facts of the case. Or – so and I think that's the way the question should be couched, is: You're prevented by – if they prove their case, you will not consider the mitigating circumstances, that's one answer. If you can still consider mitigating circumstances, in spite of the nature of the case, that's a different answer. I think that's the question: Can you – would you still consider the mitigating circumstances?
>
> BRUCE:
>
> Yes, Your Honor. But I am – I understood him to say that he would not present –
>
> THE COURT:
>
> That's a different question. He has no burden to present anything.
>
> BRUCE:
>
> Right. But I'm – there is no – he's saying there is no mitigating circumstances.
>
> THE COURT:
>
> Well, that's – what I'm saying is you can still find mitigating circumstances and facts within the case no matter what's proven. The burden is on the State. It's not on Mr. Doskey or Mr. Cuccia to prove anything to you. They don't have to do that. You're perfectly free to find it on your own. The question is: Is the case – with this case, under these facts, prevent you from considering mitigating circumstances in favor of Mr. Brown?
>
> BRUCE:
>
> No. I would always consider mitigating circumstances.

The defense then asked Bruce about having written on his questionnaire: "If this case concerns the murder of children, since I have two small grandchildren, I would have no option but to vote for death." Bruce elaborated:

> BRUCE:
>
> Again, that's telling you that I lean toward death, and you would

have to – not you in particular – but the evidence would have to show me that there was something – in other words – I don't know how to explain this. But if the person that's being on trial actually done those things, meaningfully, then I don't see where you couldn't vote for death. However, if there were some things that come out in the trial – evidence of whatever nature – that says something – not necessarily, just evidence or it's a witness or whatever, that says something that makes me feel that there was a reason why he acted that way that wasn't totally his fault or whatever the case may be; that he's still guilty of the crime, but there may be something in there that – then maybe, I would consider that differently. But it's still, you know, children that can't defend themselves.

. . . .

DOSKEY:

All right. So the death – let me ask you the question. . . . If you find somebody guilty of first degree murder, it's because you find that he knew what he was doing, he meant to do it, and he did it.

BRUCE:

Uh-huh. (Affirmative response.)

DOSKEY:

In that situation.

BRUCE:

That's what I'm telling you. It would have [to] be some pretty powerful mitigating circumstances.

DOSKEY:

Okay. That we would have to show some mitigation for you to consider on it.

BRUCE:

Not necessarily you have to show it, but whatever comes out –

DOSKEY:

Okay. I understand now. I understand now.

In denying the defense's cause challenge against Bruce, the trial court found that while he was "not always consistent," he stated that he would consider mitigating evidence, such that his ability to follow the law as instructed was not substantially impaired by his views. Given the above, we find the trial court exercised great caution in this regard and that Bruce was sufficiently rehabilitated on the issue. Accordingly, the trial court did not abuse its discretion in denying the cause

challenge, and this claim is without merit.

Michael Eschete. Similarly, Eschete's responses taken as a whole indicate a willingness to consider mitigating circumstances toward a life sentence. The following exchange occurred between the State and Eschete:

> MORVANT:
>
> You know, the mom and two kids are brutally killed. The mom is sexually assaulted. Her daughter is. The place is set on fire. What we had been talking about, earlier, was that would you still have an open mind to listen to the mitigating circumstances before you decided whether you'd vote for the death penalty or life in prison?
>
> ESCHETE:
>
> Sure.
>
> MORVANT:
>
> You could do that?
>
> ESCHETE:
>
> Yes.
>
> MORVANT:
>
> You could do that?
>
> ESCHETE:
>
> Yes.
>
> MORVANT:
>
> In other words, it would be – I mean, obviously, you're being asked to make one of the most decisions [sic] in your life, probably. So you want to make sure you have all the facts in front of you and all the information in front of you; am I correct?
>
> ESCHETE:
>
> No doubt.
>
> MORVANT:
>
> All right. So I'm kinda not following, maybe, what you just said just a few minutes ago.
>
> ESCHETE:
>
> I thought your question was what was our stance on the death penalty if we were to find him guilty.
>
> MORVANT:
>
> No. Well, it is, to the extent of where you fit in this particular five-category thing. But a No. 2 would be someone who favors the death penalty, but can consider life. So you're telling me although you may favor the death penalty, you're gonna still

have an open mind –

ESCHETE:
Correct.

MORVANT:
– and listen to the case before you make a decision, and you will give somebody a life sentence if you think it's warranted?

ESCHETE:
Yes.

Later, the defense asked Eschete whether he could still consider a life sentence if no mitigating circumstances appeared from the evidence, and he responded, "I would think I would lean heavily towards a death penalty, but I can, also, consider the other options. But I would think I would lean hard towards the death penalty. But I haven't experienced this, so I'm not sure how I'd feel when it comes down to that decision at the time." When asked if he could still consider a life sentence even if he found no mitigating circumstances, Eschete answered, "I would see that as a possibility, but I would think it would be less of a possibility." The court then clarified that the question was not if he found "none," but whether if none was shown to him, if this was the "kind of case" that would prevent him from considering mitigating circumstances, and Eschete said, "No."

Defendant also argues, as he did in his challenge for cause below, that Eschete made comments indicating he would base his sentencing decision on an illegitimate ground, specifically, the financial cost of punishment. When prompted by the State, Eschete rated himself a two and stated, "I just think it's the most appropriate sentence for the crime. And I would think, fiscally, it would probably be more expensive if he lived to 95." The following colloquy then took place:

MORVANT:
You mentioned something about "fiscally" just a few minutes ago.

ESCHETE:
Uh-huh. (Affirmative response).

MORVANT:

What you meant [sic] by that?

ESCHETE:

Well, as far as if the State proved their case and it was just undoubtedly as heinous, the death penalty would be a more fitting sentence, I would think. And, also, as far as the taxpayers, it would cost them more – and I'm not sure – I don't know, fiscally –

MORVANT:

I got you. Would that be more overriding for you as far as listening to the evidence and mitigating circumstances on whether or not you should –

ESCHETE:

Definitely not.

MORVANT:

That's what I'm getting at.

ESCHETE:

Because I wouldn't want someone to make that the deciding factor when they were deciding something about me.

MORVANT:

You wouldn't.

ESCHETE:

Correct.

MORVANT:

And so you're being just brutally honest with me and telling me that's something you'd be thinking about, the financial part. But that would not be something that would, if you decided that this defendant ought to get life in prison, that would not override that decision. You could give him life in prison, if that's what you decided?

ESCHETE:

Correct. Yes.

When later asked by defense counsel whether the cost of life imprisonment was "going to always be in the back of [his] mind at the very least," Eschete replied, "I would think so."

In denying the defense's challenge for cause against Eschete, the trial court found that his views did not substantially impair his ability to follow the law as instructed. We find the transcript as a whole reflects that the State sufficiently

rehabilitated Eschete's statements regarding the financial costs of a life sentence versus the death penalty, and thus, the trial court did not abuse its discretion in denying the challenge for cause.

Kevin Trosclair. When prompted by the State, Trosclair rated himself a two, explaining, "I understood your definition of mitigating circumstances, and I'm open minded." When the State asked him if he could sit in the penalty phase with an open mind and give meaningful consideration to mitigating circumstances, Trosclair answered affirmatively. Trosclair further indicated that in the event the defense decided not to present any mitigating evidence, he could still give meaningful consideration to the evidence in front of him and would not automatically vote for the death penalty. Additionally, when the defense asked him whether he could consider a life sentence if he found someone guilty of raping and murdering a woman, raping and murdering a seven-year-old, and murdering a one-year-old, he responded, "Yeah. Based upon mitigating circumstances." When the defense directly asked him whether they would have the burden of showing mitigating circumstances, Trosclair said, "Not at all. You don't have to do nothing."

In denying the defense's cause challenge against him, the trial court found that his feelings in favor of the death penalty did not substantially impair his ability to follow the law as instructed or to follow his oath. We agree. The totality of Trosclair's responses support this finding, and defendant does not show that the court abused its discretion. Therefore, this assignment of error is without merit.

