No. 16-8255

IN THE

Supreme Court of the United States

ROBERT MCCOY,
Petitioner,
v.

LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

JOINT APPENDIX
VOLUME I OF II (JA1-JA431)

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IN THE
SUPREME COURT OF LOUISIANA

No. 2014-KA-1449

STATE OF LOUISIANA,

Plaintiff,

v.

ROBERT LEROY MCCOY

Defendant.

Filed October 19, 2016
[218 So. 3d 535]

ON APPEAL FROM THE TWENTY–SIXTH
JUDICIAL DISTRICT COURT FOR THE PARISH OF BOSSIER

OPINION

HUGHES, J.

This is a direct appeal under LSA–Const. Art. V, § 5(D)1[1] by the defendant, Robert LeRoy McCoy. The defendant was indicted by a Caddo Parish grand jury, on May 29, 2008, on three counts of first degree murder, for the murders of Willie Ray Young, Christine Colston Young, and Gregory Lee Colston, in violation of LSA–R.S. 14:30. After a trial, the jury found the defendant guilty as charged on all three counts. At the conclusion

[1] Article V, Section 5(D) provides, in pertinent part: "[A] case shall be appealable to the supreme court if ... the defendant has been convicted of a capital offense and a penalty of death actually has been imposed."

of the penalty phase of the trial, the jury unanimously returned a verdict of death on all three counts, finding the aggravating circumstance that the defendant knowingly created a risk of death or great bodily harm to more than one person. The trial court sentenced the defendant to death, in accordance with the jury's determination. The defendant now appeals his convictions and sentences, raising sixteen assignments of error. After a thorough review of the law and the evidence, we find no merit in any of the assignments of error. Therefore, we affirm the defendant's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

Christine Colston Young and her husband, Willie Ray Young, were shot and killed at their home at 19 Grace Lane in Bossier City, Louisiana, on May 5, 2008; Christine's grandson, Gregory Lee Colston, was also shot and later died. Gregory had recently come to live with his grandparents so that he could finish his senior year at a local high school, after his mother, Yolanda Colston, had separated from the defendant earlier in the Spring of 2008 and following an incident of domestic abuse battery in April 2008.[2] On advice of law enforcement, Yolanda and her infant daughter had gone into protective custody out-of-state, and a warrant was issued, on April 16, 2008, for the defendant's arrest for aggravated battery, by Detective Kevin Humphrey. In April and May, the defendant had evaded arrest under the warrant by failing to show up for work at his place

[2] At the penalty phase, Yolanda Colston testified that, during the incident of domestic abuse, the defendant pinned her down on the bed at knifepoint and threatened to kill her and then kill himself.

of employment. The defendant had also traveled to Oakland, California, where his half-brother resided, but his cell phone records indicated that he returned to Bossier City on or about May 4, 2008, as calls were initiated from the defendant's cell phone in Bossier and Caddo Parishes on the day of, and the day after, the murders.

On the night of May 5, 2008 a 911 call was placed from 19 Grace Lane, in which Christine Colston Young could be heard screaming, "She ain't here, Robert ... I don't know where she is. The detectives have her. Talk to the detectives. She ain't in there, Robert." A gunshot was then heard on the 911 tape and the call was disconnected.

The Bossier City Police Department ("BCPD") broadcast that a disengaged 911 call came from 19 Grace Lane, which was heard by Detective Humphrey, who immediately recognized the address as the residence of Yolanda Colston's parents. However, Detective Humphrey was working a security detail at a local store, and so he notified the first responders, via police radio, that he had an arrest warrant for Robert McCoy, whose estranged wife's mother resided at 19 Grace Lane. Detective Humphrey cautioned the first responders to be on the lookout for a white four-door Kia, which he believed was driven by Robert McCoy.

Officer Kary Szyska responded that he was in the vicinity, approaching 19 Grace Lane, and that he saw a white Kia fleeing from the scene, which was recorded on the officer's dashboard video camera. Officer Szyska made a U-turn and gave chase. On a dead-end street within a few blocks of the victims' home, the video showed a black male matching the defendant's general

physical description jump out of the driver's side of the Kia, scale a nearby fence, and run across I–20.

Meanwhile, Detective Humphrey called the victims' home and, receiving no answer, he drove there, arriving with other officers to find the front door ajar. Upon entering, the officers discovered fifty-five-year-old Christine Colston Young and fifty-year-old Willie Young, who was a cousin of the defendant, dead at the scene. Seventeen-year-old Gregory Colston was found gravely injured, but alive, and he was transported to the hospital, where he died a short time later. All three victims suffered a single gunshot wound to the head, fired from close range.

Since the abandoned Kia had a temporary license plate, the police ran the VIN (vehicle identification number) and found that it was registered to Robert and Yolanda McCoy. The police impounded the vehicle and searched the interior. There was a white cordless (landline) telephone on the driver's seat, and the charger/cradle for the cordless handset was found inside the victims' residence. The serial and model numbers on the handset found in the defendant's Kia matched that on charger/cradle found in the victims' home, confirming that the phone used by Christine Colston Young to call 911 was the phone found in the defendant's abandoned vehicle immediately after the murders.

Also found in the center console of the abandoned Kia was a Walmart bag with a box of .380 caliber ammunition. Inside the Walmart bag was a cash receipt from earlier that same day (at 16:55, or 4:55 p.m., on May 5, 2008), for the purchase of the ammunition. The police obtained video surveillance footage from Walmart, generated at the time of the purchase on the receipt, which showed an individual matching the de-

fendant's physical description purchasing ammunition while wearing a black "do-rag" on this head.[3]

A manhunt began for the defendant involving the BCPD, the U.S. Marshall's Office, and the FBI. The police began with the defendant's cell phone records.[4] They noticed he had been repeatedly calling a number in Oakland, California. Detective Humphrey testified that the last ping on the cell phone being used by the defendant occurred in Fort Smith, Arkansas, and then the phone went dead. At that point, the police subpoenaed the phone records for the Oakland number the defendant had been calling, and as soon as the defendant's phone was no longer being used, an Arkansas cell phone began calling the Oakland number. The police called the Arkansas cell phone number and a truck driver answered.[5] The police asked the truck driver if a

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[3] A witness, Sharon Moore, testified that she had a relationship with the defendant in 2008, and that, on May 5, 2008, he asked her to buy some bullets for him because he was working on the railroad in some bad neighborhoods. The defendant also tried to borrow money from Ms. Moore to buy the bullets, but she did not give him any money. Ms. Moore testified that she accompanied the defendant to buy the bullets at the Walmart in Minden.

[4] When the defendant abandoned the white Kia, he left a black bag with a Mason insignia on the front, in the back seat, which contained his personal cell phone. The police ascertained that, after the murders and after abandoning his cell phone in the Kia, the defendant began using his sister's cell phone. The defendant took his sister's cell phone on his four-day flight from justice, which law enforcement traced to ultimately track down the defendant. The black Mason bag and its contents, including the defendant's abandoned cell phone, were not admitted at trial for lack of evidentiary value and that property was retained by the BCPD.

[5] On first obtaining the name and address of the Arkansas cell phone's owner (an elderly lady living in Arkansas), law enforce-

black male named Robert was riding in the eighteen-wheeler with him. The driver replied, "[H]e was, but he's not now," relating that Robert had gotten into another eighteen-wheeler, which had been directly behind him at a weigh station in Spokane, Washington. The Arkansas truck driver told the police that he had picked Robert up in East Texas,[6] and Robert had borrowed his cell phone to make some calls after the battery went dead on his phone. The Arkansas truck driver disclosed that he and the second truck driver, with whom the defendant thereafter hitched a ride, had been issued tickets at the Spokane weigh station. The police contacted the weigh station and learned that the truck the defendant was traveling in was a Swift Transportation eighteen-wheeler. The police contacted Swift Transportation and learned that the eighteen-wheeler in which the defendant was traveling was bound for Oakland, California. Through GPS tracking, they located the Swift truck in Lewiston, Idaho, where it was making a warehouse pick-up.

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ment contacted her to ascertain that she was safe, and she informed law enforcement that the cell phone was used by her husband, who was a truck driver.

[6] The police learned that after the murders, the defendant's brother, Spartacus McCoy, had given him a ride to Lindale, Texas. Spartacus was initially charged as an accessory to first degree murder. He gave a statement to police, but by the time of trial, Spartacus was deceased. The State did not oppose the defense motion in limine to exclude that statement and it was not introduced at trial. According to the PSI prepared by the Probation and Parole Division following the verdicts in this case, the police also charged another brother of the defendant, Carlos McCoy, as an accessory after the fact. Carlos McCoy pled not guilty, and the case was continued without date on June 1, 2009.

The BCPD communicated to the Lewiston Police Department ("LPD") that a murder suspect was a passenger in a Swift eighteen-wheeler in their jurisdiction and gave the location. On May 9, 2008 the LPD stopped the eighteen-wheeler in Lewiston, Idaho, and they arrested the defendant.[7] The defendant and the truck driver were the only occupants of the eighteen-wheeler, and the driver was not suspected of, or charged with, any crimes. The police searched the eighteen-wheeler, and found a loaded, silver handgun on the floorboard behind the passenger seat where the defendant had been seated. The weapon was not in a holster or bag, and the safety was not on.[8] The truck driver denied having a gun or any knowledge of a gun being in his truck. The LPD also seized from the defendant a cell phone and his wallet, which contained a pay stub, a birth certificate, a social security card, identification cards, insurance cards, and credit cards, all in the name of Robert McCoy, though the defendant had given the name of "Vance McCoy."

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[7] A video dashboard camera, mounted in one of the LPD patrol cars showed the defendant being removed from the eighteen-wheeler, placed under arrest, and put in a patrol car. At that time, the defendant was wearing a black "do-rag."

[8] The gun seized from the eighteen-wheeler in which the defendant was traveling was a .380 caliber Tanfoglio pistol, model Tital II, serial number EB06206. That gun was admitted into evidence at trial, as State Exhibit Number 74 ("S–74"). A firearms examiner tested the weapon and the evidence, and conclusively determined that the bullet that killed Willie Young, which was removed from his brain during autopsy, was fired from S–74, and all four cartridge casings found at the scene at 19 Grace Lane were conclusively determined to have been fired from S–74. A forensic pathologist testified that Christine Colston Young and Gregory Colston suffered exit wounds, meaning the bullets that killed them passed through their skulls and exited.

On May 12, 2008, while awaiting extradition to Louisiana, the defendant unsuccessfully tried to hang himself with a bed sheet. The defendant was returned to Louisiana on May 14, 2008.

On May 15, 2008 the defendant appeared, by video, at a 72–hour hearing, and the court appointed the Indigent Defender Board to represent him. On May 29, 2008 a Bossier Parish grand jury indicted the defendant for the May 5, 2008 first degree murders of Christine Colston Young, Willie Ray Young, and Gregory Lee Colston, alleging in each instance a violation of LSA–R.S. 14:30(A)(3) (murder when "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person"). On June 17, 2008 the defendant entered a plea of not guilty to the charges at the formal arraignment.

On July 1, 2008 the State gave its notice of intent to seek the death penalty against the defendant. Thereafter, the defense moved for the appointment of a sanity commission to evaluate the defendant's mental capacity to understand the proceedings against him and to assist in his defense. The trial court ordered Dr. Richard Williams, a psychiatrist, and Dr. Mark Vigen, a clinical psychologist, to examine the defendant, which they did and by agreement submitted their findings by report to the court. At a hearing held on November 14, 2008 the trial court noted that both experts found the defendant competent to stand trial.[9]

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[9] As discussed hereinafter, the defendant was not found to suffer from mental retardation or intellectual disability, as defined by LSA–C.Cr.P. art. 905.5.1 ("[N]o person with an intellectual disability shall be subjected to a sentence of death ...."). The sanity commission experts evaluated the defendant's full scale IQ at 89, his verbal IQ at 95, and his performance IQ at 83.

Thereafter, both the State and the defense filed motions for discovery and inspection, and the defendant filed a variety of pro se motions into the record, including subpoena requests for a number of witnesses.[10] The State filed motions to quash the defendant's pro se subpoena requests, asserting that the testimony of the individuals, sought by the defendant to be subpoenaed, had no evidentiary value or relevance to contribute to the case and that the defendant's actions were "meant to harass and unduly delay this matter."

On December 6, 2009 the defendant wrote to the trial court advising that a conflict of interest had arisen between him and the public defender's office, and he sought to represent himself until additional counsel could be retained and enrolled.[11] On January 12, 2010

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[10] The group of individuals the defendant sought to have subpoenaed included, among others: a Caddo Parish juvenile court judge, an FBI agent, and Senator David Vitter. The defendant also sought to subpoena a newspaper columnist, Loresha Wilson, who wrote several articles in the local newspaper about the defendant and the triple homicide. The trial court subsequently quashed the defendant's pro se subpoenas issued to Senator Vitter and to the local newspaper columnist because they were not filed in proper form.

[11] In his pro se filing, the defendant stated that he was representing himself, after a breakdown in his relationship with the public defender's office on April 16, 2009, when attorney Craig Forsythe and "private investigator Shanks" came to the jail to meet with him. The defendant asserted that Mr. Forsythe "cursed [him] like a dog!" During a subsequent April 24, 2009 meeting with Mr. Forsythe and Mr. Shanks, the defendant indicated that he tried to discuss information with them about his alibi defense, his whereabouts, and the subpoenas he wanted issued, which information he stated that he had already given to his public defender, Pam Smart, and Mr. Shanks stated to the defendant that they had not received any information about subpoenaing those witnesses. The defendant said he then stated to Mr. Forsythe and

the trial court held a hearing, initially slated to address the motion to quash subpoenas, but after the defendant announced to the court that he had a conflict of interest with the public defender's office and that his family would be hiring an attorney, the trial judge recessed the hearing until the counsel issue could be resolved.

On February 11, 2010 after the trial judge gave the defendant a full recitation of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the defendant waived those rights and asserted his right to represent himself under *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). After interrogating the defendant, the trial judge ascertained that the defendant merely sought to represent himself "until my [retained] counsel enrolls next month." The defendant assured the judge that even if counsel did not enroll, he would still be prepared to go to trial on the previously set date of May 24, 2010.

On March 1, 2010 Larry English filed a motion to enroll as counsel for the defendant, and Mr. English appeared in open court two days later to formally enroll. Mr. English admitted to the court that he was not certified to try death penalty cases but that he had made calls to board certified lawyers in order to assemble a legal team to try the case. The trial judge informed the defendant that his new attorney was not certified in death penalty cases, and the defendant acknowledged that he understood that and still wished to go forward

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Mr. Shanks, "I told them that's the exact reason why I don't trust them!" Whereupon, the defendant stated that Mr. Forsythe began to curse him, and he (the defendant) "dismissed [himself] from the meeting." The defendant stated that he reported the incident to "Chief Defender Phillips" and "informed him of the incident and dismissal of counsel."

with Mr. English as his attorney. Then Mr. English filed a motion to continue the trial, which the judge denied because the defendant had filed a pro se motion for speedy trial on January 13, 2010 and the case had already been set for trial at least once before. Thereafter, the trial judge relieved the public defender's office from its representation of the defendant.

On April 16, 2010 Mr. English took a writ to the Second Circuit on the trial court's denial of his motion to continue. While that writ application was pending, the trial court held an additional hearing, on April 23, 2010, on the defendant's motion to continue, at which time Mr. English reported that he was "having trouble ... putting together a legal team to represent Mr. McCoy because nobody wants to step into a capital murder case that they've got to go to trial on within such a short period .... I'm still not up to speed or nearly ready to undertake the representation of Mr. McCoy." After the defendant and counsel assured the trial judge that they were withdrawing the defendant's speedy trial motion, the judge reset the trial date to February 7, 2011, which he deemed "a hard ... date." The trial judge also warned counsel: "Mr. English, I want you to understand that if I grant this continuance you will not be allowed to withdraw." Subsequently, the Second Circuit noted that the trial court had granted the defendant's motion to continue, and the writ was withdrawn. *See State v. McCoy*, 45,623 (La. App. 2 Cir. 5/20/10).

On March 12, 2010 the State filed its notice of intent to use evidence of other acts and/or crimes at trial, pursuant to LSA–C.Cr.P. art. 720 and LSA–C.E. art. 404(B). Specifically, the State's notice covered "[a]ll evidence from the criminal investigation of the incident that occurred on or about the 2nd day of April, 2008

concerning Yolanda Colston." The defense responded by filing a motion in limine to exclude "any prior bad acts" of the defendant from trial. The parties argued the motions before the court on November 16, 2010, with the State urging that the issue of the defendant's aggravated battery against Yolanda Colston constituted res gestae because "that's what caused [the defendant] to come into contact with these victims on that particular night." The trial judge agreed and granted the State's motion to admit other crimes evidence. The defense counsel noticed his intent to seek writs, which were subsequently denied by the appellate court "on the showing made." *See State v. McCoy*, 46,266 (La. App. 2 Cir. 1/6/11) (unpublished).

On December 14, 2010 Mr. English filed a motion requesting the trial court to declare the defendant indigent, for purposes of obtaining funds through the Louisiana Public Defender Board, so that the defense could hire a mitigation expert and investigator, a social worker, and a mental health expert, which was heard by the trial court on January 4, 2011. Mr. English disclosed to the court that mitigation experts were necessary should there be a guilty verdict in the case, but the defendant disagreed with that defense strategy. Mr. English further informed the court that the defendant had directed him not to proceed with the motion to declare him indigent, but Mr. English stated that to follow the defendant's directive would not be in the defendant's best interest, opining that his client was suffering from "severe mental and emotional issues that ha[ve] an impact upon this case." Mr. English asked the trial court to "order that Mr. McCoy submit to the experts that are required in a capital murder case."

In addition, numerous motions filed by the defendant, pro se, were addressed during the January 4, 2011

hearing, concerning which Mr. English stated: "I do not adopt those motions. I've asked [the defendant] not to file those motions .... I do not believe it's in his best interest to do so .... [T]here may be some statements or documents in there that I believe ... may be detrimental to his case given the overwhelming ... evidence that is against him." Mr. English also indicated that he was satisfied with the discovery response by the State, which he said had "provided us with all of the evidence in this case." The district attorney confirmed that the State had given "open file" discovery to the defense. At the conclusion of the hearing, the defendant acquiesced in withdrawing his various pro se motions.

Thereafter, the State realized that declaring the defendant indigent triggered Rules of the Supreme Court of Louisiana, Rule XXXI ("In any capital case in which a defendant is found to be indigent, the court shall appoint no less than two attorneys to represent the defendant ....") and that since Mr. English's enrollment there had been only one attorney representing the defendant.[12] Accordingly, on January 24, 2011, the State filed a "Motion to Determine Waiver of Co–Counsel," requesting a contradictory hearing "to determine defendant's waiver of co-counsel at defendant's capital murder trial." On that same day, the trial court held a hearing on the motion, during which the district attorney stated that he filed the motion to "get Mr. English and/or Mr. McCoy's position." Mr. English advised the court that although another attorney, James Gray, had been advising him about the case, neither

[12] Mr. English clarified to the court that, despite having filed a motion in the matter, attorney Carlos Prudhomme had "not been involved in the case" and would "not be helping ... handle the trial."

Mr. Gray nor any other attorney would be participating in the trial of the case, and he was comfortable trying the case single-handedly.[13] The trial judge questioned the defendant about the issue, and the defendant informed the court that, even though Mr. English was not capital certified, he waived the Rule XXXI two-attorney representation standard because he did not want to have the public defender's office reappointed to his case. Also during the January 24, 2011 hearing, Mr. English orally requested a continuance of the February 7, 2011 trial date to further develop mitigation evidence. The trial court denied the defense motion to continue the trial date, and the defense thereafter filed an application for review with the appellate court.

Initially, the appellate court denied the writ application because the defense "failed to provide this Court with any documentation that the motion to continue was ever filed or ruled upon by the trial court." *State v. McCoy*, 46,387 (La. App. 2 Cir. 2/1/11) (unpublished). However, on the following day, the appellate court issued a stay of the proceedings and, thereafter, issued a ruling granting the writ, lifting the stay, and remanding the case with instructions. *State v. McCoy*, 46,387 La. App. 2 Cir. 2/2/11) (unpublished); *State v. McCoy*, 46,394 (La. App. 2 Cir. 2/3/11) (unpublished). In its ruling, the appellate court expressed concern that the defendant was proceeding to trial with only one defense attorney, who was not certified as qualified to defend capital cases. *Id.*, 46,394 at p. 2. The appellate court granted the writ and remanded the case back to the

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[13] Mr. English admitted to the trial court that, while he anticipated trying the case alone, he had relied on both Pam Smart and James Gray of the Public Defender's Office for assistance in preparing for trial.

trial court to grant the defendant a continuance of the trial date,[14] directing the trial court to also "ensure that Mr. McCoy is, or has been, fully apprised on the record of the benefits of having two capital-defense qualified attorneys and that McCoy has knowingly and intelligently waived same." *Id.*, 46,394 at p. 3.

In response to the appellate court's February 3, 2011 ruling, the State immediately filed a "Motion to Appoint Additional Counsel," and, on the same day, the trial court held a hearing on the motion to address the concerns voiced by the appellate court. In addition to the district attorney and defense counsel of record, a representative from the local public defender's office, Randall Fish, was present at the February 3, 2011 trial court hearing, during which the court and the parties discussed whether the defendant could continue to be represented by retained counsel and also be entitled to the appointment of two capital-qualified attorneys through the public defender's office. The defendant unequivocally declined assistance from the public defender's office, stating: "I don't want the Court to put counsel on me ... that I don't want." The trial judge and the district attorney questioned the defendant as to his waiver of counsel under Rule XXXI, and the defendant

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[14] In support of his argument that a continuance of the trial date was needed, defense counsel submitted to the appellate court documentation from the mitigation experts, containing "an explanation from the experts of the time required to conduct a meaningful study suitable for use as evidence in a criminal trial," which the appellate court recognized had not been submitted to the trial court. *Id.*, 46,394 at p. 2. The appellate court noted that, at the time of the January 24, 2011 hearing, "[d]espite a trial date approximately one month away and despite a nearly year-old promise [by Mr. English] to 'assemble a team,' evidently no work had been done in this capital case to develop this evidence." *Id.*

affirmed that he voluntarily waived the public defender's office being appointed as co-counsel in his case. The defendant stated that he was "totally opposed to that and most of all ... I choose not to be strong armed to take a public defender's aspect of secondary counsel when that's totally against my wishes." Based on the defendant's repeated assurances that he was knowingly and voluntarily waiving the appointment of additional counsel, the trial judge denied the State's motion for appointment of a second trial counsel, and a trial date of July 28, 2011 was set.

On July 12, 2011 the trial court held a hearing to address the State's motion for discovery, which requested written notice from the defendant of his intention to offer a defense of alibi, and the State's motion to quash various subpoena requests issued by the defendant in proper person. As to the former, Mr. English informed the court that "[w]e have no alibi evidence in this case," notwithstanding the defendant's pro se notice of intent to offer an alibi. As to the defendant's pro se subpoena requests, the State asserted they were not in proper form, and Mr. English replied, "I do not adopt any of the subpoenas that Mr. McCoy has filed. He has done that against my advice." The trial court did not quash the pro se subpoenas on that date, but reserved his decision until a later date.

On July 26, 2011 two days before the trial was slated to begin, the court held a hearing in which Mr. English reported that he learned over the weekend of the defendant's "intention to terminate my services." After the trial judge fully advised the defendant of his rights under *Miranda*, the defendant disclosed that Mr. English would not be his lawyer going forward. The trial judge informed the defendant, "[T]hat's my determination at this point." The defendant claimed that his par-

ents had retained two new attorneys, although those attorneys were not in court at the July 26th hearing. The defendant asserted that Mr. English has been "trying to ... make me cop out to three counts of first degree murder. Didn't want me to go to trial." Mr. English informed the court that he and the defendant had an irrevocable disagreement as to the trial strategy. Relying on *State v. Bridgewater*, the trial judge denied the defendant's motion to substitute counsel as untimely, given that the lawyers the defendant was seeking to enroll were not present in court that day and trial was slated to commence in two days. *See State v. Bridgewater*, 00–1529 (La. 1/15/02), 823 So.2d 877, *on rehearing*, 00–1529 (La. 6/21/02), 823 So.2d 877, 909, *cert. denied*, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003). Accordingly, the trial judge ordered Mr. English to remain counsel of record. Moments after the trial court's ruling that the defendant's request to discharge counsel was untimely, the defendant made a one-sentence invocation of his right to self-represent, which the court disposed of as untimely under *State v. Bridgewater*.

Voir dire commenced on July 28, 2011, and jury selection of twelve jurors and two alternate jurors was completed on August 2, 2011. Trial on the merits commenced on August 3, 2011, and the State gave its opening statement. Thereafter, Mr. English gave an opening statement in which he conceded guilt, stating, "I'm telling you Mr. McCoy committed these crimes," but he asserted that the defendant was suffering "from serious emotional issues" that inhibit his ability "to function in society and to make rational decisions." Accordingly, Mr. English urged the jury to consider this case in terms of a second degree murder trial.

The State presented its case through the testimony of eleven witnesses and 100 exhibits before resting its

case-in-chief. On August 4, 2011 Mr. English announced to the court that, against the advice of counsel and warnings of a possible perjury indictment, the defendant had elected to testify. The trial judge advised the defendant of his rights under *Miranda*, and the defendant acknowledged that he understood those rights and wished to testify. Thereafter, the defendant testified to his alibi defense and sought to refute the State's evidence with his theories of a vast conspiracy that landed him on trial for his life.[15] The district attorney

[15] At trial, the defendant denied committing an aggravated battery upon his estranged wife, Yolanda Colston. He also denied owning a gun and suggested that the Idaho police had planted the murder weapon in the eighteen-wheeler as part of a conspiracy with BCPD Detective Humphrey. The defendant further denied spending the night with Sharon Moore the night before the murders or that he asked her for money to buy bullets, suggesting that the district attorney had "concocted that story." The defendant testified that he went out-of-state on April 21, 2008, after Officers Joshua Bounds and Richard McGee came to his house and beat him in the face with a weapon. The defendant stated that those officers stole his car on April 18, 2008, so he could not have been the person seen running from the white Kia on the police cruiser dashcam video recorded on May 5, 2008. The defendant claimed that he never returned to Bossier City. He explained that he had let his good friend, Robert Evans, a truck driver, use his cell phone, and it was Robert Evans who was calling Sharon Moore around the time of the murders because he had "offered" Sharon Moore to Mr. Evans, although "she didn't think highly of that." The defendant further claimed that Detective Humphrey threatened to kill him because he was going to expose corruption in the police department involving Officers Bounds and McGee, all of whom the defendant described as being "very strongly in drugs." The defendant further testified that the "Robert" that Christine Colston Young was screaming at on the 911 tape was really Robert Thomas, a drug-dealing cop who owned White Automotive off Barksdale. The defendant theorized that Mr. Thomas killed the victims because Willie Young was transporting drugs for them and owed them a debt of $2,500. The defendant claimed that Rob-

cross-examined the defendant, after which the defense rested its case. After deliberations on August 4, 2011, the jury returned a unanimous verdict of guilty as charged on all three counts.

The penalty phase was held on August 5, 2011. The State called five victim impact witnesses: (1) Yolanda Colston (mother of victim Gregory Colston, and daughter/step-daughter of victims Christine Colston Young and Willie Young); (2) Lorenzo Evans (friend of Gregory Colston); (3) Kent Falting (teacher and coach of Gregory Colston); (4) Eric Davis (son of Christine Colston Young); and (5) Pauline Miles (sister of Willie Young). Thereafter, the defense called one mitigation expert, Dr. Mark Vigen.[16] After deliberation, the jury returned a verdict recommending the sentence of death on all three counts, finding that the State proved one of

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ert Evans hitched a ride with the truckers, not him. The defendant stated that he was in Houston on the night of the murders, and the reason that calls were being initiated from his cell phone in Bossier and Caddo Parishes on the day of, and day after, the murders was because Mr. Evans had his cell phone. The defendant denied ever attempting to commit suicide. He claimed that the officers made that up to cover-up the fact that they had beaten him. The defendant testified that he had been unable to subpoena any of his witnesses, relating that he had wanted to call to the stand FBI Agent J.T. Coleman, who investigated alleged drug-dealing activities of Officers Richard McGee and Robert Thomas. He said that he also wanted Senator David Vitter to be subpoenaed for trial because "I know Mr. David Vitter personally and [he] knows everything that goes on with me." The defendant testified that those witnesses would have corroborated all that he was saying.

[16] Dr. Vigen testified that the defendant "is one of those people that can lie to themselves so extensively and for such a long period of time that they ultimately end up believing what the lie is."

the three aggravating circumstances advanced,[17] namely that the offender knowingly created risk of death or great bodily harm to more than one person.

On December 6, 2011 attorneys from the Louisiana Capital Assistance Center appeared before the trial court and filed a motion for new trial and a motion in arrest of judgment on the defendant's behalf. Appellate counsel filed a supplemental motion for new trial on January 17, 2012. The trial court held a hearing on the defendant's post-verdict motions on January 23, 2012, and at the conclusion, denied the motion for new trial. The defendant waived delays, and the trial court formally imposed the sentence of death in accordance with the jury's verdict.

On August 8, 2012 appellate counsel filed a "Second Motion for New Trial." The trial court subsequently ruled that the second motion for new trial was untimely filed. A writ application was denied by the appellate court "on the showing made." *State v. McCoy*, 48,083 (La. App. 2 Cir. 1/17/13) (unpublished). This court also denied review. *State v. McCoy*, 13–0400 (La. 4/5/13), 110 So.3d 1067.

The defendant now appeals his convictions and death sentences on the basis of sixteen assignments of error: (1) the defendant's right to counsel of choice was violated when the trial court denied his request to discharge and substitute trial counsel prior to trial; (2) the

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[17] The State relied on three aggravating circumstances, pursuant to LSA–C.Cr.P. art. 905.4(A)(1) ("The offender was engaged in the perpetration or attempted perpetration of ... aggravated burglary ...."); LSA–C.Cr.P. art. 905.4(A)(4) ("The offender knowingly created a risk of death or great bodily harm to more than one person."); and LSA–C.Cr.P. art. 905.4(A)(7) ("The offense was committed in an especially heinous, atrocious or cruel manner.").

trial court erred in denying the defendant's right to self-representation; (3) the trial court erred in failing to conduct a hearing and grant the defendant's request for substitution of counsel on his showing that trial counsel was incompetent or otherwise unable to furnish adequate representation; (4) the trial court erred in ruling that trial counsel, rather than the defendant, could decide whether to concede guilt of murder; (5) the defendant's right to counsel was denied when he was involuntarily represented by trial counsel who conceded his guilt against his express instructions and entirely failed to adversarially test the State's case; (6) the defendant's right to conflict-free counsel was violated when his trial counsel actively represented interests contrary to the expressed interests and objectives of the defendant; (7) the defendant's rights to compulsory process, to an impartial jury trial, to plead not guilty, to present a defense, to confront witnesses, to require the State to prove guilt beyond a reasonable doubt, and to a fair trial were violated when trial counsel advocated his guilt of second degree murder; (8) the trial court erred in failing to appoint certified indigent counsel; (9) the trial court erred in denying the defendant's motion to suppress the statement of Gayle Houston as untimely; (10) the State exercised peremptory challenges based on the race of prospective jurors in violation of state and federal equal protection clauses and LSA–C.Cr.P. art. 795; (11) the trial court erred in failing to give a "lesser-included offense" instruction; (12) the trial court erred in permitting "untested, unnoticed, unadjudicated act evidence" at the penalty phase, in violation of *State v. Jackson*, 608 So.2d 949 (La. 1992), the Eighth Amendment, and due process; (13) the trial court erred in admitting victim impact evidence from the basketball coach of one of the victims; (14) the trial court committed prejudicial error in refusing to allow the de-

fendant to voluntarily excuse himself from being present at trial; (15) the trial court erred in dismissing the defendant's "Second Motion for New Trial," without reaching any of the merits, pursuant to an incorrect application of LSA–C.Cr.P. art. 853(B); and (16) the trial court erred in failing to hold a renewed competency hearing in violation of LSA–C.Cr.P. art. 643 and procedural due process. The defendant has urged no challenge to the sufficiency of the evidence used to convict him of three counts of first degree murder.

LAW AND ANALYSIS

Right to Counsel of Choice

In his first assignment of error, the defendant contends that the trial court erred in denying his pretrial motion to discharge Mr. English as his trial counsel and to substitute another attorney as defense counsel, as the defendant contends a conflict arose between the defendant and Mr. English concerning the manner of trial defense to be presented.

The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence." An accused's right to counsel is echoed in Louisiana Constitution, Article I, Section 13, which states that "[a]t each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment." *See also* LSA–C.Cr.P. art. 511 ("The accused in every instance has the right to defend himself and to have the assistance of counsel. His counsel shall have free access to him, in private, at reasonable hours.").

The Supreme Court has recognized the efficacy of having the assistance of counsel during the adversarial procedure of a criminal trial. *Wheat v. United States*, 486 U.S. 153, 158–59, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988) ("[T]he Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime.") (citing *Gideon v. Wainwright*, 372 U.S. 335, 343–44, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963)). Although "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant," the Sixth Amendment also encompasses "the right to select and be represented by one's preferred attorney." *Wheat v. United States*, 486 U.S. at 159, 108 S.Ct. at 1697.

The denial of a criminal defendant's right to retained counsel of choice is a violation of the Sixth Amendment and a structural error, requiring reversal. *United States v. Gonzalez–Lopez*, 548 U.S. 140, 148–50, 126 S.Ct. 2557, 2564, 165 L.Ed.2d 409 (2006). When the right to be assisted by counsel of one's choice is wrongly denied, no harmless error analysis inquiring into counsel's effectiveness or prejudice to the defendant is required:

> Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Gonzalez–Lopez, 548 U.S. at 148, 126 S.Ct. at 2563.

The assistance of counsel may be secured in various ways, including: the hiring of an attorney's services by the criminal defendant or by another on behalf of the defendant, the attorney's volunteering of services pro bono, or the court's appointment of private counsel or the public defender if the defendant is indigent.[18] *State v. Reeves*, 06–2419, p. 35 (La. 5/5/09), 11 So.3d 1031, 1055, *cert. denied*, 558 U.S. 1031, 130 S.Ct. 637, 175 L.Ed.2d 490 (2009). However, in order to exercise the right to choose a particular attorney, a defendant must have the means to obtain and afford the services of said counsel, whereas an indigent defendant has a right to "appointed" counsel, but does not have the right to have a particular attorney appointed. *State v. Sims*, 07–2216, p. 1 (La. 11/16/07), 968 So.2d 721, 722 ("A defendant is guaranteed the right to counsel of choice so long as the defendant can obtain and afford the services of said counsel."); *State v. Jones*, 97–2593, pp. 2–3 (La. 3/4/98), 707 So.2d 975, 976; *State v. Rideau*, 278 So.2d 100, 103 (La. 1973) ("An indigent defendant is not entitled to choose a certain lawyer.").[19]

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[18] *See* LSA–C.Cr.P. art. 512 ("When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:141 et seq. ..."); LSA–C.Cr.P. art. 515 ("Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned by the court. The court may assign other counsel in substitution of counsel previously assigned or specially assigned to assist the defendant at the arraignment.").

[19] *See also State v. Sims*, 07–2216, p. 1 (La. 11/16/07), 968 So.2d 721, 722 (per curiam) ("The right to private, non-appointed counsel of choice does not distinguish between a paid attorney and a pro bono lawyer.").

The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. *Wheat v. United States*, 486 U.S. at 159, 108 S.Ct. at 1697; *State v. Reeves*, 06–2419 at pp. 35–36, 11 So.3d at 1055–56. *See also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–26, 109 S.Ct. 2646, 2652–53, 105 L.Ed.2d 528 (1989). Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients, other than himself, in court. *Wheat v. United States*, 486 U.S. at 159, 108 S.Ct. at 1697. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. *Id.* Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the government. *Id.*

The Supreme Court has stated unequivocally that a criminal defendant who has been appointed counsel has no right under the Sixth Amendment to the counsel of his choice:

> The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts. "[A] defendant may not insist on representation by an attorney he cannot afford."

Caplin & Drysdale, 491 U.S. at 624, 109 S.Ct. at 2652 (quoting *Wheat*, 486 U.S. at 159, 108 S.Ct. at 1697). This distinction was again noted by the Supreme Court in *United States v. Gonzalez–Lopez*, 548 U.S. at 151, 126 S.Ct. at 2565, wherein the Court held that "the right to

counsel of choice does not extend to defendants who require counsel to be appointed for them."

A defendant's right to choose his counsel only extends so far as to allow the accused to retain the attorney of his choice if he can manage to do so, but that right is not absolute. *State v. Harper*, 381 So.2d 468, 470–71 (La. 1980); *State v. Leggett*, 363 So.2d 434, 436 (La. 1978); *State v. Mackie*, 352 So.2d 1297, 1300 (La. 1977). *See also Caplin & Drysdale*, 491 U.S. at 626, 109 S.Ct. at 2652 ("Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of ... counsel.' "); *State v. Brown*, 03–0897, p. 11 (La. 4/12/05), 907 So.2d 1, 12, *decision clarified on rehearing*, 03–0897 (La. 6/29/05), 907 So.2d 1, 36, *cert. denied*, 547 U.S. 1022, 126 S.Ct. 1569, 164 L.Ed.2d 305 (2006) ("[A] criminal defendant's right to the counsel of his choice is not absolute.").

Furthermore, this court has consistently held that a defendant's right to counsel of his choice cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice. *State v. Bridgewater*, 00–1529 at p. 20, 823 So.2d at 896; State v. Seiss, 428 So.2d 444, 447 (La. 1983); *State v. Champion*, 412 So.2d 1048, 1050 (La. 1982). *See also State v. Givens*, 99–3518, pp. 9–10 (La. 1/17/01), 776 So.2d 443, 452. The "[d]efendant must exercise his right to counsel of his choice at a reasonable time, in a reasonable manner[,] and at an appropriate stage of the proceedings." *State v. Seiss*, 428 So.2d at 447. A trial court, therefore, does not abuse its broad discretion to conduct proceedings "in an orderly and expeditious manner," as mandated by LSA–C.Cr.P. art. 17, by denying a continuance on the morning of trial

based on the defendant's desire to change counsel. *State v. Anthony*, 347 So.2d 483, 487 (La. 1977) ("The law is well settled that a defendant in a criminal trial cannot, by a last minute change of counsel, force a postponement of his trial.").

The circumstances of *State v. Seiss*, supra, are analogous to the present case. In *State v. Seiss*, an indigent defender was appointed to represent the defendant, and on the day of trial the defense counsel presented a motion to withdraw so that the defendant could substitute another defense counsel. The indigent defender explained to the court why he should be allowed to withdraw from representation of the defendant:

> Yesterday I talked with Mr. Seiss and he emphatically informed me that he had no desire at all for me to represent him. It is my position that the fiduciary relationship of attorney/client is too valuable for me to be forced to represent a client who has no confidence in my abilities, nor is he willing to cooperate with me in any manner for me to represent him. Given that lack of rapport between us ... I don't see how the amount of exposure that he has in this matter that I should be forced to represent him and I do not think that the administration of criminal justice in Rapides Parish would be so unduly burdened by allowing him, now that his indigency status has altered, he is employed and he is financially able to hire an attorney of his own choosing why he could not be allowed to so do and that's basically my position.

State v. Seiss, 428 So.2d at 446. The defendant also informed the court of his reason for seeking to replace

appointed counsel with retained counsel: "Like he said, you know, he was appointed to me as a State lawyer and now ... I [am] employed and I'd like to get a lawyer of my choice." *Id.* Although the defendant claimed to have hired a replacement attorney, that attorney had not enrolled as counsel for the defendant and was not present on the day of trial; the trial court denied the motion to withdraw. *Id.* In ruling that the trial court did not abuse its discretion in denying defense counsel's motion to withdraw, this court stated:

> This court has consistently held that this right cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice. *State v. Champion*, 412 So.2d 1048, 1050 (La. 1982); *State v. Johnson*, 389 So.2d 1302, 1304 (La. 1980); *State v. Jones*, 376 So.2d 125, 129 (La. 1979); *State v. Lee*, 364 So.2d 1024, 1028 (La. 1978); *State v. Anthony*, 347 So.2d 483, 487 (La. 1977). Defendant must exercise his right to counsel of his choice at a reasonable time, in a reasonable manner and at an appropriate stage of the proceedings. *State v. Champion*, supra at 1050; *State v. Johnson*, supra at 1304; *State v. Lee*, supra at 1028; *State v. Leggett*, 363 So.2d 434, 436 (La. 1978); *State v. Cousin*, 307 So.2d 326, 328 (La. 1975). Absent a justifiable basis, "[t]here is no constitutional right to make a new choice of counsel on the very date the trial is to begin, with the attendant necessity of a continuance and its disrupting implications." *State v. Leggett*, supra at 436. Once the trial date has arrived, the question of withdrawal of counsel largely rests with the discretion of the trial court, and his ruling will not be disturbed

> in the absence of a clear showing of abuse of discretion. *State v. Leggett*, supra at 436; *State v. Cousin*, supra at 328; State v. Boudoin, 257 La. 583, 588–89, 243 So.2d 265, 267 (1971).

State v. Seiss, 428 So.2d at 447. Likewise, in both *State v. Lee*, 364 So.2d at 1028, and *State v. Anthony*, 347 So.2d at 487, this court found no error in the trial court's denial of a motion to withdraw, on the defendant's claim that another retained counsel would be substituted, when the attorney to be substituted neither enrolled as counsel nor appeared in court on the day the motion was heard.

During the instant prosecution, the defendant was first represented by appointed counsel, then represented himself for approximately one month (as discussed hereinafter), and thereafter counsel was retained by the defendant's family.