Assignment of Error No. 21

In this assignment of error, defendant argues the trial court erred in denying his cause challenges against two venire members, Juanita McMillan and John Lagarde, on grounds that they would be influenced by their personal relationships with people involved in this case, forcing the defense to use peremptory strikes on

both. *See* La. C.Cr.P. art. 797(3).[67]

Juanita McMillan. Defendant argues that given the number of people McMillan knew who were involved in the case, the trial court's finding that she would be impartial was unrealistic. McMillan indicated that she knew seven individuals listed as State witnesses, namely: Lt. Todd Charlet, Capt. Todd Diaz, Robert "Bud" Dill, Whitney Lirette, Lt. Valerie Martinez, Det. Robert "Bubba" Trotti, and Sheriff Craig Webre. Specifically, McMillan related that approximately six years prior, she dated Lt. Charlet—who was involved in defendant's arrest and drafted the affidavit in support of the search warrants—for about a year, but assured the court that this would not cause her to hold him in higher or lower regard than anyone else. She further stated that they never talked about his work but that she "kinda knew what cases he was working on" while they were in a relationship.

McMillan also told the court that Capt. Diaz was married to her cousin and that she knew Dill through Lt. Charlet but that both were acquaintances she rarely saw and to whom she does not say more than "hello." She stated that Lirette was friends with her youngest daughter and that they had sleepovers at McMillan's house while they were in high school about three years ago. Furthermore, Ms. McMillan indicated Lt. Martinez was friends with her oldest daughter and that McMillan had occasionally met socially with Lt. Martinez herself, the most recent occasion having

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[67] La. C.Cr.P. art. 797 provides:

> The state or the defendant may challenge a juror for cause on the ground that:
>
> (1) The juror lacks a qualification required by law;
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
> (3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict;
> (4) The juror will not accept the law as given to him by the court; or
> (5) The juror served on the grand jury that found the indictment, or on a petit jury that once tried the defendant for the same or any other offense.

been a couple of years before. She also provided that she met Det. Trotti when she worked as a secretary at New York Life 30 years ago, that she became reacquainted with him while she was dating Lt. Charlet, but that she had not seen him in six or eight years. Finally, she stated she went to school with Sheriff Webre and sees him at events but that he is just an acquaintance. When discussing each of these individuals, the trial court asked McMillan whether she would hold them in higher or lower regard or judge their credibility differently than anyone else, and she consistently indicated that she would not.

Defendant also notes that McMillan related she knew not only the trial judge but also district attorney Camille Morvant, who, according to her jury questionnaire, allowed her to complete a pretrial intervention program for driving under the influence in 2012. However, McMillan indicated that they were both acquaintances and this would not influence her at all in the case. Additionally, defendant notes that McMillian provided on her questionnaire that her ex-husband worked as a bailiff for the Lafourche Parish Sheriff's Office, but the record reflects that this issue was not discussed during voir dire.

While the defense conceded when challenging McMillan for cause that her answers were "textbook answers for not being disqualified" and that she "may earnestly believe in her ability that she will not give some preference in some way, shape, or form to the assessment of this evidence[,]" defense counsel nonetheless asserted that it would be "unreasonable" to expect her to do so in light of the number and type of connections she had with people related to the case. In its ruling, the trial court noted that McMillan dated Lt. Charlet before the offense occurred and has had no relationship with him since. Furthermore, the court found that while she had drinks with Lt. Martinez in the past, there was no indication she had discussed the case with her. The trial court ultimately denied the challenge, concluding that after observing McMillan's demeanor and responses, she would be true to her oath, follow

the law, and be impartial to both sides.

Our review of the record establishes the same. McMillan repeatedly indicated she would be fair and impartial, and the trial court was within its discretion to accept her responses at face value. There is no indication from the record that the nature of any of these relationships were "such that bias or prejudice may be reasonably implied." *State v. Lewis*, 391 So.2d 1156, 1158 (La. 1980). Thus, we find defendant shows no error in the trial court's ruling in this regard.

John Lagarde. When asked by the court whether he knew defendant or any of his family, Lagarde indicated that he did not. Defense counsel then asked him whether he had a nephew named Jonas Lagarde, who had a daughter named Madison who had passed away, and Lagarde confirmed that he did. Defense counsel then asked Lagarde whether he knew that Madison's mother, Braya Brown, was defendant's sister, and Lagarde stated that he did not. Defense counsel also asked him whether there was a "whole controversy between the Brown family and the Lagarde family" over Madison's death, and Lagarde stated, "I'm not certain on that. I don't have much contact with Jonas." Lagarde stated that this information would not affect his ability to serve as a juror and that he would still be fair to both sides.

Out of the hearing of the venire, defense counsel later informed the court that the relationship between Braya and Jonas "was not a stable relationship" and that Braya had filed two petitions against Jonas, one to establish paternity for their daughter and another for protection against abuse. At the urging of defense counsel, the court questioned Lagarde individually about whether he recalled any additional details about the relationship, and Lagarde stated that he had met Braya but that he did not know anything about the nature of their relationship. He further related that Jonas came to his house a couple of times for Christmas but that he did not "have contact with Jonas at all – much at all besides that[,]" that Jonas had not been to his house in about two years and that he had not spoken to Jonas since then. The defense

then challenged Lagarde for cause. The trial court denied the challenge, noting Lagarde's lack of knowledge about the relationship between Braya and Jonas.[68]

We find nothing in the record to suggest Lagarde's relationship with his nephew would have influenced his verdict. To the contrary, his answers demonstrated that he would be impartial, and the trial court was within its discretion in taking his answers at face value. Defendant has shown no error in the trial court's ruling.

Assignment of Error No. 22

Defendant asserts the trial court erroneously excused two jurors, Curtis Steward and Wilton Mire, who were qualified and fit to serve.

Curtis Steward. The State challenged Steward for cause, arguing that his answers were rambling and incoherent and that he did not seem to have a full understanding of the process. In granting the challenge, the trial court stated that while Steward's answers to the court were "concise and controlled[,]" his responses to counsel for both the State and defendant "were not always formulated in a coherent manner." The court also found that Steward "made some good points," but that "they were lost in between a lot of other ramblings that didn't make any sense[,]" and expressed concern regarding his ability to understand the court's instructions.[69]

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[68] The trial court stated:

> My recollection and my notes reflect that he had no knowledge of any issues with the nephew and Mr. Brown's family through Braya Brown. He knew that they had a child together and the child got ill. He just repeated that information. He knows nothing of their relationship. He has not learned anything or recalled anything in the four to five weeks he's been in the process. So, the challenge for Mr. Lagarde based on relationship to the Brown family, through Joshua – his neph – Jonas, I'm sorry, his nephew is denied.

[69] The trial court's full oral ruling is as follows:

> I have – the Court has observed Mr. Steward personally and throughout his service. His responses to the questions posed by the Court were concise and controlled. His responses to questions by counsel for the State and the defense were not always formulated in a coherent manner.
>
> I will note in observation that he's actually had the same clothes on that he had Monday when he was here and held the door open for me as he got here. He had

Per La. C.Cr.P. art. 787, a court "may disqualify a prospective petit juror from service in a particular case when for any reason doubt exists as to the competency of the prospective juror to serve in the case." Here, the voir dire transcript reflects that Steward gave several rambling, incoherent responses suggesting that he was not mentally competent to serve. We therefore do not find the trial court abused its discretion in granting the State's challenge against him.

Wilton Mire. The trial court excused Mire *sua sponte* on the basis of his hearing impairment, as well as the inadequacy of available courtroom equipment to correct his hearing impairment. The record reflects that Mire asked the deputy clerk to speak more loudly while administering the oath and twice requested the trial judge to speak more loudly, telling him on the second occasion, "Sometimes, I can't quite understand you." However, Mire participated in the remainder of voir dire with counsel without complaining of hearing issues.