On May 15, 2008 at the defendant's initial appearance before the court, he was referred to the public defender's office, and on June 17, 2008, when he was arraigned, the defendant was represented by the public defender's office. However, the defendant's relationship with his appointed counsel soured when the defendant felt that no investigation was being done on his claims of innocence. In February of 2010 the defendant declared that he would represent himself, but he qualified that he would be doing so only "until my [retained] counsel enrolls next month," but assured the court that whether new counsel enrolled or not he would still be prepared for previously-set trial date of May 24, 2010.

On March 1, 2010 retained counsel Larry English enrolled as defense counsel and informed the court that while the defendant's family "approached me ... about retaining my services ... I'm basically handling this case

pro bono."[20] On January 4, 2011, on motion of Mr. English, the trial court declared the defendant indigent, so that he could apply for state funding to hire mitigation experts. Nevertheless, Mr. English proceeded as either retained or pro bono counsel.

When Mr. English enrolled as defense counsel on March 1, 2010, he assured the trial court that he had begun to assemble a "legal team ... to try this case" since he was not a certified capital counsel, but he sought a continuance of the May 24, 2010 trial date. In denying the motion for continuance, the trial court extensively detailed the delays that had already been encountered in bringing the case to trial, which had been originally set for June 1, 2009, noting the fact that the defendant had previously filed a pro se motion for speedy trial on January 13, 2010. However, an application for writs was filed with the appellate court, and subsequently the trial court agreed to continue the May

[20] On February 3, 2011, Mr. English informed the court that "there's a lot about me not having capital experience—capital certified which I'm not. But I just want to put on the record and remind the reason why I'm sitting here ... not making any money representing Mr. McCoy because Mr. McCoy's family came to me and Mr. McCoy was representing himself." Mr. English stated to the trial court that he believed that it would be better for him to represent the defendant than for the defendant to proceed pro se, but Mr. English reiterated, "I'm not being paid." The defendant then responded on the record: "Mr. English ha[s] been paid by my mom .... We're not totally ... indigent ... on this but they may have not paid him as much as he choose [sic] to pay. But he has not just taken this case without any financial contributions, Your Honor." On the issue of Mr. English's compensation, a typewritten letter, written in July of 2011 to the trial judge by the defendant's parents, appears in the record and states that they "advanced" to Mr. English $5,000 for his representation of the defendant in this capital trial, money which they stated they borrowed against their car title.

2010 trial date to February 7, 2011, on the defendant's agreement to withdraw his motion for speedy trial and on Mr. English's assurance that he would not thereafter withdraw as defense counsel.

At a hearing held before the trial court on July 26, 2011, two days before the commencement of the defendant's capital trial, Mr. English stated to the court that he had learned over the weekend that the defendant wanted to terminate him as defense counsel. The defendant confirmed this statement, telling the trial court that Mr. English would not be continuing as his attorney. The trial court informed the defendant, "[T]hat's my determination at this point." The defendant then stated that Mr. English had been paid a fee, implying that he had the right to terminate Mr. English as his counsel. The defendant expressed frustration as to Mr. English's refusal to adopt his alibi defense and to the fact that Mr. English was "trying to make [him] cop to all three counts of murder," indicating these factors had caused a breakdown in the attorney-client relationship. The defendant also claimed to have two new defense attorneys "on standby" ready to enroll "as soon as Mr. English is taken out of my case," and the defendant assured the trial judge that these two new attorneys were "ready to proceed [to] trial," scheduled to begin two days later, and that there would "be no ... delays." However, when the trial court asked the defendant if these replacement attorneys were present in the courtroom, the defendant replied "no." The defendant was further unable to tell the trial court the names of his new defense attorneys, but argued to the court that he was credible about the fact that new counsel would enroll as he stated.[21] The trial court then denied the de-

[21] On this issue, the defendant stated:

fendant's request to discharge Mr. English and substitute counsel, stating:

> [I]n anticipation of this motion and in looking up the law in this motion, I've looked at *State of Louisiana versus Roy Bridgewater* that is cited at 823 So.2d 877 .... Mr. McCoy, there have been times that you have been represented by the Public Defender's Office. There was a time that you had attempted to represent ... yourself .... [Y]ou have been represented by Mr. English. And the case stands for the right—you do have the right to choose counsel but that counsel cannot be chosen when it is an attempt to obstruct the Court's orderly procedure or to interfere with a fair administration of justice. And it states that ... "In order for the defendant to exercise his right to counsel he must exercise his right to counsel of his choice at a reasonable time, in a reasonable manner, and at an appropriate stage of the proceedings." This matter has been set since February. This matter has been under a scheduling order at least

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I just want to bring back to the Court's remembrance when I dismissed [public defender] Ms. Pam Smart. I didn't have a standby lawyer here then, Your Honor. And when I spoke to you about Mr. English enrolling he enrolled in the same and proper fashion in which, you know, I told you he would enroll, Your Honor. I was creditable of my word. I was creditable of the things that I spoke to you about in that aspect, Your Honor. And I'm still creditable about this aspect. These attorneys have—are very familiar with this case. They have been standing by and vindicating things with the case; they are very familiar with this case, Your Honor. That's why they're not going to need any continuance hiring for this case; they're very familiar with it.

> two different times. The case was continued by the Louisiana Second Circuit Court of Appeal in February and was continued to this term, which I specifically set aside in order to be able to have this hearing. We are two days before the hearing date .... [T]hese two attorneys that you state are going to represent you are not in this courtroom at this time. They have not come before this Court and asked to enroll in this case. Even if they were to enroll there would have to be assurances that they were prepared to go to trial on Thursday. So based on the fact that this is not a timely request and this Court also takes into consideration that even if there are irreconcilable differences between counsel and the person that is accused of a crime that the [*Bridgewater*] Court said that ... "A right to counsel choice must be made in a timely manner. It must be the choice at a reasonable time, and a reasonable manner, and at an appropriate stage of the proceedings." This is not an appropriate stage of the proceedings. There is no counsel that is present today to state that they would enroll. And therefore, I deny Mr. English being relieved at this time and he will remain as counsel of record and this case will go to trial on Thursday.

Having carefully examined the trial court record in this matter, we are unable to say the trial court erred in its finding that the defendant's motion to substitute counsel was untimely and constituted an attempt "to obstruct the Court's orderly procedure or to interfere with a fair administration of justice." Although the defendant asserts that he was unaware of Mr. English's alleged refusal to pursue his claims of innocence as a

defense and therefore unable at an earlier point in the proceedings to bring the alleged irreconcilable differences to the attention of the trial court and to seek a substitution of counsel, the record reflects that differences in the defendant's expectations for his defense and Mr. English's trial strategy were evident to the court and the parties as early as a December 14, 2010 hearing before the court, wherein the defendant and Mr. English discussed their disagreements before the trial court.

During the December 14, 2010 hearing (held on motion of Mr. English to have the defendant declared indigent so that public funds could be made available to hire mitigation experts), the trial court was informed that the defendant did not want to be declared indigent and did not want to hire mitigation experts since he wanted to put on a defense based entirely on his claim of innocence. During the hearing, Mr. English made several statements to the trial court, in the presence of the defendant, that the defendant was suffering from "severe mental and emotional issues," and yet the defendant did not seek to replace Mr. English as his defense counsel at that time.

Subsequently, during a January 4, 2011 hearing (held on issues related to pro se discovery motions filed independently by the defendant), it was revealed that Mr. English did not support the defendant's pro se discovery requests seeking to develop certain evidence and witnesses related to his claims of innocence and the existence of an alibi. At the conclusion of the hearing, the defendant acquiesced in withdrawing his various pro se motions, and he made no objection to Mr. English's continued representation.

Then, at a January 24, 2011 hearing, provoked by the district attorney in light of Louisiana Supreme Court Rule XXXI ("In any capital case in which a defendant is found to be indigent, the court shall appoint no less than two attorneys to represent the defendant ...."') to "get Mr. English and/or Mr. McCoy's position" on the rule since Mr. English was not certified as a capital defense qualified counsel and there was no second defense counsel enrolled on the defendant's behalf, the trial judge questioned the defendant about the issue, and the defendant informed the court that, even though Mr. English was not capital certified, he waived any Rule XXXI entitlement to representation by two attorneys because he did not want to have the public defender's office reappointed to his case. Mr. English also divulged to the court, during that hearing, the difficulties he was having representing the defendant because of his "severe mental issues," stating, "Mr. McCoy is going to attempt to take over this trial and argue in front of the jury." Mr. English further stated, "It's going to be a zoo, Judge, because I'm not going to do what he wants me to do ... I do not believe this man is rational ... I have an ethical duty to this man not to follow his bizarre behavior." In response, the defendant advised the trial court that Mr. English "won't subpoena people that will validate my innocence," expounding at length on that assertion. The defendant further revealed to the trial court his awareness of Mr. English's planned trial strategy when he stated: "Mr. English has told me there is no way he can win this case." Notwithstanding, the defendant did not seek to have Mr. English substituted with other defense counsel.

Further, as noted hereinabove, following an order by the appellate court in *State v. McCoy*, 46,394 (La. App. 2 Cir. 2/3/11) (unpublished), the trial court held a

February 3, 2011 hearing, to revisit the defendant's refusal to allow appointment of a second defense attorney from the public defender's office to satisfy this court's Rule XXXI of "no less than two attorneys" to represent an indigent defendant, the defendant chose to continue to be represented only by Mr. English, stating, "I choose not to be strong armed to take a public defender's aspect of secondary counsel when that's totally against my wishes." It was at this hearing that the trial date of July 28, 2011 was set.

Even though the defendant claims he had no knowledge that Mr. English was going to concede his guilt until July 12, 2011, argument presented by newly-enrolled appellate counsel alluded, during a January 23, 2012 post-trial hearing on a motion for new trial, that the issue had been under discussion for at least a few months before trial, in stating:

> Mr. English formed the view relatively early on that the evidence against Mr. McCoy was overwhelming and that the ... only successful outcome in the case, in Mr. English's view, was to try to persuade the jury to return a life sentence rather than the death sentence and that the best way to do that strategically was to concede Mr. McCoy's guilt of the killings, being the killer of the three victims in this case .... A couple of months before the trial, Mr. English approached Mr. McCoy to put in fairly bold terms that he believed that Mr. McCoy needed to take a plea of guilty to a life sentence if he could get one rather than to proceed to trial.

The record clearly reveals the defendant's awareness of Mr. English's trial strategy, to avoid the death penalty by conceding guilt and seeking a life sentence,

some eight months prior to July 12, 2011.[22] Thus, the trial judge did not abuse his discretion by denying the motion to discharge and replace retained counsel two days before trial. This assignment of error is without merit.

Right to Self–Representation

In his second assignment of error, the defendant contends he was denied his right to self-representation, when, after the trial court denied his motion to substitute another trial counsel for Mr. English during a July 26, 2011 hearing on the matter held two days before trial, the defendant attempted to invoke his right of self-representation.

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel; for this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. *Faretta v. California*, 422 U.S. at 835, 95 S.Ct. at 2541. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he 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." *Id.* Thus,

[22] In a recorded jailhouse telephone conversation between the defendant and his father, on August 4, 2011 (the day the jury returned its unanimous verdicts in the guilt phase of the defendant's capital trial), which was filed into the record in connection with the defendant's "Supplemental Motion for New Trial," the defendant told his father, "I seen straight through English, Daddy, when he first came and met me, Daddy. And that's been over a year and a half ago."

when a defendant asserts this right of self-representation, a trial judge must make two independent decisions: (1) whether defendant's waiver of his right to be represented by counsel is intelligently and voluntarily made, and (2) whether his assertion of his right to represent himself is clear and unequivocal. *State v. Hegwood*, 345 So.2d 1179, 1181–82 (La. 1977). A trial judge confronted with an accused's unequivocal request to represent himself need determine only whether the accused is competent to waive counsel and is "voluntarily exercising his informed free will." *State v. Santos*, 99–1897, p. 3 (La. 9/15/00), 770 So.2d 319, 321 (per curiam).[23]

Whether the defendant has knowingly, intelligently, and unequivocally asserted the right to self-representation must be determined based on the facts and circumstances of each case. *State v. Bridgewater*, 00–1529 at p.18, 823 So.2d at 894 ("[C]ourts should 'indulge in every reasonable presumption against waiver.'") (quoting 3 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 11.3(a) (2nd ed. 1999)).

Furthermore, the right to self-representation is not absolute. *Martinez v. Court of Appeal of California*,

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[23] We note the Supreme Court's pronouncement in *Indiana v. Edwards*, 554 U.S. 164, 177–78, 128 S.Ct. 2379, 2387–88, 171 L.Ed.2d 345 (2008): "[T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky [v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."

528 U.S. 152, 161, 120 S.Ct. 684, 691, 145 L.Ed.2d 597 (2000). Most courts require the defendant to elect to represent himself in a timely manner. *Id.*, 528 U.S. 152, 161–62, 120 S.Ct. 684, 691. A defendant who waits until trial to ask the court to excuse his appointed attorney in order to search for retained counsel, after having acquiesced in representation by an attorney throughout pretrial procedures, has waited so long that a trial judge's action in denying such a delaying tactic is justified. *State v. Hegwood*, 345 So.2d at 1182; *State v. Austin*, 258 La. 273, 278–79, 246 So.2d 12, 13–14 (1971).

In the case at bar, on July 26, 2011, the defendant sought to discharge and replace Mr. English as defense counsel, but the motion was denied by the trial court. Immediately after the trial court informed the parties that Mr. English would be continuing as counsel and that the trial would commence in two days, the defendant stated:

> MR. MCCOY: Through *Ache [sic] versus Oklahoma*,[24] Your Honor, I have the right to speak, I have a right to represent myself through Ache [sic] versus Oklahoma, Your Honor, and too—
>
> THE COURT: Not at this time, Mr. McCoy, the *State versus Bridgewater* [case] states that you have unequivocally given up that right because ... you have not made that known to the Court unequivocally before this date. So I will instruct you to speak through Mr. English at this time and ... Mr. English is your attorney and he will be representing you ....

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[24] *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

Given the circumstances and prior procedural history of this case, the defendant's one-sentence statement was not perceived by the trial court as a "clear and unequivocal" assertion of his right to self-represent. Coming as it did moments after the trial court's ruling that the defendant could not discharge and replace Mr. English as his defense counsel, since the defendant's request to do so came just two days before trial, it was not urged "in a timely manner." The trial judge refused to entertain the defendant's late mention of self-representation, stating, "Not at this time."

Notably, the trial judge had previously allowed the defendant to represent himself, in February of 2010, and the defendant did so for one month before Mr. English enrolled as counsel. In contrast with the one-line assertion the defendant invoked on July 26, 2011, after which his request was denied, he made an unequivocal invocation of his right to represent himself on February 11, 2010, when he sought to substitute his self-representation for the representation of the public defender's office, stating:

> MR. MCCOY: Your Honor, I would like to present to the Court today under *Ferret [Faretta] versus Carroll—California*.[25] I've also presented to the Public Defender's Office a valid—requested document for respective counsel to assist me through the proceeding that I'm going through and not to collate themselves within my attorney aspects. But I ask them to assist me through it because I am a competent defendant, and I am literate, and

[25] *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

> I'm up under Ferret *[Faretta] versus California*. You know, I am eligible for—to represent myself and not being able to represent myself when I'm eligible is a violation of my Sixth and Fourteenth Amendment right. I've given the Public Defender's Office a year and a half of opportunities to represent me and they did not represent me. And being competent, and being an understanding defendant, I have the right up under the United States Constitution to represent myself and not to be forced to have representation on me ....

After this February 11, 2010 assertion of his right to self-representation, the trial judge advised the defendant of his *Miranda* rights and questioned him under *Faretta* as to his capacity to represent himself in a capital murder trial. During that colloquy, the defendant told the judge that he understood he was facing a possible death penalty, that he graduated from Rice University with a degree in Business Administration,[26] that he understood he was entitled to a trial by jury during which the State would have to prove its case beyond a reasonable doubt, and that he was entitled to an attorney. At that point, the defendant volunteered that "I'm going to have [an attorney] next month ... I have paid counsel." The trial judge completed his *Faretta* questioning and after satisfying himself that

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[26] We note that in penalty phase mitigation testimony, Dr. Mark Vigen told the jury that the defendant lied about going to Rice University and about earning a degree in Theology from another institution.

the defendant was exercising a knowing and voluntary choice with "eyes open,"[27] the trial judge continued:

> THE COURT: All right, first of all you're asking to represent yourself. I believe that you have the education if that is what you want to do but I am strongly and I mean very strongly encouraging you not to represent yourself in this matter, sir ... because of the complexities of the law in this matter and the evidence regarding this matter .... And you understand that you'll be held to the same rules [or] standards as an attorney if you represent yourself?
>
> MR. MCCOY: Yes, sir, I do. And I know this is a complex situation, Your Honor, but this is my life and ... I know the steps that I'm taking. I know the, you know, the advantages and disadvantages but I choose to proceed forward because this is for my best interest.

On February 11, 2010, based on the defendant's assurances that no one was forcing him to waive counsel, that he understood the penalties he was facing, and that he would be held to the same courtroom decorum and standards as an attorney, the trial judge ruled that the defendant could proceed pro se, noting specifically that in the event that his anticipated retained counsel did not sign on as expected, the defendant would proceed to trial representing himself on the then-scheduled trial date of May 24, 2010. The trial judge also appoint-

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[27] *Faretta v. California*, 422 U.S. at 835, 95 S.Ct. at 2541 ("A defendant ... 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.' ") (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942)).

ed Randall Fish of the public defender's office to assist the defendant in any matters of law at that time.

A comparison of the colloquies that took place on February 11, 2010 and July 26, 2011 demonstrates that the July 2011 one-sentence assertion was not the definitive expression of the right to waive counsel and exercise the right to self-representation that the defendant had asserted before the trial court on February 10, 2010, and the trial judge was no doubt able to compare those two events when he dismissed the July 2011 one-sentence assertion.[28] After the trial court declined the defendant's July 26, 2011 assertion ("I have a right to represent myself through Ache [sic] versus Oklahoma"), two days before trial, the defendant presented no further assertion of a right to self-representation in lieu of retained counsel, nor did he enter a contemporaneous objection. The trial court, based on the facts and circumstances surrounding the defendant's July 26, 2011

[28] Appellate counsel urged the same issue of self-representation at the hearing on the motion for new trial held on January 23, 2012, the denial of which counsel now asserts was error. Appellate counsel argued that in requesting to represent himself two days before trial, the defendant "wasn't playing games." In denying the motion for new trial, the trial judge recalled that defendant's July 26, 2011 assertion of his right to represent himself was a "very brief request" contrasted with his earlier (February 11, 2010) assertion to self-represent which had been granted "after a long dissertation or a long discussion with Mr. McCoy." The trial judge looked to defendant's entire history of representation in this case, which showed vacillation between appointed counsel, self-representation, and retained counsel: "There was just too much that was not clear and unequivocal about that and the Court declined to allow him to represent himself." Here, the trial judge had the benefit of his own memory of defendant's repeated endorsement of Mr. English, even after the Second Circuit pointedly questioned whether his waiver of representation by two capital qualified attorneys was knowingly and intelligently made.

statement, determined that any motion of self-representation was untimely and, as stated in *Bridgewater*, the "defendant's request to represent himself was not an unequivocal one; rather, it was an obfuscated request to substitute appointed counsel because of his disagreement with current counsel's choice of trial strategy." *State v. Bridgewater*, 00–1529 at p. 19, 823 So.2d at 895. We find no abuse of discretion in any denial by the trial court of self-representation on July 26, 2011.

Right to Hearing on Motion to Withdraw

In the defendant's third assignment of error, he contends that the trial court is required to appoint substitute counsel when the defendant makes a showing that appointed counsel is incompetent or unable for some cause to furnish adequate representation and that he made a clear showing that Mr. English was unable to furnish adequate representation, such that the trial court erred in failing to hold a hearing on the issue. The defendant argues that the trial judge had notice that the defendant's right to effective assistance of counsel was being jeopardized by the strategic differences in how to defend this case, which lead to irreconcilable differences between attorney and client.

The defendant cites *State v. Draughn*, 05–1825 (La. 1/17/07), 950 So.2d 583, *cert. denied*, 552 U.S. 1012, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007), in which the capital defendant specifically did not raise a claim of ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but rather, challenged the trial court's failure to hold a hearing or otherwise address the defendant's pretrial allegations about counsel, stating, "In brief, the defendant states: 'Mr. Draughn is not here

asserting a claim of ineffective assistance of counsel, but, rather, is challenging the trial court's failure to hold a hearing or otherwise address his pre-trial allegations.' " *State v. Draughn*, 05–1825 at pp. 18–19, 950 So.2d at 599. Likewise, the instant defendant's brief to this court states that the "*[d]efendant is not now advancing a claim under* Strickland." (Emphasis original.) The defendant further states, "[T]he summary denial of the defendant's requests and complaints without adequate investigation into Mr. McCoy's entirely legitimate grievances requires reversal."

On the similar claims urged in *State v. Draughn*, this court cited LSA–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."), and held:

> Assuming, without deciding, that the trial court's failure to hold a hearing on the defendant's pre trial motions may have been error, this fact, without more, fails to present the court with anything from which to discern prejudice to the defendant without a corresponding claim that counsel rendered ineffective assistance at trial. At the most, the trial court's failure to hold a pre trial hearing on the motions would constitute harmless error.

State v. Draughn, 05–1825 at p. 19, 950 So.2d at 599.

In this case, the defendant claims he made a "clear showing" that he and Mr. English had a "catastrophic conflict" in their attorney-client relationship, which at a bare minimum, required the trial judge to conduct an ex parte hearing, as was done in *State v. Bridgewater*, supra, and *State v. Campbell*, 06–0286 (La. 5/21/08), 983

So.2d 810.[29] Indeed, on July 26, 2011, Mr. English asked the trial court for an ex parte hearing to air the divergent defense theories between counsel and client, which the trial court declined, telling Mr. English, "[Y]ou are the attorney, sir ... [a]nd you have to make the trial decision of what you're going to proceed with ...."

In *State v. Bridgewater*, the trial court held a pretrial, ex parte hearing (following which the transcript was sealed), in which appointed defense counsel clarified that the conflict arose out of the defendant's wish to present a defense of total innocence and counsel's recommendation that the defendant admit to second degree murder and argue that the requisite specific intent, needed to prove first degree murder, was lacking. *State v. Bridgewater*, 00–1529 at pp. 20–21, 823 So.2d at 896. In *Bridgewater*, the trial court found that the defendant had voiced the same strategic conflict with his previous counsel and that he had "gone through" two other defense attorneys, suggesting a "pattern." *Id.* Given that the Bridgewater defendant's capital trial was scheduled to begin in four days, this court found no abuse of discretion in the trial court's denial of defense counsel's motion to withdraw. *Id.*

A fair reading of the instant record leaves this court with the inescapable conclusion that the trial

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[29] Importantly, as discussed in the defendant's second assignment herein, on July 26, 2011, the defendant did not make a clear and unequivocal assertion of his right to waive counsel and represent himself, as he had done previously on February 11, 2010. Consequently, the trial judge did not err by not holding an ex parte hearing to interrogate defendant under *Faretta*. In this respect, this case is distinguishable from *Bridgewater* and *Campbell*, wherein the trial court held an ex parte hearing.

judge was intimately familiar with the strategic difficulties playing out between the defendant and Mr. English, which had previously caused the defendant to discharge the public defender's office and to briefly represent himself. Thus, an ex parte hearing for the sole purpose of reviewing the case history that was already known to the trial court was unnecessarily cumulative, particularly when the issues repeatedly came to light at various pretrial hearings, including on January 4, 2011, January 24, 2011, July 12, 2011, and July 26, 2011. The defendant's stated complaints about Mr. English all centered on strategic differences, as subsequently articulated by appellate counsel at the hearing on the motion for new trial: "Mr. McCoy's objective was to be acquitted ... and to be allowed to go home. Mr. English's clear objective was in the guilt phase to have him found guilty of second degree murder ... but given a life sentence and that if it went into the penalty phase to have the jury return a life sentence rather than a death sentence." The same scenario occurred in *Bridgewater* and *Campbell*, wherein capital defendants disagreed with their appointed counsels' appreciation of the overwhelming evidence against them and disagreed with counsels' decision to embark on the same defense strategy as Mr. English did in this case, leading to requests to forego representation by their respective counsel.

In this case, neither the defendant nor appellate counsel argue that Mr. English was otherwise incompetent as a defense attorney, although there was considerable discussion about his lack of capital certification. Mr. English held himself out as "a seasoned criminal trial lawyer," who had "practic[ed] law for close to twenty years."

This court has stated that the district court cannot be required to appoint different counsel "merely to

please the desires of the indigent accused, in the absence of a showing that the court appointed attorney is inept or incompetent to represent the accused." *State v. White*, 256 La. 36, 42, 235 So.2d 84, 86 (1970).

Nothing presented by the defendant in this assignment of error suggests that the trial judge in this case abused his discretion by not holding an ex parte hearing, in addition to the July 26, 2011 hearing, on the question of Mr. English's competence to provide an adequate representation. Notwithstanding, any trial court error in this respect appears harmless under *State v. Draughn*, supra, and *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993) ("The inquiry ... is 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."). For these reasons, this assignment of error is without merit.

Concession of Guilt at Trial

In his fourth assignment of error, the defendant contends that the trial court erred in ruling that the defendant's retained counsel could decide whether to concede guilt of the charged murders at trial, without the defendant's consent. The defendant asserts that the relationship between an attorney and his client "is one of principal and agent wherein the lawyer's authority derives from and is limited by the authority of the client" (emphasis omitted), such that the defendant should have been able to decide what manner of defense would be presented at trial, instead of having to accept Mr. English's decision to concede his guilt, at the outset, in the opening statement.

In support of his position on this issue, the defendant cites *State v. Felde*, 422 So.2d 370, 393 (La. 1982), *cert. denied*, 461 U.S. 918, 103 S.Ct. 1903, 77 L.Ed.2d 290 (1983), in which the capital defendant asserted that he was "denied effective assistance of counsel at trial due to adherence by defense counsel to an employment condition set by the defendant that defense counsel not attempt to obtain any jury verdicts other than 'Not Guilty by Reason of Insanity' or 'Guilty of First Degree Murder' with Capital Punishment." After the *Felde* defendant was sentenced to death, he appealed raising a claim of ineffective assistance for counsel's adherence to pursue the "all or nothing" strategy he had imposed. This court refused to find the *Felde* defendant's counsel ineffective, observing that "[u]nder our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney .... The fact that a particular strategy is unsuccessful does not establish ineffective assistance." *State v. Felde*, 422 So.2d at 393. The *Felde* court went on to rule that "a defendant can limit his defense consistent with his wishes *at the penalty phase of trial*." *Id.*, 422 So.2d at 395 emphasis added).

This court 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. Bordelon*, 07–0525, pp. 35–36 (La. 10/16/09), 33 So.3d 842, 864–65. *Cf. Schriro v. Landrigan*, 550 U.S. 465, 479–81, 127 S.Ct. 1933, 1942–44, 167 L.Ed.2d 836 (2007) ("[I]t was not objectively unreasonable for th[e] [Arizona] court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate

further possible mitigating evidence ...."). Importantly, *State v. Felde* did not endorse the suggestion espoused in the instant case by the defendant, i.e., that trial counsel must adopt a capital client's unsupportable trial strategy *at the guilt phase*, particularly when the assertion of such a defense would involve perjured testimony.

Nevertheless, the defendant urged in brief to this court that Mr. English should have advanced his "unflinchingly maintained claim of innocence," while Mr. English repeatedly advised the trial court that to do so would run afoul of his ethical obligations. *See* Louisiana Rules of Professional Conduct, Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent ...."). Given the overarching burden of Mr. English's requirement as an attorney to adhere to Rule 1.2(d), the defendant's repeated assertion that "the principal has the right throughout the duration of the relationship to control the agent's acts" is unpersuasive.

The Supreme Court discussed such an ethical dilemma in *United States v. Cronic*, 466 U.S. 648, 656 n.19, 104 S.Ct. 2039, 2045 n.19, 80 L.Ed.2d 657 (1984):

> Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt. And, of course, even when there is a bona fide defense, counsel may

> still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances. [Citations omitted.]

Applying these ethical considerations to the present case, the agency relationship between an attorney and client anticipates that the attorney will comply with the client's *lawful* instructions. In this case, presenting an alibi defense at the guilt phase put Mr. English in an ethical conundrum, as committing perjury is a crime pursuant to LSA–R.S. 14:123. In *Nix v. Whiteside*, 475 U.S. 157, 173–76, 106 S.Ct. 988, 997–99, 89 L.Ed.2d 123 (1986), the Supreme Court determined that the Sixth Amendment right to assistance of counsel is not violated when an attorney refuses to cooperate with a defendant in presenting perjured testimony at trial.

In the instant case, the State's evidence against the defendant was overwhelming. In a post-trial affidavit, Mr. English explained his trial strategy:

> Robert McCoy believed that law enforcement and others were conspiring against him and he was simply unable to accept the evidence against him .... I became convinced that the evidence against Robert McCoy was overwhelming .... I know that Robert was completely opposed to me telling the jury that he was guilty of killing the three victims and telling the jury that he was crazy but I believed that this was the only way to save his life. I needed to maintain my credibility with the jury in the penalty phase and could not do that if I argued in the guilt phase that he was not in Louisiana at the time of the killings, as he insisted. I consulted

with other counsel and was aware of the *Haynes* case and so I believed that I was entitled to concede Robert's guilt of second degree murder even though he had expressly told me not to do so. I felt that as long as I was his attorney of record it was my ethical duty to do what I thought was best to save his life even though what he wanted me to do was to get him acquitted in the guilt phase. I believed the evidence to be overwhelming and that it was my job to act in what I believed to be my client's best interests .... I firmly believe that Robert McCoy is insane and was not competent to be tried .... [H]e could not assist counsel or participate effectively in the proceedings due to his mental illness. He could not rationally understand the proceedings because he saw the evidence, the procedures and the rulings through the lens of his delusion that law enforcement, the prosecutor, the judge and ultimately myself were conspiring against him. Robert could not consult with me with any reasonable degree of rational understanding both because his paranoia and delusions destroyed our professional relationship and also because all information was distorted or obscured by his delusions.... Robert was unable to deal rationally with the evidence of his guilt and the case against him. Robert could not recall and relate facts pertaining to his actions and whereabouts at the time of the crime because he truly believed that he was elsewhere at the time of the crime. He could not assist in locating and examining relevant witnesses because his witnesses were a part of his delusions in some cases or their relevance was dictated by his para-

> noia and his belief in a large scale conspiracy against him. Robert could not review discovery or listen to evidence and assist in assessing any distortions or misstatements because he could not grapple with the evidence in the real world. He could not make rational decisions despite my efforts to clearly explain his alternatives and could not testify except to give vent to his delusions and paranoia ....

Mr. English acknowledged his ethical dilemma to the trial judge numerous times during the course of the trial court proceedings. During a January 4, 2011 hearing, Mr. English stated that the defendant was "recommending ... a course of action that [he (Mr. English) did] not believe [was] in [the defendant's] best interest," and Mr. English "believe[d] as a lawyer that [he had] an ethical duty given the ramifications of this case to not follow that advice." Mr. England further advised the trial court, during a January 24, 2011 hearing, that he believed he "ha[d] an ethical duty to this man not to follow his bizarre behavior." Mr. England repeatedly reiterated to the trial court, as he did during a July 12, 2011 hearing, that he "ha[d] an ethical duty ... to try to defend [the defendant] and do the ... best [he (Mr. English) could] to save [the defendant's] life." The alibi defense the defendant wanted Mr. England to put on, but which could not be substantiated, had no reasonable chance of success, but exposed those who attempted such a defense to the charge of perjury.

The ongoing discussion of this trial strategy issue culminated at the pretrial hearing held on July 26, 2011, when it was raised by trial counsel as follows:

> MR. ENGLISH: Your Honor, at this time I'm going to ask for an ex parte hearing with the

> Court to discuss my representation with Mr. McCoy .... Mr. McCoy is insistent that I put forward a defense in this case at the guilt phase of this trial. I have made a determination, Your Honor, that the evidence in this case is so overwhelming against Mr. McCoy that in order to do that ....
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> * * *
>
> THE COURT: ... I think that you've stated this on the record prior to this date .... I believe that—you are the attorney, sir .... And you have to make the trial decision of what you're going to proceed with ....

Clearly, the trial judge had Professional Conduct Rule 1.2(d) in mind when he reminded Mr. English that he was the attorney, i.e., the person who had the ethical obligation to advance a lawful defense.[30]

Conceding 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. Louisiana courts have consistently upheld the defense strategy of acknowledging guilt, against a charge of ineffective assistance of counsel, under the standard enunciated in *Strickland*. *See, e.g.*, *State v. Tucker*, 13–1631, pp.

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[30] *See also* Louisiana Rules of Professional Conduct, Rule 3.3(b) ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."). In furtherance of his ethical obligations, before the defendant testified in the guilt phase of the trial, Mr. English stated on the record that he had advised the defendant not to testify and had warned him about perjury and its criminal consequences.

36–41 (La. 9/1/15), 181 So.3d 590, 618–21, *cert. denied*, —— U.S. ——, 136 S.Ct. 1801, 195 L.Ed.2d 774 (2016) (wherein the capital defendant did not acquiesce in counsel's decision to admit guilt of second degree murder and feticide in the guilt phase closing argument and, on direct appeal, this court found that the defendant failed to demonstrate a per se violation of the Sixth Amendment resulting from a conflict of interest, noting that "counsel's obligation to provide effective assistance 'is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth' and did not extend to 'in any way assisting the client in presenting false evidence or otherwise violating the law' "; no claim of ineffective assistance, under Strickland, was presented on appeal); *State v. Holmes*, 06–2988, p. 1 n.2 (La. 12/2/08), 5 So.3d 42, 48, cert denied, 558 U.S. 932, 130 S.Ct. 70, 175 L.Ed.2d 233 (2009) (unpublished appendix) (noting defense counsel conceded the defendant was guilty of second degree murder, but that the jury found the State proved guilt of first degree murder, this court concluded that, given the defendant's numerous inculpatory statements and possession of the victim's property, counsel's decision to concede her guilt to second degree murder fell well within the ambit of sound trial strategy); *State v. Legrand*, 02–1462, p. 27 (La. 12/3/03), 864 So.2d 89, 107 (unpublished appendix) ("[R]egarding counsel's acknowledgment of guilt during defense closing argument, an acknowledgment of guilt may form part of defense strategy" and did not constitute ineffective assistance.); *State v. Taylor*, 01–1638, p. 4 (La. 1/14/03), 838 So.2d 729, 737 ("The defense conceded defendant's guilt, but argued the crime more properly fit second degree murder."); *State v. Frost*, 97–1771 (La. 12/1/98), 727 So.2d 417, 439, cert denied, 528 U.S. 831, 120 S.Ct. 87, 145 L.Ed.2d 74 (1999) (unpublished appendix) ("Trial counsel employed a clear strategy throughout voir dire, the guilt phase,

and the penalty phase of defendant's trial of acknowledging defendant's guilt and the brutal nature of the crime while pleading for the jury to spare defendant's life ... [C]ounsel's admission that the crime was 'cruel, heinous, and atrocious,' formed part of a carefully constructed strategy to save defendant's life ... [T]he defendant has not demonstrated counsel's decision rendered his trial globally unfair or the verdict generally suspect ... [and it] did little to prejudice defendant's case."); *State v. Burkhalter*, 428 So.2d 449, 457 (La. 1983) (wherein the defendant was found guilty of second degree murder, though charged with first degree murder, and this court found no ineffective assistance of defense counsel, who had argued that at most the defendant was guilty of second degree murder; this court stated, "Defendant's lawyer succeeded in saving defendant from execution, no doubt ... because of tactical decisions in trying the case like the arguments to which defendant now takes exception."); *State v. Berry*, 430 So.2d 1005, 1014–15 (La. 1983) (wherein defense attorney's admission of the defendant's intent to commit robbery was not held ineffective assistance of counsel, finding that counsel "may have been trying to establish his candor with the jury" and that "[n]arrowing the presumption of innocence claim to the charge of first degree murder was intended to direct the jury toward a lesser verdict").

This court does not sit to second guess strategic and tactical choices made by trial counsel. *State v. Hoffman*, 98–3118, p. 40 (La. 4/11/00), 768 So.2d 542, 579, *supplemented*, 00–1609 (La. 6/14/00), 768 So.2d 592 (per curiam), *cert. denied*, 531 U.S. 946, 121 S.Ct. 345, 148 L.Ed.2d 277 (2000); *State v. Myles*, 389 So.2d 12, 31 (La. 1979). We find no merit in this assignment of error.

Counsel's Failure to Follow Express Directions of the Defendant

In the interrelated fifth and sixth assignments of error, the defendant claims that he was denied the assistance of counsel within the meaning of the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution when his lawyer conceded his guilt against his expressly-stated wishes, setting up an irreconcilable conflict of interest between attorney and client and resulting in defense counsel's failure to adversarially test the State's case.[31]

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[31] In the guilt phase opening statement by Mr. English, he stated to the jury, in pertinent part:

> [A]s a defense lawyer, we are trained to make the State prove every piece of evidence that it wishes to interject into a trial. In this case I cannot stand in front of you because of what the stakes are in this case and lie to you or tell you any differently that the District Attorney can prove every fact that he has just alleged to you. There is no way reasonably possible that you can listen to the evidence in this case and not come to any other conclusion than Robert McCoy was the cause of these individuals' death[s]. But that's not the only issue to be decided. First degree murder requires that there be specific intent—specific intent to kill those individuals. The State cannot put on any evidence that Robert McCoy ever made any malice statement towards those individuals; that those individuals was [sic] ever on his radar to do harm. Robert McCoy is crazy .... He meets the legal definition of competent, but evidence will be put on in this case that Robert McCoy suffers from emotional and mental issues that affects [sic] his ability to make decisions in this case .... We believe that the evidence will show that because of Mr. McCoy's emotional and mental conditions that this is a second degree murder trial.

By conceding the defendant's guilt in his opening statement and again in his closing argument of the guilt phase—conceding before the jury that the defendant caused the deaths of the three victims but because of his mental deficiencies he lacked the specific intent to murder—the defendant argues that Mr. English failed to subject the prosecution's case to meaningful adversarial testing, and under *United States v. Cronic*, supra, prejudice must be presumed. The defendant urges that this trial strategy deprived him of the presumption of innocence along with the right to knowingly and intelligently exercise his privilege against compulsory self-incrimination, his right to trial by jury, his right to present a defense, and his right to confront his accusers. Even though the fifth and sixth assignments of error are worded in terms of "denial of right to counsel," the argument is essentially one of ineffective assistance of counsel, which this court has consistently reviewed under the *Strickland* standard.[32]

In *United States v. Cronic*, decided the same day as *Strickland v. Washington*, the Supreme Court created a limited exception to the application of Strickland's two-part test in situations that "are so likely to prejudice the accused that the cost of litigating their effect in

[32] Under the standard for ineffective assistance of counsel set out in *Strickland v. Washington*, adopted by this court in *State v. Washington*, 491 So.2d 1337, 1339 (La. 1986), a reviewing court must reverse a conviction if the defendant establishes: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect. Nevertheless, the defendant in the instant case specifically avers that he is not raising a claim of ineffective assistance of counsel under Strickland in this direct appeal, reserving that claim for collateral review.

the particular case is unjustified." *Cronic*, 466 U.S. at 658, 104 S.Ct. at 2046. The Supreme Court identified three situations implicating the right to counsel in which prejudice will be presumed. First are situations in which a defendant is denied counsel at a critical stage of a criminal proceeding, i.e., the complete denial of counsel. Second, and the most relevant here, are situations in which a defendant's trial counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659, 104 S.Ct. at 2047. Finally, prejudice is presumed when the circumstances surrounding a trial prevent a defendant's attorney from rendering effective assistance of counsel. *Cronic*, 466 U.S. at 659–60, 104 S.Ct. at 2047 (citing *Powell v. Alabama*, 287 U.S. 45, 57–58, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). As to the second situation envisioned by *Cronic*, prejudice is presumed when the attorney " 'entirely fails to subject the prosecution's case to meaningful adversarial testing.' " *Bell v. Cone*, 535 U.S. 685, 696–97, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914 (2002) (quoting *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039). *Bell v. Cone* made plain that the difference between *Strickland*, which deals with the failure of counsel on specific points, and *Cronic*, which addresses the complete failure of counsel to oppose the prosecution, is one "not of degree but of kind." *Id.*[33] Courts distinguish *Strick-*

[33] In *Bell v. Cone*, the Supreme Court held that the defendant's claims that counsel had been ineffective at his capital sentencing hearing for failing to adduce mitigating evidence and for waiving closing argument. The Court found that such omissions "are plainly of the same ilk as other specific attorney errors we have held subject to Strickland's performance and prejudice components." *Bell v. Cone*, 535 U.S. at 697–98, 122 S.Ct. at 1851–52. Notably, in *Cronic*, the Supreme Court remanded that case to be considered under the *Strickland* test. *Cronic*, 466 U.S. at 666–67, 104 S.Ct. at 2050–51.

land and *Cronic*, as the "distinction between ineffective assistance of counsel and the constructive denial of counsel," respectively. *Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002), cert. denied, 537 U.S. 1072, 123 S.Ct. 676, 154 L.Ed.2d 567 (2002).

In the present case, the defendant argues that *Cronic* controls his Sixth Amendment claim and that prejudice should be presumed because, by conceding his guilt in the opening statement of the guilt phase of trial, Mr. English "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." (Emphasis omitted.) On the other hand, the State opines that in analyzing the defendant's counsel and representation claims, the Strickland standard should apply. For the second situation of *Cronic* to apply, "the attorney's failure must be complete." *Bell v. Cone*, 535 U.S. at 697, 122 S.Ct. at 1851. Here, by conceding the defendant's guilt, Mr. English did not completely abdicate the defendant's defense, rather Mr. English advanced what he saw was the only viable course of action. At the hearing on the motion for new trial, Mr. English testified about his trial strategy of conceding the defendant's guilt:

> [MR. ENGLISH:] I reached that conclusion [as to trial strategy] a long time before [the day of trial], that I was going to have to stand in front of that jury and beg for Robert McCoy's life. I had no option.
>
> [POST–CONVICTION DEFENSE COUNSEL:] And that conceding his guilt in your mind was the only way to go for it.
>
> [MR. ENGLISH:] I'm a seasoned criminal trial lawyer, had been doing this for a number of

> years, and I had never had a case where the evidence was so overwhelming against a client.

In addition, Mr. English remained active at trial, probing weaknesses in the prosecution's case. As stated hereinafter in connection with our discussion of the defendant's tenth assignment of error, during jury selection, Mr. English ardently fought to retain some racial diversity in the defendant's trial by pressing a *Batson* claim and arguing for challenges when warranted. During trial, Mr. English cross-examined most of the State's guilt phase witnesses, frequently asking questions written by the defendant.[34]

Here, the defendant pled not guilty to the three-count indictment. Mr. English's strategy was to concede the defendant's guilt, but in an effort to spare him

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[34] Mr. English was able to get the police officer who had pursued the suspect, who fled from the scene of the crime in a white car owned by the defendant, to admit that he could not positively identify the assailant he was pursuing as the defendant. Mr. English cross-examined the police dispatcher, who admitted that there was no way to identify the "Robert" named in the 911 recording as the defendant, without a last name having been given. Mr. English also elicited testimony from the State's firearms examiner that she had not been asked to look for DNA or fingerprints on the weapon or the cartridges or bullets, and she did not know who had fired the weapon. On cross-examination by Mr. English, the Walmart employee/witness admitted that he could not say that the individual in the video purchasing ammunition was definitely the defendant. Mr. English elicited testimony from the forensic pathologist that there was a sufficient quantity of a marijuana metabolite in the body of victim Willie Young at the time of autopsy to indicate that Mr. Young had smoked some marijuana thirty to sixty minutes prior to his death. During Mr. English's cross-examination of the defendant's friend, Gayle Houston, Mr. Houston admitted that when he gave the defendant a ride on the evening of the shooting, the defendant was crying, thereby humanizing the defendant as capable of remorse in front of the jury.

capital punishment he argued that a verdict of second degree murder would be more appropriate, asserting that the defendant's mental incapacity prevented him from forming the requisite specific intent to commit first degree murder. The defendant faults this trial strategy, given that Louisiana does not recognize the defense of diminished capacity.[35] The defendant urges

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[35] In *State v. Dressner*, 08–1366, pp. 25–26 (La. 7/6/10), 45 So.3d 127, 143–44, *cert. denied*, 562 U.S. 1271, 131 S.Ct. 1605, 179 L.Ed.2d 500 (2011), this court stated:

> It is well-settled, "[w]hen a defendant is tried upon a plea of 'not guilty', evidence of insanity or mental defect at the time of the offense shall not be admissible." La.Code Crim. Proc. art. 651; *State v. Holmes*, 06–2988, p. 46 (La. 12/2/08), 5 So.3d 42, 74, *cert. denied*, 558 U.S. 932, 130 S.Ct. 70, 175 L.Ed.2d 233 (2009). Under La.Rev.Stat. § 14:14, Louisiana's codification of the *M'Naughten* Rule, an offender is exempt from criminal responsibility only if he is incapable of distinguishing between right and wrong with reference to the conduct in question. Thus, Louisiana does not recognize the doctrine of diminished capacity absent a dual plea of not guilty and not guilty by reason of insanity. *State v. Deboue*, 552 So.2d 355, 366 (La. 1989), *cert. denied*, 498 U.S. 881, 111 S.Ct. 215, 112 L.Ed.2d 174 (1990); *State v. Nelson*, 459 So.2d 510, 513 (La. 1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 322 (1985); *State v. Lecompte*, 371 So.2d 239, 243 (La. 1978). Evidence of a mental defect, which does not meet the *M'Naughten* definition of insanity, therefore, cannot negate a specific intent to commit a crime and reduce the degree of the offense. *Holmes*, 06–2988 at p. 46, 5 So.3d at 74. Consequently, in crimes requiring specific intent, diminished mental capacity is not a recognized defense. *Lecompte*, 371 So.2d at 243. [Footnote omitted.]

In the present case, the defendant did not enter a dual plea of not guilty and not guilty by reason of insanity, and thus no evidence of insanity or mental defect at the time of the offense was admissible at his trial. *See* LSA–C.Cr.P. art. 651 ("When a de-

that, by conceding the only factual issue in dispute, Mr. English did not submit the State's case to the crucible of adversarial testing and, thus, denying him the second category of right to counsel delineated in *Cronic*, and depriving him of a fundamentally fair trial, requiring reversal without any showing of specific prejudice.

The U.S. Supreme Court addressed a similar argument in *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). Nixon was charged with capital murder and faced overwhelming evidence of his guilt at trial, including his own confession in graphic detail as to how he kidnapped and killed his victim. *Nixon*, 543 U.S. at 180, 125 S.Ct. at 556. After investigating the State's evidence and witnesses, defense counsel developed a strategy to concede Nixon's guilt and ask the jury to spare his life. *Id.*, 543 U.S. at 181, 125 S.Ct. at 557. Defense counsel explained this strategy to Nixon on multiple occasions. *Id.* However, Nixon never consented and, instead, remained unresponsive throughout these discussions. *Id.* After state post-conviction proceedings, the Florida Supreme Court, relying on *Cronic*, held that Nixon's conviction should be reversed because of defense counsel's failure to obtain Nixon's affirmative and explicit consent to pursue a strategy of conceding guilt. *Id.*, 543 U.S. at 186, 125 S.Ct. at 560. The U.S. Supreme Court granted certiorari to resolve the question of whether defense counsel's failure to obtain Nixon's express consent to concede his guilt should be evaluated under *Cronic* or *Strickland*. *Nixon*, 543 U.S. at 186–87, 125 S.Ct. at 560. The Supreme Court reversed, holding that "counsel's

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fendant is tried upon a plea of 'not guilty', evidence of insanity or mental defect at the time of the offense shall not be admissible ....").

effectiveness should not be evaluated under the *Cronic* standard, but under the standard described in *Strickland*." *Id.*[36] Defense counsel, in conceding Nixon's factual guilt, had not waived the State's obligation to prove beyond a reasonable doubt, through competent and admissible evidence, that Nixon committed first degree murder. *Id.*, 543 U.S. at 188, 125 S.Ct. at 561. The Supreme Court stated that such a concession strategy does not amount to the functional equivalent of entering a guilty plea on the defendant's behalf—the State must still prove its case subject to cross-examination of its witnesses by defense counsel—and may constitute a reasonable strategic choice in a case in which the circumstances of the crime are horrendous and the evidence of the defendant's guilt overwhelming.[37] Under those circumstances, " 'avoiding execution [may be] the best and only realistic result possible.' " *Id.*, 543 U.S. at 191, 125 S.Ct. at 562–63 (quoting ABA

[36] *See also Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002) (commenting that "those courts that have confronted situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses have consistently found these partial concessions to be tactical decisions, and not a denial of the right to counsel. As such, they have analyzed them under the two-part *Strickland* test.") (footnote omitted).

[37] Herein, the defendant cites *Cooke v. State*, 977 A.2d 803, 843–44 (Del. 2009), also a capital case, in which the Delaware Supreme Court reversed the defendant's conviction because defense counsel not only argued for a verdict of "guilty but mentally ill" over his client's objection (albeit without formally changing his plea), but defense counsel also introduced a privileged and otherwise inadmissible confession to the crime in order to advance the mental illness argument. The confession, which the *Cooke* defendant disputed, essentially made the State's case at the guilt stage. Here, although the defendant claims that *Cooke* is "on all fours" with the present case, the distinction is obvious, and this court is not bound by it.

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, § 10.9.1, Commentary (Rev. ed. 2003) (reprinted in 31 Hofstra L.Rev. 913, 1040 (2003)).[38]

Given the circumstances of this crime and the overwhelming evidence incriminating the defendant, admitting guilt in an attempt to avoid the imposition of the death penalty appears to constitute reasonable trial strategy. The jury was left with several choices after Mr. English conceded that the defendant shot the three victims, including returning a responsive verdict of second degree murder or manslaughter, as well as not returning the death penalty. Therefore, in light of *Nixon*, the defendant has not shown that trial counsel's actions were ineffective. *See State v. Felde*, 422 So.2d at 393 ("The fact that a particular strategy is unsuccessful does not establish ineffective assistance."). *Cf. Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995) ("A defendant may prevail on an ineffective assistance claim relating to trial strategy ... if he can show counsel's strategy decisions would not be considered sound.").

The defendant states that he "is explicitly not raising a claim of ineffective assistance under the *Strickland* standard at this time," in which case the defend-

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[38] *Nixon* acknowledged that although such a concession in a run-of-the-mill trial might present a closer question, "the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus .... Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared." *Nixon*, 543 U.S. at 190–92, 125 S.Ct. at 562–63. The Court reasoned, "In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in a useless charade." *Id.* (internal quotation marks and citation omitted).

ant "would bear the burden of establishing prejudice," reserving that claim for post-conviction proceedings "if they should become necessary."

Accordingly, we conclude that the defendant has shown no per se violation of the Sixth Amendment resulting from any conflict of interest. Therefore, we find no merit in the defendant's fifth and sixth assignments of error.

Deprivation of Other Constitutional Rights

In his seventh assignment of error, the defendant complains that Mr. English was not acting as the defendant's lawyer "in any true sense," which deprived him of his constitutional rights, including the right to compulsory process. Specifically, the defendant claims that Mr. English refused to subpoena the defendant's witnesses, offered no opposition to quashal of the defendant's pro se subpoenas, and declared that he would not call any of the witnesses the defendant sought by way of those subpoenas, contrary to the defendant's wishes. The defendant also complains that by conceding his guilt Mr. English nullified his plea of not guilty, deprived him of his constitutional right to an impartial jury, and Mr. English's "limited" cross-examination undermined his right to confront and cross-examine his accusers, all of which relieved the State of its burden under the Due Process Clause. The defendant suggests that at his capital trial, he "had in effect two prosecutors and no defense lawyer."

The defendant's pro se subpoena requests commanded a good bit of the trial court's pretrial attention in this case. As noted in our discussion of the defendant's fourth assignment of error, supra, presentation of the defendant's alibi defense was not ethically possible

for Mr. English, and thus there was no legitimate reason that Mr. English would have defended the pro se subpoena requests from quashal. *See State v. Kenner*, 336 So.2d 824, 831 (La. 1976) (counsel is not required to undertake futile steps). No constitutional violation has been demonstrated.

Likewise, as discussed in connection with the defendant's fifth assignment of error, supra, Mr. English actively cross-examined the State's witnesses. Finally, Mr. English's concession of guilt did not render the defendant's not guilty plea meaningless, as the State was still obliged to present evidence establishing the essential elements of the crimes charged. *See Florida v. Nixon*, 543 U.S. at 187–88, 125 S.Ct. at 560–61 (counsel's guilt phase concession of Nixon's guilt did not amount to "the functional equivalent of a guilty plea" and did not waive Nixon's constitutional rights, including the right to a trial by jury, the protection against self-incrimination, and the right to confront one's accusers).

The abundance of evidence that the defendant killed the three victims in this case set the course for how the trial would unfold. All of the parties were imminently aware of the high stakes of the capital trial.[39] At every turn, the trial judge scrupulously sought to protect the defendant's constitutional rights. Mr. English's strategic decision to concede factual guilt did not waive the defendant's constitutional rights, but rather was a strategic choice designed to obtain the lesser

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[39] *See California v. Ramos*, 463 U.S. 992, 998–99, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983) (recognizing that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

verdict of second degree murder, instead of first degree murder. Nixon forecloses the claims raised in this assignment of error.

Failure to Appoint Certified Capitol Defense Co–Counsel

In the defendant's eighth assignment of error, he claims that he was denied the assistance of co-counsel to which he was entitled and that his waivers of appointment of co-counsel were not knowingly and intelligently made. The issue arose during pretrial at hearings held on January 24, 2011 and February 3, 2011. At the conclusion of both hearings, the trial judge indicated that the "only way" he could appoint additional counsel would be to have the public defender's office assist Mr. English as co-counsel, a choice that the defendant repeatedly declined as an option. Consequently, the hearings ended with the trial judge's conclusion that the defendant had made a "knowing, voluntary, and intelligent" waiver of co-counsel, and he denied the State's motion for appointment of additional counsel. The defendant now argues that at both the January 24, 2011 and the February 3, 2011 hearings, the trial court erred by failing to fully advise him of the benefits of two capital qualified attorneys. The defendant further suggests that the trial judge erred by limiting his options for co-counsel to only that provided by the public defender's office, when additional counsel could have been appointed from the "office of the State Public Defender."

At issue during the January 24, 2011 hearing was Louisiana Supreme Court Rule XXXI(A)(1)(a), which provides that in cases of indigent capital defendants, the trial court "shall appoint no less than two attorneys to represent the defendant. At least two of the ap-

pointed attorneys must be certified as qualified to serve in capital cases ...." "[T]o determine defendant's waiver of co-counsel at defendant's capital murder trial," the State had filed a "Motion to Determine Waiver of Co-Counsel," which was before the court on January 24, 2011. Also present at the January 24, 2011 hearing was Randall Fish of the local public defender's office.

During the hearing, not only did the trial court inform the defendant of his rights, but the district attorney also stated that "the intent of the rule in having two attorneys is, if one attorney gets up there in the guilt phase and the jury finds the defendant guilty there is a theory out there that that attorney has lost his ... 'creditability' ... with the jury. And then another attorney should step up to handle ... the penalty phase." Mr. English advised the court that he did "not have another counsel that intends to participate at trial." After the defendant and trial counsel conferred, the following colloquy occurred:

> MR. ENGLISH: It is my understanding that if the Court appoints a co-counsel, that co-counsel ... would be a public defender. Mr. McCoy has ... stated to me that he does not want the public defender's office appointed as co-counsel in this case. Okay. I want to state for the record, Your Honor ... I'm not capital certified; we waived that .... I am confident, Your Honor, that if I'm allowed to have all the tools that I can adequately give him a defense.
>
> * * *
>
> THE COURT: ... The only option that I would have, if I appointed anyone, would be the public defender's office.

MR. MCCOY: I can't get a conflict of interest attorney, Your Honor? Outside the public defender's office? From what I understood, Your Honor, I am entitled to a conflict of interest attorney, Your Honor.

[DISTRICT ATTORNEY]: Your Honor, there's never been any conflict of interest.

THE COURT: Not that I know of .... Mr. McCoy, there has not been a conflict of interest. The public defender's office would have been appointed in your case and has been appointed in your case. You retained private counsel through Mr. English .... And then you stated that you wished to waive his capital certification on the record. The other side of that is that if this Court were to appoint anyone the Court would have to appoint the public defender's office. That's the only persons that the Court could appoint .... So the Court would only have the option to appoint the public defender's office. If the public defender's office felt that there was a conflict in any way then they would appoint conflict counsel at that point. But I would have to go back to the public defender's office to appoint someone as a co-counsel, Mr. McCoy ... Do you wish this Court to appoint a public defender office attorney as a second attorney? That is up to you, Mr. McCoy.

* * *

MR. ENGLISH: I ... would not object to a co-counsel being appointed but that's up to Mr. McCoy.

> MR. MCCOY: Your Honor, I'm undecided at this moment ... that's a hard decision to make, Your Honor. This decision that I make, Your Honor ... will be a decision that will mitigate the rest of my life, Your Honor.
>
> * * *
>
> MR. ENGLISH: I think ... to make sure that we move forward with this that the Court appoint a public defender as a second counsel in this case, Your Honor.
>
> THE COURT: Mr. Fish?
>
> MR FISH: Your Honor, on behalf of the public defender's office we're going to certainly object ... to being appointed as co-counsel .... Mr. McCoy has private counsel, Your Honor.
>
> * * *
>
> MR. ENGLISH: ... [B]ecause the public defender's office objects, Your Honor, I withdraw that ... request.
>
> * * *
>
> THE COURT: Okay, then that request has been withdrawn.

Thereafter, trial counsel again conferred with the defendant and the following statements were made:

> MR ENGLISH: ... Your Honor, Mr. McCoy wants me to put on the record I have other lawyers who are advising me on this case, including the public [defender's] office .... I will be the only lawyer that will be handling the trial, Your Honor, but in terms of ... helping prepare me for this case, I have ... relied on both

> Pam Smart [and] James Gray ... [of] ... the state public defender's office, and ... several mitigation experts, Your Honor ... Mr. McCoy is now ... going to state, Your Honor, that he waives appointing a second person to the case. Correct, Mr. McCoy?
>
> MR. MCCOY: You're correct.

The January 24, 2011 hearing concluded with the defendant waiving appointment of a Rule XXXI second attorney to his case.

The counsel issue was back before the court on February 3, 2011, following remand from the Second Circuit, which included a strong directive to the trial court "to ensure that Mr. McCoy is, or has been, fully apprised on the record of the benefits of having two capital-defense qualified attorneys and that McCoy has knowingly and intelligently waived same." *State v. McCoy*, 46,394 (La. App. 2 Cir. 2/3/11). In response to the Second Circuit's February 3rd ruling, the State filed, on the same day, its motion to appoint additional counsel. The trial court held a hearing on the motion, upon its filing, on February 3rd. Randall Fish, of the public defender's office was also present at the February 3rd hearing, when the trial court fully explained the situation to defendant:

> THE COURT: Mr. McCoy ... you have been declared indigent ... for purposes of being able to get mitigation experts. There is a Supreme Court rule that is out there that states that if you're declared indigent that you have the right to counsel, which you've already been advised of that right to counsel, that you would be given—Mr. English would still be your counsel but that ... death qualified attorneys would be

appointed to represent you in this matter. That would come through the public defender's office, which they would appoint death qualified personnel to be able to represent you in this case. Mr. Marvin has asked that those two people be qualified and that you be appointed through the public defender's office death qualified individuals. That usually comes through CAPOLA, which is the Capital Assistance Program if I'm stating that correctly, and CAPOLA would be appointed and determine who those counsels are ...

[DISTRICT ATTORNEY]: I think that the Court should ... appoint the public defender's office with instructions that it should appoint two death qualified people and there may be one from this local PDO and one from CAPOLA or maybe more tha[n] one.

* * *

MR. ENGLISH: ... Mr. McCoy has an objection ... if the counsels come from the public defender's office here locally. I have explained to him that ... more likely than not ... that those two attorneys would be appointed from the Louisiana Capital Defense Association. Which means they ... do not work for the public defender's office. They are death penalty qualified. More likely than not they will be two attorneys in private practice who ... work with this association. And that the public defender's office will merely be retaining those people. But nobody from the local public defender's office will be involved in this case and ... would the local public defender's office agree with that?

* * *

MR. FISH: Randall Fish, on behalf of the public defender's office. Your Honor, at this time we don't know. As far as I know a capital case through the public defender's office would be assigned to me and Larrion Hillman. I don't know, at this point, I certainly don't know that the Capital Assistance Project would be secured through the public defender's office ... at the present time. And in addition, we may or may not seek ... review of being appointed in addition to Mr. English. That's something I have to discuss with Ms. Smart and make a decision on in the next day or two. But I do see some practical problems with appointed counsel being appointed in addition to private counsel .... [I]f we're to be appointed, I think it should be our responsibility to solely handle the defense of the case and not share that responsibility with Mr. English.

* * *

MR. ENGLISH: Your Honor, the Second Circuit made a certain suggestion, the D.A. has filed a motion ... I don't object to additional counsel being appointed to support me. [M]y ego is not such as that .... I'm confident that under the facts of this case that I can do what needs to be done. But certainly having two additional attorneys in no way offends me. Mr. McCoy, Your Honor, does not believe ... that the public defender's office will adequately represent him .... He would not have any problems, Your Honor, if the lawyers come from the Louisiana Capital Defense Association. In light of

everything that Mr. Fish has said ... I have no response ... to that. I'm simply trying to communicate where I believe my client's position is .... I personally do not have any problem and recommended to Mr. McCoy that you cannot have to[o] many lawyers in a case like this .... I'm perfectly comfortable proceeding as a single attorney because I'm relying upon the expertise—there are other ... capital defense lawyers who have been providing me expertise and direction in this case. I understand it is a capital case; I feel confident ... that I can represent Mr. McCoy. But I welcome any help if the Court so deems so and the district attorney's office deems so. The problem is with Mr. McCoy, Your Honor, ... he doesn't have any confidence in the public defender's office.

THE COURT: All right. Mr. McCoy?

MR. ENGLISH: Have I said that correctly, Mr. McCoy?

MR. MCCOY: You're exactly right, sir.

THE COURT: ... The district attorney has asked that additional capital qualified personnel be appointed to represent you, sir. And I am entertaining that motion at the present time. The only way that I can appoint anybody is that it has to be appointed through the public defender's office. And the public defender's office would of course decide who would be capital qualified to be able to represent you, and assist Mr. English, that is my option. From listening to Mr. English you're stating that you want Mr. English and Mr. English alone to represent you and you do not want the public de-

fender's office to represent you. Is that what this Court is hearing?

MR. MCCOY: Well what I'm saying today, Your Honor, I would love, you know, to have my prior representation of Mr. English but the assistance of the public defender board, no, sir, it's not needed by myself. I have no confidence in the public defender board. I've had prior run-ins with the public defender board. And if I'm not mistaken, Judge, I mean, please correct me if I'm wrong, there are some outside officials that can be retained through the—the Louisiana Association for other conflict of interest attorneys, Your Honor. I mean, this is my life, Your Honor .... I understand the statements ... that are validated before the Court, Your Honor, but I have no second chance at this, Your Honor. And I don't want the Court to put counsel on me, Your Honor, that I don't want. I object of this, Your Honor.

* * *

[Mr. English confers with Mr. McCoy off the record.]

* * *

THE COURT: Mr. McCoy, are you telling this Court that you fully waive the public defender's office being appointed? Understanding that Mr. English is not capital qualified. And that you waive these two attorneys, I mean, you waive the Court appointing the public defender's office with capital qualified attorneys to be sitting on this case? Is that what you're telling this Court?

> MR. MCCOY: Your Honor, I'm telling this Court today that I am confident with Mr. English but with other legal assistance beyond the public defender's office, Your Honor. Beyond the public defender's office, Your Honor. Because if they was to appoint me—Your Honor, this is to better represent the Court as well. If they were to appoint me some counsel from the public defender's office, I'm going to fire them, Your Honor. I'm just putting it qualified on the record; I'm going to fire them.
>
> THE COURT: So you are waiving any representation by the public defender's office fully and voluntarily, is that what I hear you say?
>
> MR. MCCOY: Yes, I don't want anybody from the public defender's office, Your Honor. But beyond the public defender's office, Your Honor, conflict of interest attorney, I will accept ... from the Louisiana Defense Association of the Capital Association, I will accept, Your Honor.
>
> THE COURT: Mr. McCoy, I don't have that authority. The only authority I can do is appoint the public defender's office. I will ask you again, are you fully, and knowingly, and voluntarily waiving the public defender's office to be appointed as co-counsel with Mr. English?
>
> MR. MCCOY: Yes, I am, Your Honor.

Thereafter, the defendant acknowledged that he did not know who the public defender's office might assign to his case, but he reiterated that he had past dealings with Mr. Fish and Ms. Smart, and consequently, he did not want as counsel any representative from the public defender's office, even someone he had never known

before. The district attorney re-emphasized the rationale underlying Rule XXXI to the defendant:

> [DISTRICT ATTORNEY]: ... And you understand the reason the Court is trying to appoint two lawyers is if you end up being found guilty and this case proceeds into the penalty phase to determine whether you end up with a death penalty or life in prison. The reason the Supreme Court rule says that you should appoint two attorneys is because that attorney that handled the guilt phase of the trial has failed .... And the jury might possibly have lost confidence in anything that he or she says and not believe them. So in the penalty phase when that same lawyer stands up there and says, ladies and gentlemen, you only have two options here give my client death or give him a life sentence. There is no not guilty at that point.

The defendant responded affirmatively, indicating, "Uh-huh." The district attorney then asked the defendant, "Do you understand that if the Court appoints the public defender's office and you end up with two lawyers that you don't like ... you always have the right to terminate those lawyers?" The defendant answered:

> MR. MCCOY: Yes, sir. I just spoke that on the record; I'm fully aware of that. But the repercussions of that is this is time consuming .... and most of all ... that is against my best judgment ... to even obtain someone that I have no confidence in whatsoever ....

Thereafter, the trial judge reiterated the purpose of appointing two attorneys to represent an indigent capital defendant and then asked for the defendant's confirmation:

THE COURT: Mr. McCoy, [the district attorney] has covered, like I tried to cover with you, what the Supreme Court is stating. The Supreme Court has stated that ... for some reason you go into the guilt phase and they find you guilty, and then it goes to a penalty phase. If Mr. English is the only attorney the Supreme Court has stated that he may lose creditability and that may affect you in the penalty phase as [the district attorney] has stated before. That is the reason behind the Supreme Court statute .... My only recourse is to appoint the public defender's office. Do you want me to appoint the public defender's office as second counsel?

MR. MCCOY: For the record, again, Your Honor, I'm totally opposed to that and most of all, Your Honor. I mean, if you really look at it, Your Honor, I choose not to be strong armed to take a public defender's aspect of secondary counsel when that's totally against my wishes, Your Honor. I know the Court by verbatim can work some other appointment of capital specialist out—other than the public defender board, Your Honor. Because the public defender board may can finance someone through the public defender's office to represent me in another ... jurisdiction.

THE COURT: The only option ... this Court has is once you're declared indigent is to appoint the public defender's office. You understand all of your rights, is that correct, Mr. McCoy?

MR. MCCOY: That's exactly correct, Your Honor.

> THE COURT: You understand that you have the right to have another attorney appointed to represent you through the public defender's office, is that correct?
>
> MR. MCCOY: Yes, sir, but I don't want that, Your Honor.
>
> THE COURT: And you are fully and voluntarily waiving those rights, is that correct?
>
> MR. MCCOY: I'm waiving the right of someone from the public defender's office representing me, Your Honor, because—
>
> THE COURT: And you're doing that knowingly and voluntarily, is that correct?
>
> MR. MCCOY: Yes, sir.
>
> THE COURT: All right, thank you, sir. Then I will not appoint the public defender's office at this time ....

Nevertheless, the defendant now suggests that, even after these comprehensive exchanges, he "was denied" the right to qualified counsel based on an "inadequate waiver."

Importantly, Rule XXXI does not create a statutory right to two attorneys for indigents facing a capital trial. "The Rules shall not be construed to confer substantive or procedural rights in favor of any accused beyond those rights recognized or granted by the United States Constitution, the Louisiana Constitution, the laws of the state, and the jurisprudence of the courts." Louisiana Supreme Court Rule XXXI(B).[40] In *State v.*

[40] We note that the language of Rule XXXI expressly states that "[i]n all capital cases, the following ***standards*** shall be applicable to the defense of indigents ...." (Emphasis added.)

Jones, 97–2593 at pp. 5–6, 707 So.2d at 978, the trial court faced the same situation and determined that for purposes of Rule XXXI, co-counsel could be appointed notwithstanding that the Jones defendant had a retained, and subsequently pro bono, counsel, presaging the scenario at hand:

> It is plainly preferable to have two attorneys in a capital case and we find no reason that the presence of collaterally retained private counsel should eliminate the need or countermand the advantages of two. Further, we can discern no reasoning nor find authority for the proposition that an indigent defendant is entitled to two State-funded attorneys, but an indigent defendant who has retained counsel from a collateral source is not entitled to a second counsel. Certainly, it is in the best interest of the taxpayer to encourage collaterally obtained counsel at no cost to the public fisc. It would therefore defy logic to punish such a defendant by refusing to appoint co-counsel because he has, in effect, saved IDB funds through retention of private counsel.
>
> However, we reiterate that an indigent capital defendant has no recognized right to two attorneys and in some cases may not desire a second appointed counsel. In such a case, it would be unjust to require a defendant to accept appointed counsel along with his retained counsel. Because there is no right to second counsel, because a defendant may oppose the appointment, and because other unforeseen reasons may weigh against appointment of second counsel, such an appointment is left to the discretion of the trial court.

In the subsequent case of *State v. Koon*, 96–1208 (La. 5/20/97), 704 So.2d 756, cert. denied, 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997), the defendant claimed he was denied the assistance of co-counsel to which he was entitled under Rule XXXI. Like the instant defendant, the *Koon* defendant became unhappy with his public defender early on, and the trial court appointed a solo practitioner as lead counsel, and the lead defense counsel recruited a second attorney who later abandoned the case, leaving Koon with only his original defense counsel to try the case. *Koon*, 96–1208 at pp. 20–21, 704 So.2d at 769. The *Koon* defendant waived a second defense counsel, and this court affirmed his conviction and death sentence, noting that Rule XXXI "does not give rise to an affirmative right to multiple attorneys in capital trials." *Koon*, 96–1208 at p. 21, 704 So.2d at 769. The court found that Koon had waived the right to co-counsel after discussion with his original defense counsel and advisement by the judge. *Id.*

Koon's subsequent counseled post-conviction application, raising ineffective assistance of trial counsel, based in part on the absence of a second trial counsel, was denied, and this court denied certiorari. *State ex rel. Koon v. State*, 3–93–1268 (19th J.D.C. 3/21/00), *writ denied*, 00–1205 (La. 1/26/01), 781 So.2d 1258. However, over a decade after his capital trial, Koon's conviction for three counts of first degree murder and his death sentence were vacated on federal habeas review for ineffective assistance of counsel. In granting Koon's petition for writ of habeas corpus, the federal district court observed that Koon's private counsel rendered ineffective assistance in four respects; the most egregious omission was that defense counsel failed to interview and investigate the only known witness to the crime.

Koon v. Cain, 2007 U.S. Dist. LEXIS 97113, *26–30 (M.D. La. Feb. 1, 2007). The federal court also relied on the fact that defense counsel: (1) presented a mental-health/status defense at trial, yet only hired his chief expert witness on the issue one day before trial; (2) failed to use the assistance of co-counsel; and (3) failed to adequately prepare Koon for testimony at trial. Koon v. Cain, 2007 U.S. Dist. LEXIS 97112 *2 (M.D. La. Apr. 11, 2007). The Koon court found that counsel's decision to proceed to trial alone without the aid of at least one other attorney was part of the basis of its ruling, observing that "although an 'affirmative right' to two attorneys may not exist in Louisiana, defense counsel's refusal to be assisted by competent co-counsel can factor into the ineffective assistance analysis." *Koon v. Cain*, 2007 U.S. Dist. LEXIS 97113 at *31–32. The Fifth Circuit affirmed the district court's ruling. *Koon v. Cain*, 277 Fed.Appx. 381 (5th Cir. 2008).

Importantly, the federal district court granted habeas relief in *Koon v. Cain* on February 1, 2007, some seven months before the Louisiana Public Defender Act of 2007 became effective, and over three years before the Capital Defense Guidelines (La. Admin. Code, Title 22, Section 901 et seq.) were promulgated in May 2010, as discussed hereinafter. The statutory enactments, LSA–R.S. 15:141–184, and Capital Defense Guidelines became effective after *Koon v. Cain* and suggest that *Koon* may be distinguishable from the instant case, given those statutes and guidelines place the ongoing responsibility for filling out the defense team on the state public defender, which was not the statutory landscape when *Koon v. Cain* was decided.

Notably, *Koon v. Cain* presented a case of ineffective assistance of counsel, decided under the principles announced in *Strickland v. Washington*, 466 U.S. 668,

104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). By appellate counsel's choice, he specifically has not raised a claim of ineffectiveness of counsel in this direct appeal, and thus, such a claim is not before the court.

In the present case, at the hearing on the motion for new trial, John Di Giulio of the Louisiana Public Defender Board ("LPDB"), formerly the Louisiana Indigent Defense Assistance Board ("LIDAB"), was called as a witness. Mr. Di Giulio testified that Randall Fish's objection, on behalf of the local public defender's office, to being appointed alongside retained counsel (Mr. English) was inconsistent with the Capital Defense Guidelines, enacted in May 2010, approximately one year before the defendant's capital trial.

Mr. Di Giulio explained that under the Capital Defense Guidelines, the district public defender or the state office is responsible for supplying the additional resources to bring the defense team into compliance with the guidelines, even for a capital defendant with retained or pro bono counsel. He stated that the minimum compliance for capital defense is two counsel, at least one of whom is certified as a capital defense qualified lead counsel. Mr. Di Giulio testified that his office provides supervision of capital trial counsel, receives monthly reports of every capital trial in the state, and contracts with a number of non-profit corporations to provide indigent capital defense. Mr. Di Giulio testified specifically that Randall Fish, in objecting to the local public defender's office being appointed as co-counsel to serve alongside Mr. English, expressed a position inconsistent with the guidelines and, thus, was not accurate. According to Mr. Di Giulio, the notion expressed by the trial judge in this case—that co-counsel would have to be appointed *from* the local public defender's office—seemed to be the understanding of the parties

at the time, but it was not the only option. Mr. Di Giulio posited that, in a case such as the present one—when the local public defender's office had been involved and then removed—it would have been more appropriate to contact the LPDB office, which could have appointed one of its contract program attorneys, who do trial level work all over the state, to assist in the case. Mr. Di Giulio suggested that, even in a case in which the defendant has a private attorney, the Capital Defense Guidelines would still apply to remedy a deficiency if a determination of indigency has been made. Mr. Di Giulio indicated that, in a situation in which the public defender's office has "an inability to get along with the defendant," the state public defender's office could appoint one of their 501(c) attorneys to either assist or replace trial counsel.

Of particular interest to the instant case is § 905(B)(1) of the Capital Defense Guidelines, which states, "The district public defender, regional director and state public defender are to be independent of the judiciary and they, not the judiciary or elected officials, shall select lawyers for specific cases." 22 La. Admin. Code, Part XV, § 905(B)(1). Also, the guidelines require "the district public defender, regional director or state public defender, as appropriate, [to] be responsible for supplementing existing services available to the defendant to meet the requirements of this Section." 22 La. Admin. Code, Part XV, § 913(C)(2). In addition, 22 La. Admin. Code, Part XV, § 905(D)(1) states, "In any circumstance in which the performance of a duty under this Section would result in a conflict of interest, the relevant duty should be performed by the state public defender, a defender organization or independent authority free of a conflict of interest and identified for this purpose in the Capital Representation Plan."

Further, the guidelines provide that "[c]ounsel shall not be assigned to a defendant who indicates that he does not wish to receive public defender services." 22 La. Admin. Code, Part XV, § 911(C)(4). Thus, as these provisions and the testimony of LPDB witness John Di Giulio affirmed, if the instant defendant were entitled to conflict counsel, the starting point would necessarily be via referral by the district public defender to the LPDB regional director and/or the state public defender. The February 3, 2011 colloquy shows the difficulty the parties had in explaining that reality to the defendant because he vehemently rejected anything involving the "public defender."

Based on the absence of trial co-counsel, the defendant's appellate counsel urges that the defendant should be granted a new trial as to both the guilt and penalty phases of trial. The State maintains no new trial is warranted, arguing during the hearing on the motion for new trial, "[I]t's real convenient now to come back and say, well, we've got all [these] problems, the ones that are all protected by attorney-client privilege so there's no way anybody could have known that but they were such of big magnitude that I was effectively denied my right to a lawyer, so that's where we are."

The record presented in this case demonstrates that the defendant could not have been more resolute in declaring that the appointment of co-counsel through the public defender's office was unacceptable to him.

The trial court clearly informed the defendant that a second co-counsel would be appointed "through the public defender's office"; this statement was in compliance with the Capital Defense Guidelines, which, as stated above, directs in § 905(B)(1) that the district

public defender, regional director, and state public defender, not the judiciary or elected officials, select lawyers for specific cases and, when there is a conflict of interest, § 911(C)(4) directs that the state public defender, a defender organization or independent authority free of a conflict of interest must undertake the indigent defense. Implicit in the delivery of indigent defense organizational structure is that a claim of conflict is evaluated within the public defender hierarchy by "the appropriate non-conflicted authority," as stated in § 911(E)(1), and, if a conflict is found, the case is referred to an attorney hired by the LPDB for conflict-free representation.

Notwithstanding, the defendant in this case steadfastly persisted in rejecting any participation of the "public defender" in his defense, stating at the February 3, 2011 hearing on the issue that he did not need "the assistance of the public defender board" and that he had "no confidence in the public defender board."

This court has previously indicated that a trial court would be "unjust" in compelling a defendant to accept a second indigent defender along with his retained counsel, when he has expressed opposition to such, in *State v. Jones*, 97–2593 at p. 6, 707 So.2d at 978 ("[I]n some cases [a defendant] may not desire a second appointed counsel. In such a case, it would be unjust to require a defendant to accept appointed counsel along with his retained counsel."). Moreover, the decision of whether or not to appoint counsel to an indigent defendant is reviewed under the abuse of discretion standard. *Id.* ("Because there is no right to second counsel, because a defendant may oppose the appointment, and because other unforeseen reasons may weigh against appointment of second counsel, such an appointment is left to the discretion of the trial court.").

Under the particular facts and circumstances of this case, we find no abuse of discretion in the trial court's failure to appoint a second trial counsel, and there is no merit in this assignment of error.

Motion to Suppress

In his ninth assignment of error, the defendant contends that the trial court erred in refusing to grant his pro se motion to suppress the pretrial statement given by his friend and neighbor, Gayle Bernard Houston, because the statement was coerced. This handwritten motion was entitled "Motion to Suppress Evidence & Motion for Acquittal/Dismissal" and was filed in the trial court by the defendant on April 8, 2009. The motion stated, in pertinent part:

> State of Louisiana—Detectives of Bossier City Police ... violated said suspects Spartacus McCoy; Carlos McCoy; and neighbor Gale Houston's 6th Amendment right to counsel by interrogating them without their lawyer present and/or forcing/pressuring them to make a false confession ....
>
> * * *
>
> ... Gale Houston stated: "He only did and said what was told of him", "so he too wouldn't be incarcerated." Law states: "that no suspect should be forced; threatened; co-hearsed [sic]; and coached to make any statement in which they do not want to make ..." "Violation of 5th Amendment right and numerous civil rights by law enforcement officials ... Suspect was also intoxicated."

On July 21, 2009 the trial judge ruled on the defendant's motion in pertinent part as follows:

> First, this Court will address Petitioner's "Motion to Suppress Evidence." Petitioner fails to adhere to the time limitations provided for such a motion in Arts. 703 and 521 of the Code of Criminal Procedure. Such a motion should be filed within 15 days after arraignment. Petitioner has not done so. Petitioner was arraigned on June 17, 2008 and Petitioner's "Motion to Suppress" was filed on April 8, 2009. While the court has such discretion to allow an untimely "Motion to Suppress," the burden of proof is on the defendant to prove the ground of his motion, which he has not done so in this case. Therefore, for the foregoing reasons, Petitioner's Motion to Suppress is DENIED.

The defendant faults the trial court for setting a series of new filing deadlines for motions to be filed even after it denied the defendant's pro se filing as untimely, noting that the trial court set motions to be heard up to December 28, 2010, and the defendant's trial did not commence until July 28, 2011, some two years after the defendant's motion to suppress was denied as untimely. Counsel suggests that the judge's denial was "arbitrary and unfairly targeted [defendant's] pro se filings."

Importantly, LSA–C.Cr.P. art. 17 vests in the trial court "all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders .... It has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done." Further, LSA–C.Cr.P. art. 521(A) provides: "Pretrial motions shall be made or filed within fifteen days after arraignment, unless a different time is provided by law or fixed by the court at arraignment upon a showing of good cause why fifteen days is inad-

equate." In addition, LSA–C.Cr.P. art. 703(C) governs motions to suppress evidence and provides:

> A motion filed under the provisions of this Article must be filed in accordance with Article 521, unless opportunity therefor did not exist or neither the defendant nor his counsel was aware of the existence of the evidence or the ground of the motion, or unless the failure to file the motion was otherwise excusable. The court in its discretion may permit the filing of a motion to suppress at any time before or during the trial.

The purpose of these rules is to prevent interruption of trials, avoid the effort and expense of useless trials, and to protect juries from exposure to inadmissible evidence. *State v. Taylor*, 363 So.2d 699, 702 (La. 1978).

In the present case, the defendant filed numerous pro se motions and subpoena requests and also initiated disciplinary complaints against Mr. English. The district attorney asserted that the defendant's actions were "meant to harass and unduly delay this matter." The attorneys who represented the defendant actively sought to curtail his pro se filings. At every opportunity, Mr. English advised the trial court that he did not adopt the defendant's motions or subpoena requests. When Mr. English first enrolled as counsel, he expressed optimism in representing the defendant: "Based upon our conversations, I'm confident that he will rely on my counsel and allow me to be the counsel in this case. We had a very candid conversation about this. That I would be the only voice from this day forward speaking for Mr. McCoy." That optimism faded over the intervening months, and trial counsel's frus-

tration was palpable at the hearing on January 4, 2011 because the defense was not speaking with one voice:

> MR. ENGLISH: I believe also, Your Honor, there was a Motion to Suppress Evidence that Mr. McCoy had filed and I'm looking at a ruling here and I don't see a date on it, but indicated that the Court would set a new date to hear his Motion to Suppress the Weapon, the Illegal Tape Recording, Confidential Communication without Accused's Knowledge and Consent, and a Coerced Confessions and State Dispositions. I have talked to Mr. McCoy. I ... told him that I don't believe that this motion has any value in this particular case and that it would be a waste of resources given what the evidence is. He has agreed and so we're not going to argue that motion either, Your Honor.
>
> THE COURT: All right, and that motion will be withdrawn at this time ....