The court proposed equipping Mire with a wireless headphone system to ensure that he could hear the proceedings, but upon testing the system, court staff and defense counsel discovered that the headphones picked up quiet conversations at both counsel tables. The trial judge stated that having observed and interacted with Mire, he did not believe Mire would be qualified to serve if his hearing impairment went uncorrected. Finding that the court was incapable of correcting the impairment without jeopardizing the privacy of off-the-record conversations, the trial judge proposed discharging Mire. The State proposed trying to correct the issue

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> the same clothes on yesterday when he appeared for this panel and he's got the same clothes on today. And I didn't understand a lot of what he said. I believe he lost his train of thought every time he answered a question of any length more than one time. I believe he did make – he actually made some good points, but it was – those good points were I don't know how to say it, but they were lost in between a lot of other ramblings that didn't make sense. And I'm not sure about his explanation of oppression and new world order and those types of things. Those – I believe that his feelings and his mental processes substantially impair his ability to follow the law as instructed by the court and to follow his oath. I just don't think he would understand the judicial instruction at the end of the case or even at the beginning of the case and I'm going to grant the State's challenge for cause.

with the assistance of a professional, but the court countered that this was "not any highfalutin kind of operation" as the headphones had been purchased at Best Buy, and the court reporter advised that the court's built-in wired headphone system would present the same issue. The State further noted that Mire did not appear to have a problem hearing counsel but only hearing the trial judge when he was not speaking directly into the microphone.

Both the State and defense objected to Mire's removal, and the trial court removed Mire over both objections. Specifically, the defense cited La. C.Cr.P. art. 401.1,[70] which requires courts to provide interpreters for venire members with hearing loss, but the court noted that there was no indication that Mire understood sign language. The defense moved for a mistrial in response to the court's finding that it was unable to accommodate Mire, and the court denied the motion, finding La. C.Cr.P. art. 401.1 inapplicable to the situation because Mire required hearing

[70] La. C.Cr.P. art. 401.1 provides:

> A. When a person with a hearing loss is among the petit jury venire, the court shall:
> (1) Provide an interpreter for the deaf prospective juror. The interpreter shall be sworn in as an officer of the court.
> (2) Permit the interpreter to be present and assist a deaf prospective juror during voir dire.
> B. When a deaf or hard of hearing person is summoned for jury duty, the court shall:
> (1) Provide an interpreter for the deaf juror. The interpreter shall be sworn in as an officer of the court.
> (2) Instruct the interpreter, in the presence of the jury, to:
> (a) Make true, literal, and complete translations of all testimony and other relevant colloquy to the deaf juror during the deliberations of the jury.
> (b) Refrain from participating in any manner in the deliberations of the jury.
> (c) Refrain from having any communications, oral or visual, with any member of the jury regarding the deliberations of the jury except for literal translations of jurors' remarks made during deliberations.
> (3) Permit the interpreter to be present and assist a deaf juror during the deliberations of the jury.
> (4) Give a special instruction to the interpreter not to disclose any portion of the deliberations with any person following a verdict.
> (5) Direct all costs relating to the interpreting services provided, including summoning, voir dire process, and empaneling of a juror in all trials, to be paid by the clerk of court's office through the juror and witness fee account.
> C. The verdict of the jury shall be valid notwithstanding the presence of the interpreter during deliberations.
> D. All costs relating to the interpreting services provided in this Article shall be paid by the clerk of court's office through the juror and witness fee account.

assistance as opposed to an interpreter, and the court could not securely provide hearing assistance. The defense also re-urged its motion for a change of venue, now on the basis of the court's inability to accommodate hearing-impaired jurors, and the court denied the motion without comment.

La. C.Cr.P. art. 401(A)(4) provides that "no person shall be deemed incompetent solely because of the loss of hearing in any degree." However, under La. C.Cr.P. art. 401(B)(1), a person may be challenged for cause in the event of a "loss of hearing or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party." *See also* La. C.Cr.P. art. 787 ("The court may disqualify a prospective petit juror from service in a particular case when for any reason doubt exists as to the competency of the prospective juror to serve in the case."). The trial court was presented with a difficult situation in this instance, and it is evident from the record that it expended a considerable amount of time and effort attempting to correct the issue. The record also reflects that the decision to discharge Mire was not made lightly but with careful consideration of potential prejudice to the substantial rights of both parties, specifically, the attorney-client privilege and the right to conduct off-the-record discussions out of the hearing of the jury. Accordingly, we find the trial court acted within its discretion in discharging Mire on this basis, and defendant does not show reversible error in this regard.

Assignment of Error No. 23

Defendant avers the trial court erred in granting the State's challenges for cause against six jurors with sincerely held religious beliefs in opposition to the death penalty.[71] He argues that a juror's vote for a life sentence constitutes an

[71] Defendant identifies these jurors as Rebecca Billiot, Phyllis Weems, Anthony Bourgeois, Martha Robinson, Douglas Bourg, and Susan Arceneaux. Prior to trial, defendant filed a motion to

exercise of religion such that the trial court violated the First Amendment and the Louisiana Religious Freedom Act, R.S. 13:5230 *et seq*., in granting these challenges. He also contends that a juror does not violate his oath by being unable or unwilling to vote for the death penalty.

La. C.Cr.P. art. 798(2) allows for disqualification of a juror based on conscientious scruples against the infliction of capital punishment. *See* Note 63, *supra*. La. C.Cr.P. art. 798 was drafted to conform to *Witherspoon*, and this Court has rejected challenges to its constitutionality as it relates to excluding jurors during death qualification voir dire. *See State v. Odenbaugh*, 10-0268, p. 48 (La. 12/6/11), 82 So.3d 215, 248–49. Moreover, this Court has previously determined that La. C.Cr.P. art. 798 does not violate prohibitions against religious discrimination.[72] As a result, this assignment of error is without merit.

Assignment of Error No. 24

In this assignment of error, defendant avers he was denied a jury comprised of a fair cross section of his community in violation of his constitutional and statutory rights.

Defendant filed a Motion to Quash the Venire on September 12, 2016, the day jury selection began. In said motion, defendant argued that according to the 2015 Census Bureau estimate, Lafourche Parish was 13.9% African-American, and the venire assembled in this case was 9.6% African-American, resulting in an absolute disparity of 4.3% and a comparative disparity of 31%. The State responded to this

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preserve religious freedom in jury selection and the trial court denied the motion. Defendant also contemporaneously objected to each of these cause challenges on the basis of religious exclusion.

[72] *See State v. Turner*, 16-1841, p. 90 (La. 12/5/18), 263 So.3d 337, 396; *State v. Sanders*, 93-0001, p. 20 (La. 11/30/94), 648 So.2d 1272, 1288 ("[T]he 'single attitude' of opposition to the death penalty 'does not represent the kind of religious characteristic that underlies those groups that have been recognized as being distinctive.'") (internal ellipsis omitted) (quoting *State v. Lowenfield*, 495 So.2d 1245, 1254 (La. 1985)); *see also State v. Robertson*, 97-0177, pp. 19–21 (La. 3/4/98), 712 So.2d 8, 25–26 ("It is not the prospective juror's religion per se which justifies the challenge for cause but his views on the death penalty, regardless of their source or impetus.").

motion on September 19, 2016, arguing that African-Americans were not underrepresented in the venire and that the jury selection process used in Lafourche Parish does not result in the underrepresentation of African-Americans. In support, the State argued that the Lafourche Parish Clerk of Court's Office draws the names of potential jurors from a database using voter registration rolls and DMV records, from which it regularly culls former residents who have either moved or passed away. The State further asserted that it was unclear how the defense determined that the venire was 9.6% African-American, as neither the juror information sheets nor the roll of potential jurors disseminated to counsel contained any designation of race. The State also pointed out that the defense's figures were based on juror response as opposed to juror draw. The State argued that the percentage of African-American jurors drawn was nearly identical to the percentage of African-Americans residing in Lafourche Parish provided by the defense.[73]

At the hearing on the motion on September 22, 2016, the defense argued that the question was not simply whether the draw was appropriate, but whether the disparity was caused by the manner in which notices were sent to prospective jurors. It also argued that because a significant number of jurors were excused before they were due to appear in court, the actual number of African-Americans who responded to their notices was unclear. The defense maintained that the figures provided in its motion demonstrated a disparity and argued that the venire should be quashed because additional time was needed to determine the cause of the disparity.