In *State v. Bodley*, 394 So.2d 584, 593 (La. 1981), this court confronted a similar situation and reasoned that "[w]hile an indigent defendant has a right to counsel as well as the opposite right to represent himself, he has no constitutional right to be both represented and representative." The instant case is an example of a defendant who sought to be both represented and representative.

Notwithstanding, although Gayle Bernard Houston testified as a State witness, the pre-trial statement of Mr. Houston was not admitted into evidence; however, it was used to refresh his memory. Mr. Houston testified that he was a childhood friend of the defendant and he had known the defendant all of his life. Mr. Houston related to the jury that on the night of May 5, 2008, he

and his brother picked up the defendant and his brother, Spartacus McCoy (who was deceased by the time of trial), in downtown Shreveport. Mr. Houston further testified that he and his brother went to pick the defendant up because the defendant's brother had sounded upset so they "decided to see what was going on." Mr. Houston disclosed that when the defendant got into his car "he was just quiet and—and then eventually he just said, you know, he 'F'd' up and we was all trying to figure out what—what you done 'F'd' up." Mr. Houston repeated several times in his testimony that the defendant "looked normal" to him.

On further questioning by the district attorney, Mr. Houston seemed hesitant to repeat the entirety of the defendant's statements made on that date and, when asked about whether he had given a statement to police, Mr. Houston acknowledged that he had given a statement to Detective Brian Griffith on May 8, 2008. Referring to the transcript of that statement, Mr. Houston agreed that his memory was refreshed, and he was able to give additional details about the events of that evening. *See* LSA–C.E. art. 612(B) ("In a criminal case, any writing, recording, or object may be used by a witness to refresh his memory while testifying.").

Referencing Mr. Houston's statement to Detective Griffith, the district attorney asked Mr. Houston what he told the detective in relation to the defendant saying he "F'd up," to which Mr. Houston replied, "I said he done shot three people." The district attorney then read aloud from the statement in formulating his next questions to Houston, as reflected in the following colloquy:

> [DISTRICT ATTORNEY:] ... [A]round in the middle of that page you said, "He wouldn't ex-

> plain why or he—he just wouldn't explain nothing. He just said that he shot three people. I done F'd up. I'm not going back to jail, Gayle." That's you right?
>
> [MR. HOUSTON:] Yes.
>
> [DISTRICT ATTORNEY:] "Robert, you need to turn yourself in." "I'm not going back to jail." Do you remember him saying that to you?
>
> * * *
>
> [MR. HOUSTON:] Now, you know, like I said, when I'm doing my statement, you know, I—I been drinking and I could have everything backwards.

Mr. Houston also stated that he could only say for sure that the defendant stated that he "F'd up." Mr. Houston explained that he could have heard the other statements, which he reported to police as having been made by the defendant, from other people, instead of directly from the defendant.

Thereafter, Mr. English cross-examined Mr. Houston, quoting verbatim from his statement, asking, "After reading this statement do you still say Robert was acting normal or was he crying that night?" Mr. Houston again responded that the defendant was "acting normal." The following colloquy ensued:

> [MR. ENGLISH:] ... On a direct question from [the district attorney], you stated that Mr. McCoy was acting normal, correct?
>
> [MR. HOUSTON:] Yes.
>
> [MR. ENGLISH:] But in your statement to the police you told him he was crying, correct?

> [MR. HOUSTON:] Yes.
>
> [MR. ENGLISH:] Which one was it?
>
> [MR. HOUSTON:] Crying.

Mr. English then propounded a line of inquiry submitted by the defendant:

> [MR. ENGLISH:] Now, did you lie to the Bossier—What you said in this statement, now, even though you don't remember it, did you lie to the police department?
>
> [MR. HOUSTON:] No.
>
> [MR. ENGLISH:] ... Mr. McCoy wants to know did you tell his father that the detectives had coached you and you made all of this up?
>
> [MR. HOUSTON:] No.
>
> [MR. ENGLISH:] Okay. Mr. Houston, you indicated that you were drinking, correct?
>
> [MR. HOUSTON:] Yes.
>
> [MR. ENGLISH:] And the—the—This is a legitimate question. The fact that you were drinking, would that have clouded your recollection in any way of what Mr. McCoy did or did not do?
>
> [MR. HOUSTON:] No ....

In support of this assignment of error, the defendant cites this court's decision in *State ex rel. Johnson v. Maggio*, 440 So.2d 1336, 1337 (La. 1983) (per curiam), for the proposition that a pro se petitioner "is not to be denied access to the courts for review of his case on the merits by the overzealous application of form and pleading requirements or hyper-technical interpreta-

tions of court rules." *State ex rel. Johnson* involved appellate review of a habeas corpus proceeding following the pro se applicant's conviction for criminal mischief, which was in contrast to the instant proceeding wherein the defendant attempted to act both pro se and via trial counsel.

Under the instant circumstances, we conclude that any error of the trial court in denying the defendant's pro se motion to suppress the statement of Gayle Houston was harmless since the written statement was not introduced into evidence, but rather was used only to refresh the memory of Gayle Houston during his trial testimony, pursuant to LSA–C.E. art. 612(B), and since there was no contemporaneous objection made to the use of the statement at trial. We expressly note that defense counsel also used the statement to refresh the witness's memory on cross-examination. Furthermore, there was no motion by either the district attorney or defense counsel to introduce any part of the statement into evidence. This assignment of error fails on the merits.

Voir Dire

In the defendant's tenth assignment of error, he argues that the State's exercise of peremptory challenges as to prospective jurors was based on race, in violation of the U.S. and Louisiana Constitutions, as well as LSA–C.Cr.P. art. 795(C) ("No peremptory challenge made by the state or the defendant shall be based solely upon the race or gender of the juror."), necessitating a new trial.

The discriminatory use of peremptory challenges by a prosecutor to exclude potential jurors based solely on race has long been considered a constitutional viola-

tion. *Batson v. Kentucky*, 476 U.S. 79, 84–85, 106 S.Ct. 1712, 1716–17, 90 L.Ed.2d 69 (1986); *Swain v. Alabama*, 380 U.S. 202, 203–04, 85 S.Ct. 824, 826–27, 13 L.Ed.2d 759 (1965). The *Batson* court outlined a three-step process for a trial court to use in evaluating a claim that a peremptory challenge was based on race. *Snyder v. Louisiana*, 552 U.S. 472, 476, 128 S.Ct. 1203, 1207, 170 L.Ed.2d 175 (2008); *State v. Nelson*, 10–1724, p. 9 (La. 3/13/12), 85 So.3d 21, 28. Under *Batson* and its progeny, the opponent of a peremptory strike must first establish a prima facie case of purposeful discrimination. *State v. Nelson*, 10–1724 at p. 9, 85 So.3d at 28–29. Second, if a prima facie showing is made, the burden shifts to the State to articulate a race neutral explanation for the challenge. *Id.*, 10–1724 at p. 9, 85 So.3d at 29. Third, the trial court then must determine if the opponent of the strike has carried the ultimate burden of proving purposeful discrimination. *Id.* (citing *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724).

This final step involves evaluating "the persuasiveness of the justification" proffered by the striking party, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *State v. Nelson*, 10–1724 at p. 15, 85 So.3d at 32 (quoting *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam)). Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. *Purkett v. Elem*, 514 U.S. at 768, 115 S.Ct. at 1771; *Hernandez*, 500 U.S. at 359, 111 S.Ct. at 1866.

Since the trial judge's factual findings in the context of evaluating discriminatory intent largely turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Hernandez*

v. New York, 500 U.S. 352, 364, 111 S.Ct. 1859, 1869, 114 L.Ed.2d 395 (1991); *Batson*, 476 U.S. at 98, n. 21, 106 S.Ct. at 1724, n. 21. A trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. *Snyder v. Louisiana*, 552 U.S. at 477, 128 S.Ct. at 1207. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Hernandez v. New York*, 500 U.S. at 369, 111 S.Ct. at 1871.

In the instant case, following a *Witherspoon*[41] qualification, ninety-four prospective jurors remained in the venire, and those prospective jurors were further divided into panels of seven prospective jurors, each, for general voir dire questioning. The parties questioned eight full panels and two prospective jurors from the ninth panel to complete jury selection of twelve jurors and two alternate jurors. Of those fifty-eight prospective jurors, ten appear to have been African–American: Ms. Curry, Ms. Venus, Ms. Eason, Ms. Thomas, Mr. Burks, Mr. Mitchell, Mr. Burrell, Mr. Landry, Mr. Small, and Ms. McWashington. According to the defendant, the jury was composed of eleven Caucasian jurors and one African–American juror, and the two alternate jurors were Caucasian.

Three *Batson* challenges were made by the defense, respecting peremptory strikes made by the State as to prospective jurors Ms. Curry, Mr. Landry, and Ms. McWashington. The defendant now contends that, in denying these challenges, the trial court relied on incorrect factual bases, failed to assess the credibility of

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[41] *See Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) (holding that a prospective juror who under no circumstances would vote to impose the death penalty, instead voting automatically for a life sentence, is properly excluded).

the State's proffered race neutral reasons in light of disparate treatment of similarly-situated white jurors and other evidence of discriminatory intent, and failed to "have regard for" the State's strike of the "jointly struck juror, Ms. Venus."

During voir dire in this case, the first peremptory strike against an African–American, Ms. Curry, was made upon completion of questioning of the first panel of prospective jurors. Afterward, following the questioning of the second and third panels, the State and the defense both exercised a peremptory back-strike to remove first panel prospective juror Ms. Venus, making her the second African–American removed by a peremptory strike (the two other African–Americans previously removed were removed "for cause," not peremptorily).

After the back-strike of Ms. Venus, the defense raised its first *Batson* claim. The defense urged that there had been a clear pattern of striking African–American jurors by the State. The district attorney responded that Ms. Venus could not be considered as part of a pattern of racially discriminatory strikes when the defense also submitted a peremptory strike against her. Mr. English, in essence, asserted that, because Ms. Venus was a "strongly pro-death penalty" juror, she favored the prosecution, such that the only reason the district attorney could have had for striking her was the fact that she was African–American. Mr. English also conceded that he was not seeking to have Ms. Venus returned to the jury venire; however, the State's strike of Ms. Venus, as the second peremptory strike of an African–American in the trial, gave him a basis upon which to contend that there was a pattern of racially discriminatory strikes and that the previously-stricken African–American, Ms. Curry, should be returned to

the jury venire. The trial judge reviewed the voir dire up to that point and did not perceive a pattern of discriminatory strikes on the State's part; thus, the trial judge did not require the State to make a race neutral articulation at that time. Nevertheless, the district attorney volunteered that the contents of Ms. Curry's juror questionnaire "are clear as to the reason she was struck."

The fourth and fifth panels of prospective jurors were questioned together and, of those fourteen prospective jurors, three were African–American—Mr. Burks, Mr. Burrell, and Mr. Mitchell. At the conclusion of questioning, the State challenged Mr. Burks for cause, based on his opposition to the death penalty, which the trial court granted without objection by the defense. The State then submitted a challenge for cause as to Mr. Burrell, based on his personal knowledge of the case and of the victims, and the defense did not enter a formal objection. Mr. Mitchell was selected from these panels to serve as the only African–American juror in this case.

Following the examination of the seventh panel of prospective jurors, the State exercised its twelfth peremptory challenge to excuse Mr. Landry, and the defense then urged its second *Batson* claim. Mr. English urged, "I believe that there's a clear pattern of [the district attorney] striking African–Americans from this jury. I think that Ms. Curry should be brought back in and should be placed back on this jury, Judge." The trial judge then noted that there had been three African–American jurors peremptorily struck, at that point, stating:

> Ms. Curry was the first—She was a black female that was struck. Ms. Venus, however,

> was struck by both Mr. English and Mr. Marvin at the same time .... And I will take note of that. I will state that there is a black male [Mr. Landry] that was finally struck by Mr. Marvin. I will let Mr. Marvin state any race-neutral reasons that he has and I will take those into consideration ....

Before the district attorney began articulating his neutral reasons for his peremptory challenges, he argued that Ms. Venus should not be considered as part of a pattern of racial discrimination, for purposes of evaluating the *Batson* challenge, given that both sides struck her, stating, "The remedy of *Batson* is to put the person back on the jury, okay. Do you want her back?" Mr. English responded that, while he did not seek to reseat Ms. Venus, he thought that both Ms. Curry and Mr. Landry should be placed back on the jury.

The district attorney offered as his reason for peremptorily striking Ms. Curry, her responses on the juror questionnaire, which established that she was "personally, morally, or religiously opposed to the death penalty and will always vote to impose life sentence." The trial court accepted the State's reasons for striking Ms. Curry as race neutral and denied the *Batson* claim as to her. As for Mr. Landry, the district attorney pointed to the fact that Mr. Landry did not answer most of the multiple questions on his juror questionnaire pertaining to the death penalty, that the death penalty sections were the only sections in the juror questionnaire that Mr. Landry did not fill out, and that Mr. Landry's failure to fill out the death penalty sections of the juror questionnaire indicated that he must have had "some kind of reservation about the death penalty." Mr. English countered that he thought Mr. Landry's statements during voir dire were so strongly

in favor of the death penalty that he had Mr. Landry on his list to strike because "he would not be favorable to my side." The trial court ruled that the district attorney had stated "a race-neutral reason" and denied the *Batson* claim over the objection of the defense.

At the conclusion of the examination of the seventh panel of prospective jurors, twelve jurors had been selected and placed under the rule of sequestration. An eighth panel of prospective jurors was then brought in for the selection of the alternate jurors; in that panel were two African–Americans, Mr. Small and Ms. McWashington. The defense challenged Mr. Small for cause because he had been a high school classmate of Gregory Colston's, and the challenge for cause was granted by the trial court.

Thereafter, the State peremptorily struck Ms. McWashington, and the defense then made its third *Batson* claim. As a race neutral reason for his peremptory challenge, the district attorney pointed to Ms. McWashington's statement that Officer Richard McGee had been pastor of her church for the preceding four or five years. The district Attorney further stated:

> Richard McGee is in these police reports. He is the man that Mr. English's client has accused of having an affair with his wife that provoked all this. I'm not going to let one of his parishioners sit on this jury .... If I'm not mistaken, one of the subpoenas that we've been arguing about weeks before was to Mr. McGee.

The district attorney further noted that Ms. McWashington had indicated that if Richard McGee were called to the stand as a witness, "she would tend to believe him" because "[h]e's her pastor." The trial court found that the State had articulated a race neutral reason un-

der *Batson*, and excused Ms. McWashington over defense objection.

Whether peremptorily striking three African–American jurors in the present case constitutes a prima facie pattern of discriminatory strikes is a question that becomes moot after the State provides race neutral reasons, pursuant to *Hernandez v. New York*, 500 U.S. at 359, 111 S.Ct. at 1866 ("Once a prosecutor has offered a race neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."). A trial judge may therefore effectively collapse the first two stages of *Batson* and rule on the question of discriminatory intent without deciding the question of whether the defendant established a prima facie case of purposeful discrimination. *See State v. Nelson*, 10–1724 at p. 10, 85 So.3d at 29.

On appeal, the defendant concedes that Ms. Curry's strong aversion to capital punishment was a legitimate basis for the State to peremptorily strike Ms. Curry. We find no merit in the defendant's assertion that, when considered in context with the other State peremptory challenges, which he claims were race-based, the trial court erred in failing to grant the *Batson* challenge as to Ms. Curry. As shown hereinbelow, all of the peremptory challenges exercised by the State at trial arose from legitimate race neutral considerations.

During the *Witherspoon* voir dire, Ms. Curry declared unequivocally that "I am not for the death penalty .... I could consider it but I would always lean toward life." We conclude that the State's peremptory strike of Ms. Curry was justified given her pro-life sentence stance, and the trial court's ruling upholding the

State's strike is supported by precedent. *See State v. Williams*, 96–1023, p. 33 (La. 1/21/98), 708 So.2d 703, 727 (holding that the State's articulated reason for striking a prospective juror because she appeared "weak ... on the death penalty" was accepted as a race neutral reason) (quoting *United States v. Bentley–Smith*, 2 F.3d 1368, 1375 (5th Cir. 1993) ("The reason certainly is stronger if the attorney is able to articulate an objective fact, such as that the juror was slow in answering questions or had to have questions repeated .... [but] the judge is free, based upon all the information presented and that judge's eyewitness observation of counsel, to conclude that the reason is offered in good faith and not as a subterfuge for race.")). In this case, looking at the whole of Ms Curry's voir dire testimony, no racial animus was apparent in the making of this peremptory challenge. *See Miller–El v. Dretke*, 545 U.S. 231, 252, 125 S.Ct. 2317, 2332, 162 L.Ed.2d 196 (2005) (wherein the Supreme Court considered "[t]he whole of the voir dire testimony" to evaluate the prosecution's reasons for striking the juror at issue).

Further, the defendant's argument on appeal, that the State's peremptory challenge of Ms. Venus should be considered when evaluating the State's peremptory challenge of Ms. Curry, ignores the clear directives of LSA–C.Cr.P. art. 795(D) to the contrary, given that the defense simultaneously challenged the same juror. Although Paragraph (C) of Article 795 authorizes the trial court to demand a race neutral reason for the exercise of a peremptory challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror, Paragraph (D) of Article 795 provides that the "provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same

juror." Because Ms. Venus was peremptorily challenged by both the State and the defense, the trial court was not required to order the articulation of race neutral reasons, pursuant to LSA–C.Cr.P. art. 795(D), and we find no *Batson* violation apparent in the peremptory strike of Ms. Venus.

As to the *Batson* claim made after the peremptory challenge of Mr. Landry, the defendant argues that, when the district attorney in this case was concerned that the failure of Mr. Landry to answer juror questionnaire death penalty questions suggested his ambivalence about the death penalty, he should have asked additional questions about the matter and his failure to do so was an indication that the State's articulation of this reason in support of his peremptory strike against Mr. Landry was pretextual. On this point, the defense cites *Miller–El v. Dretke*, wherein the Supreme Court similarly reasoned, when a perceived conflict in a juror's position arose, "[W]e expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike." *Miller–El v. Dretke*, 545 U.S. at 244, 125 S.Ct. at 2327. The defense also cites *State v. Harris*, 01–0408, p. 8 (La. 6/21/02), 820 So.2d 471, 476, and *State v. Collier*, 553 So.2d 815, 822 n.11 (La. 1989), which recognized that the failure of a prosecutor to question, or questioning in only a cursory manner, a prospective juror who is challenged on the basis of a claimed bias raises a strong inference that the juror was excluded on the basis of race alone. Notwithstanding, we note that *Miller–El v. Dretke* further directs:

> [T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evi-

> dence with a bearing on it. It is true that peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.

Miller–El v. Dretke, 545 U.S. at 251–52, 125 S.Ct. at 2331–32 (citations omitted). Indeed, in *Miller–El v. Dretke*, the Supreme Court noted that "we read [the juror's] voir dire testimony in its entirety." *Id.*, 545 U.S. at 247, 125 S.Ct. at 2329.

Turning to Mr. Landry's voir dire, "in its entirety," we conclude that the record supports the articulated reasons for the district attorney's exclusion of him. Mr. Landry's responses in the *Witherspoon* round, at the very least, lacked clarity and potentially demonstrated an inconsistency in his thought process. Mr. Landry's response to questioning by the district attorney presented a somewhat confused opinion about the death penalty:

> [DISTRICT ATTORNEY]: Tell me your views on the death penalty?
>
> MR LANDRY: I'd say give them life in prison.
>
> * * *
>
> [DISTRICT ATTORNEY]: Okay. Did I take that to mean you're opposed to the death penalty?
>
> MR. LANDRY: I would like to know what really he done to put him life in prison. Well put him in there, you know?

[DISTRICT ATTORNEY]: I'm having a little difficulty hear[ing] you.

MR LANDRY: I'd say I'd have to know what's going on in order to put him in there. To take the penalty, you know. To put him in penalty.

[DISTRICT ATTORNEY]: ... [C]an you consider the death penalty as an option ... as a verdict that you personally could ... render?

MR. LANDRY: I would say that, yeah.

[DISTRICT ATTORNEY]: Okay. And that you were saying you need to know factors about—

MR. LANDRY: What—right what he did and everything.

[DISTRICT ATTORNEY]: Okay. Well that's what the whole trial would be about.

MR. LANDRY: Yeah—yeah, before I put, you know, say about a penalty, death penalty and everything.

[DISTRICT ATTORNEY]: Okay. But—but do you see yourself as someone—let's just—let's go at it like this. Let's say you were in an argument with your best friend just a friendly argument about the death penalty .... And your best friend said the death penalty should be abolished; we should not have it in our law. What do you say back?

MR. LANDRY: I wouldn't go for it.

[DISTRICT ATTORNEY]: Why?

MR. LANDRY: Because I don't believe that, you know, the death penalty is good, you know.

> If he did the crime it's all right, and, you know, he did the crime. But if he didn't do the crime, well, you know, it's way just—you know.
>
> [DISTRICT ATTORNEY]: Okay. So you would take the position the death penalty should not be in our laws?
>
> MR. LANDRY: It should be in the law if you did it if you did the crime but if you didn't do the crime he shouldn't, you know, he shouldn't have it.
>
> [DISTRICT ATTORNEY]: Okay. Do you see yourself as someone that could vote to impose the death penalty and come back into the courtroom and say, yeah, that's my verdict?
>
> MR. LANDRY: Yeah.
>
> * * *
>
> [DISTRICT ATTORNEY]: Can you consider a life sentence too?
>
> MR. LANDRY: Yeah.

Ultimately, Mr. Landry concluded that he could consider both verdicts, a life sentence or a death sentence, and the district attorney did not issue a cause challenge as to Mr. Landry.

However, during general voir dire, the district attorney asked Mr. Landry, "[O]n your questionnaire there were a couple of sections on here regarding the death penalty. And I notice that you didn't answer .... So, tell me what your views are on the death penalty?" Mr. Landry's response seemed to indicate that he was expecting to see a video of the crime, when he stated, "I would really have to see what really happened and watch the films to see what was going on—or watch the

pictures." The district attorney pressed Mr. Landry for a definitive statement as to his opinion, asking, "Do you think the death penalty should be in our law?" Mr. Landry replied, "Well, if they did the crime, you know, it would be, you know." The district attorney then inquired, "If the death penalty is available and you're on a jury what are you looking for that would make you say ... the death penalty should be the punishment here?" Mr. Landry replied, "Well, when you look at it you'll probably be able to see what happened, you know, if he did the crime, killed the people, you know."

In explaining his reasons for striking Mr. Landry, the District Attorney stated:

> Mr. Landry did not fill out the form in either of the sections that only pertain to the death penalty. He refused to fill it out. He didn't check anything in there. So he had some kind of reservation about the death penalty. He may be the most pro-death penalty guy out there. I don't know. But I know he didn't fill out the form .... And that's the only two sections that he didn't fill out. He told us three times about his bad back and medical problems and what sports and what courses he took and his income range and everything else in there, but wouldn't answer the questions about the death penalty .... I'm trying to find folks that will sit on the jury that I think have the guts to impose the death penalty.

The defendant further contends that other prospective jurors, who were white and who omitted one or two of the death penalty questions, were not struck from the jury, indicating that this fact supports his claim that these other jurors were "similarly situated" to Mr. Landry, and yet, Mr. Landry received disparate

treatment.[42] However, the fact that the State did not strike similarly situated white jurors is not, alone, grounds to find the stated reason for the strike pretextual. *See State v. Juniors*, 03–2425, p. 31 (La. 6/29/05), 915 So.2d 291, 317–18, *cert. denied*, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006) ("[T]he fact that a prosecutor excuses one person with a particular characteristic and not another similarly situated person does not in itself show that the prosecutor's explanation was a mere pretext for discrimination."); *State v. Collier*, 553 So.2d at 822 ("Other courts have rejected explanations for challenges when the prosecutor failed to challenge other jurors, not of the defendant's race, who shared the same characteristic as that claimed by the prosecutor as the reason for the challenge .... However, the fact that a prosecutor excuses one person with a particular characteristic ... and not another similarly situated person does not in itself show that the prosecutor's explanation was a mere pretext for discrimination. The accepted juror may have exhibited traits which the prosecutor could have reasonably believed would make him desirable as a juror.").

Looking at his voir dire testimony as a whole, Mr. Landry's *Witherspoon* responses and his general voir dire responses revealed repeated incidents of inconsistency about his opinion on the death penalty, which prompted the State to peremptorily exclude him. *See State v. Juniors*, 03–2425 at pp. 31–32, 915 So.2d at 318 (Although "an equivocal response in answer to whether [a prospective juror] could legitimately consider voting for death ... may not have risen to the level of a sustain-

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[42] We note that none of the white comparables disregarded death penalty question numbers 93 through 103, as Mr. Landry did on his juror questionnaire.

able challenge for cause, it does support the race-neutral reasons furnished by the State after defense counsel objected on *Batson* grounds to the peremptory strike against [the prospective juror].”). *See also Uttecht v. Brown*, 551 U.S. 1, 7, 127 S.Ct. 2218, 2223, 167 L.Ed.2d 1014 (2007) (“[W]hen there is ambiguity in the prospective juror’s statements,” the trial court is “entitled to resolve it in favor of the State.”).

Mr. Landry gave answers that were both distinctly pro-life and answers in which he seemed to indicate that he could consider death if he “could see” that the defendant did commit murder. In addition to these disparate opinions, Mr. Landry did not respond to death penalty question numbers 93 through 103 on his questionnaire, checking answers only to death penalty question number 104 (with its 8 subparts). The totality of Mr. Landry’s responses left the district attorney with questions as to Mr. Landry’s position on the death penalty and whether he could actually vote to impose it. Given that uncertainty, the decision of the district attorney to excuse Mr. Landry peremptorily does not appear to be founded on race, and no discriminatory intent appears to have tainted the State’s peremptory strike of Mr. Landry.

The State’s peremptory challenge of prospective juror Ms. McWashington was based on her friendship with Officer Richard McGee, who was named by the defendant to a jailhouse confidant as having been involved with his wife, contributing to the family breakdown that lead to the events at issue in this case. However, the defendant argues on appeal that it was known by the time that Ms. McWashington was peremptorily challenged (after acknowledging that Officer McGee was a family friend and the pastor of her church) “that Officer McGee was not going to be called as a witness in

the case by either side," though it was not a fact established in the record. Consequently, the defendant asserts that the State's reasons were pretextual, given that Ms. McWashington's answers otherwise favored the State (having expressed no aversion to the death penalty during voir, when she stated, "I really don't see a problem with the death penalty," and acknowledging that she could consider both life imprisonment and the death penalty). Thus, the defendant claims it was error for the trial court to deny his *Batson* challenge as to Ms. McWashington. Nevertheless, knowledge of, or a personal relationship with, a party or potential witness in a case is a sufficient race neutral explanation for challenge to prospective juror. *See State v. Qualls*, 40,630, pp. 20–21 (La.App. 2 Cir. 1/27/06), 921 So.2d 226, 240; *State v. Mamon*, 26,337, p. 18 (La.App. 2 Cir. 12/16/94), 648 So.2d 1347, 1359, *writ denied*, 95–0220, p. (La. 6/2/95), 654 So.2d 1104. Therefore, we conclude that the State's peremptory challenge of Ms. McWashington bears no indicia of racial animus, and the trial court properly denied the *Batson* claim as to her.

The Supreme Court has acknowledged that, looking back on voir dire from the appellate level, "[t]he rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." *Miller–El v. Dretke*, 545 U.S. at 238, 125 S.Ct. at 2324. Given the broad discretion *Batson* accords the trial judge in ruling on the fact-bound question of whether race was significant in determining who was challenged and who was not, an appellate court should not substitute its evaluation of the record for that of the trial court. *See Hernandez v. New York*, 500 U.S. at 364, 111 S.Ct. at 1868 ("[T]the trial court's

decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal."); *Batson*, 476 U.S. at 98 n.21, 106 S.Ct. at 1724 n.21 ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.").

In the instant case, the defendant has not borne his burden under *Batson*. At a point when three African–Americans had been struck peremptorily from the twelve-person jury, the judge acquiesced in the suggestion that the State should articulate reasons; however, it should be noted that, of the two African–American females in that number, one was strongly opposed to the death penalty (Ms. Curry), and the other was struck simultaneously by the State and the defense (Ms. Venus), and thus, was not part of the *Batson* equation, pursuant to LSA–C.Cr.P. art. 795(D). Additionally, the parties expressed uncertainty as to the race of the third juror struck (Mr. Landry).

Neither the numbers nor the facts support a prima facie showing that the State based its peremptory challenges on race. The trial judge's findings that no discriminatory purpose tainted the State's peremptory strikes is borne out by the record, and no abuse of discretion is apparent. Under the circumstances, the defendant's *Batson* claims fail on the merits and warrants no relief by this court.[43]

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[43] We note that the defendant's *Batson* claim was revisited in connection with the defendant's motion for new trial. At a January 23, 2012 hearing the defense filed into evidence statistical data from the judicial district "from January 2007 to July 2011," arguing that this data demonstrated a longstanding pattern of disproportionate numbers of African–Americans being struck by the

Bossier Parish District Attorney's Office, at a rate of "almost two and a half times the rate that they reject white jurors" in the parish. However, this court instructed against relying solely on such statistical data to establish a prima facie case of discrimination in *State v. Dorsey*, 10–0216 (La. 9/7/11), 74 So.3d 603, and in *State v. Duncan*, 99–2615 (La. 10/16/01), 802 So.2d 533. In *State v. Duncan* this court rejected an exclusively numerical formula in establishing a prima facie case under *Batson*, stating, "[T]here is not a per se rule that a certain number or percentage of the challenged jurors must be black in order for the court to conclude a prima facie case has been made out ... Such number games, stemming from the reference in *Batson* to a 'pattern' of strikes, are inconsistent with the inherently fact-intense nature of determining whether the prima facie requirement has been satisfied. Indeed, such attempts to fashion absolute, per se rules are inconsistent with *Batson* [476 U.S. at 96–97, 106 S.Ct. 1712] in which the court instructed trial courts to consider 'all relevant circumstances.' " *State v. Duncan*, 99–2615 at pp. 21–22, 802 So.2d at 549–50. We concluded in *State v. Duncan* that "it is important that the defendant come forward with facts, not just numbers alone, when asking the district court to find a prima facie case." *Id.*, 99–2615 at p. 22, 802 So.2d at 550 (quoting *United States v. Moore*, 895 F.2d 484, 485 (8th Cir. 1990)). *See also Foster v. Chatman*, —— U.S. ——, ——, 136 S.Ct. 1737, 1748, 195 L.Ed.2d 1 (2016) ("[A]ll of the circumstances that bear upon the issue of racial animosity must be consulted."). We conclude that the trial court did not abuse its discretion in denying the defendant's motion for new trial on Batson grounds. No prejudicial error was demonstrated under LSA–C.Cr.P. art. 851(B)(2) or (4), which would warrant granting a new trial, and none of the "new material" presented in the motion for new trial persuades that the trial court erred in denying the motion for new trial on Batson grounds. (We note that the instant case is clearly distinguishable from *Foster v. Chatman*, which held that the strikes of two African–American prospective jurors violated the defendant's constitutional rights under *Batson*, based on a finding that certain of the prosecutor's race neutral reasons were expressly contradicted by other evidence and that there was a "persistent focus on race in the prosecution's file.")

In his eleventh assignment of error, the defendant avers that the trial court erred by failing to instruct the jury as to any lesser-included offense, which did not require specific intent to kill or inflict great bodily harm, i.e., felony murder, particularly when the sole defense offered by trial counsel was that the defendant's diminished mental capacity precluded him from formulating the requisite specific intent to kill or inflict great bodily harm. The defendant also complains, on appeal, that the trial court failed to charge the jury as to its authority to return a lesser verdict, even if convinced of guilt of first degree murder.[44] The defendant argues that failure to so instruct the jury constituted a violation of due process, in violation of the rule announced in *Beck v. Alabama*, 447 U.S. 625, 636, 100 S.Ct. 2382, 2389, 65 L.Ed.2d 392 (1980): "[A] defendant is entitled to a lesser included offense instruction where the evidence warrants it."

As an initial matter, the defendant concedes that trial counsel neither requested any such jury instruction, nor objected to the instructions as given. In fact, when queried by the trial court as to whether he was "satisfied with the jury charges," Mr. English responded, "I'm satisfied with them, Your Honor." Accordingly, the claim raised here was not preserved for appellate review. LSA–C.Cr.P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was

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[44] The jury instructions, as given, demonstrate that this portion of the defendant's claim is meritless, as the trial judge plainly instructed the jury, "If you are not convinced that the defendant is guilty of the offense charged, you may find the defendant guilty of a ... responsive lesser offense ...." The trial court's jury instructions further included detailed instructions regarding the "two possible ... responsive lesser offenses" in this case, second degree murder and manslaughter.

objected to at the time of occurrence .... 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."); *State v. Draughn*, 05–1825 at p. 56, 950 So.2d at 621 ("The failure of the defense to contemporaneously object ... waives our review of the issue on appeal."). Although the defendant contends that this is a fundamental structural error that should be reviewed by this court, we conclude that the jury instructions as given in this case do not demonstrate error.

Louisiana Code of Criminal Procedure Article 802 requires the trial court to charge the jury as to the law applicable to the case. As a general matter, a trial judge has the duty to instruct jurors as to "every phase of the case supported by the evidence whether or not accepted by him as true," and that duty extends to "any theory of defense which a jury could reasonably infer from the evidence." *State v. Marse*, 365 So.2d 1319, 1323 (La. 1979). *See also State v. Henry*, 449 So.2d 486, 489 (La. 1984) (" '[D]ue process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence.' ") (quoting *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 2053, 72 L.Ed.2d 367 (1982)).

In the present case, the State charged the defendant in a single indictment with three counts of first degree murder, committed when the offender had the specific intent to kill or inflict great bodily harm upon more than one person, pursuant to LSA–R.S. 14:30(A)(3). The legislatively approved responsive

verdicts for first degree murder are set out in LSA–C.Cr.P. art. 814(A)(1), which states:

> The only responsive verdicts which may be rendered when the indictment charges the following offenses are:
>
> 1. First Degree Murder:
>
> Guilty.
>
> Guilty of second degree murder.
>
> Guilty of manslaughter.
>
> Not guilty.

The guilt phase verdict forms for each of the three counts in this case comported with LSA–C.Cr.P. art. 814(A)(1), stating, in pertinent part:

> 1. We, the jury, find the defendant guilty.
>
> 2. We, the jury, find the defendant guilty of Second Degree Murder.
>
> 3. We, the jury, find the defendant guilty of Manslaughter.
>
> 4. We, the jury, find the defendant not guilty.

Further, as set forth hereinabove, the trial judge's instructions to the jury also comported with *Beck v. Alabama*, in that the jury was not given an all-or-nothing option between capital punishment or innocence, as the jury was also instructed as to, and given the option of returning, the lesser included verdicts of second degree murder or manslaughter.

Notably, the guilt phase of the defendant's capital trial was virtually devoid of evidence that the May 5, 2008 triple homicide unfolded as a felony murder, i.e., during the perpetration of an aggravated burglary,

given that the defendant was the son-in-law of two of the victims and step-father of the third victim, although he was clearly not a welcome guest, as evidenced in Christine Colston Young's 911 call upon his arrival at her home. There was no sign of forced entry upon the first responders' arrival at 19 Grace Lane, as attested to by Sergeant Alvin Eagle, Jr., who testified that the front door was slightly ajar—"two to three inches opened." Under these circumstances, even had trial counsel requested a jury instruction on felony murder, a lesser offense excluding the element of specific intent, such an instruction would not have been properly admitted under *Hopper v. Evans* because the elements of such crime were not "fairly supported by the evidence." Nevertheless, the absence of a jury instruction on felony murder did not preclude the defendant from testifying that he had no intent to kill his family, nor Mr. English from urging to the jury repeatedly in his guilt phase closing argument that his client had no intent to kill because "Robert McCoy is so defective emotionally. He is so defective mentally .... Robert McCoy doesn't have the mental capacity to form a specific intent." The instructions provided by the trial judge closely follow those provided in Section 7.03 of the Louisiana Judges' Criminal Bench Book. Accordingly, this assignment of error lacks merit.

Admission of Other Crimes Evidence

In his twelfth assignment of error, the defendant contends the trial court erred in allowing the admission of evidence of other unadjudicated violent crimes allegedly committed by the defendant, during the penalty phase of the trial, without prior notice by the State or the holding of an advance hearing outside the presence of the jury, in violation of *State v. Jackson*, 608 So.2d

949 (La. 1992). The defendant contends that the result was an unfair sentencing hearing, and the defendant's death sentence be vacated and a new penalty phase ordered.

Louisiana Code of Criminal Procedure Article 905.2(A) provides that "[t]he sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates." Rules governing the admission in penalty phase hearings of unrelated and unadjudicated crimes evidence to prove the defendant's character and propensities have evolved jurisprudentially.

In *State v. Brooks*, 541 So.2d 801, 814 (La. 1989), this court approved the State's introduction in its penalty phase case-in-chief of unrelated and unadjudicated crimes, once the trial court determines that: (1) the evidence of the defendant's connection with the commission of the unrelated criminal conduct is clear and convincing; (2) the proffered evidence is otherwise competent and reliable; and (3) the unrelated crimes have relevance and substantial probative value as to the defendant's character and propensities, which is the focus of the sentencing hearing under LSA–C.Cr.P. art. 905.2.

In *State v. Jackson*, 608 So.2d 949, 955 (La. 1992), this court reaffirmed the holding announced in State v. Brooks, but deemed it necessary to place a limitation on this type of evidence in order to ensure that due process is not violated by the injection of arbitrary factors into the jury's deliberations and to prevent a confusing or unmanageable series of mini-trials of unrelated and unadjudicated conduct during the sentencing hearing.

In Jackson, this court ruled that, to be admissible in a penalty phase hearing, the evidence of the unadjudicated criminal conduct must involve violence against the person of the victim, for which the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for capital murder. *State v. Jackson*, 608 So.2d at 955–56.

In *State v. Bourque*, 622 So.2d 198, 248 (La. 1993), cert. denied, 523 U.S. 1073, 118 S.Ct. 1514, 140 L.Ed.2d 667 (1998), this court held that evidence of an unrelated, unadjudicated killing, committed one hour before the murder at issue in the capital case being tried, was admissible, since it was relevant evidence of the defendant's character and propensities and fell within the *State v. Brooks* and *State v. Jackson* limitations. However, in *State v. Bourque*, the defendant's death sentence was reversed because the prosecutor had conducted a "prohibited mini-trial" on the issue of the defendant's guilt or innocence in the unadjudicated killing. *State v. Bourque*, 622 So.2d at 248. In *Bourque*, of the twelve prosecution witnesses heard at the penalty phase, eleven testified about the unadjudicated killing, which this court held "impermissibly shift[ed] the focus of a capital sentencing jury from considering the character and propensities of the defendant to a determination of guilt or innocence of the unadjudicated criminal conduct." *Id.* Thus, this court limited the amount of admissible evidence of unadjudicated criminal conduct, which a prosecutor may introduce in its case-in-chief during the penalty phase to a "minimal" amount. *Id.*

However, this court retreated from that opinion and overruled *State v. Bourque* in *State v. Comeaux*, 93–2729, p. 10 (La. 7/1/97), 699 So.2d 16, 22, cert. denied, 522 U.S. 1150, 118 S.Ct. 1169, 140 L.Ed.2d 179 (1998), holding that Bourque's limitation on the amount of ad-

missible evidence, no matter how highly relevant to the defendant's character and propensities, was unnecessary to guarantee due process. In retreating from the Bourque holding, *State v. Comeaux* recognized that "[p]erhaps an overabundant amount of evidence of significant unadjudicated criminal conduct ... could reach a point where the jury's attention is improperly shifted, this court concluded that "whether otherwise admissible evidence of unrelated and unadjudicated criminal conduct (the admissibility of which has already been subjected by this court to significant limitations) injects an arbitrary factor into a capital sentencing hearing is one to be decided on a case-by-case basis." *State v. Comeaux*, 93–2729 at pp. 10–11, 699 So.2d at 22. The Comeaux court held that a trial judge "should cautiously consider the quantum of evidence necessary to convey the message to the jury that the defendant has engaged in other serious criminal conduct that the jury should consider in its determination of sentence, without shifting the jury's focus from its function of determining the appropriate sentence in the capital case to a focus on the defendant's involvement in other unrelated criminal conduct." *Id.*, 93–2729 at pp. 11–12, 699 So.2d at 23.

In the instant case, for context we note that, on March 12, 2010 (over a year before defendant's capital trial commenced), the State filed pretrial notice of its intent to use evidence of other crimes pursuant to LSA–C.Cr.P. art. 720 and LSA–C.E. art. 404(B) "at the defendant's trial," leaving open the possibility that the evidence would be admitted in either the guilt phase or the penalty phase. The State's notice described the other crimes evidence it sought to introduce as: "All evidence from the criminal investigation of the incident

that occurred on or about the 2nd day of April, 2008 concerning Yolanda Colston."

On November 16, 2010 the trial court held a pretrial hearing on the matter, and after considering the parties' arguments, the court ruled that the State's other crimes evidence was res gestae and thereby admissible. The defendant's trial counsel noticed his intent to seek writs on the issue, and thereafter, the Second Circuit denied review of the trial court's ruling permitting the state to introduce evidence of prior other crimes evidence under LSA–C.E. art. 404(B). *See State v. McCoy*, 46,266 (La. App. 2 Cir. 1/6/11) (unpublished). Contrary to appellate counsel's assertion in brief, the trial court did not limit its ruling to the guilt phase.

During the penalty phase, the State called Yolanda Colston as its first witness, and she was introduced as the mother of victim Gregory Lee Colston. Yolanda was also the daughter of victim Christine Colston Young, and the stepdaughter of victim Willie Ray Young. Yolanda testified that by the Spring of 2008, her relationship with the defendant had "gotten bad" and the two had separated, with Yolanda and her children leaving the marital residence. Yolanda described the event that led to the warrant being issued for that defendant's arrest, which was outstanding at the time of the triple homicide, telling the jury that the defendant had broken into her house through a sliding door and was hiding inside, lying in wait, when she and her two-year-old daughter returned home. Yolanda said that the defendant came out of hiding with a knife and took her to the back room with the knife pressed against her throat; he held her down on a bed and threatened to kill her and then kill himself—all in the presence of their eighteen-month-old daughter. Yolan-

da testified that she pleaded with the defendant, "Please do not to do this."

At that point, the defense objected, arguing (outside the presence of the jury) against the evidence "that should have been put on at the guilt phase" coming in at the penalty phase. The defense asserted that the State "cannot go into details of prior criminal acts ... it is not permissible under the laws of Louisiana." The district attorney reminded the court that it filed its notice of intent to introduce other crimes evidence "a long time ago," and it was ruled admissible to show "what motivation [the defendant] had for being there and why the police were looking for him and why he was named as a suspect immediately after discovery of the bodies .... [S]he is allowed under the law to tell the jury what happened between her and the defendant and how it's affected her life. That's what this ... penalty phase is about." The defense disagreed, seeking to limit the evidence to the fact that a warrant issued against the defendant for aggravated battery against Ms. Colston and to limit the testimony to exclude any "graphic detail" about the actual battery. The defense moved that Ms. Colston's testimony be struck for going "into the specific details."

The trial court overruled the defense objection relying on *State v. Comeaux*, which he quoted as holding: "Evidence that established the defendant in the recent past has engaged in criminal conduct involving violence to the person is highly probative of the defendant's character and propensities." The defense then moved for a mistrial on grounds that the evidence should not be admitted because they are "mere allegations," which the defendant had never been tried on. The trial court reiterated his reliance on *State v. Comeaux* and denied the mistrial.

The defendant contends on appeal that it was clear error for the trial court to deny a mistrial when the State elicited inadmissible evidence of other, unadjudicated criminal conduct. The defendant further asserts that, based on the admission of this inadmissible evidence, his sentence should be vacated.

Pursuant to LSA–C.Cr.P. art. 775, upon motion of a defendant, a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial or when authorized by LSA–C.Cr.P. art. 770 (listing as a basis for mistrial, among others, reference to "[a]nother crime committed or alleged to have been committed by the defendant as to which evidence is not admissible") or LSA–C.Cr.P. art. 771 (regarding inappropriate remarks or comments). A trial judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. *State v. Sanders*, 93–0001, p. 21 (La. 11/30/94), 648 So.2d 1272, 1288, cert. denied, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996); *State v. Wingo*, 457 So.2d 1159, 1166 (La. 1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2049, 85 L.Ed.2d 322 (1985). Mistrial is a drastic remedy and is warranted under LSA–C.Cr.P. art. 770 only when a remark or comment referencing an accused's commission of other crimes results in prejudice to his substantial rights sufficient to undermine the fairness of trial. *State v. Broaden*, 99–2124, p. 16 n.5 (La. 2/21/01), 780 So.2d 349, 360 n.5.

In the present case, when Yolanda Colston's testimony resumed, the district attorney asked no more questions about the previous aggravated battery, and the remainder of her testimony was in the form of a victim impact statement. Yolanda's testimony regarding the previous incident in which defendant threat-

ened her life consumed less than two pages of transcript, and thus did not constitute a "prohibited minitrial" or inappropriately shift the jury's focus. Yolanda's recollection of the prior aggravated battery event was concise and did not recount graphic details. The evidence of the defendant's unadjudicated aggravated battery against Yolanda Colston was timely,[45] competent, clear and convincing, and highly probative of the defendant's character and propensity for violence, and thus, had direct bearing on the penalty phase of his bifurcated trial without injecting an arbitrary factor. No *State v. Jackson* violation is apparent under these facts, and this assignment of error fails on the merits.

Victim Impact Testimony

In the defendant's thirteenth assignment of error, he contends that the State exceeded the scope of appropriate victim-impact evidence, beyond that authorized under *State v. Bernard*, 608 So.2d 966 (La. 1992), during the testimony of Kent Falting, teacher and basketball coach of the youngest victim, Gregory Colston,

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[45] As applied to the instant case, the defendant committed an aggravated battery against Yolanda Colston in April 2008. The punishment for aggravated battery is imprisonment, with or without hard labor, for not more than ten years, pursuant LSA–R.S. 14:34(B). Under LSA–C.Cr.P. art. 572(A)(2), the State had four years, or until April 2012 to institute prosecution against the defendant for aggravated battery, as an offense not necessarily punishable by imprisonment at hard labor. Accordingly, on May 29, 2008, the date the defendant was indicted for triple homicide, the *State v. Jackson* timeliness window ("to that conduct for which the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for the first degree murder for which he is being tried") for introducing evidence of the April 2008 aggravated battery was still open. *See State v. Jackson*, 608 So.2d at 955.

and thereafter, State Exhibit Number 101 ("S–101"), written by Coach Falting, was sent into the jury's deliberation room, allegedly in violation of LSA–C.Cr.P. art. 793. As discussed below, neither complaint warrants this court's intervention.

Louisiana Code of Criminal Procedure Article 905.2(A) provides, in pertinent part: "The sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates."[46] Thus, the State was entitled to introduce evidence at the penalty phase that provided the jury with "a quick glimpse" of Gregory Colston's short life of seventeen years and the impact his loss of life had on his family members, friends, and associates. *See Payne v. Tennessee*, 501 U.S. 808, 830, 111 S.Ct. 2597, 2611, 115 L.Ed.2d 720 (1991) ("A State may decide also that the jury should see 'a quick glimpse of the life petitioner chose to extinguish,' ... to remind the jury that the person whose life was taken was a unique human being.") (quoting *Mills v. Maryland*, 486 U.S. 367, 397, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384 (1988)).

State v. Bernard allowed the State to "introduce a limited amount of general evidence providing identity to the victim and a limited amount of general evidence demonstrating harm to the victim's survivors." Bernard, 608 So.2d at 971. In providing guidance for the proper introduction of victim impact evidence, the court instructed that the State may present evidence

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[46] Article 905.2 was amended in 1999 (via 1999 La. Acts, No. 783, § 3 (effective January 1, 2000)) to expand who may testify as "victim impact" witnesses—from merely family members—to also allow testimony from a victim's "friends and associates."

reasonably showing that the defendant "knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors ...." *Id.*, 608 So.2d at 972. However, the Bernard court cautioned that "the more detailed the evidence relating to the character of the victim or the harm to the survivors, the less relevant is such evidence." *Id.*, 608 So.2d at 971. Also forbidden are "detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors." *Id.*, 608 So.2d at 972.

Under LSA–C.Cr.P. art. 905.2(A) and *State v. Bernard*, Coach Falting qualified as an appropriate victim impact witness for seventeen-year-old Gregory Colston. Coach Falting, whose testimony consumed only five pages of the sentencing hearing transcript, told the jury that Gregory, a high school senior at the time of his murder, had earned a "preferred walk-on spot" at Northwestern State University in Natchitoches for the upcoming year. Coach Falting taught Gregory geometry his sophomore year, and he earned the highest grade in the class that year, a 98% "A." Coach Falting also recalled that Gregory volunteered to tutor other athletes, and he was "extremely loyal to his teammates and friends and was more than willing to help them out ... getting them on the right track for the class."

Through Coach Falting, the State admitted its only exhibit at the penalty phase, S–101, a newspaper article written by Coach Falting about Gregory entitled, "The World Has Lost a Dreamer," which had been published in the local newspaper after the triple homicide. During Coach Falting's testimony, the defense objected to the newspaper article being admitted into evidence on grounds that it was "written" and because "newspaper

articles are not allowed into evidence," an assertion that the district attorney promptly took odds with; and the trial court overruled the objection and received the evidence.

According to the defendant, on appeal, the newspaper article was not immediately published to the jury. However, during the State's closing argument, the district attorney told the jury:

> I had Coach Falting testify earlier today and he brought me the article that he wrote and it's offered into evidence. This is State's Exhibit 101. And I'm not going to read it because I can't, but I invite you to. And you can—you can take that back into the jury room.

Notably, the defense voiced no objection during the State's argument. Shortly after retiring to deliberate, the foreperson sent a note to the trial court stating that the jury wished to inspect S–101, the newspaper article written by the coach. When asked if he had any objection to the trial court delivering that writing to the jurors, Mr. English responded, "No, Your Honor." Thereafter, extra copies of S–101 were delivered to the deliberation room to facilitate the jurors' inspection.

The defendant complains, on appeal, that S–101 was "entirely inadmissible" as hearsay and as a written document, which should not have been sent into the jury room under LSA–C.Cr.P. art. 793. The defendant's broader argument is that the combination of Coach Falting's testimony, his newspaper article admitted as S–101, and the fact that the jurors read the article in the jury room "exceeded the narrow limit of permissible victim impact" evidence in violation of *State v. Bernard.*

Nevertheless, the alleged error of sending the article into the jury room was not preserved for appellate review in the absence of a contemporaneous objection. LSA–C.Cr.P. art. 841; *State v. Draughn*, 05–1825 at p. 56, 950 So.2d at 621 ("The failure of the defense to contemporaneously object ... waives our review of the issue on appeal."). In any event, as discussed below, the error, if any, was harmless. *See State v. Frost*, 97–1771 at p. 14, 727 So.2d at 430 ("The adducement of victim impact evidence which exceeds the scope of Bernard is reviewed under a harmless error standard.").

Louisiana Code of Criminal Procedure Article 793(A) provides, in pertinent part:

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

See State v. Johnson, 541 So.2d 818, 824 (La. 1989) (holding it was error to allow the jury to view autopsy and crime lab reports when they would assist the jury only if examined for content); *State v. Perkins*, 423 So.2d 1103, 1109–10 (La. 1982) (holding that the jury should not inspect written documents for the contents during deliberation). In *State v. Johnson*, this court recognized that Louisiana follows a minority view regarding written evidence in the deliberation room:

> The rationale for the rule expressed by Art. 793 appears to be the concern that if jurors are allowed to review the contents of written ex-

> hibits during their deliberations, they will place undue weight on such exhibits and not decide the case with an even balance concerning all of the evidence, and their own recall thereof. "[T]he Louisiana legislature has made the value-determination that, because of the presumed prejudice, documents received in evidence should be sent to the jury on its request only 'when a physical examination thereof is required to enable the jury to arrive at a verdict.'" *State v. Freetime*, 303 So.2d 487, 489 (La. 1974) (emphasis in opinion).

As we have noted in the past, *Freetime*, 303 So.2d at 489, most other jurisdictions allow jurors to take documents or papers, with the exception of depositions, into the jury room. *See* 4 Wharton's Criminal Procedure 555 (Torcia 1976); Annt., 37 A.L.R.3d 238. But the Legislature has not seen fit to change our state's rule, the violation of which has usually resulted in the reversal of the defendant's conviction. *See, e.g.*, *Perkins*, supra (trial judge committed reversible error by allowing jury to view a copy of defendant's statement in the jury room); *Freetime*, supra (conviction reversed where trial judge allowed jury to review defendant's confession during deliberations). *See also State v. Passman*, 345 So.2d 874 (La. 1977) (trial judge correctly refused jury's request to examine police radio log).

Johnson, 541 So.2d at 824. In reversing the *Johnson* defendant's first degree murder conviction and death sentence on other grounds, the court instructed that "it is unnecessary for us to determine whether the violation of Art. 793, standing alone, warrants reversing defendant's convictions." *Id.*, 541 So.2d at 825. Nevertheless, the court added that on retrial, "the jury

should not be allowed to examine the verbal contents of written exhibits during deliberations." *Id.*

In *State v. Adams*, 550 So.2d 595, 599 (La. 1989), this court stated that the "trial judge has no discretion to make exceptions" to the statutory prohibitions of LSA–C.Cr.P. art. 793. However, the *Adams* court recognized that the State and defense may agree to waive the statutory provisions of LSA–C.Cr.P. art. 793, but the agreement must be in clear express language and must be reflected in the record. *State v. Adams*, 550 So.2d at 599.

More recently, in *State v. Baham*, 13–0058 (La.App. 4 Cir. 10/1/14), 151 So.3d 698, *writ denied*, 14–2176 (La. 9/18/15), 178 So.3d 138, 139, during prosecution of a second degree murder the jury requested during deliberations to see the statement of an eyewitness who had testified at trial. Over defense objection, the trial judge sent the jury the transcript of the witness's statement, reasoning that, under LSA–C.Cr.P. art. 793(A), it would have been permissible to replay the audio of the witness's statement, properly admitted as impeachment evidence, to the jury but that it was easier to allow them to read the statement rather than to deal with the technical difficulties of audio player. *State v. Baham*, 13–0058 at p. 10, 151 So.3d at 704.

The Fourth Circuit found that the trial court erred in permitting the jury to review the transcribed statement, but opined that "such errors may not necessitate reversal." *Id.*, 13–0058 at p. 11, 151 So.3d at 705. The Fourth Circuit deemed the error a "trial error," which can be quantitatively assessed in the context of other evidence and therefore is subject to harmless error analysis, as opposed to a "structural error," which defies analysis under the harmless error doctrine. *Id.*, 13–0058 at p.

12, 151 So.3d at 705. Accordingly, the Fourth Circuit opined that "although Art. 793's prohibition is explicit, violation of that article does not mandate reversal." *Id.* Thus, when viewed in relation to the "substantial" and "extensive" evidence of the *Baham* defendant's guilt (the crime was captured from numerous video-surveillance camera angles), the Fourth Circuit found the error of the jury's access to a witness's statement during deliberation was harmless, as it did not contribute to the verdict, and affirmed the conviction. *Id.*, 13–0058 at pp. 12–13, 151 So.3d at 705–06.

In the instant case, even if trial counsel's objection during Coach Falting's testimony, based on the article as a "written" piece of evidence, preserved the issue on appeal, despite trial counsel having expressed no objection when the newspaper article was sent to the jury,[47] it is nevertheless significant that the newspaper article was admitted during the penalty phase. The article was a tribute piece, written in memory of the defendant's youngest victim, Gregory Colston and, although it was written victim-impact evidence, its

[47] The contemporaneous objection rule, contained in LSA–C.Cr.P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence.") and LSA–C.E. art. 103 ("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 ...."), 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 that either could have been avoided or corrected at the time or should have put an immediate halt to the proceedings. *State v. Taylor*, 93–2201, p. 7 (La. 2/28/96), 669 So.2d 364, 368.

purpose was to paint a picture of who Gregory had been to Coach Falting.[48] Given that the focus of the penalty phase is "the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates," pursuant to LSA–C.Cr.P. art. 905.2, the newspaper article was probative evidence relevant to the defendant's sentencing hearing.

We conclude that any error of the trial court, under LSA–C.Cr.P. art. 793, in providing written copies of the newspaper article to the jury to read during deliberations was a trial error, subject to harmless error analysis. Under the specific facts of this case, wherein the defendant shot three family members in the head at close range, the jury's decision to return a sentence of death on all three counts seems wholly unattributable to the trial court's decision to provide copies of the written article, S–101, to the jury during their penalty phase deliberations. *See* LSA–C.Cr.P. art. 921 ("A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or

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[48] We note that the largest portion of the less than one-page newspaper article by Coach Falting consisted of the title "The World Has Lost a Dreamer" in large lettering and a photograph of the victim Gregory Colston, thus, it seems likely that the newspaper article was requested at least as much for the photograph as for the written content. *See State v. Davis*, 92–1623, p. 23 (La. 5/23/94), 637 So.2d 1012, 1025 (a "[p]hotograph is not 'written' evidence of 'testimony' within the meaning of art. 793."). *See also State v. Overton*, 337 So.2d 1058, 1065 (La. 1976) ("As [Article 793] reads, the matter is one to be decided 'in the discretion of the court.' In this situation, where the jury had not yet viewed the photographs in evidence, it was more orderly to permit the photographs to be sent to the jury room than to conduct [a] ... proceeding for this purpose in open court after oral arguments .... There is no abuse of discretion in this ruling.").

variance which does not affect substantial rights of the accused."); *State v. Johnson*, 94–1379, p. 14 (La. 11/27/95), 664 So.2d 94, 100 ("The Sullivan inquiry 'is 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.' ") (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)).

Coach Falting's victim-impact statements were neither overly emotional nor overly descriptive of the victim. Nor did his newspaper article provide more than "a quick glimpse" of Gregory Colston. Further, the trial judge instructed the jury on the weight to be given to the victim impact testimony. Under these circumstances, even assuming that the trial court technically erred in permitting the written article to be read by the jurors in the deliberation room, that error appears harmless beyond a reasonable doubt. None of the victim impact testimony interjected an arbitrary factor into the proceedings so as to undermine confidence in the sentencing verdict returned by the jury. We find no merit in this assignment of error.

Presence of the Defendant a Trial

In his fourteenth assignment of error, the defendant argues that he was prejudiced by being forced to remain in the courtroom during his trial after he requested to be allowed to excuse himself from the proceedings.

With respect to a jury trial, LSA–C.Cr.P. art. 831(A) provides generally that a defendant shall be present at all proceedings "when the court is determining and ruling on the admissibility of evidence," "at all

proceedings when the jury is present," and "[a]t the rendition of the verdict or judgment, unless he voluntarily absents himself." However, this court has recognized that the provisions of LSA–C.Cr.P. art. 831 are not absolute and may be tempered by exigent circumstances arising at trial. *See State v. Broaden*, 99–2124, pp. 14–15 (La. 2/21/01), 780 So.2d 349, 360 ("[T]he provisions of Article 831 are not absolute .... [A]n accused may waive his presence by voluntary absence, [LSA–C.Cr.P.] art. 832,[49] or by not objecting to his absence from an Article 831A(3) hearing ....").

A defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom; a trial judge "must be given sufficient discretion" to deal with a disruptive defendant. *Illinois v.*

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[49] Article 832 provides, in pertinent part:

> A defendant initially present for the commencement of trial shall not prevent the further progress of the trial, including the return of the verdict, and shall be considered to have waived his right to be present if his counsel is present or if the right to counsel has been waived and:
>
> (1) He voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to be present during the trial; or
>
> (2) After being warned by the court that disruptive conduct will cause him to be removed from the courtroom, he persists in conduct which justifies his exclusion from the courtroom.

Allen, 397 U.S. 337, 343–44, 90 S.Ct. 1057, 1060–61, 25 L.Ed.2d 353 (1970). Code of Criminal Procedure Article 832 was adopted to comply with the opinion in *Illinois v. Allen* and to clarify the trial court's right to exclude an unruly defendant. LSA–C.Cr.P. art. 832, 1997 Revision Comment (b). In tandem, LSA–C.Cr.P. art. 17 vests in the trial court "all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders .... It has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done."

In this case, the defendant seemingly orchestrated outbursts for effect during his capital trial, exemplifying the type of defendant for whom LSA–C.Cr.P. art. 832(A)(2) was enacted. The defendant's disruptive behavior began with the State's opening statement, on August 4, 2011, when he turned around in his seat and appeared to be talking to a member of the audience; whereupon, the trial judge excused the jury, and gave the defendant his first warning:

> I'm making this warning. Mr. McCoy, if you do that again, then I will warn you one more time. After that, I will remove you from this courtroom to a place where you can hear the evidence in this proceeding, but you will not disrupt this courtroom. You are to pay attention. You're not to talk to anyone behind you ....
>
> * * *
>
> ... Mr. McCoy, we are in trial proceedings at this time. Any other outbursts—I will warn you again ... I have no problem in removing you from this courtroom .... You will be in a spot where you can hear the proceedings so that you

> can hear the testimony, but you will not be a disruption to this courtroom, sir.

Afterwards, trial counsel gave his opening statement, in which he conceded the defendant was the cause of the victim's deaths and informed the jury that the defendant did not have specific intent to kill because he stated that "Mr. McCoy is crazy." At which point, the defendant exclaimed, "What?" and then, "Judge Cox, may I be excused?" Once again, the jury was excused, and the trial judge further admonished the defendant:

> Mr. McCoy, this is your second warning .... If you make any other outbursts I will remove you from the courtroom to a conference room where you can hear the proceedings, sir ....

The defendant again asked if he could be removed, and the trial judge at first stated that the defendant could be removed to a conference room, but then ordered: "Deputy, he has to remain at the table, please."

The next outburst by the defendant came on August 5, 2011, as the penalty phase commenced, and the State called its first witness, the defendant's ex-wife, Yolanda Colston. Again, the defendant requested to be removed from the courtroom. The trial judge again denied the request, stating:

> I cannot do that under the law, Mr. McCoy, so I'm letting you know that ahead of time. I'm asking that you restrain yourself and stay in your chair, please, sir. And you are to be present according to the law.

Thereafter, during mitigation evidence presented by the defense, via the testimony of clinical psychologist Mark Vigen, Ph.D., the defendant began challeng-

ing the expert verbally by interjecting his own questions to the witness and, once again, the jury was excused. The trial judge reprimanded the defendant and directed him to "write those questions down and give them to your attorney to ask, but you are not to have an outburst in this courtroom again, sir." The jury was returned, only to be excused again a few minutes later following another outburst, after which the judge removed the defendant from the courtroom. Given that it was noon when the judge removed the defendant from the courtroom, Mr. English suggested that they break for lunch so that the jury would not have to be told that the defendant had been removed and so that "maybe Mr. McCoy will have calmed down by the time we get back and you can bring him back in." Upon returning from the lunch recess, the judge engaged in the following colloquy with the defendant before the jury came back into the courtroom:

> THE COURT: ... Mr. McCoy, sir, you have the right to write questions to your attorney .... I don't need any statements, please, Mr. McCoy. I'm just doing the best that I can with trying to keep everything even-keeled. I need you to sit in that chair and be quiet. And you can slide your questions to Mr. English. You can ask him to ask any questions of Dr. Vigen that you want him to ask .... But I cannot have those with you speaking out like that ... [Y]ou and I've talked.
>
> MR. McCOY: Yes, we have, Your Honor.
>
> THE COURT: ... I'm asking you to please not disrupt the courtroom. And I'm asking you that as a gentleman. Can you do that sir?

> MR. McCOY: Yes, sir, I can, Your Honor. I give you my word as a gentleman. I won't interrupt anymore.

No further disruptions occurred on the record of the defendant's sentencing hearing.

The defendant now makes the argument on appeal that, under LSA–C.Cr.P. art. 832, he had a legal right to voluntarily absent himself from the proceedings and the trial court erred as a matter of law by denying him that right. The defendant claims that he was prejudiced by being forced to remain in the courtroom, citing trial counsel's concession of guilt and presentation of sentencing hearing testimony against the defendant's wishes. The defendant contends that his presence at the defense table "implicitly endorsed the existence of a lawyer-client relationship and gave Mr. English's representation a legitimacy it did not have." The defense further contends that the district attorney capitalized on the defendant's outbursts, when cross-examining the defense's mental health expert, Dr. Vigen, by questioning whether the defendant is someone who cannot not follow rules or laws and pointing to the defendant's disruption of the trial proceedings "three times this morning"; and thereafter arguing this point to the jury at the close of the penalty phase.

Recently, in *State v. Tucker*, 13–1631 at pp. 41–42, 181 So.3d at 621–22, this court faced a similar scenario when a capital defendant was removed from court at the request of defense counsel after the defendant became disruptive, then argued on appeal that counsel could not waive his presence at his capital trial. This court found that, "assuming the trial court erred in not first warning defendant under *Illinois v. Allen* or in not inquiring further into the validity of the waiver assert-

ed by defense counsel, a violation of defendant's right to be present at all stages of trial may constitute harmless error if a reviewing court determines beyond a reasonable doubt that the error did not influence the verdict." *State v. Tucker*, 13–1631 at p.42, 181 So.3d at 622. Accordingly, this court concluded that Tucker's absence from the final moments of the State's rebuttal argument was harmless. *Id.*

The present defendant's behavior does not rise to the level of disorder, disruption, and disrespect evinced in *Illinois v. Allen*, 397 U.S. at 339–40, 90 S.Ct. at 1059 (during his trial the defendant, "in a most abusive and disrespectful manner," argued with, and threatened, the judge and tore his attorney's file and threw papers on the floor) or in two leading Louisiana cases, *State v. Riles*, 355 So.2d 1312, 1313 (La. 1978) (during his trial the defendant argued with the judge, scuffled with the deputy sheriffs, and "otherwise disrupted the trial") or *State v. Lee*, 395 So.2d 700, 701–04 (La. 1981) (during his trial the defendant sang the Star Spangled Banner, "spoke in Elizabethan English of a rather Biblical style," recited scripture, and generally ranted). Nevertheless, the defendant's conduct appears to have been disruptive enough to warrant admonishment by the trial judge. Even though the defendant sought to voluntarily remove himself from the courtroom, the trial judge exercised the utmost restraint in responding to his disruptive behavior and, given that the jurors were judging the defendant in life or death matters, the trial court implicitly recognized that the jury had a right to observe the conduct and demeanor of the defendant during the trial as he faced the evidence of his crimes. Under the standard of review set forth in the above-cited jurisprudence, we find no abuse of discretion or due process violation apparent in the trial court's decision to deny the defend-

ant's request to be removed from the proceedings. This assignment is without merit.

Denial of "Second Motion for New Trial"

In his fifteenth assignment of error, the defendant contends that the trial court erred in dismissing his "Second Motion for New Trial," without reaching the merits, on the basis that it was untimely filed.

We reiterate that the evidence of the defendant's guilt was overwhelming. Nonetheless, the defendant persists in pursuing his alibi theory, and appellate counsel has expended considerable resources to investigate that defense,[50] which appears wholly baseless.

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[50] We note that a significant portion of the post-trial record in this case contains defense filings and hearing transcripts pertaining to appellate counsel's efforts to ascertain how and when the defendant's personal cell phone, which had been seized as evidence, had gone missing, post-verdict, an exercise which the district attorney aptly described as "go[ing] down rabbit trails wasting dollars and time." In addition, we also note that, during the course of the defendant's appeal, the defense's investigation into the defendant's alibi included an ex parte motion to view tangible objects in the possession of the BCPD, including a black "Mason" bag and its contents abandoned inside the defendant's white Kia, after the murders. Even though the defendant's cell phone had not been in the defendant's possession after May 5, 2008, since it was also abandoned inside the white Kia, the defense sought to have it forensically tested. On November 16, 2011, appellate counsel's associate, Ada Phelger, made an appointment to view and photograph the evidence according to police protocols and under police supervision. However, during that appointment, appellate counsel telephoned Ms. Phelger to meet him at Bossier Max for lunch. Whereupon, Ms. Phelger returned the evidence under inspection to the evidence bags and returned it to the police property room as per protocol. On November 30, 2011 Ms. Phelger returned to the Bossier City police department, unannounced, seeking to continue viewing the evidence that she had previously been viewing on November 16, 2011. The police were able to accommo-

In the defendant's second motion for new trial, he alleged there was newly discovered evidence relevant to his alibi.[51]

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date her, even though she had not made an appointment, and the police brought out the evidence boxes she had previously been viewing. At that time, however, the defendant's personal cell phone could not be found, and it has not subsequently been located. The trial court held at least three hearings related to the missing cell phone, and it was alluded at those hearings that the BCPD attribute the loss of the cell phone to Ms. Phelger; and appellate counsel went to great lengths to absolve his associate of any blame in the loss. This cell phone, which the defendant abandoned in the white Kia, though designated as Exhibit D–2, was not introduced as evidence at trial as it was deemed to have no evidentiary value. Appellate counsel justified the protracted post-verdict investigation because Mr. English did not investigate the defendant's alibi defense at the guilt phase.

[51] In the defendant's "Second Motion for New Trial," he asserted that "new and material evidence" shows: (1) The defendant left the Shreveport area near the end of April 2008 (after BCPD officers allegedly beat him and stole his car), when his brother, Carlos McCoy drove him to Dallas, Texas, where the defendant boarded a Greyhound Bus for Oakland, California, under the assumed name of "Ricki Ross" on April 18, 2008; (2) on May 2, 2008 the defendant flew from Oakland, California, to Houston, Texas, where he and a childhood friend, Robert Evans, stayed at a motel. While in Houston, the defendant spent time with two women he met there; (3) on May 4, 2008 Robert Evans, a professional truck driver, left Houston and returned to Shreveport to pick up a tractor trailer, which was bound for California, but, the defendant was afraid of returning to Bossier Parish because of his encounters with law enforcement, so Robert Evans agreed to take some of the defendant's "property" home for him to Bossier City; the defendant and Evans agreed to meet in Dallas on May 6, 2008, to head to California together; (4) the defendant rode from Houston to Dallas with Reena Miles, a friend of his brother, Carlos, and stayed in her home in Dallas; (5) as arranged, the defendant and Robert Evans met at a truck stop in Dallas, Texas, on May 6, 2008, and headed toward California. We note that LSA–C.Cr.P. art. 854, requires that, when the ground for the motion for new trial is newly discov-

The second motion for new trial has no demonstrable merit as it fails to show that on the date of the triple murder, May 5, 2008, the defendant was anywhere other than 19 Grace Lane in Bossier City, and the trial court did not abuse its discretion by denying the motion for new trial.

Under LSA–C.Cr.P. art. 853(B), a motion for new trial, founded on grounds of newly discovered evidence, may be filed within one year after the verdict. The jury in this case returned its unanimous verdict in the guilt phase on August 4, 2011, and returned its recommendation of the death sentence on August 5, 2011. The defendant timely filed his original motion for new trial on December 6, 2011, after twice seeking a continuance of the formal imposition of sentence in order to obtain

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ered evidence, the motion must show: "(1) That notwithstanding the exercise of reasonable diligence by the defendant, the new evidence was not discovered before or during the trial; (2) The names of the witnesses who will testify and a concise statement of the newly discovered evidence; (3) The facts which the witnesses or evidence will establish; and (4) That the witnesses or evidence are not beyond the process of the court, or are otherwise available." In the present case, although the allegedly new and material evidence, described in the defendant's second motion for new trial, would add certain details not contained in the defendant's trial testimony, all of the salient facts were testified to by the defendant at trial; thus, the new evidence is merely cumulative. Further, there is no statement in the second motion for new trial as to whether the listed new witnesses are within the process of the court or are otherwise available. In fact, rather than make the assurance of availability of these new witnesses, the second motion for new trial notes, "Undersigned counsel has begun the laborious task of investigating the evidence supporting Mr. McCoy's account, but the work is intensive given the geographic breadth of Mr. McCoy's journeys, his lack of knowledge of the full names of some of the persons with whom he travelled and associated, and the peripatetic lifestyle of many of these potential witnesses."

more time for preparation of the motion for new trial, pursuant to LSA–C.Cr.P. art. 853(A). The original motion for new trial urged seven arguments, all of which are re-urged in the defendant's appellate brief before this court. On January 20, 2012 the defendant filed a "Supplemental Motion for New Trial." The trial court held a contradictory hearing on the motion for new trial on January 23, 2012 and denied the defendant's motion for new trial.

Thereafter, the defendant's appellate counsel deposited his "Second Motion for New Trial" with the U.S. Postal Service ("USPS"), by certified mail, on Monday, August 6, 2012. Given that in 2012, August 4th and 5th fell on Saturday and Sunday, respectively, appellate counsel justified mailing his motion on Monday, as the first business day after the one-year anniversary of the verdicts.[52]

The second motion for new trial was physically received and filed in the district court on August 8, 2012.[53] The State responded, on September 14, 2012,

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[52] It is appellate counsel's position that depositing the second motion for new trial in USPS mail, on August 6, 2012, amounted to "timely filing on that date" and comports with the "mail box" rule of *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (the date a pro se inmate deposits his habeas corpus application in the prison mail system, as reflected by the metered postage and the stamp placed on the envelope by prison authorities, is considered the date of filing). However, that rule pertains to inmates only and attorneys are held to a stricter time limit under Louisiana Supreme Court Rule VII, § 9, and Rule X, § 5(d), infra.

[53] In reply to the State's opposition to the second motion for new trial, the defendant's appellate counsel attached exhibits showing a certified mail receipt for item number 7011 1150 0000 0130 8781 bearing a USPS cancellation stamp date of "Aug 6, 2012." Additionally, a USPS.com track and confirm notice for item

arguing that the second motion for new trial was untimely filed and that the defendant's conviction and sentence were "on appeal" on August 8, 2012. On October 1, 2012 the defendant's appellate counsel filed his reply to the State's opposition to the second motion for new trial. On October 9, 2012 the trial court filed its written judgment, which included reasons for ruling that the second motion for new trial was untimely filed on August 8, 2012. The trial court also spoke to the merits of the defendant's "new evidence," noting specifically that the defendant failed to specify his whereabouts on May 5, 2008, the day of the triple homicide in Bossier City, Louisiana, although he asserted additional details about his alleged whereabouts on May 4th and May 6th.

On November 8, 2012 appellate counsel filed his notice of intent to seek writs and also filed a motion to reconsider denial of the second motion for new trial. The district court denied the motion to reconsider on November 16, 2012. The Second Circuit denied the writ application, on January 17, 2013, with the following order:

WRIT DENIED.

The applicant, Robert McCoy, seeks review of the trial court's denial of his second motion for a new trial. Although this writ application is timely filed, on the showing made, this writ is hereby denied. *See* La. C.Cr.P. art. 853; La. C.Cr.P. art. 851(3); La. C.Cr.P. art. 858; *State v. Cavalier*, 96–3052 (La. 10/31/97), 701 So.2d 949.

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number 7011 1150 0000 0130 8781 reflects that the item was delivered on August 8, 2012 at 9:08 a.m.

State v. McCoy, 48,083 (La. App. 2 Cir. 1/17/13) (unpublished). Thereafter, the defendant sought supervisory review from this court, which was denied. *State v. McCoy*, 13–0400 (La. 4/5/13), 110 So.3d 1067.

On appeal, the defendant now argues that filing by mail is permissible and "the date the filing is tendered to the postal service for shipment is considered the filing date" under Rules of the Supreme Court of Louisiana, Rule VII, Section 9, and Rule X, Section 5(d). However, even were we to conclude that the cited appellate court rules apply to the filing of a motion for new trial in the district court, the defendant's second motion for new trial would nevertheless have been untimely under those rules. While the Louisiana Rules for Proceedings in District Courts are silent on the question of filing by mail, this court's Rules VII and X, as well as the Uniform Rules of Louisiana Courts of Appeal, Rule 2–13, direct that if a brief, writ, or other document due to be filed in an appellate court is received by mail on "the first legal day following the expiration of the delay," there shall be a rebuttable presumption that it was timely filed. Here, the defendant's second motion for new trial was received in the district court on August 8, 2012, which was the third legal day following the filing delay. Thus, the motion was untimely, and the trial court did not abuse its discretion by denying it as untimely.

Even if the defendant's second motion for new trial had been timely filed, the defense faced a formidable hurdle of showing that it exercised reasonable diligence yet failed to find the new evidence before trial. *See* LSA–C.Cr.P. art. 851(B)(3) (grounds for a new trial include "[n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during trial ... and ...

would probably have changed the verdict or judgment of guilty."). The "new and material evidence" section of the defendant's second motion for new trial relies almost exclusively on the defendant's trial testimony and his pro se "Affidavit—Facts of Incident" (referenced in the defendant's appellate brief as "Affidavit 7/28/10"), which he prepared on July 28, 2010 and filed into the trial court record on August 4, 2010, approximately one year before his capital trial. Given that the defendant was the author of that pro se affidavit and he was fully aware of his own trial testimony, nothing presented in the second motion for new trial appears to be the type of evidence that was unavailable to the defense at the time of the defendant's capital trial, or at the latest, at the time he filed his original motion for new trial. Despite the defendant's actual knowledge of the events, the second motion for new trial avers that the "newly discovered" evidence "remained unavailable to defendant."

In the second motion for new trial, appellate counsel further suggests that had the jury heard from the fourteen witnesses, which the defendant repeatedly sought, pro se, to have subpoenaed, the outcome of trial would have been different. However, this issue was not *newly*-discovered at the time the second motion for new trial was filed. The pro se subpoena issue was the subject of trial court hearings as far back as 2009, some two years before the defendant's capital trial, and even then, the relevance to the defendant's capital trial of those fourteen witnesses was never established. Appellate counsel also uses the second motion for new trial to revive the right-to-counsel issue, which was previously urged in the original motion for new trial, and was argued at length during the hearing on the original motion for new trial.

Given that this assignment of error involves a *second* motion for new trial, LSA–C.Cr.P. art. 856 applies: "A motion for a new trial shall urge all grounds known and available to the defendant at the time of the filing of the motion. However, the court may permit the defendant to supplement his original motion by urging an additional ground, or may permit the defendant to file an additional motion for a new trial, prior to the court's ruling on the motion." Here, the defense failed to discharge its affirmative duty to present all grounds known and available to it in the initial motion for new trial. The defense offers no explanation as to why it failed to present the travel itinerary of the defendant, alleged to establish his alibi and which was surely known to the defendant from the start of this prosecution, in the first motion for a new trial.

Moreover, the "newly" discovered evidence presented in the second motion for new trial is not material. Evidence is material only if it is reasonably probable that the result of the proceeding would have been different had the evidence been disclosed. *State v. Marshall*, 94–0461, p. 16 (La. 9/5/95), 660 So.2d 819, 826 (citing *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)). A reasonable probability is one that is "sufficient to undermine confidence in the outcome." *State v. Marshall*, 94–0461 at p. 16, 660 So.2d at 826. In *State v. Watts*, 00–0602, p. 9 (La. 1/14/03), 835 So.2d 441, 449, this court held that a trial court should ascertain on a motion for new trial "whether there is new material fit for a new jury's judgment." The only issue is "whether the result will probably be different." *Id.* Herein, nothing presented in the defendant's second motion for new trial is either new or material; it merely restates arguments raised in his initial motion for new trial, which the trial court had

already denied on the merits, following a lengthy contradictory hearing.

It is well established in our jurisprudence that the granting or refusing to grant a motion for a new trial rests within the sound discretion of the trial judge and will not be disturbed on review in the absence of clear abuse. *State v. Credeur*, 328 So.2d 59, 62 (La. 1976) (citing *State v. Randolph*, 275 So.2d 174, 177 (La. 1973), and *State v. Jackson*, 253 La. 205, 215, 217 So.2d 372, 376 (1968)). Under these circumstances, the trial court did not abuse its discretion by denying the second motion for new trial on timeliness grounds, as the filing by certified mail was untimely by three days. Moreover, the second motion for new trial failed to establish "new and material" evidence, which had it been introduced would probably have changed the outcome in defendant's capital trial, as required by LSA–C.Cr.P. art. 851(B)(3). This assignment of error is without merit.

Failure to Hold Post–Verdict Competency Hearing

In the defendant's sixteenth assignment of error, he asserts that the trial court erred in refusing to hold a post-verdict competency proceeding to re-assess the defendant's mental capacity. Approximately four months after the defendant's conviction in his capital trial, but before the trial court imposed the jury's recommended sentence of death, appellate counsel filed a motion for a sanity commission, seeking to have the defendant's mental capacity evaluated for a second time.

At a hearing held on January 23, 2012, appellate counsel argued that, notwithstanding the original sanity commission's findings "early on" that the defendant was competent to proceed to trial, "things did change" and the defendant's "unquestionably bizarre behavior"

warranted appointment of a second sanity commission. Following the hearing, the trial court denied the motion.

On appeal the defendant now contends that the trial judge was put on notice—both before and during trial—and failed to make further inquiry into the defendant's competence, violating statutory law and due process principles.

Louisiana Code of Criminal Procedure Article 642 provides: "The defendant's mental incapacity to proceed may be raised at any time .... When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed." This court has recognized that the issue of mental capacity to proceed may even be raised after conviction. *See State v. Clark*, 367 So.2d 311, 312 (La. 1979). *See also State v. Payne*, 586 So.2d 652, 654 (La. App. 5 Cir. 1991). The Supreme Court has held that "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope v. Missouri*, 420 U.S. 162, 181, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975).

[42] Generally, a person who suffers from a mental disease or defect, which renders him incapable of understanding the nature and object of the proceedings against him, of consulting with counsel, and of assisting in preparing and conducting his defense, may not be subjected to trial. LSA–C.Cr.P. arts. 641 649.1; *State v. Rogers*, 419 So.2d 840, 843 (La. 1982) (citing *Drope v. Missouri*, 420 U.S. at 171, 95 S.Ct. at 903, and *State v.*

Bennett, 345 So.2d 1129, 1136–38 (La. 1977)). Given the presumption of sanity in Louisiana, the defense carries the burden of proving by a preponderance of the evidence that, as a result of a mental disease or defect, the defendant lacks the capacity to understand the proceedings against him or to assist in his defense. *State v. Bennett*, 345 So.2d at 1138.[54] The determinations of the trial judge as to competency of the defendant to stand trial are entitled to great weight on review and will not be overturned absent an abuse of discretion. *State v. Rochon*, 393 So.2d 1224, 1228 (La. 1981).

In the present case, just a few months post-indictment, the trial court ordered a sanity commission to evaluate the defendant at the behest of his then-appointed public defenders. The trial judge appointed Dr. Richard W. Williams, a psychiatrist, and Mark P. Vigen, Ph.D, a psychologist, to evaluate the defendant. Both experts submitted confidential reports to the trial court. Dr. Vigen assessed the defendant's full scale IQ score as 89, with his verbal IQ measured at 95, and his Performance IQ at 83.[55] Dr. Vigen diagnosed the defendant with narcissistic personality disorder, but found no active mental state that would interfere with

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[54] *See also* LSA–R.S. 15:432 ("A legal presumption relieves him in whose favor it exists from the necessity of any proof; but may none the less be destroyed by rebutting evidence; such is the presumption ... that the defendant is sane and responsible for his actions ....").