The trial court denied the motion, finding that the defense failed to make a prima facie showing of systematic exclusion. The court stated that the percentage set forth by the defense was "almost a guess" because it did not represent the entire

[73] Specifically, the State submitted that according to the company employed by the clerk of court to assist in jury selection, Grid Information Technologies, LLC, 180 of the then-1,298 total subpoenas, or 13.867%, had been sent to African-Americans.

jury pool drawn and that, based on its own observations, it was not convinced that an underrepresentation of African-Americans existed in the venire present in court. The court also stated that, while a significant number of people either did not respond to their notices, requested to be excused, or were determined to be deceased, no showing had been made that these circumstances resulted in an underrepresentation of African-Americans in the venire.

Defendant now argues that the trial court erred in denying the motion, claiming that it did not address the percentages provided in its motion or the systematic failings of the Lafourche Parish jury summons process and instead improperly relied on its own observations of African-American juror turnout. Specifically, he asserts that the court failed to consider "the effect Lafourche Parish summoning dead and out-of-parish jurors had on the comparative disparity of black jurors on the venire."

The selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial. *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Under La. C.Cr.P. art. 419(A), "A general venire, grand jury venire, or petit jury venire shall not be set aside for any reason unless fraud has been practiced, some great wrong committed that would work irreparable injury to the defendant, or unless persons were systematically excluded from the venires solely upon the basis of race." The burden of proof "rests on defendant to establish purposeful discrimination in the selection of grand and petit jury venires." *State v. Lee*, 559 So.2d 1310, 1313 (La. 1990); *State v. Loyd*, 489 So.2d 898, 903 (La. 1986); *State v. Liner*, 397 So.2d 506, 516 (La. 1981); *State v. Manning*, 380 So.2d 54, 57 (La. 1980); *State v. Sheppard*, 350 So.2d 615, 651 (La. 1977). As noted above, *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979), provides the following:

In order to establish a prima facie violation of the fair-cross-section

> requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Courts typically evaluate the degree of underrepresentation using the "absolute disparity" measure (the difference in the percentage of the group in the jury pool and the percentage of the group in the jury-eligible population), the "comparative disparity" measure (the ratio of the absolute disparity to the distinctive group's representation in the jury-eligible population), or a standard deviation analysis, but have not established a specific qualifying degree of underrepresentation. *Berghuis v. Smith*, 559 U.S. 314, 329, 130 S.Ct. 1382, 1393, 176 L.Ed.2d 249 (2010). Additionally, defendants must demonstrate the mechanism by which the jury selection process works to systematically exclude the distinct group and cannot "make out a prima facie case merely by pointing to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation." *Id.*, 559 U.S. at 332, 130 S.Ct. at 1395.

We find defendant does not establish entitlement to relief on this basis. Nothing in the record suggests that African-Americans were in fact underrepresented in the venire in this case or that Lafourche Parish systematically excludes this group in its jury selection process. Defendant does not dispute that Lafourche Parish jury pools are selected randomly from a combination of voter registration rolls and DMV records, and he does not demonstrate, or even speculate, how this method of venire selection would systematically exclude African-Americans. While he cites the summoning of deceased and non-resident jurors as a potential cause of the alleged disparity, he provides no explanation as to how this would contribute to the underrepresentation of African-Americans in particular. Additionally, as defendant only provides questionable data regarding his own venire, it is impossible to

determine the proportion of African-Americans represented in Lafourche Parish venires generally. As such, defendant fails to show "systematic exclusion" of a distinct group and is therefore not entitled to relief. *State v. Turner*, 16-1841 (La. 12/5/18), 263 So.3d 337, 394, *reh'g denied* (1/30/19); *see, e.g., Moore v. Cain*, No. CV 14-0297-JJB-EWD, 2017 WL 4276934, at *8 (M.D. La. Sept. 7, 2017), *report and recommendation adopted,* No. CV 14-297-JJB-EWD, 2017 WL 4275903 (M.D. La. Sept. 26, 2017) (unpub'd) ("The mere fact that one particular jury venire may exhibit disproportionality does not in any sense amount to proof that the State's system of constituting its central jury pool is unconstitutional or leads to the systematic exclusion of any particular group from the jury-selection process.").

Miscellaneous Assignments of Error

Assignment of Error No. 25

Defendant asserts the trial court erred in declining to disqualify assistant district attorney Heather Hendrix. Prior to trial, defendant filed a motion to recuse assistant district attorney Hendrix, alleging that she was previously employed by a law firm retained to seek post-conviction relief on behalf of defendant's brother, Jason Brown. At the hearing on this motion, the defense submitted an affidavit from defendant's mother stating that some time before the instant offenses, she, her husband, and defendant all met with several staff members from the firm, including Hendrix, for about 45 minutes to an hour and discussed matters related to Jason's conviction, including "family relationships." The State stipulated to the affidavit, and the defense stipulated that Hendrix would testify that she had no independent recollection of the meeting, what was discussed, or who was present, but that according to a notepad she used at the time, the meeting took place on July 23,

2012.[74] Finding no legal basis upon which to disqualify Hendrix, the trial court denied the motion.

Defendant argues that his trial counsel had planned to call both his mother and Jason as penalty phase witnesses and that Jason's testimony would have been "necessary and expected as evidence in mitigation of sentence" because they were exposed to the same adverse factors as children. Defendant contends that the information Hendrix learned about his family through her representation of Jason gave the State an unfair advantage in penalty phase investigation and preparation.

Defendant relies generally on La. C.Cr.P. art. 680, which provides mandatory grounds for recusal of a district attorney.[75] The defendant has the burden of proving grounds for recusal by a preponderance of the evidence. *State v. Bourque*, 622 So.2d 198, 216–17 (La. 1993). While the burden of proof remains the same for disqualification of an assistant district attorney, "the grounds for disqualification are not necessarily restricted to the statutory grounds to recuse a district attorney as set forth in La. C.Cr.P. art. 680." *Id.*, 622 So.2d at 217.

Here, defendant does not argue or show that any of the grounds set forth in La. C.Cr.P. art. 680 were present, nor does it appear that disqualification was otherwise warranted. Accordingly, this assignment of error is without merit. We also note defendant does not dispute that Hendrix did not recall what was discussed

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[74]In its memorandum in opposition to the motion, the State alleged that the sole claim set forth in Jason's application for post-conviction relief was ineffective assistance of trial counsel and argued that discussing such a claim would not necessitate the disclosure of confidential family matters.

[75] Per La. C.Cr.P. art. 680:

> A district attorney shall be recused when he:
> (1) Has a personal interest in the cause or grand jury proceeding which is in conflict with fair and impartial administration of justice;
> (2) Is related to the party accused or to the party injured, or to the spouse of the accused or party injured, or to a party who is a focus of a grand jury investigation, to such an extent that it may appreciably influence him in the performance of the duties of his office; or
> (3) Has been employed or consulted in the case as attorney for the defendant before his election or appointment as district attorney.

during the meeting and, beyond the vague assertion that "family relationships" were discussed, he does not articulate any specific topics discussed or information disclosed. The trial court therefore properly denied the motion.

Assignment of Error No. 26

In this assignment of error, defendant argues that the indictment filed against him was constitutionally defective in that it failed to demonstrate on its face that the grand jury considered, found, or concurred on any aggravating circumstances.[76] Specifically, he asserts that the indictment does not specify which underlying felonies, if any, were found under R.S. 14:30(A)(1)[77] and, further, that because all three counts contain multiple aggravating circumstances phrased in the alternative ("and/or"), it is unclear whether the requisite number of jurors concurred on any individual aggravating circumstance.