[55] An IQ score of 75 or below warrants further inquiry into whether a defendant has an intellectual disability. *See Brumfield v. Cain*, ––– U.S. ––––, ––––, 135 S.Ct. 2269, 2278, 192 L.Ed.2d 356 (2015); *Hall v. Florida*, ––– U.S. ––––, ––––, 134 S.Ct. 1986, 1996–2001, 188 L.Ed.2d 1007 (2014); *State v. Dunn*, 01–1635, p. 25 (La. 5/11/10), 41 So.3d 454, 470, *cert. denied*, 562 U.S. 1063, 131 S.Ct. 650, 178 L.Ed.2d 480 (2010).

his rational understanding of the proceedings against him or his ability to assist his counsel in his defense. Similarly, Dr. Williams found the defendant exhibited no evidence of intellectual disability.[56] Dr. Williams diagnosed the defendant with antisocial personality disorder, with narcissistic features, and found the defendant capable of understanding, assisting, and testifying in his own defense. On November 14, 2008 the trial judge held a hearing on the record with the attorneys present and ruled: "This Court does find that Mr. McCoy is competent to assist his attorney in this matter and is competent to stand trial according to Dr. Richard Williams and according to Dr. Mark Vigen. The Court finds this case is able to go forward."

In his appellate brief to this court, the defendant asserts that before and during trial, the trial judge was put "on notice" that there was "a bona fide doubt as to defendant's competence to proceed," as repeatedly advised by the defendant's trial counsel, Mr. English. To put the issue in context, we review a few of the trial court incidents during which the defendant's competence was questioned by his trial counsel.

On January 4, 2011 (when defendant's capital trial was slated to commence the following month, on February 7, 2011), Mr. English apprised the trial court that defendant had ordered him not to develop any mitigation evidence, even though Mr. English stated he "believe[d] that those experts are important ... if there is a guilty verdict and he face[s] a capital sentencing." Mr. English notified the court that he was not abiding by

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[56] *See* LSA–C.Cr.P. art. 905.5.1 ("Notwithstanding any other provisions of law to the contrary, no person with an intellectual disability shall be subjected to a sentence of death.").

the defendant's wishes, but was adhering to his ethical duty to provide a defense that was in the defendant's best interest. Mr. English advised the trial judge that "my client is suffering from some severe mental and emotional issues that [have] an impact upon this case." "I do not believe that Mr. McCoy is capable of making value judgments in this case about his defense and I ask him ... that he not make any statements in this courtroom." One of the issues before the court on January 4, 2011 was the defendant's pro se motions and subpoena requests, which the defendant had persisted in filing notwithstanding that he was represented by retained counsel. At the conclusion of the hearing that day, Mr. English announced that the defendant "has accepted my advice to not speak in this court today." Thereafter, the defendant's pro se motions were withdrawn.

On January 24, 2011 (with the trial still slated to commence on February 7, 2011), the trial court held a hearing on the State's motion to "flush out the issue" of whether the defendant, having been declared indigent, was entitled to two attorneys under Louisiana Supreme Court Rule XXXI. The defendant's express waiver of a second trial counsel was necessary, and the trial court took great care to explain the advantages of a second trial counsel to the defendant and to ensure that the defendant was aware of his Miranda rights. The defendant replied to the trial court, "I'm fully competent upon understanding everything [the trial judge] has to say to me, sir." Even though trial counsel advised the defendant not to speak on the record, the defendant reminded the trial judge that when Mr. English enrolled in March 2010, it was with the stipulation that he would "put a legal team together," observing that it now looked like the team was going to come from mem-

bers of the local public defender's office, some of whom were present in court. The defendant made it clear that any involvement of public defender's office in his case was unacceptable to him, explaining, "I've had problems with the public defender's office, Your Honor, from day one."

The defendant waived appointment of a second attorney to assist in his capital case under Louisiana Supreme Court Rule XXXI, and the hearing moved on to the topic of funding for mitigation experts. Mr. English announced that Dr. Mark Vigen, Dr. Craig Forsyth, and John Craft would be mitigation experts for the defendant. The district attorney announced that the State would be ready for trial on February 7, 2011, whereupon Mr. English disclosed that his experts would need more time to prepare for trial. The defendant took the opportunity to report to the trial court the difficulty he was having getting trial counsel to issue the subpoenas he requested, and the trial judge advised him that the subpoenas he was asking about had not been issued in proper form, which is why they were quashed. The trial judge clearly informed the defendant that he was free to properly subpoena those witnesses through his attorney. The ensuing colloquy between the defendant, his trial counsel, and the trial judge illustrate the defendant's intellectual capacity and the absence of any intellectual disability:

> MR. MCCOY: ... Mr. Larry English told me that I cannot subpoena a sitting judge. And I know that is very contrary to the record.
>
> THE COURT: ... Mr. McCoy, you are being advised by Mr. English on that ....
>
> MR. MCCOY: I understand, but—

THE COURT: If proper procedure is followed, Mr. English will follow your instructions, or not follow your instructions, based on his advice.

MR. MCCOY: But Mr. English works for me, Your Honor. Mr. English is—

THE COURT: I understand that, Mr. McCoy.

MR. MCCOY: —required to follow the instructions that I give Mr. English, Your Honor.

THE COURT: I understand that, Mr. McCoy, but that's between you and your attorney.

MR. ENGLISH: Your Honor, I need to state something on the record.

THE COURT: Yes, sir.

MR. ENGLISH: I believe that Mr. McCoy has severe mental issues.

MR. MCCOY: No, sir, that is not going to work on the record, Your Honor.

* * *

MR. ENGLISH: Let me finish, Your Honor. I believe Mr. McCoy has severe mental issues. Mr. McCoy has made statements to me that has caused me to have some concerns even though I know there's been a sanity commission ... put in place. I'm going to reiterate to the ... Court again, Your Honor, I believe Mr. McCoy has severe mental issues. That is a mitigating factor in this case as the reason why my motion to continue to allow Dr. Mark Vigen to do a full evaluation of him, Your Honor, to bring those issues forward. Mr. McCoy has made statements to me, Your Honor. He is—he is irra-

tional .... He's asking me to do ... things which I ... cannot do that goes ... counter what his interests are in this trial. I believe, Your Honor, it is imperative that this Court grant me a continuance so that I can have Mr. McCoy evaluated in some detail by Mark Vigen to present that evidence as mitigating facts in this case, Your Honor. We're all in this courtroom. It is what it is. All of us in this courtroom, we had an opportunity to evaluate Mr. McCoy, Your Honor .... I have tried to give Mr. McCoy the best counsel I can. Mr. McCoy, Your Honor, continues to make statements that are irrational. He continues to ask me to do things, Your Honor, that if I followed his advice would almost certainly lead to a conviction and a jury issuing a death penalty in this case. That is the reason why I am asking ... Your Honor, for a continuance in this case ... given that Mr. McCoy has exhibited very bizarre behavior to me that warrants ... being further evaluated, Your Honor, ... and there are mitigating circumstances in this case.

* * *

MR. MCCOY: Your Honor, to address that matter, *Mr. English is putting on the judicial record that there is something wrong with me and I defer that to Your Honor*. Let me share what my problem is with Mr. English, Your Honor ....

* * *

THE COURT: Mr. McCoy, please listen to me. You're fixing to reveal attorney/client privilege. You're fixing to put this all on the record

.... Sir, if ever a person needed to exercise their rights to be quiet and to use their right to remain silent, this is one of those cases, sir .... Mr. English has advised you. I'm advising you. I cannot stop you from making a statement, Mr. McCoy.

MR. MCCOY: But, Judge Cox, this—this really needs to be heard though. This really needs to be put on the record, not just for court documents but for validation. When your own attorney, Your Honor, tells you that the District Attorney brung [sic] a plea saying that you got your fingerprints on the gun; that the victims' blood is on your clothing; ... when it comes to evidence that there is no victims' blood on your clothing; that there's no fingerprints on the gun .... Mr. English has been very deceptive towards me. Mr. English do not want me to talk, Your Honor, because Mr. English has fed me nothing but a whole bunch of mishaps since we have been in this. Did he say I'm irrational, Your Honor? Because, I'm not going to let him tell me anything, Your Honor. I know what I've done and I know what I didn't do, Your Honor. Mr. English has told me there is no way he can win this case ....

MR. ENGLISH: ... I'm going to again advise Mr. McCoy ... not to continue to divulge attorney/client conversations. And I'm going to reiterate to the Court, Your Honor, why I'm making a motion to continue. I apologize to the Court while I'm making a Motion to Continue .... Mr. McCoy, Your Honor, ... is severely mentally compromised.

MR. MCCOY: No, sir.

MR. ENGLISH: He is ... continuing, Your Honor, against all advice of counsel to not listen to me when his life is on the line .... If I followed Mr. McCoy's advice, I'd be put in a position, Your Honor, that I've never been put into my time as a lawyer of not following my client's advice. Your Honor, ... this is a predictor. You're watching this man's behavior. It is bizarre.

MR. MCCOY: No, it's not, Your Honor.

MR. ENGLISH: I need a mental health expert appointed to evaluate Mr. McCoy, Your Honor .... Mr. McCoy is going to attempt to take over this trial and argue in front of the jury. And when he does that, Your Honor, I have the responsibility of then standing in front of the jury and fighting for his life .... This man is irrational. He is severely emotionally and mentally compromised .... He will not and cannot assist me. He is going to fight me. He is going to take over this trial .... This man needs to be evaluated, Judge, and that evidence needs to be brought before a jury at the proper time ....

* * *

MR. MCCOY: But, Your Honor, if I don't put it on the judicial record and Mr. English still don't agree with the things that I'm asking him to do as far as subpoenaing people, Your Honor, if we go to trial without these proper people subpoenaed, Your Honor, that's a worse situation for me, Your Honor. Just like, Your Honor, the eyewitness that gave the description of

the person at the scene of the crime, Your Honor, that hasn't been turned over to me for discovery so I could subpoena that person so that person can validate, Your Honor, that that wasn't me at the crime, Your Honor. The District Attorney haven't turned it over to us, Your Honor, and that's exculpatory evidence to prove my innocence ....

* * *

MR. ENGLISH: Your Honor, the District Attorney, to my knowledge, turned over all discovery to date.

MR. MCCOY: No, he didn't.

MR. ENGLISH: May I finish? Your Honor, Mr. McCoy is asking me to subpoena witnesses to put forth a theory ... that will help the District Attorney send him to the death chamber. I will not follow his advice. I will not subpoena FBI agents. I will not subpoena judges. I will not ... not run all over the country looking for witnesses that don't exist. Mr. McCoy is severely mentally compromised, Your Honor, ... and I'm asking this Court to grant my Motion to Continue so that he can be evaluated because this is going to be the case. It is going to be a zoo.

MR. MCCOY: No, it's not, Your Honor.

MR. ENGLISH: It's going to be a zoo, Judge, because I'm not going to do what he wants me to do. I can be relieved from this case. I do not believe this man is rational. I think I have an ethical duty .... I have sought legal counsel from other death penalty lawyers on advice on this.

> I have an ethical duty to this man not to follow his bizarre behavior .... And I'm asking this Court to please allow me to have this man evaluated, Your Honor, because he is mentally and emotionally compromised.
>
> MR. MCCOY: And, Your Honor, for the record, and I'm going to end my conversation, Your Honor. *Your Honor, I've been evaluated. There is ... nothing wrong with me, Your Honor .... Mr. English wants the Court to believe something is wrong with me to further evaluation that has already been evaluated before, your Honor. There is nothing wrong with me. I'm fully competent. I'm fully understanding of the aspects of this case* ....
>
> MR. ENGLISH: I'm going to advise Mr. McCoy to be quiet, Your Honor.
>
> * * *
>
> MR. MCCOY: Let—let me talk here.
>
> MR. ENGLISH: ... He's now saying stuff, Your Honor, that goes to the heart of his defense and he's compromising his case.

[Emphasis added.]

At the conclusion of the hearing, the trial court denied trial counsel's motion for a continuance, and the ruling was ultimately overturned by the Second Circuit, which stayed the proceedings and remanded the case back for consideration of the second counsel issue; the defense having prevailed in obtaining a continuance, the trial was rescheduled for July 28, 2011.

On July 12, 2011 (with trial set for July 28, 2011), the trial court held a hearing, once again, to quash sub-

poenas requested by the defendant, pro se. On this date, the defendant voiced his displeasure with Mr. English's reluctance to abide by his wishes and issue the subpoenas for the alibi witnesses he wanted for trial, pointing out, "There's a zeal that an attorney is supposed to have for his client and that zeal is not being met here." Mr. English responded, "I have no ethical duty as a lawyer to hold Mr. McCoy's hand while he walks into the death chamber .... I have an ethical duty, Your Honor, to try to defend him and do the ... best I can to save his life." Afterwards, Mr. English assured the trial court that he would "not call those witnesses if they are subpoenaed." Mr. English reiterated, "I do not believe that Mr. McCoy has the mental capacity to assist himself to—to insist on going down this path, Your Honor, is reckless."

On July 26, 2011, two days before trial, Mr. English told the court, "I was informed by Mr. McCoy this weekend that it was his intention to terminate my services." The defendant explained, at length, to the court that he no longer wished to be represented by Mr. English because counsel was trying to make him "cop out to three counts of first degree murder." Mr. English confirmed that "we have an irrevocable disagreement between how to proceed in this case." Even though Mr. English requested to be allowed to withdraw as counsel in the case, the trial judge refused that request. Thereafter, during his opening statement on August 3, 2011, Mr. English told the jury, "Robert McCoy is crazy."

As the quoted incidents establish, when the defendant's trial counsel asserted that defendant was irrational, incompetent, or crazy, the defendant would rationally respond to deny the assertions. Throughout such proceedings in which the defendant complained to

the trial judge that his trial counsel would not investigate and secure evidence to put forth his desired alibi defense, the trial judge had the benefit of witnessing firsthand the defendant's demeanor and his pro se performance in court, during which the defendant strongly defended himself against his trial counsel's claims that his behavior was crazy or abnormal. The State observes, in brief to this court, that the defendant was disruptive in court when he disagreed with trial counsel "but exercised self-control when he wanted to."

Against this backdrop of trial court exchanges, we review the applicability in this case of LSA–C.Cr.P. art. 643, which requires a trial court to appoint a sanity commission "when it has reasonable ground to doubt the defendant's mental capacity to proceed." Reasonable ground in this context refers to " 'information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted [the court] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense.' " *State v. Snyder*, 98–1078, p. 24 (La. 4/14/99), 750 So.2d 832, 851 (quoting *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980)). The fact that the defendant's capacity to proceed is called into question does not, for that reason alone, require the trial court to order a mental examination of the defendant. *State v. Cyriak*, 96–0661, pp. 8–9 (La.App. 3 Cir. 11/6/96), 684 So.2d 42, 47. In *State v. Synder*, 98–1078, p. 23 (La. 4/14/99), 750 So.2d 832, 850,[57] the court stated that,

[57] We note that *State v. Snyder* is distinguishable from the instant case. In *State v. Synder*, a sanity commission had found the defendant competent to proceed and counsel conceded that the defendant was "technically competent," in that he had an understanding of the proceedings against him. However, the sanity

"when such claims, combined with objective medical evidence, raised a sufficient doubt as to defendant's competence, we must question whether defendant received a fair trial in this regard."

While appellate counsel, in this case, offers no objective medical evidence, he suggests that the testimony of various law enforcement officers at the guilt phase, who testified as to the defendant's various pretrial suicide attempts,[58] demonstrate "reasonable grounds" that should have prompted the trial judge to order a reexamination of the defendant's mental capacity. However, in *Drope v. Missouri*, the Supreme Court recognized that " 'the empirical relationship between mental illness and suicide' or suicide attempts is uncertain and that a suicide attempt need not always signal 'an inability to perceive reality accurately, to reason logically and to make plans and carry them out in an organized fashion.' " *Drope v. Missouri*, 420 U.S. at 181 n.16, 95 S.Ct. at 908 n.16 (quoting Greenberg, "Involuntary Psychiatric Commitments to Prevent Suicide," 49

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commission doctors also found that the defendant was so depressed he had some difficulty in communicating and they recommended a change in medication. This court held that, under these circumstances, the trial court abused its discretion by taking absolutely no steps to investigate the problem despite objective medical corroboration of counsel's complaints and by denying counsel's motion to continue trial (and also denying counsel an opportunity to make an ex parte showing of the problems she was having with the defendant) for four or five weeks while the defendant's new medication reached maximum therapeutic levels.

[58] Trial testimony indicated that the defendant had, after he was first apprehended in Idaho, attempted to hang himself in the Idaho jail, that he later swallowed a razor blade, that he later swallowed a large quantity of paper, and on another occasion he bit into his arm.

N.Y.U.L.Rev. 227, 234–36 (1974)). When the defendant, in this case, testified at trial on his own behalf and was asked about whether he had wanted to kill himself, he responded, "As you see, I love me. What am I going to kill myself for?" The defendant denied attempting suicide and told the jury that the suicide watch he was placed under in Lewiston, Idaho was a sham to cover up the fact that the officers there had beaten him.

That the defendant's mental capacity did not degenerate from the time of his sanity commission in 2008 through the course of 2011 trial was evidenced by the defendant's own statements at trial, which demonstrated his efforts to educate himself on relevant legal issues. During questioning about adverse statements made by witness Gayle Houston, his childhood friend, the defendant related that the district attorney "had told him [Mr. Houston] that they was going to tie him into it as an accessory to the fact [and] ... that's a threat .... That's coercion." The defendant continued, in his testimony, "[T]hey coerced him ... to the point that he couldn't make an intelligent decision on his own. That's the aspects of Mintzy (sic) versus Arizona. You can't coerce a person. You can't lead a person. You can't vindicate the aspects of your law to a person in which they—they're not able to make a probable decision."

Also, during his trial testimony, the defendant was being asked about whether he was the person seen purchasing ammunition at Walmart on the date of the murder and whether he was the person seen by Officer Szyska jumping out his white Kia automobile on the night of the murder and running away, and the defendant replied:

> *State versus Tilley* vindicates that the description of a suspect has to be sufficient and in de-

> tail. You can't speculate and say this is someone. You have to know that that is someone. There are a lot of people on death row right now because someone speculated because that is someone. You have to be specific. You have to know if that's Robert McCoy, that's Robert McCoy; if that's McGee, that's McGee.

At the post-trial January 23, 2012 hearing on the defense motion for the appointment of a second sanity commission, appellate counsel pointed to trial counsel/Mr. English's specific and emphatic declarations to the trial court that the defendant was incompetent and unable to assist in his defense. Appellate counsel also pointed to the allegations that the defendant had attempted suicide. Appellate counsel further claimed that following the verdict, he had solicited the help of Dr. Frank Gresham, a psychologist with expertise in administering intelligence testing, and asserted that Dr. Gresham opined that the verbal score obtained in the defendant's earlier IQ testing was inflated by eleven points and that the full scale IQ score was inflated as a result of the error.

The district attorney countered that the defendant was examined pre-trial by Dr. Vigen, a member of the 2008 sanity commission that found the defendant competent to proceed. The district attorney reminded the trial court that Dr. Vigen was subsequently retained by the defense (after obtaining a requisite waiver from the State), as their mitigation expert for trial purposes, evidencing the defense's high regard for Dr. Vigen. The district attorney further pointed out that, at trial, Dr. Vigen testified that the defendant's mental health was such that he was competent and capable of standing trial. The district attorney further asserted that "there is absolutely nothing that indicates that since that

[original] testing that his mental health has deteriorated to the point that he should not be competent to stand trial and assist in his defense."

At the conclusion of the January 23, 2012 hearing, the trial court denied the motion for appointment of a post-verdict sanity commission and, relying on *State v. Holmes*, stated that "it was not surprising for a defendant facing a capital murder trial to become depressed and contemplate suicide." The trial judge also cited *State v. Bridgewater* (wherein the defendant requested a sanity commission, after a sanity commission one year previously found the defendant competent, and no additional medical evidence was brought forth to challenge the determination of competency) as similar to the instant case. Herein, the trial judge stated that "[o]bjections by attorneys, standing alone, are not enough to require a commission," cogently summarizing his appreciation of the defendant's mental state:

> [I]t's my belief that Mr. McCoy completely understood the seriousness of the charges against him. After all, he wrote scores of his own motions regarding his case. Many of those motions were legally on point. If he didn't understand the seriousness of the charges or the way the legal system works, he wouldn't have filed everything that he did. If we were to accept movant's claim at face value and determine that a court determine sanity at the drop of a hat, then every time a defendant acted differently before trial, or argued with his attorney, or said I'm mentally incompetent, everything would have to stop until a new commission was held and found the defendant to be competent to stand trial. While it is true that Mr. English stated he thought Mr. McCoy lacked the capac-

> ity to help defend himself in this case, we need to recognize that Mr. McCoy only wanted to plead not guilty, and Mr. English determined that the best trial strategy would be to plead guilty, according to Mr. English. A major reason that Mr. McCoy would be unable to assist in his own defense is due to the major divide over trial strategy. This court cannot set a precedent that permits a finding of lack of capacity when the defendant disagrees with trial strategy and refuses to speak to their attorney out of anger. Using the factors of *US versus Moghaddam*, a case that movant relies upon but fails to cite, Mr. McCoy's history of irrational behavior was limited .... Mr. McCoy has a criminal history which doesn't show irrationality, just a disrespect of the law. While Mr. McCoy's behavior at trial warranted his removal from the courtroom, after being told to, he did settle down. Prior medical opinions, specifically the medical opinion that created the report, stated he was mentally competent to stand trial .... Dr. Vigen was called to testify at the trial, had the opportunity to visit with Mr. McCoy further, and never raised that Mr. McCoy was incompetent or not competent to stand trial. For those reasons, I deny that motion.

The present case fails to demonstrate that reasonable grounds existed at the time of sentencing to convene a second sanity commission. *State v. Hicks*, 286 So.2d 331, 333 (La. 1973) (wherein defense counsel presented no evidence on the motion for appointment of a sanity commission and the psychiatrist asked by the court to examine the defendant reported that the defendant ap-

peared to have the capacity to proceed; thus, "[t]he only logical conclusion that can be drawn from this record is that the defense has failed to convince the court that there was a reasonable ground to doubt the defendant's mental capacity to proceed."). Similarly, in the present case, trial counsel told the trial court repeatedly that he believed the defendant had severe mental issues, but brought forth no objective medical evidence to support his belief sufficient to raise the "reasonable ground" required under LSA–C.Cr.P. art. 643. Consequently, the mere repetition of the allegation did not put the trial judge on notice of a bona fide change in the defendant's mental functioning. Furthermore, appellate counsel's reliance on the defendant's alleged suicide attempts is misplaced since all of those incidents predated the defendant's 2008 evaluation by the initial sanity commission. Here, the trial judge specifically noted that he had heard no reasonable ground or any medical evidence to support ordering a new sanity commission. The trial judge's ruling is entitled to great weight on review, and we find no abuse of discretion in his decision to deny the post-verdict motion for the appointment of a sanity commission. We find no merit in this assignment of error.

Capital Sentence Review

Under LSA–C.Cr.P. art. 905.9 and Rules of the Supreme Court of Louisiana, Rule XXVIII, this court reviews every sentence of death imposed by Louisiana courts to determine if it is constitutionally excessive. In making this determination, pursuant to Rule XXVIII, Section 1, this court considers: whether the jury imposed the sentence under the influence of passion, prejudice, or any other arbitrary factors; whether the evidence supports the jury's findings with respect to a

statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender.

Pursuant to Rule XXVIII, Section 3, a Uniform Capital Sentence Report ("UCSR") and a Pre–Sentence Investigation Report ("PSI") were filed into the appellate record for review by this court. In addition, the State and the defense have filed sentence review memoranda, and the defense filed objections to the UCSR and PSI, contending only a de minimis mitigation investigation was performed in this case and specifically claiming there was a deficiency in detail as to the defendant's educational and employment history.

These documents, along with the defendant's guilt phase testimony and Dr. Vigen's penalty phase testimony, indicate that the defendant, Robert Leroy McCoy, is an African–American male, born on October 2, 1973, and is the second oldest of five children born to the marital union of Robert McCoy, Sr. and Mary McCoy. The defendant was raised by both parents in a home in the Eden Gardens neighborhood of Shreveport, where his parents still reside. Mrs. McCoy worked as a sitter and performed domestic work before becoming disabled, due to congestive heart failure, and Mr. McCoy did cement work for various construction companies before retiring. The defendant mentioned an older half-brother and half-sister born to his father. At trial, the defendant described his childhood as "fair," and that they were "working class" but there was always food on the table. The defendant stated that he was educated at Eden Gardens Elementary, Ridgewood Middle School, and C.E. Byrd High School, where he participated in football, weight-lifting, and ROTC. The defendant claimed to have graduated high school with a 3.8 grade point average.

The defendant had no military service. His employment history, through 1999, was with Dominos, the Sheraton Hotel, the casinos, and Foremost Dairy. From 1999 to 2001, he worked as a deckhand for Nabor's Drilling; from 2001 to 2002, he worked at Langston Drilling; from 2002 to 2006, he ran a lawn service called The Real McCoy; and from 2006 to 2008, he worked for Greystone Drilling and Union Pacific Railroad.

The defendant married Yolanda Colston in 2005, during which time a daughter was born, but the defendant stated that he is not certain he is her father. The defendant reported no prior marriages, but has four children from four previous relationships: a daughter born in 1996, and three sons born in 1999, 2000, and 2005. The defendant was raised in the Baptist church and most recently was a member of Stonewall Baptist Church in Bossier City, where he and Yolanda sought counseling with the pastor.

The defendant denied abusing alcohol or any illegal substances. He underwent anger management counseling while incarcerated at Caddo Correctional Center on a previous offense. Since his arrest on the instant triple homicide, the defendant purportedly attempted suicide at least four times, all of which he denied, attributing his injuries to mistreatment by law enforcement. The sanity commission experts evaluated the defendant as having an exaggerated view of his self-worth, tending to rewrite reality in order to maintain his positive image, and having a Narcissistic Personality Disorder with antisocial and paranoid features.

The defendant has no juvenile criminal record, and excluding the crimes charged in the current case, the defendant's adult criminal record includes convictions

for the following: March 30, 1997, simple criminal damage to property; March 18, 1999, simple criminal damage to property; September 7, 2000, no license plate light; April 24, 2001, attempted second degree kidnapping; and April 2008, aggravated battery.

The defendant is considered a third felony offender. The PSI notes his history of violent behavior has escalated and opined that he "cannot be rehabilitated." In the defendant's statement for the PSI, he denied committing the murders stating "he would never have hurt his family in that way." The defendant further stated that his trial counsel "sold me out," and "the District Attorney and Police Department are hiding the truth of this horrific crime."

Passion, Prejudice, or Other Arbitrary Factors

The first degree murders of Christine Colston Young, Willie Young, and Gregory Colston occurred on May 5, 2008. Following jury selection, trial commenced on August 3, 2011, approximately three years after the crime was committed.

The defendant is an African–American, as were all three victims. The victims were the mother, stepfather, and son of the defendant's estranged wife, Yolanda Colston. Additionally, Willie Young was the defendant's cousin.

The defendant's jury was composed of one African–American juror and eleven Caucasian jurors. Trial counsel raised several *Batson* claims at the defendant's trial, as to which the trial court found no discriminatory intent by the State. Appellate counsel re-urged the *Batson* claims in this appeal, and as discussed hereinabove relative to the defendant's tenth assignment of

error, we concluded the *Batson* claims had no merit, as race was not an issue at trial.

At the time of the triple homicide, manhunt, and the defendant's suicide attempts, the defendant's case commanded some media attention, but not an abundance. At least one article was published about allegations of beatings of inmates, including the defendant, at Bossier Max. During the time that the defendant was acting as his own counsel, he filed and argued a motion to change venue based on pretrial publicity, which the trial court denied.

Appellate counsel argued that the State interjected an arbitrary factor into the defendant's sentencing hearing when it admitted Exhibit S–101, a tribute article written about Gregory Colston entitled, "The World Has Lost a Dreamer," which was published in the local newspaper after the murders. Appellate counsel claims that the error of admitting such an inflammatory victim article was compounded by the State making copies and distributing them for the jurors to review in the deliberation room. In this court's discussion of the defendant's thirteenth assignment, supra, we concluded that the article provided no more than a "quick glimpse" into the life of victim Gregory Colston, and any error associated with the jury's review of the written article was harmless; thus, no arbitrary factor appears to have been interjected by Exhibit S–101.

In the defense sentence review memorandum, it is argued that the defendant's execution would be arbitrary, given that he was represented by a single attorney at his bifurcated capital trial and that his attorney was not capitally-certified. The defense asserts that trial counsel conceded the defendant's guilt in the triple homicide, thereby effectively relieving the State's bur-

den of proving the sole aggravating factor upon which the jury rested its sentencing recommendation, pursuant to LSA–C.Cr.P. art. 905.4(A)(4) ("The offender knowingly created a risk of death or great bodily harm to more than one person.").

Aggravating Circumstances

The State relied upon three aggravating circumstances under: LSA–C.Cr.P. art. 905.4(A)(1)—the offender was engaged in the perpetration or attempted perpetration of aggravated burglary; LSA–C.Cr.P. art. 905.4(A)(4)—the offender knowingly created a risk of death or great bodily harm to more than one person; and LSA–C.Cr.P. art. 905.4(A)(7)—the offense was committed in an especially heinous, atrocious, or cruel manner. The jury based its verdicts in the sentencing phase on LSA–C.Cr.P. art. 905.4(A)(4), finding that the defendant created a risk of death or great bodily harm to more than one person. The record is replete with evidence supporting that aggravating circumstance. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[47] At the guilt phase, the jury heard Christine Colston Young's frantic 911 call, from which the jurors could infer that the defendant's arrival and entry into her home was uninvited and unauthorized. The trial court instructed the jury on the elements of aggravated burglary at the penalty phase, but otherwise, the State did not emphasize that aggravating circumstance. Likewise, the jury declined to find that the triple homicide, in which each of the victims succumbed to a single gunshot wound to the head, was committed in an especially heinous, atrocious, or cruel manner. 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 interjects an arbitrary factor into the proceedings. *State v. Tate*, 01–1658, p. 23 (La. 5/20/03), 851 So.2d 921, 939, *cert. denied*, 541 U.S. 905, 124 S.Ct. 1604, 158 L.Ed.2d 248 (2004); *State v. Letulier*, 97–1360, p. 25 (La. 7/8/98), 750 So.2d 784, 799.

In the instant case, evidence of the aggravating circumstances did not interject an arbitrary factor into these proceedings because evidence of the manner in which the offense was committed and of the nature of the victim's injuries was relevant and properly admitted at trial. Furthermore, the remaining aggravating circumstance, i.e., that the offender killed more than one person, was more than amply supported. Hence, the jury's sentencing decision in this case does not appear to be arbitrary or capricious. *See State v. Roy*, 95–0638, pp. 19–20 (La. 1996), 681 So.2d 1230, 1242, *cert. denied*, 520 U.S. 1188, 117 S.Ct. 1474, 137 L.Ed.2d 686 (1997). Consequently, the defendant's sentence of death is firmly grounded upon the jury's finding of the LSA–C.Cr.P. art. 905.4(A)(4) aggravating circumstance, as to each count.

Proportionality

Although the federal Constitution does not require proportionality review, as indicated in *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell*, 561 So.2d 692, 710–11 (La. 1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 799, 112 L.Ed.2d 861 (1991); *State v. Wille*, 559 So.2d 1321, 1341 (La. 1990), cert. denied, 506 U.S. 880, 113 S.Ct. 231, 121 L.Ed.2d 167 (1992). This court, however, has

set aside only one death penalty as disproportionately excessive under the post–1976 statutes, finding in one case, inter alia, a sufficiently "large number of persuasive mitigating factors." *State v. Sonnier*, 380 So.2d 1, 9 (La. 1979). *See also State v. Weiland*, 505 So.2d 702, 707–10 (La. 1987) (although this case was reversed on other grounds, dictum suggests that the death penalty was disproportionate).

This court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. *State v. Sonnier*, 380 So.2d at 7.

The State's sentence review memorandum reveals that since 1976, jurors in the 26th Judicial District Court, which is comprised of Bossier and Webster Parishes, have returned a guilty verdict in twenty-two capital cases, excluding the defendant's case and, of those, nine juries recommended the death penalty.

It is appropriate for this court to look beyond the 26th Judicial District and conduct the proportionality review on a statewide basis. *See State v. Davis*, 92–1623, pp. 34–35 (La. 5/23/94), 637 So.2d 1012, 1031, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359 (1994). This court has observed that Louisiana juries appear especially prone to impose capital punishment for crimes committed in the home. *See State v. Dressner*, 08–1366 (La. 7/6/10), 45 So.3d 127; *State v. Leger*, 05–0011 (La. 7/10/06), 936 So.2d 108; *State v. Blank*, 04–0204 (La. 4/11/07), 955 So.2d 90; *State v. Bridgewater*, 00–1529 (La. 1/15/02), 823 So.2d 877; *State v. Jacobs*, 99–1659 (La. 6/29/01), 789 So.2d 1280; *State v. Howard*, 98–

0064 (La. 4/23/99), 751 So.2d 783; *State v. Gradley*, 97–0641 (La. 5/19/98), 745 So.2d 1160; *State v. Robertson*, 97–0177 (La. 3/4/98), 712 So.2d 8; *State v. Tart*, 93–0772 (La. 2/9/96), 672 So.2d 116; *State v. Code*, 627 So.2d 1373 (La. 1993); *State v. Burrell*, 561 So.2d 692 (La. 1990); *State v. Perry*, 502 So.2d 543 (La. 1986); *State v. Williams*, 490 So.2d 255 (La. 1986); *State v. Summit*, 454 So.2d 1100 (La. 1984).

State v. Wingo observed in this regard that "[t]he murder of a person by an intruder who violated the sanctuary of the victim's own home [is] a particularly terrifying sort of crime to decent, law abiding people." *State v. Wingo*, 457 So.2d at 1170. Moreover, juries in Louisiana have not hesitated in imposing the death penalty in a variety of cases involving multiple deaths or when a defendant creates the risk of death or great bodily harm to more than one person. *See State v. Scott*, 04–1312 (La. 1/19/06), 921 So.2d 904; *State v. Brown*, 03–0897 (La. 4/12/05), 907 So.2d 1; *State v. Robinson*, 02–1869 (La. 4/14/04), 874 So.2d 66; *State v. Wessinger*, 98–1234 (La. 5/28/99), 736 So.2d 162; *State v. Robertson*, 97–0177 (La. 3/4/98), 712 So.2d 8; *State v. Baldwin*, 96–1660 (La. 12/12/97), 705 So.2d 1076; *State v. Tart*, 93–0772 (La. 2/9/96), 672 So.2d 116; *State v. Taylor*, 93–2201 (La. 2/28/96), 669 So.2d 364; *State v. Sanders*, 93–0001 (La. 11/30/94), 648 So.2d 1272; *State v. Deboue*, 552 So.2d 355 (La. 1989). Compared to these cases, it cannot be said that the death sentence in this case is disproportionate. Nothing in any of the post-trial documents, filed pursuant to Louisiana Supreme Court rule XXVIII, warrants reversal of the defendant's death sentence in this case.

DECREE

For the reasons assigned herein, the defendant's conviction and death sentence are affirmed. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial judge shall, upon receiving notice from this court under LSA–C.Cr.P. art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by LSA–R.S. 15:567(B), immediately notify the Louisiana Public Defender Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under LSA–R.S. 15:178; and (2) to litigate expeditiously the claims raised in that original application, if filed, in the state courts.

CONVICTION AND SENTENCE AFFIRMED.

CRICHTON, J., additionally concurs and assigns reasons.

CRICHTON, J., additionally concurs and assigns reasons.

I agree in all respects with the holding of this case, but write separately to spotlight the exhaustive efforts undertaken by the trial court and the state in ensuring that the representation of the defendant comported with all legal requirements. Our law and jurisprudence recognize the delicate balance which must be struck be-

tween protecting an accused's right to counsel with his or her liberty to reject counsel, as well as the duty of the trial court to maintain orderly proceedings. It is my opinion that the trial court here navigated these complex issues in exemplary fashion, and it is for this reason I agree wholeheartedly with the opinion's conclusion that Mr. McCoy's assignments of error relating to his representation are wholly without merit.

First, Mr. McCoy and his family selected Mr. English, known to the family from a prior attorney-client relationship, over and above any other attorney on the planet—despite his lack of capital certification. Notably, it was the district attorney who twice moved the court to examine Mr. McCoy's waiver of capital-certified counsel pursuant to Louisiana Supreme Court Rule XXXI. In both instances, the trial court and the district attorney advised Mr. McCoy that, as an indigent defendant, he was entitled to representation from no less than two capital-certified attorneys. Also in both instances, Mr. English reiterated on record to the court and Mr. McCoy that he was not capital certified. Mr. McCoy in both hearings adamantly and unequivocally rejected the appointment of additional or new counsel pursuant to Rule XXXI and affirmed his choice of Mr. English as his trial counsel. I cannot conceive of any other steps which the district attorney or the trial court could have taken to apprise Mr. McCoy of his rights under Rule XXXI and ensure that his waiver of those rights was both knowing and voluntary.

Mr. McCoy furthermore exhibited such a strong aversion to the public defender's office that he elected to represent himself in the interim time between dismissing the public defender's office and his retention of Mr. English. He also sought to represent himself after the trial court rejected his request to substitute counsel

two days before his trial began. However, the right to self represent and the right to counsel of choice are not absolute, and cannot "be manipulated to obstruct orderly court procedure or to interfere with the fair administration of justice." *State v. Bridgewater*, 00–1529 (La. 1/15/02), 823 So.2d 877, 896, on reh'g (June 21, 2002). Mr. McCoy's attempts to self represent or change counsel two days before the start of his trial would have wreaked havoc in this capital case; furthermore, defendants do not control court proceedings, and even Mr. English voiced concerns that Mr. McCoy was "going to attempt to take over this trial" through his representational demands. Thus, the trial court properly rejected his requests.

Finally, and though it is irrelevant to the untimeliness of the request, the stated reason Mr. McCoy wished to dismiss Mr. English—a trial strategy of conceding Mr. McCoy's guilt in hope of saving his life—is without merit. Mr. English was ethically bound under Louisiana Rules of Professional Conduct Rule 1.2(d) and Rule 3.3(b) to advance a defense which satisfies his ethical obligations to his client but also his ethical obligations to the court. Mr. English determined that, in the face of overwhelming evidence, and on the belief that advancing the defense desired by Mr. McCoy would result in the subornation of perjury, conceding guilt and pleading with the jurors for Mr. McCoy's life was his only feasible tactical option. In reviewing the facts and evidence presented, I agree that Mr. English was left with few options in presenting a defense which satisfied both ethical standards, and that he chose the best option available. *Cf. Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002) ("those courts that have confronted situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses have

consistently found these partial concessions to be tactical decisions, and not a denial of the right to counsel.") (footnote omitted)).

GOEBEL & VIGEN
PSYCHOLOGISTS
[Letterhead]

October 2, 2008

CONFIDENTIAL REPORT: ROBERT LEROY MCCOY

REFERRAL INFORMATION AND OPINIONS:

Mr. Robert Leroy McCoy is a 34-year-old black male incarcerated at the Bossier Maximum Security Jail. Mr. McCoy was arrested on May 9, 2008, for the May 5, 2008, killings of Christina Colston, Willie Ray Young, and Gregory Colston. The 26th Judicial District Court ordered a competency/sanity evaluation on July 17, 2008. The purpose and limitations of the evaluation were explained to Mr. McCoy, and he agreed to proceed with the evaluation. He was cooperative in all that was asked of him.

OPINIONS:

The tests of competency involve determining whether or not the defendant is suffering from a mental illness that precludes his ability to understand the nature and consequences of the proceedings against him, and to properly assist in his own defense. It is my opinion that Mr. McCoy is not mentally impaired. He is able to understand the nature and consequences of the proceedings, and he is able to assist in his defense.

To make a determination of insanity at the time of the offense, the presence of a serious mental disorder or defect is required. Additionally, there must be a causal relationship between the mental disease and the offense behavior. Specifically, the defendant's inability to appreciate the nature and quality, or wrongfulness of

his actions must be the direct result of the individual's mental disorder. It is my opinion that Mr. McCoy has no mental disorder and that he was able to appreciate the rightfulness/wrongfulness of his actions at the time of the event in question before the Court.

ASSESSMENT PROCEDURES:

Document Review:

- Arrest History
- Bossier City Police Department records
  - Incident Report
  - 911 call and dispatch
  - Trometric Gipson interview
  - Charlotte McCoy interview
  - Carlos McCoy interview
  - Spartacus McCoy interview
  - Sharon Moore interview
- Arrest Record from Lewiston, Idaho
- Nez Perce County Sheriff Incident Reports
- St. Joseph Medical Center, Lewiston
- Bossier Maximum Security Jail
  - Intake Assessment
  - Clinic Notes
  - Incident Reports
- LSUHSC treatment records

Interviews:

- Competency/Sanity Interview-Mark Vigen
- Psychosocial Interview-Linda Grayson
- Competency/Sanity Interview-Mark Vigen and Linda Grayson

Psychological Testing:

- Health History Form
- Wechsler Adult Intelligence Scale-Ill
- Malingering Test
- Georgia Court Competency Test-MSH Revision

- Sentence Completion Test of Competency
- Test of Memory Malingering
- Competence Assessment for Defendants with Mental Retardation

SOCIAL HISTORY:

Robert McCoy was born October 2, 1973, to Robert and Mary McCoy in Shreveport. Robert said his parents were high school sweethearts and estimated they are now in their early 60's. Robert's father has worked for several cement companies, and his mother performed domestic work. Mrs. McCoy is now disabled due to congestive heart failure.