As an initial matter, La. C.Cr.P. art. 465 authorizes the use of specific short form indictments in charging certain offenses, including first degree murder. The constitutionality of the short form indictment has been consistently upheld by this Court. *State v. Draughn*, 05-1825, p. 61 (La. 1/17/07), 950 So.2d 583, 624; *State v. Baylis*, 388 So.2d 713, 718–19 (La. 1980); *State v. Liner*, 373 So.2d 121, 122 (La. 1979); *see also Schad v. Arizona*, 501 U.S. 624, 631–37, 111 S.Ct. 2491, 2496–2500, 115 L.Ed.2d 555 (1991) (indictments are not required to specify which overt act was the means by which a crime was committed). When those forms are used, a defendant may procure details as to the statutory method by which he committed the offense through a bill of particulars. *Baylis*, 388 So.2d at 719; *State v. Johnson*, 365 So.2d 1267, 1270–71 (La. 1978); La. C.Cr.P. art. 465 Official Revision Comment (a).

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[76] The defense filed a motion to quash the indictment on this basis, which the trial court denied.

[77] Notably, the State filed an answer to defendant's bill of particulars, as well as an amended answer, providing the underlying felonies alleged under R.S. 14:30(A)(1).

In this instance, the bill of indictment lists the following charges:

> COUNT 1 – committed first degree murder of Jacqueline Nieves, in violation of R.S. 14:30(A)(1) and/or (A)(3)
> COUNT 2 – committed first degree murder of Gabriela Nieves, in violation of R.S. 14:30(A)(1) and/or (A)(3) and/or (A)(5)
> COUNT 3 – committed first degree murder of Izabela Nieves, in violation of R.S. 14:30(A)(1) and/or (A)(3) and/or (A)(5)[.]

Even omitting the aggravated factors provided, defendant was properly charged in compliance with La. C.Cr.P. art. 465(31), which provides "A.B. committed first degree murder of C.D." as a short form indictment for first degree murder. Accordingly, we find this claim to be without merit.

Assignment of Error No. 30

In his final assignment of error, defendant argues that cumulative error deprived him of due process, a fair trial, and a reliable sentencing determination in violation of his rights under the United States and Louisiana Constitutions. This Court has held "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 526, 544–45 (La. 1988), quoting *State v. Graham*, 422 So.2d 123, 137 (La. 1982), *appeal dismissed*, 461 U.S. 950, 103 S.Ct. 2419, 77 L.Ed.2d 1309 (1983). Although the Court has often reviewed cumulative error arguments, it has never endorsed them. Instead, the Court has consistently found that harmless errors, however numerous, do not aggregate to reach the level of reversible error. *See, e.g.*, *State v. Strickland*, 93-0001, pp. 51–52 (La. 11/1/96), 683 So.2d 218, 239; *State v. Taylor*, 93-2201 (La. 2/28/96), 669 So.2d 364 (unpub'd app'x.); *State v. Tart*, 94-0025, p. 55 (La. 2/9/96), 672 So.2d 116, 164; *State v. Copeland*, 530 So.2d 526, 544–45 (La. 1988) (citing *State v. Graham*, 422 So.2d 123, 137 (La. 1982); *State v. Sheppard*, 350 So.2d 615, 651 (La. 1977)). Other courts treating the issue have reached the same conclusion. *See, e.g.*, *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) (court rejects cumulative error claim and finds

that "twenty times zero equals zero"); *Foster v. State*, 639 So.2d 1263, 1303 (Miss. 1994) (finding no "near errors" and so rejecting cumulative error analysis). We find no merit to this assignment of error.

CONCLUSION

For the reasons set forth herein, defendant's convictions for first degree murder are affirmed. Defendant's sentences of death are vacated and set aside, and the case is remanded to the trial court for further proceedings.

CONVICTIONS AFFIRMED; DEATH SENTENCES REVERSED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

09/30/21

SUPREME COURT OF LOUISIANA

No. 2018-KA-01999

STATE OF LOUISIANA

VS.

DAVID H. BROWN

On Appeal from the 17th Judicial District Court, Parish of Lafourche

Hughes, J., additionally concurs with reasons.

While I do not agree with all rulings made by the trial court, error if any I would find harmless.

09/30/21

SUPREME COURT OF LOUISIANA

No. 2018-KA-01999

STATE OF LOUISIANA

versus

DAVID H. BROWN

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT, PARISH OF LAFOURCHE

Crichton, J., additionally concurs and assigns reasons:

For nearly three years, the underlying attorney-client conflict concerning the scope of defendant's penalty phase mitigation evidence was brewing and yet remained unresolved until the seventh week of trial. The dispute was never about the client's desire to self-represent; in fact, defendant was unequivocal that he did not know how to represent himself and would prefer not to do so. A classic Hobson's choice was established – an illusion of choice of either (1) the defense team solely determining what witnesses and subject matter would be presented; or (2) self-representation despite the defendant's professed lack of ability or preference to do so. As a result of that incomplete and thus inaccurate set of choices – and by default – this capital defendant announced his intention to present no penalty phase opening statement, no cross-examination of the State's witnesses, no objections to whatever evidence the State wished to present, no mitigation evidence, and no closing argument. In my view, this capital defendant was effectively abandoned minutes before the penalty phase of the trial commenced.

Recognizing both the complexity and sensitivity of this legal issue, it would

have been well suited for pre-trial resolution in a closed hearing; however, no such request was ever made, and a ruling from the court was never requested. Had this issue been addressed beforehand, the parties and the court would have had the benefit of a studied consideration of the legal issues and pretrial appellate review. Such a process could have prevented the serious constitutional violation in this case. Instead, on the seventh week of trial, with a sequestered jury of citizens waiting outside the courtroom, the conflict was for the first time disclosed to the judge and prosecutor with no motion, no memoranda of law and without the solutions set forth by jurisprudence.[1] Noting that he only had "minutes notice" and admitting that he was "kinda muddy on the law and how to proceed" the trial judge told the district attorney to stand down ("you (the district attorney) can be here and observe, but that's it"). Although the judge requested overnight memoranda, the issue was wrongly framed from the outset, and any alleged waiver of counsel the next day was thus vitiated by the erroneous framing of the legal issue and incorrect legal instruction to the defendant.[2] In fact, on the morning of the *Faretta* hearing, the

[1] In my opinion, the conduct of defendant's trial counsel (of the Capital Defense Project of Southeast Louisiana) leading up to and during the *Faretta* hearing falls short of a capital trial lawyer's obligation "to continue to represent the client" after a defendant seeks to proceed without counsel. LAC 22:XV.Chapter 9 § 911(G)(1). This obligation includes "investigating the competency of the client; the capacity of the client to knowingly, voluntarily and intelligently waive the right to the assistance of counsel; [ ] the capacity of the client to engage in self-representation;" the obligation, where appropriate, to "oppose the defendant's motion;" and the obligation, where appropriate, to "seek review of a trial court decision granting a capital defendant's motion for self-representation." *Id*. This failure is notably in stark contrast with the representation by defendant's appellate counsel (of the Capital Appeals Project) who have effectively cited in the present appeal to this Court numerous cases addressing the defendant's right to direct counsel to limit the presentation of mitigation evidence in the penalty phase of trial.

[2] Because defense counsel improperly framed the issue, the trial court did not expressly rule on defendant's constitutional right to direct his counsel. Once the trial court granted defendant's request to proceed *pro se*, however, counsel should have requested a stay and applied for emergency writs, whereupon the appellate court and/or this Court could have addressed this issue and prevented nullification of the subsequent proceedings because of disagreement with the trial court's ruling. Hon. Albert Tate, Jr., *Supervisory Powers of the Louisiana Courts of Appeal*, 38 TUL. L. REV. 429, 435 (1963-1964) (noting supervisory relief is justified where "harsh results, irreparable injury or arbitrary trial action cannot be avoided by ordinary appellate remedies" and "the trial court ordinarily should, upon request, stay further proceedings or execution of an order or judgment when necessary to preserve the factual status quo and to afford the complaining party

defense team submitted a motion to withdraw, possibly on a mistaken belief that the court had requested such a motion. With no representation by counsel and true to his word, defendant took no action during the penalty phase.