Robert was raised in Eden Gardens in a three-bedroom brick house. As the "oldest boy," Robert said he was responsible for the "kids under him" and charged with protecting and watching out for them. she got older, he also helped provide financial assistance. Robert said money was always "tight," but he and his siblings never went without the things they needed. His family was "very close," and his parents' home was the place where everyone gathered. Robert's mother took the ·children to Paradise Baptist Church, her family's church. ·Robert's father also attended Paradise Baptist but kept his membership at Mt. Olive, his family's church.

Robert is the third of six children. Smietanko "Taka" is 37 years old and employed by the City of Shreveport. Taka had a twin, who died shortly after birth. Spartacus is 32 years old and owns a lawn service. Charlotte is 27 and is a waitress at Sam's Town, and 25-year-old Carlos works for Halliburton Well Service.

Robert said his parents' had a good marriage but one with significant challenges as Robert's father has fa-

thered several children outside the marriage. His oldest children are Stephen, age 41, and Alisa, age 38. Stephen lives in California, and Alisa lives in Shreveport. Robert said he was not raised with Stephen and Alisa but was aware of them. Robert's father also has a 9-year-old daughter, Jessica.

Robert attended Eden Garden Elementary, Caddo Middle Magnet, and Ridgewood Middle School. He said he moved in with an aunt in the Hollywood area of Shreveport so he could attend Byrd High School. While a student at Byrd, he participated in football, weight lifting, and ROTC. During his senior year, he attended the Caddo Career Center's auto body program. Robert graduated from Byrd in 1992 with a 3.8 GPA. He reported no behavioral problems and was never suspended or expelled. He was not diagnosed with ADD, ADHD, or a learning disability.

After high school, Robert moved to Houston and attended the Urshan Graduate School of Theology. He obtained a Pell Grant and lived with a friend, Todd Ferrell. He did not work while attending college and graduated with an Associate's Degree in May 1996. The Urshan website indicated they are owned and operated by the United Pentecostal Church International and admission to the school requires a Bachelor's Degree.

Robert reported he worked in food service until 1999 after graduating from college. Those included Domino's Pizza, Sheraton Inn, Foremost Dairy, Harrah's, Isle of Capri, Casino Magic, Horseshoe Casino, and Hollywood Casino. He worked for Nabor's Drilling for three years from 1999 through 2001 where he began as a floor hand and worked his way up to derrick hand before leaving for another job. He worked for Langston

Drilling for 9 months before resigning in 2002 due to the lack of proper safety equipment. After leaving Langston Drilling, Robert operated his own lawn service, The Real McCoy, for four years and worked part-time for Union Pacific as a conductor and engineer. Robert stated the company conducted a background check in order to hire him full-time and discovered he had a criminal record, which prevented him from becoming a full-time employee. In 2006, he worked for Tiger Axle for several months and accepted employment with Greystone Drilling in late 2006. At the time of his arrest, he worked for Greystone and Union Pacific.

Robert stated he has not had many serious relationships during his life. He dated his first girlfriend, Natasha Jack Maiden, from 1991 to 1993. That relationship ended while Robert was away at college and Natasha began to see other men. Robert said he was hurt by Natasha and did not date again until 1995 when he became involved with Gabrielle Howard. Gabrielle and Robert had one child, Laquianisha McCoy, born February 28, 1996. Robert said Gabrielle got him in "all kinds of trouble," cheated on him, and set him up to be arrested in 1997 for assault.

His next serious relationship was in 2001 with Yolanda Bradford. Robert said their relationship ended because he caught her cheating with her ex-boyfriend. Robert said Yolanda also caused him to be arrested and made many false charges against him.

He began dating his present wife, Yolanda Michelle Colston McCoy, in early 2005. They met at a gym in Southern Hills. After a few months, he began staying at her house and began paying her bills. Robert said Yolanda would not give him a key to the mobile home, let him answer the phone, or stay at the mobile home

when she was not there. A Justice of the Peace married them in November 2005. Robert and Yolanda had one child, a daughter named Aniah Colston, born October 7, 2006. When questioned about why the baby did not have his name, Robert said he is not sure the baby is his, but he has never taken a paternity test.

Robert reported their marriage was good at times, and Yolanda could be very "sweet." However, at other times she complained about insignificant things in order to precipitate an argument. He now feels the arguments were intentional so that she had an excuse to "kick" him out, so she could leave with her friends or lovers. Robert stated Yolanda was "always hard to get along with." He denied domestic violence.

Robert stated Yolanda was unfaithful to him during their entire relationship and said he caught her on two occasions having sex with other men. They separated but reconciled when Aniah was born in October 2006. Robert and Yolanda are still married. Yolanda had been married previously and had a son, Gregory Colston, from that marriage. Gregory was 15 years old when Robert and Yolanda married. Robert said he and Gregory had a great relationship and enjoyed spending time together.

Even though he has not had many serious relationships, Robert has fathered five children. His first child, Laquanisha McCoy, is 12 years old. Her mother is Gabrielle Howard. His second child was born to Versaline Addison and is a 9-year-old boy named Lamar. He has an 8-year-old son, Tyrique, born to Sonja White, and a 3-year-old son named Christian born to Crystal Willie in October 2005. His youngest child is 2-year-old Aniah Colston born to Yolanda.

Robert is in good physical health. He stands 5'8" and weights 170 lbs. He reported he has never had surgery, does not have any tattoos, and has never received a blood transfusion. He was treated with Coumadin for a blood clot on his leg due to being assaulted by corrections officers and is currently being treated with an antidepressant. Robert reported he was diagnosed with an ulcer after being taken to the hospital with rectal bleeding in June of 2008. He also reported he was beaten unconscious in May 2008 by corrections officers in Lewiston, Idaho.

Robert stated he does not drink, has never used illegal drugs, and does not use tobacco. He reported that he was in counseling and anger management at the Caddo Career Center with Dr. Cole Flournoy.

Robert denied suicide attempts although he has been transported to a hospital on several occasions during the summer of 2008 for reported attempts.

Robert reported he was beaten unconscious by three correctional officers in Idaho in May 2008. He was transported to the hospital, and it was reported that he had tried to commit suicide. He denied making a suicide attempt and reported the jail was trying to cover for the assault.

In June 2008, he was taken to the hospital again; it was reported he had tried to commit suicide by swallowing razor blades. He stated he was bleeding from his rectum due to an ulcer not a suicide attempt.

He was released from the hospital and returned to the jail only to be returned to the hospital a week later after he claimed he had been tased, maced, and tackled by an officer.

> Robert reported he had become depressed last month and chewed a hole in his arm opposite the left elbow. He was transported to the hospital and received stitches to close the injury.

Robert stated he has had several felony convictions caused by the women he dated. He denied guilt in all of the criminal matters. He was incarcerated for several years for Second Degree Kidnapping. He spent 18 months at Caddo Correctional Center and three years at Caldwell Correctional Center before being released on parole in September 2004.

DOCUMENT REVIEW:

Mr. McCoy's rap sheet shows an arrest in August 1994 for Simple Criminal Damage to Property; the charges were dismissed. He was also arrested in June 1995 for Unauthorized Entry of an Inhabited Dwelling; the charges were Non Prossed.

He was arrested in March 1997 for Driving under Suspension, Simple Criminal Property Damage, and Illegal Carrying of a Weapon when Gabrielle Howard alleged he assaulted her. His rap sheet does not show the outcome of those charges.

Mr. McCoy was arrested in March 1999 for Simple Criminal Damage to Property, Theft, and Driving under Suspension and sentenced to four years of hard labor. His sentence was suspended, and he was placed on supervised probation from May 1999 to November 2000. His rap sheet shows a probation violation in December 1999 on the Simple Criminal Property Damage charge.

Mr. McCoy was arrested in 2001 for Second Degree Kidnapping when Yolanda Bradford alleged he tried to take her from one place to another using a firearm. He

denied he tried to kidnap Yolanda but said he received a four-year sentence. He spent 18 months at Caddo Correctional Center and three years at Caldwell Correctional Center. He reported he was a GED tutor at Caldwell. He was released on parole in September 2004.

His final arrest occurred on May 9, 2008, in Lewiston, Idaho, for Giving False Information to Police and Possession of a Concealed Weapon. He was extradited to Louisiana and charged with the May 5, 2008, killings of Christina Colston, Willie Ray Young, and Gregory Colston in Bossier City.

Three deputies employed by the Nez Perce County Sheriff filed incident reports on May 12, 2008, regarding a suicide attempt by Mr. McCoy. The deputies reported finding Mr. McCoy sitting in a slumped position on his cell floor unconscious and unresponsive. Mr. McCoy had a sheet tied around his neck and the cell bars and was sitting in a position where all his body weight was on the sheet around his neck. Deputies performed CPR and called for emergency transport of Mr. McCoy to a nearby hospital. He was treated in the emergency room of St. Joseph Regional Medical Center where he became combative and irritable. A CT scan, EKG, and lab tests were performed. Mr. McCoy claimed he did not remember anything that happened and denied being suicidal. Instead, he posited there were other people in the cell and somebody else could have done this to him. Mr. McCoy denied neck pain or headache, and all tests were negative. He was discharged, returned to the jail, and placed in closed custody.

Mr. McCoy was extradited to Bossier Parish on May 14, 2008. He was immediately placed on suicide watch at

the Bossier Parish Maximum Security jail. During his assessment the following day, Mr. McCoy defied any history of suicidal or homicidal thoughts, but he was left on suicide watch as a precaution. On May 16, 2008, the mental health unit saw Mr. McCoy. He reported he had been "set up by his wife" and repeatedly stated he was "not a violent person." He stated he did not want or need mental health treatment and said, "I am a stable minded person." He reported he had "no memory" of the incident in Lewiston and stated he was lying on his bunk, someone came in, and he "woke up in a hospital." He was seen by Dr. Anita Flye on May 23, 2008; he continued to deny every having thoughts of self-harm. Dr. Flye requested discontinuation of suicide watch.

Around 2:30 a.m., June 8, 2008, deputies at the Bossier Maximum Security Facility noticed Mr. McCoy via security camera squatting in the center of the room in a pool of blood. Upon entering his cell they noticed cuts to both his right and left arm, blood in his rectal area, and feces mixed with the blood. First aid was performed, and Mr. McCoy was transported to LSUHSC. After Mr. McCoy left with EMS, deputies searched the cell and took photographs. The officers found no blood on the toilet. The majority of the blood was located on the floor and bedding. They also found bits of razor blades in the blood on the floor. During cleaning of C101, inmates found what appeared to be a broken razor blade in blood. Photos were taken.

Mr. McCoy was treated in the emergency room of LSUHSC where the cuts to his arms were sutured. X-rays taken at the time showed no evidence of a foreign body. Mr. McCoy denied cutting himself and states the laceration to his left arm occurred while working out and hitting his arm on some weights. He

does not, know how the laceration to his right arm occurred. He denied any ingestion or recent injury of any kind. He was admitted to the hospital where more tests were performed to locate the cause of the rectal bleeding. A scan of the abdomen and pelvis showed two benign hepatic hemangioma and a right inguinal hernia but no bowel obstruction, or sign of bleeding. The results of all endoscopy revealed a small pyloric ulcer but no obvious bleeding or erosion near a blood vessel. A colonoscopy indicated no lesions or sign of blood. He was discharged on June 12, 2008, and returned to the Bossier Maximum Security Facility.

Mr. McCoy was returned to LSUHSC on June 19, 2008, due to swelling and pain in his right thigh. He told hospital staff he had been attacked by guards at the jail. He was discharged on June 24, 2008, after being treated for edema, deep venous thrombosis secondary to catheter placement during his last hospitalization.

A July 21, 2008, incident report noted Mr. McCoy had complained to the medical unit. He became nauseated and vomited a large amount of what appeared to be toilet paper.

On July 29, 2008, Mr. McCoy was found unresponsive in his cell. The deputies observed a large amount of blood coming from Mr. McCoy's right arm. They called EMS and applied pressure to wound. He was placed in restraints and transported to LSUHSC. Upon entering the ER, Mr. McCoy was combative; he was biting and spitting at ER staff. The attending doctor decided to place Mr. McCoy on a vent for staff and inmate safety. Mr. McCoy was admitted to the hospital and treated for a self-inflicted bite wound to his right arm. The hospital note indicated, "The patient tried to gnaw off his arm. He was transferred to the surgical intensive care

unit where the wound was cleaned and dressed." He was discharged on July 31, 2008.

Events preceding the Recent Charges:
Robert and Yolanda separated in March 2008, and Yolanda moved back into an apartment on Walnut St., that Robert said, is owned by her ex-boyfriend, Howard. After their separation, Robert caught Yolanda in bed with Tony Green. He claimed he had been calling her on her cell phone and did not get an answer. He went to the house to check on her and noticed the grass needed to be mowed. He went up on the porch to get the lawnmower, and when he walked past her bedroom window, he heard moaning. He opened the window slide next to the air conditioner window unit and pulled back the curtain. Tony Green pulled a gun on Robert. Robert said he left and went to his home, as he did not want an altercation. Later that night, the police contacted Robert and told him Yolanda had filed a complaint and said he had held a knife to her throat. The next night, Robert was awakened by a hard blow to his head and found two men in his bedroom with guns to his head. Robert recognized one of the men as Tony Green. The men demanded his money and keys to his car. He gave them $1500.00 and the keys. They ordered him to the floor and took off in his car. Robert said he did not call 911 or file a police report because there was a warrant out for his arrest due to Yolanda's call the day before. Robert said he contacted an attorney to file for divorce and was advised to get money for a retainer and money for his bond. Instead, Robert decided to go visit his brother Stephen in California.

After a week in Oakland, Robert flew from Oakland to Houston. He spent Friday and Saturday night at the Red Roof Inn and used his credit card to pay for his room. On Sunday a friend, Renee, came to get him in

Houston and took him to Dallas. Robert spent Sunday and Monday nights in Dallas. On Tuesday, he met up with his friend, Robert Evans. He rode with Robert Evans back to California. Mr. Evans developed problems with his truck and introduced Robert to another driver, Mr. Dean, who was headed to Washington. He rode to Spokane, Washington with Mr. Dean. During a stop in Spokane, Robert said he was sleeping in the tractor when Tony Green showed up in a truck with another man from Shreveport. Robert said he recognized Tony's voice. When Tony said he was thirsty, Mr. Dean invited him to help himself to a drink behind the seat. Tony "fumbled" behind the seat for a long time and when he finished Robert said he had a "smirk" on his face. Robert contacted his brother, Stephen, to let him know he was in Washington. Stephen did not have a car or a way to get Robert, so Robert rode with Mr. Dean to Idaho. When they reached the destination in Idaho, police surrounded the truck and arrested Robert.

Robert said he had not talked to anyone in Shreveport while he was gone and did not know Yolanda's family had been killed. During the arrest, the police found a handgun under the seat of the truck. Robert denied he was the owner of the gun and tried to explain that Tony Green must have placed it there.

In addition, Robert said two weeks before his arrest he learned that Yolanda had been sleeping with her stepfather, Willie Ray Young. He claimed he discovered this information through a friend who had seen them together in public and followed them to a hotel room. Robert said he never confronted Yolanda with this information.

PSYCHOLOGICAL TESTING:

Mr. McCoy earned a Full Scale IQ score of 89, which falls at the 23rd percentile of Measured Intelligence within the Low Average range. His Verbal IQ is measured at 95 and his Performance IQ at 83. His verbal score falls at the 37th percentile in the Average range, and his performance score falls at the 13th percentile in the Low Average range. Mr. McCoy did well on the Mini Mental Status Examination indicating adequate orientation, attention, concentration, memory, and comprehension skills.

Mr. McCoy performed well on several measures of malingering suggesting that he put good effort into his test performance. Further, he earned a score of 81 on the Georgia Court Competency Test when a score of 70 is required for competency. He earned a score of 34 on a Sentence Completion test having to do with competency, when a score of 20 is required for competency.

Mr. McCoy completed the MMPI-2 in a manner that suggested that he was making every effort to present himself in an improbably favorable light. This may result from a lack of awareness or a lack of insight, but also suggests a "faking good" response set. The data are consistent with people who are defensive and reluctant to admit to common problems experienced by everyone.

Two of the 10 clinical scales of the MMPI-2 are elevated beyond significance. These elevations generally reflect unresolved hostility and anger, as well as a general dissatisfaction with one's life. Similarly scoring people are seen as having adjusted to a level of chronic depression in which worry and obsession are prominent features.

Similarly scoring people tend to be seen as dependent, passive dependent, and/or narcissistic. Interpersonal problems are common for them. These types of people tend to make excessive demands for attention and sympathy on others while paradoxically resenting people who make normal demands on them. These types of people are prone to occasional violent outbursts.

CASE CONCEPTUALIZATION:

Mr. McCoy's presentation of himself and his history is somewhat at odds with what is reported about him from third party sources. Discrepancies regarding the events preceding the deaths of Colston, Young, and Colston, regarding Mr. McCoy's suicide attempts, and regarding his past history of violence, lend themselves to several questions: ·1) Is Mr. McCoy suffering from Dissociative Amnesia, which renders him unable to recall important information such as the repeated suicide attempts; 2) Is Mr. McCoy in a state of denial, which has distorted his perception of reality by keeping the truth regarding the killings and the suicide attempts hidden from his consciousness; 3) Is Mr. McCoy psychotic and out of touch with reality such that what he reports is delusional; or 4) Is Mr. McCoy intentionally fabricating alternatives to the truth when the truth is unfavorable or painful?

A diagnosis of Dissociative Amnesia is usually associated with events considered traumatic or stressful and, therefore, could be appropriate for his loss of memory for the suicide attempts. However, Dissociative Amnesia does not explain Mr. McCoy's denial of violence against women in the face of a prior conviction or his denial of factual evidence in the killings of the Colston family. Dissociative Disorders are often associated with severe physical and sexual abuse that he does not report.

The use of the defense mechanism of denial is a plausible explanation for inconsistencies in that Mr. McCoy may have unconsciously rearranged his perception of external reality in order to eliminate the need to cope with the truth of what he might have done. Contrary to what is seen in most who use the defense mechanism of denial are Mr. McCoy's clear and well thought out explanations that counter each discrepancy with which he is confronted.

Psychosis would be an explanation if Mr. McCoy presented with typical hallucinations and delusions frequently seen in patients with psychosis arid with the disorganized and troubled thinking that so often plagues such patients. To the contrary, Mr. McCoy presents with none of the positive signs of psychosis or the negative symptoms often seen in the psychotic illnesses. Rather, Mr. McCoy is oriented in his presentation, clear thinking, and gives a thorough and clear history of his family and himself.

A claim of amnesia is most common in a context in which there is a potential for secondary gain and/or a potential to avoid an undesired consequence. In Mr. McCoy's situation, claiming amnesia could be viewed as an avenue for secondary gain in such things as trips out of the jail to the hospital, increased personal attention, sympathy, concern, care, etc. Claiming amnesia could aid in the avoidance of undesired consequences including avoiding negative attitudes toward him by others and/or a reduction in the charges against him.

COMPETENCY ISSUES:

Mr. McCoy demonstrated no active mental states that would interfere with his rational understanding of the proceedings or his ability to assist toward his defense. Essential to the issue of competency to stand trial is

whether or not a mental disease or defect is present and interfering with the defendant's ability to understand the charges against him, his ability to properly assist in his own defense, and the ability to understand the nature and consequences of the proceedings against him. I find no evidence that Mr. McCoy is experiencing the active phase of a mental disorder that would render him unable to understand the nature and consequences of the proceedings against him at this time or unable to assist his counsel in his defense.

RESPONSIBILITY ISSUES:

Mr. McCoy's mental status throughout the evaluation does not suggest the presence of a mental illness that would have interfered with his criminal responsibility at the time of the offense. Investigative documents make no mention of bizarre behavior at the time of the alleged offense. The defendant's sequence of behaviors appears to have been organized, calculated, and deliberate.

Therefore, it is my opinion that Mr. McCoy was not suffering from the symptoms of a mental disorder or disease that was causally related to the alleged offense that would have resulted in his inability to appreciate the nature and quality of the wrongfulness of his behaviors.

Hopefully, the above will be helpful to you in proceeding with Mr. McCoy's case. Should you have questions of me, please do not hesitate to call.

RESPECTFULLY SUBMITTED:

/s/ Mark P. Vigen
Mark P. Vigen

Affadavit
Notice of Intent to Offer Alibi!!!
;Cr. P. Art. 727; Notice of Alibi!!!

Upon the date of May 5, 2008; I plaintiff/defendant was in the presence of Ms. [?]eena Miles. Ms. Miles is a friend of the family through personal relations. Ms. Miles currently lives in Dallas Texas. Ms. Miles is an nurseing assistant in the medical field of medicine and patient health services. The address of Ms. Myles at this moment is not known by defendant; because of only two visits; but noted information is being obtained! Ms. Miles picked defendant up in Houston on May 4, 2008; and defendant stayed at residence in Dallas Texas owned by Ms. Miles, until transported to truck-stop in Dallas Texas on the 6th of May of 2008, to meet fellow truck driveing Robert Evans. Ms. Miles upon verification of said facts will also validate defendants reason and complaints an attempt on his life and communication of facts to family and Deputy Virgil Robinson etc; of the Caddo Parish Sheriff Office in La!!!

Pro Se- Robert McCoy II !!!

Affadavit
Notice of Intent to Offer Alibi!!!
;Cr. P. Art. 727; Notice of Alibi!!!

Before and upon the date of May 5, 2008, I plaintiff/defendant brings before you Mr. Carlos McCoy. Mr. McCoy is the brother of the accused defendant. Mr. McCoy resides in Shreveport, LA, at address 7323 Altos Loop, Shreveport, La, att. Mr. McCoy was informed with family of violations and illegal conduct on accused by B.P.D., and wifes attempts to get accused prosecuted. Mr. McCoy was also informed on Lt. Ross & Detective Humphries acknowledgement of help, but, it was total deception. Mr. McCoy was informed also in April of 2008, but accused of second attempt on his life by B.P.D., and was in total knowledge of accused leaving the state of Louisiana weeks before accused crime and can validate accused where-abouts through personal relations with accused out of state; by older brother, relatives at [illegible] of state & in state and documents to validate being completely out of state before-while-and after accused incident by the state of Louisiana.

Pro Se- Robert McCoy II !!!

Affadavit
Notice of Intent to Offer Alibi!!!
;Cr. P. Art. 727; Notice of Alibi!!!

Before and upon the date of May 5, 2008, I plaintiff/defendant brings before you Mrs. Mary McCoy. Mrs. McCoy is the mother of the accused defendant. Mrs. McCoy resides in Shreveport, La, at address 7323 Altus Loop Shreveport, La. Mrs. McCoy was informed with family of violations and illegal conduct on accused by B.P.L., and wifes attempts to get accused prosecuted. Mrs. McCoy was also informed in April of 2008, by accused of second attemp on his life by B.P.D, and was in total knowledge of accused leaving the state of Louisiana weeks before accused crime and can validate accused where-abouts through personal relations with accused by phone out of state, by older brother out of state, relatives out of state & in state and documents to validate from Money Gram being completely out of state before-while-and-after incident accused of by the state of Louisiana.

Pro Se- Robert McCoy II !!!

Affadavit
Notice of Intent to Offer Alibi!!!
;Cr. P. Art. 727; Notice of Alibi!!!

Before and upon the date of May 5, 2008, I plaintiff/defendant brings before you Mr. Robert L. McCoy SR. Mr. McCoy is the father of the accused defendant. Mr. McCoy resides in Shreveport, La, at address 7323 Altus Loop Shreveport, La. Mr. McCoy, family and friends was informed by accused on several violations and illegal conduct while traffic stops by B.P.D. Mr. McCoy was informed of attempt by accused wife actions to bring prosecution on plaintiff etc. Mr. McCoy was also informed in April of 2008, by accused of second attempt on his life by B.P.D, and was in total knowledge of accused leaving the state of Louisiana weeks before accused crime and can validate accused where-abouts through personal relations with accused out of state, his older son out of state; relatives out of state and documents to validate being completely out of state before-while-and-after accused incident by the state of Louisiana.

Pro Se- Robert McCoy II !!!

Affadavit
Notice of Intent to Offer Alibi!!!
;Cr. P. Art. 727; Notice of Alibi!!!

Before and upon the date of May 5, 2008, I plaintiff/defendant was constantly in direct communication and correspondence with Caddo Parish Sheriff Deputy Mr. Virgil Roberson. Mr. Roberson is very familiar with plaintiff through relation! Mr. Roberson resides in Shreveport, La, current address isn't known at present time, but, Mr. Roberson can be located or contacted at the Caddo Parish Courthouse or Caddo Correctional Center in Shreveport, La. Mr. Roberson is an reliable witnesses for the defense on the ground of (1) familiarity; (2) oath of service & protect and (3) loyalty to God & Justice!!! Deputy Robinson was informed of all allegations; before, while, and during [illegible] because defendant was accused of said crime. Deputy Roberson can validate & will confirm under the penalty of perjury defendants factual where-abouts, attempts on his life, and verbal communication of lodgeing before said accused incident of defendant by the state.

Pro Se- Robert McCoy II !!!

Introduction of Documents

I would like to have these documents added and recorded, therefore, be accepted as admissible evidence and recorded into the record on behalf of the defense. (under ABA standard for Criminal Justice 4-38) states, "Defense Counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information. Upon asking a second-time for the entire "Discovery Information" in [illegible] the prosecution intends to present at trial; counsel hasn't met said requests! (Rule 1.4, ABA Model Rules of Progressional Conduct). YOUR duty as counsel by law is to respond – reasonably – promptly to a defendants' request for information! 1st Amendment Right, "Freedom of Information Act"! By Law in (Georgia v. Randolph, U.S. Sup.Ct. 2006), If anyone share a space or residence etc; If someone agrees to a search & you refuse consent; as I did; & If you are personally present when permission is asked; your refusal means that evidence cannot be used against you; even if the subject of evidence is incriminating or of incrimination. Enclosed is Exhibit AB; A valid Affidavit for the defense on corruption & unlawful conduc on/by-B.P.D., officer Richard McGee's actions of statutory rape & physical knowledge of the law in which he pregnated Ms. Taylor a 14 year old in 2008!! Minors are legally incapable of consenting to sexual intercourse. "F.O. Logged"!!!

Pro-se-plaintiff
Robert L. McCoy II 1-6-10...

Affadavit

I Demarcus Nelson is writing this affidavit on the behalf of the defense of Robert McccyII. On and about 2008 of October, I Demarcus Nelson am a witness to the under age cruel sexual encounter of Richard mcgee and my cousin Demetria Taylor. Richard mcgee was fully aware of my cousin age of 14 years old. Richard mcgee pregnated my cousin without her consent and authority of her parents. While being currently a task force officer for B.P.D. And knowing the law he willfully committed carnal knowledge of a juvenile, while holding a governmental position as a respected peace officer. I declare under the penalty of perjury that all information that I have permitted is correct to the best of my knowledge. Ive written this affidavit by free will, and not under any duress.

/s/ Demarcus Nelson

1-4-2010

STATE OF LOUSIANA	26th Judicial District
-vs-	Court Docket #
Robert L. McCoyII	163572, 164646

MOTION For Speedy Trial or
Dismissal of Prosecution

Now into court comes, Robert L. McCoyII defendant, in the foregoing motion and provides to the court as follows to-wit;

I

The Defendant was placed on notice by custodians in the Louisiana Department of Correction, that a warrant/detainer was lodged against him by the 26th Judicial District Court. The alleged charge is 3 counts of 1st Degree-Murder & Aggravated Battery, in violation of Louisiana Revised Statute.

II

The Defendant has a clear right to a speedy disposition of this matter, and jurisprudence holds that, if these rights are not afforded to the defendant, then the warrant/detainer must be quashed. Strunk v. U.S., 93 S.Ct. 2260, 37 L.Ed.2d. 56 (1973). In Strunk, supra the United States Supreme Court held that the denial of a speedy trial requires reversal of the conviction and the dismissal of the charge.

III

In Miller v. Geoft, 337 So.2d 1191 (La. 1976), the Louisiana Supreme Court held that the right to a speedy trial is stressed and is noted as a guaranteed one, thus should be fully acknowledged.

IV

Furthermore, in accordance with the Louisiana Constitution of 1974, Article 1, Section 16, every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy public and impartial trial in the Parish where the offense or element of the offense occurred.

WHEREFORE, the defendant prays that based on these facts, the time that has expired, that the warrant/detainer against the defendant be resolved by affording defendant a fast and speedy trial. Or in the alternative the warrant/detainer lodged against the defendant be removed according to the above jurisprudence.

Respectfully submitted:

/s/ Robert L. McCoy II

3rd Filing or Motion
1-10-2010

D.O.C. #55947
POD 0-102

Bossier Maximum Security Facility
2985 Old Plain Dealing Rd.
Plain Dealing, Louisiana 71064

For the Records
Response to Prosecutors prior
Motion to Quash defendants affidavits
etc, … Burden met in admissible facts etc.

Upon the introduction into Law of the "Federal Basic Evidence Rule", (Federal Rule of Evidence 402) is the basic building block of evidence rules. For evidence to be relevant, same logical connection must exist between the evidence and the factual issue it is offered to prove or disprove. "(A brick is not a wall"). The main Limitation of the relevance Rule is that the connection must be based on reason and Logic rather than on bias and emotion. Said affidavits and alibis were entered under 28 U.S.C. 17416, An Federal [illegible] declination under penalty of perjury that may be substituted for an affidavit. The connection of said information enclosed in said affidavits etc, is relevant and factually [illegible] that supports the admissions and unseen context of defendants case. The plaintiff/defendant has sufficient evidence in documents to identify the person or persons, their acts/actions including has led to this present position in-which plaintiff/defendant is now included in!!! Plaintiff has sufficient evidence to show a violation of clearly established Law, and thus he has met the burden to identify and present supporting facts on the belief of the defense. Thus makes said information – Affidavits, alibis etc, admissible by the ("Federal Rule of Evidence 402") and by ("Federal Rule of Evidence 403") which balance the evidence to assure that the evidence in the case against the risk of unfair prejudice!!! It is very important that we view the "Deliberate Indifference" Clause"… (City of Canton v. Harris, 489 U.S. 378 (1989). which holds a higher form of negligence. "Conduct that shows the conscience". Judicial review, defined as "the power of

any court to hold unconstitutional and [illegible] unenforceable any Law, any official action based on the Law, or any other action by a public official that it deem is to be in conflict with the Constitution. "Rule of Law", holds that no person is above the Law, that every person, from the most powerful, public official down to the least powerful individual, is subject to the Law and can be held accountable in the courts of Law for what he or she does. "A government of Laws and not of men." Fact is, that no person in this country, not even one wearing a badge of authority, is above the Law! Plaintiff can prove all set of facts to support his claim, and the claim has arguable basis in Law or fact, and there is a chance of success. Also a plaintiff is required to support his "claim with sufficient precision and actual specificity to raise a genuine issue as to the illegality of defendants' conduct etc, at the time of alleged acts". Schultea v. Wood, 47 F.3d 1407, 1434 (5th Cir. 1995). Under § 1983, a plaintiff must identify defendants that were either personally involved in a constitutional violation or whose acts were causally connected to the constitutional violation alleged. Woods v. Edwards, 51 F.3d 577, 583 (5th Cir 1995). Subjective conclusory facts are sufficient to overcome prosecutors misguided attempt to repeat the omission of exculpatory evidence, while including inculpatory evidence, inclusion of debatably fabricated evidence, failure to follow obvious and apparent leads which implicated other individuals, and the use of questionable forensic conclusions, identification of plaintiff by eye-witneses, etc, that the involved prosecutor/26th Judicial Court etc, were acting deliberately toward the specific end result prosecution of plaintiff without regard to the learning signs, affidavits, witnesses, alibis along the way that their end result is/was unjust and not supported by the facts of their investigation. In violation of 4th, 5th, 6th, 8th and

14th Amendments of the U.S. Constitution! Amendment XIV; All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any Law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of Law; nor deny to any person within its jurisdiction the equal protection of the Laws. "The right to due process"! "The right to equal protection"!

Pro-se-plaintiff

Robert L. McCoy II

1-12-2010…

"In God we Trust"!!!

Introduction of Documented
Federal and State Law Status
on behalf of the defense.

I would like to have three documents added and recorded therefore by accepted as admissible evidence and recorded into the record. The Rules of procedure in the charter of this tribunal state specifically that documents to be used as evidence by either party must be submitted to the court in advance of their presentation as evidence. As such documents are essential to the testimony of the principal defendant for his defense.

I would also like to invoke the U.S. Supreme Court case Haynes vs- Kenner, to invoke that I'm not a Lawyer, nor do I claim to be!!!

In Kennedy v. Los Angeles Police Dept., 887 F.2d 920 [(9th Cir. 1989]. Unlike ordinary body searches, therefore, strip and body cavity searches are not allowed after arrest unless "Reasonable suspicion" justifies the search.

The area within a "Persons' Immediate Control," (Chimel v. California), 395 U.S. 752 (1969). The Chimel Rule holds that a warrantless search – next – incident to arrest is valid "iF" Limited to the "Area of immediate control", meaning the area From which the person might be able to obtain a weapon or destroy evidence. Refered to as the ("grabbable area"). Limits the area to the arrested person's "wingspan" – the area covered by the spread of the person's arm and hands. "Consent" to search must be "Free" & "Voluntary", not obtained by the use of force, duress, or coercion-.. "Threatened him with going to jail. "Said, I'm going to search your truck, and look in it for anything illegal." "Involuntary consent"! – misrepresentation & decep-

tion saying, "We have a warrant to search, when none exists. See, (Bumper v. North Carolina, 391 U.S. 543 [1968]. "Consent" can be rebuked – even in the course of search, by whom gives consentor by whom anybody else who possesses authority to do so.

Impermissibly suggestive Identification Procedure (U.S. v. Wade, 388 U.S. 218 (167). Ned v. Biggers, 409 U.S. 188 (1972). Can't Lead to an identity of the accused.

Involuntary Compressions not valid because of –

1. Chambers v. Florida, 309 U.S. 227 (1940) coercion.
2. Spano v. New York, 360 U.S. 31 (1959) deception.
3. Rogers v. Richmond, 365 U.S. 534 (1961).
4. Escobedo v. Illinois, 378 U.S. 748 (1964), denied counsel next –

The right of people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated. The third Advance Amendment upholds such – rightful guarantees by the U.S. Constitution and the Bill of Rights.

In the State Constitution, Federal or State Laws, case Laws, and court Rules. These other sources may cause litigations from on jurisdiction, but, they can only give rights to a suspect by limiting the actions of the police or the counts, they cannot deprive a suspect of any right given by the Bill of Rights. In case of a conflict between other sources of rights and the Bill of Rights, the Latter prevails!

Only Repeated for Factual Security
Basic Evidence Rule

(Federal Rule of Evidence 402) is the basic building block of evidence Rules. For evidence to be relevant, some Logical connection must exist between the evidence and the factual issue it is offered to prove or dis-

prove. "(A brick is not a wall)". The main Limitation of the Relevance Rule is that the connection muse be based on Reason and Logic Rather than on bias and emotion.

(Federal Rule of Evidence 403) Balance the evidence next – to assure that the evidence in the case against the risk of unfair prejudice. In Indianapolis et al. v. Edward, et al. 531 U.S. 32 [2000]. The doctrine of judicial Review has significant implications in Law-enforcement. It means that Laws passed by Legislative bodies can and will be reviewed by the courts in – proper case and will be declared unenforceable If found to the against the constitution. For – individual Law enforcement Officers, it means that whatever they do can be challenged in court; and, if held to have violated individual Constitutional Rights, could Result in the imposition by the Court of Civil or Criminal sanctions. The exclusionary Rule provides that any evidence obtained by the government in violation of the 4th Amendment guarantee against unreasonable search and seizure is not admissible in a Criminal prosecution to prove guilt. Evidence obtained in violation of any of the other constitutional rights is also excludable in a criminal trial.

Force disclosure of papers "illegible" to evidence, etc; Inadmissible

(Boyd v. United States, 116 U.S. 616 [1886]

"Evidence Illegally Obtained by Federal OFFICERS / excluded in criminal prosecution." (Weeks v. United Sates – next – 232 U.S. 383 [1947]. Whitley v. Albers, 475 U.S. 312 [1986]

Guarantee of the Constitution.

The efforts of the courts and their official to bring the guilty to punishment, praiseworthy as they are, are not to the aided by the sacrifice if these great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental Law of the Land … To sanction such proceedings would be to affirm by judicial decision or manifest neglect, if not open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action. Spears v. McCotter, 776 F.2d 179 [5th Cir. 1985] From 1914 to 1960, Federal Courts allowed evidence admitted evidence of a Federal crime if the evidence had been illegally obtained by state officials/Officers, as long as it had not been obtained by or in connivance with Federal Officers. This dubious practice was known as the "silver platter doctrine", a procedure that permitted Federal Courts to admit evidence illegally seized by the State Law-enforcement Officers and handed over to Federal Officers for us in Federal cases. Under this doctrine, such evidence was admissible because the illegal act was not committed by Federal Officers. In 1960, the next - court put an end to this questionable practice by holding that the Fourth Amendment prohibits & prohibited the use of illegally obtained evidence in Federal prosecutions whether obtained by Federal or by State officers there by laying to rest the silver platter doctrine, (Elkins v. United States, 364 U.S. 206 [1960]. Can't put illegally obtained evidence on accused when he neither owned, possessed, concealed, not on his person, nor seen with, or, taken off of accused! In like manner, putting the prosecutor in the place of the Federal Officers and the detectives etc, in like place of state law enforcement officials; the detectives of the etc, cannot

submitt illegally obtained evidence in state prosecutions, this dubious practice is strictly illegal and is an open defiance to the prohibitions of the constitution that intends to protect people against such unauthorized actions. No deoxyribonucleic acid, the chemical that carries a person's genetic information, known in some circles as genetic fingerprinting; DNA may be recovered from a variety of sources of different individuals, from semen, blood, hair, skin, sweat and saliva. "None found or located anywhere of accused"! Also see, (Rochin v. California, 342 U.S. 165 [1952] (Mapp v. Ohio, 467 U.S. 643 (1961). Fourth Amendment next – Right required state courts to exclude evidence obtained by unlawful searches and seizures. In both federal and state courts, the basis procedure for excluding evidence on a claim of illegal search and seizure is a pre-trial motion to suppress the evidence. In which counsel, per my wishes, request & submission of affidavit refused to file, etc.. Said refusals are violations of accused Constitutional rights during pre-trial proceedings, etc…Said motion to suppress & Fast and speedy trial requests was made filed/ was made by accused, but, denied by counsels outright defiance of accused rights and it is an error of the court to protect and support such defiance. The exclusionary rule may be used only by the person whose Fourth Amendment Rights have been violated, meaning the person whose reasonable expectation of privacy was breached by the police. "Illegally seized" Evidence includes contraband, "Fruits of the crime" (For example stolen goods), instruments of crime (such as burgular tools etc) or "Mere evidence" (shoe, shirt, or the like connecting a person to the crime), which is seize illegally, may not be admitted at a trial to show the defendants guilt.

"Fruit of the poisonous Tree", doctrine states that once the primary evidence ("the tree") is shown to have been unlawfully obtained, seizure of confession from coercion, threats, force, etc, and secondary or derivative next – evidence ("the Fruit") derived from it is also inadmissible (Silverthorne Lumber Co. v. United States, 251 U.S. 385 [1920]. This rule is based on the principle that evidence illegally obtained should not be used to gain other evidence; because the original illegally obtained evidence "taunts" all evidence subsequently obtained. The tainted secondary evidence (some courts prefer to call it "derivative evidence" or "secondary evidence") can take various forms.

Example 1. The police conduct an illegal search of a house and find a map that shows the location of the stolen goods. Using the map, the police recover the goods in an abandoned warehouse. Both the map and the goods are not admissible as evidence, but for different reasons. The map is not admissible, because it is illegally seized evidence, the goods (physical evidence are not admissible either because they are "Fruit of the Poisonous tree"!

Example 2. The police enter a suspect house without probable cause or consent and discover the suspects diary, and a entry of which contains the details of murder and the location of the murder weapon. The police go to the location and find the weapon. The diary is not admissible as evidence in court because it is illegally seized evidence, the murder weapon is not admissible because it is the "Fruit of the poisonous tree." "We must abide by the Constitution, Bill of Rights & the laws of the land; no one is above the law!" I move for, "Dismissal of Charges"!!! Pro-Se Plaintiff Robert McCoy 7-17-2017

Cynthia J. Johnston
Clerk of Court
26th Judicial Court

Robert McCoy II Doc # 163572, 164646
v.
State of Louisiana Judge Cox

Affidavit
Constitutional Rights
The "One Free Bit" Rule

In U.S. Supreme Court Case (Haynes -vs- Kenner) I invoke that I'm not a lawyer, nor do I claim to be. The Constructional Right to compulsory process to obtain witnesses; the Sixth Amendment expressly provides that the accused in a criminal prosecution shall have the right to compulsory process for obtaining witnesses in his or her favor. The right to obtain witnesses includes 1. The power to require the appearance of witnesses, and 2. The right to present a defense, which in turn includes the defendants right to present his or her own witnesses and his or her own version of the facts. The essence of this principle is that the defendant is given the same right as the prosecutor to present witnesses in state & Federal proceedings. next – If the trial court excludes evidence crucial to the defense and bearing substantial assurances of the trustworthiness, this violates the right to present a defense even when the evidence is technically not admissible under local rule of evidence (Chambers v Mississippi, 410 U.S. 284 (1973).

Violation of Court
No Response to Filed Motions.