Given the Hobson's choice, from that point forward, this capital defendant was unrepresented by his previously appointed certified defense team,[3] but it is difficult to conclude that he was voluntarily self-represented ("I don't think I can question a witness…I just don't have – emotionally, I don't know how to question somebody – you know what I'm saying – in a situation like this"). The defendant presented nothing, and the jury unanimously recommended the death penalty.

To be licensed to practice law in the State of Louisiana, every lawyer must take an oath in which he or she swears or affirms to support the Constitution of the United States, the Constitution of the State of Louisiana and to maintain the respect due to courts of justice and judicial officers. All attorneys who practice law in this jurisdiction must comply with our Rules of Professional Conduct, and the Louisiana Public Defender Board Capital Defense Guidelines specifically mandate that certified counsel in capital cases "comply with the Louisiana Rules of Professional Conduct."[4]

As the majority opinion finds, the Sixth Amendment of the United States

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a reasonable opportunity to secure supervisory review.").

[3] The extensive certification procedures and requirements appear in Louisiana Public Defender Board Capital Defense Guidelines, LAC 22:XV.Chapter 9. Requirements for certification as lead capital counsel include, but are not limited to, five years of experience in criminal practice and participation as lead counsel in a number of complete felony criminal trials. The Board may consider participation in capital cases, and the case's result or verdict, when determining whether to certify an attorney.

[4] *See* Louisiana Public Defender Board Capital Defense Guidelines, LAC 22:XV.Chapter 9 § 915(I)(1)(b); *see also* LAC 22:XV.Chapter 9 § 903(C)(1) ("All elements of the Capital Representation Plan should be structured to ensure that counsel defending death penalty cases are able to do so…under conditions that enable them to provide zealous advocacy in accordance with the Louisiana Rules of Professional Conduct."). When applying for certification, counsel must attest that they will comply with the guidelines as well as the other continuing obligations for certified counsel. LAC 22:XV.Chapter 9 § 915(C)(3)(g).

Constitution and Louisiana Constitution Article I §13 compel this Court to set aside the death sentence and remand the case for a new penalty phase hearing. In addition to noting my bewilderment as to these troubling circumstances, I write separately to hypothesize what issues might arise if an unscrupulous and unprofessional attorney were to view this opinion as a blueprint for sowing reversible error in the penalty phase of a capital trial.

Specifically, if hypothetical counsel makes a strategic decision to wait several years until a sequestered jury trial is well underway to bring to a trial court's attention a fundamental rift with the client, might Rule 1.3 Diligence ("A lawyer shall act with reasonable diligence and promptness in representing a client"), Rule 1.4(a)(2) Communication ("A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished"), Rule 3.5(d) Impartiality and Decorum of the Tribunal ("A lawyer shall not engage in conduct intended to disrupt a tribunal"), and Rule 8.4(d) Misconduct ("It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice") be implicated?

Assuming future capital counsel claims to not know of the holding in this case, other Louisiana jurisprudence, or persuasive and applicable jurisprudence on the issue from other States, might Rule 1.1(a) ("Competence [involves], the legal knowledge, skill, thoroughness and preparation") be implicated? Of particular concern, would Rule 3.3(a)(2) ("A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse…") be implicated? That duty would surely include knowledge of the holding of this case, the holdings of *State v Felde*, 422 So.2d 370 (La. 1982), and *State v Bordelon*, 07-0525 (La. 10/16/09), 33 So.3d 842, as well as the persuasive

cases from other states cited in the majority opinion.

If counsel finds himself deadlocked with a client over scope of representation issues concerning the penalty phase, should counsel consider Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued") or Rule 1.16(b)(1),(4); (c) and (d) (Declining or Terminating Representation)?

If, in the future, the capital defense team mistakenly informs a client of only two options – accept counsel's absolute control over the penalty phase presentation or forego the assistance of counsel entirely – a judge can correct counsel's misunderstanding of the law and prevent reversible error. Moreover, judges should certainly consider the wisdom, or lack thereof, of ordering the prosecutor, a party to the case, to remain a mute observer, as the judge did here.

Ultimately, though, a judge is in the best position to make a proper ruling when both the prosecutor and defense properly identify and brief an issue to the court. As I have previously recognized, a prosecutor's responsibility is as "a minister of justice and not simply that of an advocate." *State ex rel. Morgan v. State*, 15-100 (La. 10/19/16), 217 So. 3d 266, 277-78 (Crichton, J., additionally concurring) (internal quotations omitted). Remaining inert is not a choice. Even though blindsided, might the prosecutor request a definitive ruling from the court, contemporaneously object, request a stay and file an emergency writ for the appellate court to consider, all in an effort to safeguard rights of the victims' family, the constitutional rights of the defendant and, generally, to protect the record?

As for defense counsel, in *State v Wigley*, 624 So.2d 425 (La. 1993), then

Louisiana Supreme Court Associate Justice Dennis wrote: "Representing a defendant who faces execution is the most awesome responsibility an attorney will undertake in his professional career." That is undoubtedly true. However, in discharging that most awesome responsibility, appointed capital defense counsel must comply with his or her oath as a lawyer, the Rules of Professional Conduct, and – if hired and certified by the Louisiana Public Defender Board (a state agency within the Office of the Governor) – the Louisiana Public Defender Board Capital Defense Guidelines. Notably, those guidelines include the Board's mission to "protect the public by continually improving the services guaranteed by the constitutional right to counsel." The honor and privilege to practice law requires it and our system of justice demands no less.

SUPREME COURT OF LOUISIANA

No. 2018-KA-01999

STATE OF LOUISIANA

VS.

DAVID H. BROWN

On Appeal from the 17th Judicial District Court, Parish of Lafourche

McCallum, J., additionally concurs with reasons.

I join in the opinion of the majority and also the concurring comments of Justice Crichton. I write separately to offer various points that may be worthy of further consideration.

A unanimous jury found the defendant guilty of first degree murder. This Court has affirmed his guilty verdict. The jury also unanimously determined that the death penalty was appropriate for this defendant, due, no doubt, to the particularly odious and heinous nature of the crimes. However, because of a fatal defect in the conduct of the penalty phase of the trial, and the associated constitutional implications, this Court has no choice but to set aside the death penalty and remand for a new penalty hearing. Thus, the hard work and time expended by the jury has been wasted. Worse yet, the family and friends of the victims are now subjected to uncertainty as to whether appropriate punishment will be meted out to one who appears so deserving of the maximum sanction that can be provided under the criminal law of the state. They also will undoubtedly have further anxiety attendant to the prospect of enduring another trial on the penalty phase in this case. Such is the nature of the constitutional right involved in this case that if this Court does not act now the family and friends will only be subjected to excessive, further delay before some future court would take the action we now take. Such delay would

compound the effects of the procedural deficiencies herein and deny the victims' families the justice which is due them. It is best to discharge our unpleasant duty now and send the matter back to the trial court while the evidence is still fresh. This will allow the defendant to be subjected to a penalty verdict, whatever that may be, that will withstand all future constitutional attacks.

Certain comments of the defendant's appellate counsel, during oral argument, have attracted my attention. First, Ms. Kappel stated that defendant's death penalty certified trial counsel provided incorrect legal advice to him when advising him concerning his options as to his right to an attorney at the penalty phase of the proceedings. Ms. Kappel further hinted that she thought there had been a violation of the Rules of Professional Conduct in that regard. The inferences that might logically be drawn from these comments, considering the advanced and specialized training required of attorneys who are certified to handle capital cases, are troubling. An examination of various recent capital murder cases reveals a potential, disturbing pattern. It may very well be that some in our profession, who oppose the imposition of the death penalty in any circumstance, are resorting to any means to derail capital prosecutions. This "the ends justifies the means" approach is not ethically permissible. Deliberate procedural sabotage is not a legitimate trial strategy.

I need not impute any ill motives to trial counsel in this case to make the point that if such conduct were to occur, it would be subject to disciplinary sanctions. Those who oppose capital punishment have many legitimate methods at their disposal to wage their fight in the political arena. However, it must be made clear that unprofessional conduct in the trial of a case, especially a capital offense, is neither appropriate nor acceptable. This issue deserves this Court's closest scrutiny in the future.

SUPREME COURT OF LOUISIANA

No. 2018-KA-01999

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KNOLL, J., dissenting in part[*]

With all due respect, I dissent in part from the majority opinion finding fundamental error by the District Court, which allowed defendant David H. Brown to represent himself on the issue of mitigation evidence during the penalty phase. In all other respects, I agree with the majority opinion.

In my view, I find the majority opinion is flawed for several reasons. To begin with, in reversing the penalty phase it finds **structural** error. I disagree. Indeed, I do not concede there was any error, but in arguendo, the alleged error would be harmless error under the circumstances of this case because the record clearly supports defendant **intelligently** and **voluntarily** waived the benefit of counsel. Defendant clearly did not want to present any mitigating evidence. As the record shows:

> David Brown: That's correct, Your Honor. Right now, I'd like to waive counsel and represent myself from here on out in the penalty phase.

Transcript of closed hearing conducted on October 31, 2016, p. 3.

> The Court: When did you come up – when did you come to this decision?
>
> David Brown: **I came to this decision years ago.** I've discussed this with Mr. Doskey. And I told him if we got to this phase, my feelings on it. I don't know if Mr. Doskey had thought, maybe, by then I would change my mind or he would be able to talk me out of it somehow. I'm not going to allow my mother to get on the stand and be portrayed as a whore, as a slut, as a rape victim from her father, from her brothers. I will not do it.

[*] Retired Justice Jeannette Theriot Knoll, appointed as Justice ad hoc, sitting for Weimer, C.J., recused in case number 2018-KA-1999 only.

What I will do is ask to represent myself. I will offer no mitigation, because the Defense has – I don't have an obligation to put up any evidence, any mitigating evidence. Defense is going to hear the State's case and then the Defense is going to rest. **That is my plan,** Your Honor. I understand the law. I understand what I'm obligated to do and my rights.

Id., p. 4 (emphasis added).

David Brown: Right. Well, if this makes this any better, Your Honor, how about if I just agree to accept death? You okay with that, Mr. Morvant?

Id., pp. 5–6.

David Brown: Okay. I believe, **with the strategy** that I'm taking, I understand the law, and I'm just – I'm offering no defense.

Id., p. 7 (emphasis added).

David Brown: Well, Your Honor, this is my understanding of it. My understanding, through the *Witherspoon* process that we – you know, many weeks – is that I'm not obligated to put up a defense in mitigation. That I have to show no evidence. That the jurors have to consider both sides regardless if I produce any evidence.

Transcript of the closed *Faretta* hearing conducted on November 1, 2016, p. 10.

The Court: Okay. But the thing about self-representation is you can't have it halfway.

David Brown: Well, **this is my plan**, Your Honor. **My plan** is being the law states that I have not – I don't have to put any defense up, I'm going to rest all through the process.

Id., p. 11 (emphasis added).

The Court: And [the jurors] have told us that they would [consider all mitigating evidence.] But if it's not shown to them, it makes it a little difficult to find it. That's your risk if you choose it.

David Brown: Yes, sir. I just feel this is the decision I have to make to protect my mother, and whatever consequences I have to suffer I'm willing to take that.

The Court: Are you refusing to allow the Capital Defense team to represent you?

David Brown: I think the disagreement we have, yes, I would ask them to stand down.

Id., p. 13.

The Court: It's not a question of whether – at least part of my decision is not whether I think you have the legal capabilities to do this, whether you have

the legal understanding, but whether you're doing this with a clear mind – whether you understand.

David Brown: Well, I understand the consequences I'm facing. I don't know if you understand the reasons that I'm doing it for. That's – and I know I'm not capable of asking the questions that need to be asked like Mr. Doskey would be doing, and I recognize that.

Id., p. 14.

The Court: I think it's a foolish decision.

David Brown: I agree with you, in a sense. I agree with you. But it's my decision, and I believe protecting my mother and her past instead of dragging her through this for something she might not be able to shake off after this is the greater of the two evils. That's my personal opinion about it.

Id., pp. 14–15.

Defendant's disagreement with his defense team is a non sequitur. Defendant intelligently and voluntarily wanted to discharge his defense team and represent himself. He did not want to present any evidence in mitigation. The record shows the District Court clearly told defendant he could call witnesses:

The Court: Well, so let me get – I don't necessarily have to know **your strategy**, although, it is good to know. That's part of – that's going to be part of what I base my decision on, that you have a **strategy**. But if you're allowed – if I allow you to represent yourself, you can't change your mind and say, "Well, I want Mr. Doskey to call some of the witnesses and not all of the witnesses."

. . .

The Court: Because if he's representing you, he's calling them.

. . .

The Court: But what I'm telling you is you can still call other witnesses if you wish to.

Transcript of the closed *Faretta* hearing conducted on November 1, 2016, p. 11 (emphasis added).

The Court: It's your time to call, you can call whatever witnesses you want, because they're under subpoena and they're here.

Id., p. 13.

David Brown: Well, I understand the consequences I'm facing. . . .

> The Court: But you can still ask questions.
>
> Mr. Brown: Sure. Sure. I can still ask questions. But that's why I've made the decision to just rest and protect my mother. . . .

Id., p. 14.

> The Court: Mr. Doskey.
>
> Mr. Doskey: Yes, Your Honor.
>
> The Court: The witnesses that you have, are they all available that you've lined up?
>
> . . .
>
> The Court: The reason I asked him for that recitation, Mr. Brown, is I want you to understand what's available for you through their actions. . . . And you have the option, whether they represent you or not, to call all of those witnesses. . . .

Id., pp. 15–16.

Although the majority opinion states "the trial court erroneously advised defendant he could not direct his counsel to limit the mitigation evidence presented during the penalty phase," it was counsel who explained to defendant that "the only way to prevent [counsel from calling defendant's mother and uncle to testify during the penalty phase] is if [defendant] decides that he wants to discharge us." Transcript of closed hearing conducted on October 31, 2016, p. 3. I see nowhere in the record where the District Court erroneously advised the defendant, and therefore I find no District Court error that would justify reversing the jury's determinations in the penalty phase and resulting sentence.

Notably the disagreement between defendant and his defense team did not occur during the **defense** of defendant, but in **mitigation** of his violent conduct after he was found guilty by the jury. The mitigation phase is in the nature of a plea for mercy or for the jury's sympathetic understanding for defendant's violent conduct. *See generally California v. Brown*, 479 U.S. 538, 541, 107 S.Ct. 837, 839, 93 L.Ed.2d 934 (1987) ("Consideration of such [compassionate factors] is a 'constitutionally indispensable part of the process of inflicting the penalty of death.'") (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)). Defendant was not deprived of conducting

his own mitigation strategy. He vehemently chose to present no mitigation evidence in an abundance of caution to protect his mother.

The majority's reliance on *McCoy v. Louisiana*, 584 U.S. ___, 138 S.Ct. 1500, 1508–09, 200 L.Ed.2d 821 (2018) to reverse the penalty phase is misplaced. As the opinion correctly states "When later interpreting this decision, the Court opined that it is "broadly written and focuses on a defendant's autonomy to choose the objective of his **defense**." *State v. Horn*, 16-0559, p. 10 (La.9/7/18), 251 So.3d 1069, 1075." *McCoy* stands for the principal of "defendant's autonomy to choose the objective of his **defense**." The mitigation phase is not in **defense** of defendant, but rather a plea for sympathetic understanding. The *McCoy* case concerns the **defense** of the defendant during the **guilt** phase, not the penalty phase.

Furthermore, even if the holding of *McCoy* was extended to the penalty phase of a capital trial, the record establishes that, defendant's fundamental strategy of the representation was to protect his mother. The record shows the defendant would rather die than expose his mother and Uncle Calvin to relive their painful sexual past experiences in a public trial of record. Notably, defendant felt so strong in his position on this issue he expressed it three times:

> David Brown: Right. Well, if this makes this any better, Your Honor, how about if I just agree to accept death? You okay with that, Mr. Morvant?

Transcript of closed hearing conducted on October 31, 2016, pp. 5–6.

> David Brown: Because there's some – there's stuff that's in the past that I believe should stay in the past. And it took my mother many, many years to get over this. And to be drug back out, put in the newspaper – like I told you, I'm willing to accept death before I let my mother get on the stand. So if y'all agree, I agree –

Transcript of the closed *Faretta* hearing conducted on November 1, 2016, p. 9.

> David Brown: Yes, sir. I just feel this is the decision I have to make to protect my mother, and whatever consequences I have to suffer I'm willing to take that.

Id., p. 13.

Further, the disagreement between defendant and his defense team at the penalty phase concerns strategy – how best to arouse the sympathy of the jury in understanding his violent sexual conduct he inflicted upon three victims. In my view, this issue is purely one of strategy and does not concern a violation of a fundamental right which would cause reversible error. Even if *McCoy* applies, while by its own language it certainly does not, *McCoy* delineated between matters of strategy and fundamental objectives of the representation:

> . . . Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *Gonzalez v. United States,* 553 U.S. 242, 248, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008) (internal quotation marks and citations omitted). Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. See *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).
>
> Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to **achieve** a client's objectives; they are choices about what the client's objectives in fact **are**. See *Weaver v. Massachusetts,* 582 U.S. ——, ——, 137 S.Ct. 1899, 1908, 198 L.Ed.2d 420 (2017) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 165, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.").

McCoy, 584 U.S. at ___, 138 S.Ct. at 1507–1508 (emphasis in original). Furthermore, this Court has previously described counsel's "attempt to persuade the jury to spare defendant's life" by using "the testimony of defendant's father" as part of the case in mitigation during the penalty phase of a capital trial as a matter of "strategy." *State v. Taylor*, 01-1638, p. 27 (La. 1/14/03), 838 So.2d 729, 751. *McCoy* offers no reason to alter that longstanding view or reach a different conclusion here.

In arguendo, if this strategy decision is considered structural error, it would be harmless error. Before the alleged structural error is worthy of reversible error, defendant must show prejudice to the extent of a reasonable possibility of a different outcome. The United States Supreme Court has determined that structural errors fall within "at least three broad rationales." *Weaver v. Massachusetts*, 582 U.S. ___, ___, 137 S.Ct. 1899, 1908, 198 L.Ed.2d 420 (2017). The Court further observed that the categories of structural error are not mutually exclusive before emphasizing that not all structural errors result in fundamental unfairness or an unreliable verdict. *Id.* Thus, the Court proceeded to find that, when counsel failed to object to the violation of a right to a public trial (a structural error), a defendant claiming that failure amounted to ineffective assistance may still be required to show prejudice resulted from the error under the second prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Weaver*, 582 U.S. at ___, 137 S.Ct. at 1911. Even accepting that the error here was structural, I do not believe the result is fundamentally unfair or unreliable. Defendant does not argue the alleged error would produce a different outcome and indeed the record evidence shows no support for a different outcome.

Further error by the majority concerns disregarding the jury rendered a specific verdict that defendant committed the offenses in an especially heinous, atrocious, or cruel manner. And indeed he did, as the record shows. Defendant did not know his victims. No motive was established other than his pure violent sexual lust. Eighteen (18) month old Izabela suffered multiple stab wounds to her chest and abdomen. Seven (7) year old Gabriela suffered multiple stab wounds, including a stab wound penetrating her skull and brain. The record would allow the jury to determine that she was raped vaginally, anally, and orally, and died a slow death from smoke inhalation while suffering pain from her wounds. Their mother Jacquelin also suffered multiple stab wounds about her body to include her vagina and anal area. The stab wound to her collarbone was fatal. The record would allow the jury to determine that she too was raped vaginally, anally and orally.

Before defendant left, he poured gasoline around the room and started a fire, leaving his victims to die and burn.

This particular verdict by the jury of heinous and atrocious criminal conduct was well supported by the record. A sequestered jury of twelve made this determination after listening to a week of trial testimonies and evidence. This particular jury verdict undermines any case in mitigation seeking compassion or mercy for defendant's violent criminal conduct. By setting aside the penalty phase, the majority opinion gives no deference to the jury verdict. In my view, the majority opinion errs in setting aside this jury verdict without requiring defendant to show a prejudicial error resulting in a reasonable probability of a different outcome. *Cf. United States v. Castro-Alfonso*, 841 F.3d 292, 298 (5th Cir. 2016) ("In the instant case, the district judge did not 'beat around the bush' or equivocate in delivering the court's decision at the sentencing hearing. . . . We take the district court at its clear and plain word.").

It is so well established the Sixth Amendment right to have assistance of counsel can be waived, that it is not necessary to recite case law. Noticeably the majority opinion does not find defendant did not have the intelligence and capability to understand he was waiving benefit of counsel, and the consequences of his waiver of counsel, and the record would not support such a finding. Rather, the majority opinion finds the District Court's failure to inform defendant he could limit his counsel's mitigation evidence deprived defendant from intelligently waiving counsel. I disagree. The record clearly shows the defendant was intelligent and clearly understood the legal proceedings going on. Moreover, the District Court clearly explained to defendant that he could call any witness he wanted to. Still, the defendant insisted he did not want to put on any mitigation evidence. The present case is similar to *State v. Bordelon*, 07-0525 (La. 10/16/09), 33 So.3d 842. In *Bordelon*, defendant instructed his attorney to present no case in mitigation at the penalty phase after he was found guilty of the first degree murder of his twelve-year-old stepdaughter. The majority quotes from *Bordelon* so I will not reproduce that excerpt here.

However, I note this court in *Bordelon*, in the context of determining that defendant's decision to not present evidence during the penalty phase did not interject an arbitrary factor into the proceedings, stated:

> In the present case, as Felde, there is clear and convincing evidence in the record of the sanity commission proceedings involving Drs. Arcetona and LeBourgeois that defendant had the capacity to make a knowing and intelligent waiver of his right to present mitigating evidence and that he did so explicitly during his colloquy with the trial judge at the outset of the sentencing phase.

Bordelon, 07-0525, p. 36, 33 So.3d at 865. I believe defendant here made a similarly knowing and intelligent waiver, and indeed made essentially the same decision to forego the presentation of evidence during the penalty phase as was made in *Bordelon*. Rather than supporting the majority's decision to reverse the sentence, I believe *Bordelon* would support a decision to affirm.

I also emphasize that *McCoy v. Louisiana*, *supra*, was not yet decided at the time of the *Faretta* hearing, and therefore cannot support a determination that the trial judge erred in how he conducted that hearing. The United States Supreme Court has not declared that *McCoy* applies retroactively and neither has this Court. To the extent the majority applied *McCoy* retroactively, it clearly erred.

In conclusion, I fear the majority is setting a dangerous precedent for an overly liberal interpretation that conflates trial strategy with structural error and disregards the extensive evidence in the record that defendant knowingly and voluntarily waived counsel—despite the absence of any error by the District Court in how it followed the dictates of Faretta. In this instance, the reversal of the sentence and remand for a second penalty phase will needlessly cause the victims' family to again relive the horrific murders of Izabela, Gabriela, and Jacquelin. In my view, this is a travesty because defendant intelligently, voluntarily, and vigorously waived his right to counsel and to the presentation of any case in mitigation.