On 11-4-09, Defendant filed numerous motions of specificity for defense only 3 was responded too. Ignored requires for "Gag Order". On 11-8-09, Defendant re-

quest to the court under Article 439 C.CR.P. Subpoena of witnesses to appear before grand jury & Article C.CR.P. 439.1- Witnesses; authority to compel testimony & evidence in accordance with subsection B "illegible " – Article 439.1(A)(B)(C) in which request of attorney General & District Attorney together to order evidence incrimination testimony. Also under R.S. 15:471, Grand jury and district attorney to be competent witness both for state and for defense in any prosecution for perjury of false swearing, alleged to have next – been committed before the grand jury, and authorized by La. Code of Evidence Article 606; to said date of 1-24-10, - has been ignored and denied by the court. To verify upon what evidence/factual/any indictment was found, or that it was without evidence. No Response! On 11-11-09 According to Article C. CR.P. 739 Indigent defendant request for additional subpoena's, A sworn application was issued to the court for additional witnesses alleging that the testimony of additional witnesses is relevant and material and not cumulative and that the defendant cannot safely go to trial without it, was ignored to said date of 1-24-10 – and denied by court, with no response! On 11-18-09 According to Article C. CR.P. 703 motion to suppress Evidence & may moved on any constitutional ground to suppress. According to C.CR.P. Article 701, motion for a speedy trial was requested in accordance with affidavit to support defendants right in June of 2008, on May 21, 2008, and above date; but counsel, Refused to submit request etc; by denying defendant next – constitutional guarantees and judge accompanied said "miscarriage of justice;" even up on validation through clerks office motions/documents/affidavits by defendant and refused defendants request for a "Contradictory hearing" within 30 days of injustice etc; saying "I should have filed said motion within 15 days after arraignment," when

defendant met regulations in advance; but, counsel was "deliberately indifference" in unproper legal representation validating, "Actual Ineffectiveness of counsel" valid in (Wiggins v. Smith), 539 U.S. 510, 534-35, 128 S.Ct 2527, 2542-43, 1561, 2d. 471, 493-94 (2003). In accessing prejudice [in capital case], we reweigh the evidence in aggravation/against the totality of available mitigating evidence.

Constructive Ineffectiveness
The Cronic standard

United Sates v. Cronic, 466 U.S. 648, 658, 1045 S.Ct. 2039, 2046, 80L. Fd. 2d. 657, 667 (1984). Bell v. Cone, 535 U.S. 685, 695-98, 122 S.Ct. 18433, 1850-52, 152 L. Fd. 2d. 914, 927-29 (2002).

1. Defendants facts to statue

If your lawyer represents a government next – lawyer collaborated or had a connection with the prosecution etc; see e.g. (Mickens v. Taylor, 535 U.S. 162, 174-76 122 S.Ct. 1237, 1245-46, 152 L.Fd 2d 291, 306-07 (2002). (Precision facts). Kimmelman v. Morrison, 477 U.S. 365, 384-85, 106 S.Ct. 2574, 2587-88, 91 L.Fd. 2d 305, 325-26. Trial Court refused to rule on defendants motion to suppress evidence because counsel's motion was untimely etc. The defendant none-the-less ultimately obtained a hearing on the merits of the suppression motion by raising a claim that his trial counsel was ineffective for failing to make a timely suppression motion by raising a claim that his trial counsel was ineffective for failing to make a timely suppression motion. Kimmelman v. Morrison, 477, 477 U.S. 365, 106 S. Ct. 2574, 91 L.Fd. 2d. 305(1986).

1) Counsel had a conflict of interest.

2) Counsel failed to investigate and perform certain pretrial functions.

3) Counsel failed to pursue defenses available to defendant. (Moore v. Johnson, 194 F.3d 586, 215-619 (5th Cir. 1999). Finding counsel's error in ignoring and failing to investigate certain evidence led to an unfair trial for defendant.

People v. LaBree, 34, N.Y.2d.257, 259-61, 313 N.E.2d 730, 731-32, 357 N.Y.S. 2d. 412, 413-15 (1974). Finding ineffective assistance based on counsels inadequate investigation and preparation.

4) Cursing defendant out; till today – defendant hasn't received discovery requests on 11-4-09; 12-10-09 etc.

Further Vindication of court.
Federal Constitutional Requirements

Ignored requested motions of Brady Violations, Brady hearing, Brady Material, etc. "Unconstitutional"

1) According to the rule laid down by the U.S. Supreme Court in Brady v. Maryland; a prosecutor may not refuse a request by the defendant for evidence that is favorable to him and is material either to guilt or to punishment. Suppression of such – "exculpatory evidence" (evidence which helps the defendant) even as a mistake is unacceptable under Brady. Any evidence is crucial to proving my innocence must be disclosed as a matter of right. The prosecutors failure to reveals such evidence may have a number of consequences; including a new trial or the striking of evidence by the prosecution.

"impeachment evidence" weak witness testimony, etc.

2) Ignored motion and requested hearing raised on the "Issue of Impermissible Suggestiveness" concering

admissibility of testimony concerning the identification of Assailant by eye-witness and detectives description of 6'1, 160lbs. bright-skinned, investigated by S.P.D. and validated accused doesn't fit description etc, but, accused is incarcerated and changed. Factors of witness reliability is crucial and Identification of testimony should be suppressed. Neil v. Biggers, 409 U.S. 188(1972). State v. Butler, 850 50.2d. 932 (La.Ct.App.2d.Cir.2008). State v. Young, 839 50.2d 186 (La.Ct.App.4thCir.2008). State v. Martin, 595 50.2d 592(La. 1992).

In Accordance to Article 521.

Judge Cox; is biased, prejudiced, or personally interested in the case to such an extent that he would be unable to conduct a fair and impartial trial.

In filing said affidavit, "Lve want a different Judge" (Cal. Civ. Proc. Code § 170.6).

Defendant also move for recusation of Judge and D.A., under Article 671/Grounds for recusations of Judge and D.A.

Quoted: By Attorney Miller and Attorney Gorley, Judge Cox said he's going to stay up all night to make sure that me and my brothers get the death penalty and is denying validated motions guaranteed by the U.S. Constitution to defendant, etc.

Quoted: By Attorney Miller, Attorney Gorley, Carlos and Robert McCoy Sr, D.A., Schulyer, Marvin told by brothers and father, if they testify against me and make false statements under oath, they will go free, but, if they don't, they will get the death penalty for accessory and he can promise they/with me/ will never see the light of day again. My father informed D.A. Marvin, he didn't raise his kids to lie on each other and

we'll see him in trial!!! Also a "conflict of evil" lies with D.A. Schulyer has a personal interest in the case and grand jury proceedings which is in conflict with fair and impartial administration of justice. F.C. has affidavit on file!

Pro-se-plaintiff Robert McCoy

Clerk of Court Office of
26th Judicial District Court

Admissible

Constitutional Rights, Statues
and Valid Laws in Support of Defense

Robert McCoy II 55949 Judge Cox
-v-
State of Louisiana Docket #, 163512, 164646

Memorandum of Law
Notice

Plaintiff invokes that he is not a lawyer; nor do he claim to be under U.S. Supreme Court case

Haynes-vs.-Kenner

1) (a) The "personal knowledge rule" (Federal rule of evidence 602) Requires all witnesses (except expert witnesses) to testify based on first hand information.

-Example- can a person testify that something happened; if they didn't personally observe it with one or more of his/her senses? No!!!

(bb) must have actually seen it – to be true and factual. "Lacks personal knowledge."

"Excited Utterances"

Eyewitness Description of assailent 6'1", 160lbs, bright skinned.

(b) This exception admits into evidence statements made under the stress of excitement of perceiving on unusual event. The notion is that people are unlikely to lie when they describe a sudden and exciting situation and was made immediately afterward. An even has to

be unusual to produce the necessary excitement of the truth.

"Dying Declarations"

"Spartacus McCoys' Testimony:

(c) This exception admits into evidence statements made under a sense of immediately impending death. The theory is that such statements are trustworthy because "people don't want to meet their maker with a lie on their lips.

(d) "Assertions of State of mind:

This exception admits into evidence statements setting forth people's emotions, beliefs, intent, etc. The exception rests in the importance of testimony about mental states in many criminal cases, and people's trustworthiness in describing such matters, for example, why would they lie? In the famous, though grisly, U.S. Supreme-Court case that gave rise to this exception (Hillman v. Mutual Life Insurance, U.S. Sup. Ct.1892).

Attorneys etc, are officers of the court, and must respect the institution of trial no matter what their views of the opposing witnesses are.

"Don't Rock the Boat"

Court-appointed lawyers etc, owe their jobs to the judge who appoint them and some panel attorneys may fear that to take a position that offends a judge is to bite the hand that feed them.

2. Factual Statues.

(a) (Williams v. Superior Court, 53 Cal. Rptr. 2d 832 (1996). The court juror; or if two or more persons conspire for the purpose of impending, hindering, obstructing, or defeating, in any manner, the due course of jus-

tice in any state or territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

(b) Equal Rights under the law § 1981(a).

All person within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kinds, and to no other.

(c) (People v. Arthur, 22 N.Y.2d 325, 329 N.E.2d 537, 539, 292 N.Y.S. 2d. 773, 666(1968, holding – that the issue of whether defendant was wrongly denied the right to counsel during police interrogation could be heard on appeal for the first time, where statements made during the interrogation were used by the prosecution during trial. -Also- (People v. Kinchen, 60 N.Y. 2d 772, 773, 457 N.E. 2d 786, 787, 469 N.Y.S. 2d 680, 681 (198"illegible")

(d) (United States v. Rut Ledge, 900 F.2d 1127, 1130-31 (7th Cir. 1990) – holding the police are allowed to pressure, cajole, conceal facts, actively mislead, and commit minor acts of fraud, but are not allowed to magnify a suspect's fears, ignorance, anxieties, or uncertainties to the point where rational decision become impossible.

(e) (United States v. Hernandez, 203 F.3d. 614, 621 (9th Cir. 2000) – Finding that a denial of a pro-se-request

may be unconstitutional if it was made before jury selection and if the request was not a delay tactic.

- The right to a speedy trial does not start running until you are indicted, you can waive this right, and the court balances the right against other considerations.

3. Amendment 6th of U.S. Constitution.

(a) In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where in the crime shall have been committed, which district shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defense. – Right to access court (Procunier v. Martinez).

(b) (Klopfer v. North Carolina, 386 U.S. 213, 221-22, 87 S.Ct. 988, 99293, 18L. Ed. 2d 1, 7 (1967) Ruling that a state may no postpone prosecution of any case for an unlimited period even though the accused remains free to go wherever he desires.

(c) (United States v. Marion, 404 U.S. 307, 92, S.Ct 455-30 L. Ed. 2d 468 (1971) Ruling that the right to a speedy trial guaranteed by the 6th Amendment does not apply until you have been accused of a crime, which may not occur until indictment.

(d) Federal R. Evidence 803, 804, 807, when out of court statements fall within a category listed in the Federal Rule of Evidence, it is admissible as evidence despite the Confrontation Clause of the 6th Amendment.

(e) (Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct, 1444, 20 L. Ed. 2d. 491(1968) holding defendants charged

with non-pelty criminal offenses have a right to trial by jury.

(f) (Gigloo v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L. Ed. 2d. 104 (1972) holding that the impeachment evidence, including promises that the prosecution makes to key witnesses in exchange for their testimony.

(g) (Irvin v. Dowd, 366 U.S. 717, 724-25, 81 S.Ct. 1639, 1643-44, 6L. Ed.2d. 71, 757-58(1961) holding that failure to grant change of venue, despite build up of prejudice and jury that was not impartial, is unconstitutional.

(h) (Sandstrom v. Montana, 442 U.S. 510, 524, 99 S.Ct. 2450, 2459, 61L. Ed. 2d. 39, 51 (1979) holding that prosecution must prove every element of a crime beyond a reasonable doubt, therefore, trial court may not shift the burden of proof to defendant by instructing jury to presume intent in jury instructions

(i) Usually a judge's qualification are not considered to be a constitutional issue. However, the "Due Process Clause", requires "a fair trial in a fair tribunal", before a judge with no actual bias against the defendant. (Bracy v. Gramley, 520, U.S. 899, 904, 117 S.Ct 1793, 1797, 138 L.Ed.2d. 97, 104 (1997). (Edwards v. Balisok, 520 U.S. 641, 647, 117 S.Ct. 1584, 1588, 137 L.Ed.2d. 906, 914 (1997) when the trial judge is not impartial.

(j) (Murray v. Carrier, 477 U.S. 478, 495096, 106 S.Ct. 2639, 2649, al L.Ed.2d. 397, 413 (1986) holding that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent procedural default will not bar review of claims").

(k) (Eagle v. Isaac, 456 U.S. 107, 135, 102 S.Ct. 1558, 1575-76 71L. Ed. 2d. 783, 805 (1982) stating that in some

cases "cause and prejudice" will include the correction of a fundamentally unfair incarceration.

(l) In/House v. Bell, 547 U.S. 518, 126 S.Ct 2064, 2078, 165, L.Ed. 2d, 1,22 (2006) The Supreme Court determined that A.E.D.P.A.'s higher standard of review does not apply in cases where there is a claim of actual innocence.

(m) (United States v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, ÷2401, 49 L.Ed. 2d 342, 353-54(1976) There are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires all/to be disclosed even without a specific request.

(n) (United States v. Badley, 473 U.S. 667, 675, 105 S.Ct. 3375, 3380, 87 L.Ed.2d. 481, 489-90(1985) holding the prosecutor is required to "disclose evidence favorable to the accused that if suppressed, would deprive the defendant of a fair trial.")

(o) Rights of Defendant.

Criminal defendants have a constitutional right to present a defense. Therefore, a judge cannot forbid a defendant from offering evidence of third-party guilt simply because the judge believes that the prosecutor has presented an exceptionally string case. (Holmes v. South Carolina U.S. Sup. Ct. 2006).

(p) Defense attorneys are ethically bound to zealously represent all clients, the guilty as well as the innocent. (Canon 7, ABA model code of professional Responsibility). A vigorous defense is necessary to protect the innocent and to ensure that the judge and citizens and not the police have the ultimate power to decide who is guilty of a crime. Instead, the Lawyer uses the facts to

put on the best defense possible and leaves the questions of guilt to the judge or jury.

(q) (Wiggins v. Smith, 539 U.S. 510, 534-35, 123 S.Ct. 2527, 2542-43, 156 L.Ed. 471, 493-94(2003) In accessing prejudice [in a capital case] we re-weigh the evidence in aggravation against the totality of available mitigating evidence").

(r) Claim of Legal Insufficiency of Evidence

(People v. Gray, 86 N.Y.2d 10, 19, 652 N.E.2d 919, 921, 629 N.Y.S.2d. 173, 175 (1995) – holding that a claim of legal insufficiency of the evidence must be preserved for review as a "question of law," but, noting that an intermediate appellate court may decide to review such a claim "in the interest of justice" even if it was not preserved.

(s) Weight of Evidence

(People v. Bleakley, 69 N.Y.2d 490, 493, 508 N.E.2d. 672, 674, 515 N.Y.S. 2d. 761, 762 (1987) describing "weight of evidence" analysis.

(t) (Faretta v. California, 422. Ed. 562, 580-81 (1975) holding that forcing a literate, competent, and understanding defendant to be represented by counsel violated the defendants' 6th and 14th Amendment rights.

(u) (Tumey v. Ohio, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71L.Ed. 749, 754 (1927) holding that trial under a judge with a strong personal interest in the case violated defendant's 14th Amendment rights).

Violations of the U.S. Constitution presents issues of Federal Law. See U.S.C. § 1331/2006).

(v) N.Y.Crim. Proc. Law § 470 40(2)(3)(McKinney 1994 & Supp. 2006) Rules controlling what action the court must take.

(w) "Identity at issue at trial" means you/I, that you or your attorney claimed that you did not commit the crime you were/are on trial for. See e.g. Ark. Code Ann § 16-112-201 (Michie 1987 § Supp. 2007). Identity must have been an issue at trial. Mo. Ann. Stat. § 547.035/West 2002 § Supp. 2007).

"I declare under the penalty of perjury under the Laws of the United States of American that the foregoing is true and correct, and that I am the person named above etc, and I understand that any falsification of this statement is punishable under the provisions of 18 U.S.C. Section 1001 by a fine of not more that $10,000 or by imprisonment or not more that five years or both.

Copy Filed in Federal Court

In sincerity

Pro-se-plaintiff

Robert McCoy II 55949 2-1-2010

F.O.I.A. Appeal Letter (Federal)

Admistrator: Twenty-sixth Judicial District Court
Name of Agency: Law Clerk Bossier/Webster Parish
Address: P.O. Box 310, Benton, Louisiana 71006

Return Address:
2985 Old Plain Dealing Rd
Plain Dealing, La 71064
Date: 1-27-10

To the Administrator:

This is an appeal under the Federal Freedom of Information Act ("FOIA"), 5 U.S.C. Section 552. On 12-20-09 to present date, I made a FOIA request to your agency for one "Full Discovery of Evidence," one "Bill of Info," which has been constantly denied by D.A., counsel, and court. One 10-3-09; 10-7-09; 12-6-09 etc, to present, your agency denied my request because counsel and D.A.'s obligation to provide, but, refuses to do so!!! Please be informed that I consider the requested material clearly releasable under FOIA and consider your agency's policy to be arbitrary and capricious. Under Louisiana (La. Rev. State. Ann. §§ 44:1 to 44:41 (2007), and State "Freedom of Information" Law; I'm entitled to said information. "Freedom of Information Act/Privacy Act Request" gives me the right not only to look at my own record, but allows me to request all public documents, relateing to me. I except that upon reconsideration, you will reverse the decision to deny my request. However, if you do deny this appeal, I intend to file a lawsuit to compel disclosure.

Sincerely,

/s/Robert McCoy II
/s/Robert McCoy II 55949
1-27-10…

IN RE: 26th JUDICIAL DISTRICT COURT

CLOSING OF CLERK'S OFFICE BOSSIER PARISH, LOUISIANA

ORDER

Acting in accordance with La. Const. Art. V, Sec. 1 and the inherent powers of this Court, and considering the emergency created by inclement weather,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Bossier Parish Clerk's Office be and is hereby legally closed for the conduct of business this 12th day of February, 2010, pursuant to L.R.S. 1:55 E (2), for emergency purposes due to weather which "renders it hazardous or otherwise unsafe for employees … to continue in the performance of their official duties …"

THUS DONE AND SIGNED at Benton, Bossier Parish, Louisiana, this 11 day of February, 2010.

/s/ Parker Self
Parker Self
Chief Judge

STATE OF LOUISIANA	NUMBER 163572
VERSUS	26th JUDICIAL DISTRICT COURT
ROBERT MCCOY, JR.	BOSSIER PARISH, LOUISIANA

REQUEST AND MOTION FOR DISCOVERY

Defendant is presently charged with 3 Counts of 1st Degree Murder, but for lack of information is unable to properly prepare his defense; and therefore, by counsel request the State of Louisiana voluntarily to disclose the materials specified below, and also moves the Court to order the disclosure of such materials as are not voluntarily disclosed by the State of Louisiana.

1.

In accordance with the provisions of La. C.C.Cr.P. Art 716 et seq., the Defendant request that the Court order the State of Louisiana to permit and authorize the Defendant through his counsel to inspect, copy, examine, test scientifically, photograph, or otherwise reproduce books, papers, documents, photographs, tangible objects, buildings, places or copies of portions thereof which are within the possession, custody or control of the State of Louisiana, and which the State of Louisiana intends to use in evidence at the trial, including any results of reports or copies thereof, of physical and mental examinations and of scientific tests or experiments, of a similar nature, made in connection with the case, that are in possession, custody or control of the State of Louisiana and that the State of Louisiana intends to use as evidence at the trial or were prepared by a witness whom the State of Louisiana intends to call at the trial when such results or reports relate to its case against the Defendant.

WHEREFORE, the Defendant, through the undersigned counsel prays that the State of Louisiana be required to comply with the request of discovery made by the Defendant herein.

RESPECTFULLY SUBMITTED BY:

/s/ Larry English
LARRY ENGLISH #22772
Attorney At Law
415 Texas Street, Suite 320
Shreveport, Louisiana 71101
Telephone: (318) 222-1900
Fax: (318) 226-1660

CERTIFICATE

I HEREBY CERTIFY, that a true and correct copy of the above has this day been forwarded to the District Attorney's Office by placing a copy of same, postage prepaid and properly addressed in the United States Mail.

District Attorney
Bossier Courthouse
P.O. Box 69
Benton, La. 71006

Bossier Parish, Louisiana, this 22nd day of February 2010.

/s/ Larry English
OF COUNSEL

-Cynthia J. Johnston–
Bossier Parish Clerk of Court
P.O. Box – 430
Benton, Louisiana 71006-0430.

-Documents Brief to be entered into the Record and Numbered–

First, let me say; behind every proceeding of this kind of dealing with charges of murder, indeed, behind the entire body of law governing the practices in general law, lies the shadow of another larger question -- the moral question of murder itself. Undeniably, it is the common consensus among all right-minded men and women that murder as such, in the abstract, is evil – and evil that we unfortunately live with as a weakness deeply rooted in the nature of a darkening age in nature & the world we now live in. As a consequence, the entire body of law governing the usage of war and justice has always labored under the burden and shadow of compromise and truth. A compromise, in the end, with man or woman themselves. Secondly, the issue before this tribunal/court is, however, not that of murder itself, or even of one particular war within injustice, but the defendant's guilt or innocence in a particular instance of accused wrongdoings. This issue is; "Is injustice never waged by single individuals, but by many? Therefore, the individual's accused responsibility for particular actions cannot be entirely separated from the collective responsibility as a whole. In the beginning of said pre-trial prep, for instance, there was debate over and still remains debate over individual versus collective responsibility for any actions carried out under orders of deception by higher superiors. It is the opinion of this tribunal/court that the argument by defendant of superior orders is, at best, valid only as a mitigating factor in individual responsibility. Third, and most dif-

ficult of all, the task of this and any murder crime trial is further complicated by the distinction that must be made between the individual's demonstrable criminal intentions and the individual's personal and private conscience. Here again, the law labors under a larger burden, namely the burden of human morality, and it, in turn, labors in the shadow of compromise and truth. Finally, before any tribunal/court; let me say that the jurisdiction of the tribunal/court extends only to criminal actions and criminal intentions demonstrable under the law. Judgement extends no further." "The ultimate court of appeal is the individual conscience." I the accused defendant, must look to myself and to God for the final verdict of innocence or guilt." "God" will validate the innocence of defendant"!

-In Quote-

The ultimate court of appeal is the individual's conscience. And I the accused defendant, must look to myself and God for the final verdict of innocence or guilt"! "God" will validate the innocence of the defendant"!

Pro-se-Attorney
Robert McCoy II 55949
3-1-10

-Cynthia J. Johnston–
Bossier Parish Clerk of Court
Benton, Louisiana

2-28-10:
Grounds for dismissal of all charges

-Attention-
-26th Judicial District Court–

On and about 3:00 p.m. of above date pro-se Robert McCoy II accused defendant observed P.I. David Shanks in Delta Pod at BMX. Upon exclusion of all clients pro-se- McCoy asked P.I. Shanks for a moment to verify a question. Upon asking P.I. Shanks did he receive pro-se- request of appearance on Feb. 23, 2010, he informed pro-se- No! In furtherance defendant asked P.I. Shanks has he done any type of investigating on pro-se- accused case and he informed pro-se- No! – upon valid witnesses of said confirmed miscarriage of justice, due process violations etc of "No- investigation in over 21 months to even try and validate pro-se- defendants innocence is a complete manifest negligence of the laws of the land. This is the worst Judicial defiance and constitution rights violations in Judicial history.

The efforts of the courts and their officers to bring the guilty to punishment, praiseworthy as they are, are not to be circled by the – sacrifice of these great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. To sanction such proceedings would be to affirm judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the constitution, intended for the protection of the people against such unauthorized action.

In complete violation of protection against impairments 1981(c).

Protection against impairment of non-governmental discrimination and impairment under color of state law.-

-Conspire to deprive-

In complete conspiracy with the 26th Judicial to deprive a third-person of any constitutional rights guaranteed by law to defendant.

Secondary violations etc.-

Defamation of character violations are clear, transparent and alive!

Upon reception of said documents pro-se- has filed extensive documents of this judicial breakdown, judicial miscarriage of judicial defiance of all constitutional rights by Judge and staff against defendants.

2nd Circuit Court has been informed of this claim and present evil by all 26th Judicial officials.

Pro-se-
Robert McCoy II 3-1-10

STATE OF LOUISIANA	NUMBER 163572 FILED MAR 3, 2010
VERSUS	26th JUDICIAL DISTRICT COURT
ROBERT MCCOY, JR.	BOSSIER PARISH, LOUISIANA

MOTION FOR CONTINUANCE

NOW INTO COURT, comes defendant's counsel, upon suggesting to the court that the Jury Trial set for May 24, 2010, be upset for 120 days. For the following reason, to wit:

1.

Defendant's Counsel enrolled in the above reference case February 25, 2009.

2.

Defendant's Counsel has just finished a three week civil jury trial and that finish until February 23, 2009 and as of yet has not received on item of discovery.

3.

Defendant counsel has not yet spoken to Defendant as he was retained by Defendant's family.

4.

Defendant's counsel has placed a call to the District Attorney's office to discuss Motion To Continue but was unable to speak personally with him.

5.

Defendant Counsel further avers that this is a Capital Murder Case and given the finality of final punishment if Defendant is found to be guilty, he should be

allowed the Attorney of his choice and given adequate preparation to prepare for trial.

Counsel wishes to have this date reset to a later date.

WHEREFORE, defendant prays that this Motion for Continuance be deemed good and sufficient and that same be allowed filed. Defendant further prays to this Honorable Court that the Jury Trial set for May 24, 2010 be set on a new date.

RESPECTFULLY SUBMITTED,

/s/ Larry English
LARRY ENGLISH
ENGLISH & ASSOCIATES, LLC
Louisiana Bar Roll #:22772
415 Texas Street, Suite 320
Shreveport, Louisiana 71101
Telephone: 318-222-1900
Facsimile: 318-226-1660
ATTORNEY FOR DEFENDANT

STATE OF LOUISIANA	NUMBER: 163572 FILED MAR 08 2010
VERSUS	26th JUDICIAL DISTRICT COURT
ROBERT MCCOY, JR.	BOSSIER PARISH, LOUISIANA

NOTICE OF INTENT TO APPLY FOR SUPERVISORY WRITS

NOW INTO COURT, through undersigned counsel, comes Defendant Robert McCoy Jr. pursuant to Rule 4 of the Uniform Rules for Louisiana Courts of Appeal, who hereby advises this Honorable Court and all parties of its intent to apply to the Louisiana Court of Appeal, Second Circuit, for supervisory writs from the Court's Judgment on the denying *Defendant's Motion To Continue* issued on March 3, 2010.

Respectfully submitted

/s/ Larry English

LARRY ENGLISH
English & Associates
Louisiana Bar Roll #: 22772
One Texas Centre
415 Texas Street, Suite 320
Shreveport, Louisiana 71101
Telephone: (318) 222-1900
Facsimile: (318) 226-1664

ATTORNEY FOR DEFENDANT

STATE OF LOUISIANA	DOCKET NO: 163,572 FILED NOV 16 2010
VERSUS	26TH JUDICIAL DISTRICT COURT
ROBERT McCOY	BOSSIER PARISH, LOUISIANA

MOTION IN LIMINE AS TO (1) TAPED STATEMENTS OF SPARTACUS MCCOY AND (2) ALL PRIOR BAD ACTS OF ROBERT MCCOY

NOW comes Attorney LARRY ENGLISH counsel for Defendant Robert McCoy II who represent that the State intends to introduce the statements of decedent Spartacus McCoy and that if the State is allowed to introduce said statement it would be a violation of the Amendment Confrontation Clause and the Louisiana Code of Evidence Rule 804 (B) (1).

Furthermore, the State intends to introduce evidence of prior acts. Defendant submits that this has no independent relevance, nor can it prove a material issue. Therefore, any prior bad acts of Robert McCoy should not be admitted at trial.

Respectfully Submitted

/s/ Larry English
Larry English #22772
415 Texas 320
Shreveport, Louisiana 71101
(318) 222-1900
(318) 226-1600 Facsimile
Englishlaw2008@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on the 16TH day of November 2010, Defendant hand delivered the Motion In Limine As To (1) Taped Statement Spartacus McCoy and (2) All prior acts of Robert McCoy to the following:

J. Schulyer Marvin
District Attorney
Bossier Parish Court House
P.O. Box 69
Benton, Louisiana 71006

/s/ Larry English
LARRY ENGLISH

STATE OF LOUISIANA	DOCKET NO: 163,572 FILED NOV 16 2010
VERSUS	26TH JUDICIAL DISTRICT COURT
ROBERT McCOY	BOSSIER PARISH, LOUISIANA

DEFENDANT SUPPLEMENTAL MOTION FOR DISCOVERY

NOW comes Attorney LARRY ENGLISH counsel for Defendant Robert McCoy II who requests the State supplements its Discovery To Defendant with the following

1. All Taped and/or Video Statements Of Any Individuals taken during the investigation of the above referenced matter;

2. Crime Scene Video and Pictures;

3. Insanity Commission Report of Mark Vigen;

4. Lewiston Idaho Police Vision -Hawk- In Car Video of Robert McCoy Arrest;

5. 9-11 Audio Tape;

6. Bossier City Cruiser Video; and

7. Ballistic Test linking ammunition from crime scene to weapon found with Robert McCoy

Respectfully Submitted

/s/ Larry English

Larry English #22772
415 Texas 320
Shreveport, Louisiana 71101
(318) 222-1900

(318) 226-1600 Facsimile
Englishlaw2008@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November 2010, Defendant hand delivered the Supplemental Motion For Discovery to the following:

J. Schulyler Marvin
District Attorney
Bossier Parish Court House
P.O. Box 69
Benton, Louisiana 71006

/s/ Larry English
LARRY ENGLISH

STATE OF LOUISIANA	NUMBER 163,572
VERSUS	26th JUDICIAL DISTRICT COURT
ROBERT MCCOY	BOSSIER PARISH, LOUISIANA

ORDER

The foregoing considered,

Defendant's Motion In Limine as to (1) Taped Statement Of Spartacus McCoy is granted; and (2) All Prior Bad Acts of Robert McCoy is hereby denied.

THIS DONE AND SIGNED, in chambers on this 16th day of November 2010, at Bossier Parish, Louisiana.

Hon. [Illegible]
JUDGE

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318) 227-3700

NO. 46,266-KW

STATE OF LOUISIANA

VERSUS

ROBERT MCCOY

FILED: 12/14/10
RECEIVED: BYHAND 12/14/10

On application of Robert McCoy for SUPERVISORY WRIT in No. 163,572 on the docket of the Twenty Sixth Judicial District, Parish of BOSSIER, Judge Jeffrey Stephen Cox.

ENGLISH & ASSOCIATES	Counsel for:
Larry English	Robert McCoy
	Counsel for:
John Schuyler Marvin	State of Louisiana

Before STEWART, MOORE and LOLLEY, JJ.

WRIT DENIED.

This matter comes before this Court, on application of defendant, Robert McCoy, seeking review of the denial of a motion *in limine* to restrict the state's use of evidence of prior bad acts under La. C.E. art. 404(B). On the showing made, the exercise of this Court's supervisory jurisdiction is not warranted.

Shreveport, Louisiana, this 6th day of January, 2011.

/s/ [Illegible] /s/ [Illegible] /s/ [Illegible]

Filed: January 6, 2011

s/ [Illegible]
Dty.CLERK

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318) 227-3700

NO. 46394-KW

STATE OF LOUISIANA

VERSUS

ROBERT MCCOY

FILED: 02/02/11
RECEIVED: BY HAND 02/02/11

On application of Robert McCoy for SUPERVISORY WRIT in No. 163,572 on the docket of the Twenty Sixth Judicial District, Parish of BOSSIER, Judge Jeffrey Steven Cox.

Larry English	Counsel for: Robert McCoy
John Schuyler Marvin	Counsel for: State of Louisiana

Before BROWN, CARAWAY and MOORE, JJ.

ORDER

Upon the application of Robert McCoy for supervisory review of the denial of his motion for continuance, this Court hereby orders that the proceedings below be stayed pending a forthcoming order from this Court.

Shreveport, Louisiana, this 2nd day of February, 2011.

/s/ [Illegible] /s/ [Illegible] /s/ [Illegible]

FILED: February 2, 2011

/s/ [Illegible]
Dty. CLERK

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318) 227-3700

NO: 46394-KW

STATE OF LOUISIANA

VERSUS

ROBERT MCCOY

FILED: 02/02/11
RECEIVED: BY HAND 02/02/11

On application of Robert McCoy for SUPERVISORY WRIT in No. 163,572 on the docket of the Twenty Sixth Judicial District, Parish of BOSSIER, Judge Jeffrey Stephen Cox.

	Counsel for:
Larry English	Robert McCoy
	Counsel for:
John Schuyler Marvin	State of Louisiana

Before BROWN, CARAWAY and MOORE, JJ.

WRIT GRANTED; STAY LIFTED; REMANDED WITH INSTRUCTIONS.

Applicant Robert McCoy seeks supervisory review of an order of the district court denying his motion for a continuance of his trial for three counts of first-degree murder in which the State is seeking the death penalty. For the following reasons, the writ is granted and the district court is instructed to grant a continuance of this trial.

The minutes of court show that the State filed the charges against Mr. McCoy in May 2008. Although the defendant was initially represented by attorneys from the Public Defender Office, on February 22, 2010, the district court allowed McCoy to dismiss his capital-qualified counsel and to represent himself with the assistance of capital-qualified counsel.

On March 3, 2010, attorney Larry English enrolled as counsel for the defendant, and the capital-qualified assistant public defender attorney was dismissed. Mr. English was not certified as qualified to serve in capital cases. The minutes from that hearing show that Mr. English informed the court that he would "assemble a team" for Mr. McCoy's defense.

On April 23., 2010, the trial court granted the defense a continuance of the trial, which had been scheduled for May 2010, refixed the trial date for February 7, 2011, and set September 15, 2010, as the final date for pre-trial motions.

Despite the passage of the deadline for pre-trial motions, on January 4, 2011, approximately one month prior to the trial date which had been fixed for eight months, the court heard Mr. McCoy's recently filed motion to declare McCoy indigent, apparently in an effort to secure funding for expert witnesses. The State did not oppose that motion.

Because McCoy was now indigent, the Louisiana Supreme Court rules pertaining to the defense of indigents were implicated. See Sup. Ct. Rules, Rule 31(A); LAC 22:XV.915. At a hearing on January 24, 2011, despite his own attorney's assertion at that same hearing that McCoy was "mentally and emotionally compromised," McCoy opted to waive his right to a second attorney. See *State v. Koon*, 96-1208 (La. 5/20/97), 704 So. 2d 756.

At that same hearing, McCoy's attorney asked the court for a continuance in order to obtain experts and develop mitigating evidence for use at the penalty phase of this trial should McCoy be convicted and charged. Despite a trial date approximately one month away and despite a nearly year-old promise to "assemble a team," evidently no work had been done in this capital case to develop this evidence. In addition, McCoy's counsel presented no evidence to the district court to show that he had contacted expert witnesses to determine the length of the continuance he requested.

With no evidence that McCoy required additional time to obtain expert opinion, the district court denied McCoy's request to further delay this long-scheduled trial. McCoy now seeks supervisory review of that ruling.

In furtherance of his application, McCoy has attached copies of letters from two expert witnesses explaining the work required to develop mitigating evidence. These letters, both dated January 25, 2011, were obviously not presented to or considered by the district court at the January 24, 2011 hearing. The letters contain an explanation from the experts of the time required to conduct a meaningful study suitable for use as evidence in a criminal trial.

These facts present this Court with a difficult dilemma. The delays in this case are already largely the fault of the defendant. He has chosen to eschew representation – to which he is entitled – by a pair of capital-defense qualified attorneys in favor of a single attorney who is not capital-defense qualified. That attorney has not diligently pursued mitigating evidence to present during the penalty phase of this trial. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed.

2d 471 (2003). When the attorney asked for a continuance approximately two weeks before the trial date, he had no information for the district court to show that he had insufficient time to develop mitigating evidence. On the day before jury selection for this jury trial was set to commence, he filed in this Court this emergency request for supervisory review of the district court's ruling, which request was supported by newfound information that the experts would need up to six months of additional time to prepare a mitigation study. Both the declaration of indigence and the obtaining of expert witness assistance could have been fully accomplished long prior to the trial date.

Typically, such a weak showing would lead this Court to deny supervisory relief, especially when the applicant has not shown that the trial court erred in denying a continuance based on the argument and evidence presented at the hearing. However, in a criminal case - and particularly in a bifurcated capital case - the risk of inaction in the face of these problems is that the defendant's rights to due process and effective assistance of counsel will not be preserved, thus leading to a potential reversal on appeal of any conviction and sentence obtained and a second trial at taxpayers' expense.

Thus, this Court reluctantly concludes that this trial must be continued to allow the defendant time to develop mitigating evidence.

Accordingly, we hereby grant the writ, vacate the ruling below, lift the stay previously imposed and direct the trial court to grant Mr. McCoy a continuance of this trial. Although this Court does not sit as a fact-finder, we observe that the information supplied in the letters from McCoy's expert witnesses indicates that these witnesses are already familiar with the case and

the defendant. Accordingly, the trial court should refix this trial to commence as expeditiously as possible while preserving Mr. McCoy's right to present a defense.

In addition, because this Court is not in possession of the entire record of this case, we direct the trial court to ensure that Ms. McCoy is, or has been, fully apprised on the record of the benefits of having two capital-defense qualified attorneys and that McCoy has knowingly and intelligently waived same.

Shreveport, Louisiana, this 3rd day of February, 2011.

/s/ illegible /s/ illegible /s/ illegible

FILED: February 3, 2011

/s/ illegible
CLERK

STATE OF LOUISIANA	NUMBER 163, 572 FILED AUG -5 2011
VS.	26TH JUDICIAL DISTRICT
ROBERT McCOY	BOSSIER PARISH LOUISIANA

DEFENDANTS MITIGATION STAEMENT

NOW INTO COURT COMES Attorney Robert McCoy, Defendant and represented by Attorney Larry English, who respectfully represent at the Defendant will offer the following mitigation:

> **Robert McCoy emotional and mental state are significant mitigating factors in the murder of Willie Young, Christine Colston and Gregory Colston.**

Respectfully Submitted:

/s/ Larry English
LARRY ENGLISH
604 Riverside Drive
New York, New York
Bar Number 22772
Phone: 917 531 39090

CERTIFICATE

I HEREBY CERTIFY, that a copy of the above and foregoing has this __th day of August 4, 2011 has been hand-delivered to Bossier Parish District Attorney's office.

/s/ Larry English
LARRY ENGLISH

IN THE 26TH JUDICIAL COURT
PARISH OF BOSSIER, STATE OF LOUISIANA

STATE OF LOUISIANA,
Plaintiff,
v.

ROBERT MCCOY
Defendant.

No. # 163572
Hon. Jeff Cox, Division C, presiding
[FILED DEC 06 2011]

DECLARATION OF LARRY ENGLISH

Larry English, under penalty of perjury, declares the following to be true:

1. My name is Larry English. I am over 18 years of age, of sound mind, and competent to make this declaration and personally acquainted with the facts stated herein.

2. I am an attorney barred in the State of Louisiana and am presently licensed as out of state counsel. From March 2010 until August 2011 I served as trial counsel in *State v. Robert McCoy*.

3. I was retained by Mr. McCoy's family to assume his representation and enrolled after Mr. McCoy had dismissed his appointed public defenders. I received from the family only a small fraction of the fees I had quoted for the case.

4. Throughout the entire period of my representation, Mr. McCoy adamantly maintained his innocence

and claimed that he was out of state at the time of the killings. Mr. McCoy has maintained this position despite evidence that I regarded as overwhelming that he did in fact commit these killings.

5. When I enrolled as Mr. McCoy's counsel I did not immediately challenge Mr. McCoy's innocence claim but instead said to him words to the effect of: I have no reason to disbelieve you, I'll try to collect all the evidence and get all the State's files and everything and once I review it, I'll come back in and I'll give you my honest assessment of where I think the case is.

6. I believe that usually when you are first dealing with a client facing jail or death they are in denial and your task is to bring them along to deal with the reality of the situation, the state of the evidence, the likely outcome of the trial. Then they can embrace the options and make a rational decision. I tried to take Robert McCoy through this process but there was no opportunity to do this. Robert McCoy believed that law enforcement and others were conspiring against him and he was simply unable to accept the evidence against him.

7. I am an experienced criminal practitioner and I have worked with many clients who I would consider sociopaths who have tried to play me. Even with the manipulators, what happens 99.9% of the time is that eventually they understand their situation and want to get the deal, even if it isn't until the day of trial. Robert McCoy was very different to this, this was not part of his mental makeup. I do not believe that Robert McCoy was denying his involvement in the crime to manipulate me, the system, or anyone else. I am certain that he truly believed that he was out of state at the time of the crime and that law enforcement and

others were conspiring against him. Because of this delusion Mr. McCoy was incapable of rationally dealing with the evidence of his guilt.

8. As time passed I became convinced that the evidence against Robert McCoy was overwhelming. I negotiated with the District Attorney's Office to open up the possibility of a plea of guilty in return for a sentence of life imprisonment. About a month before the July 2011 trial date I confronted Mr. McCoy with the fact that I believed that his case could not be won and that he needed to take a plea. Mr. McCoy simply could not deal with this or accept this reality. As a result of my attempts to persuade him to take a plea, Mr. McCoy came to believe that I was conspiring with the District Attorney's Office and law enforcement to sell him out.

9. On July 12, 2011 I met with Robert at the courthouse and explained to him that I intended to concede that he had killed the three victims in the guilt phase of his trial in an effort to save his life. This was the first time that I had told Robert that I intended to concede to the jury that he was the killer. Robert was furious and it was a very intense meeting. He told me not to make that concession but I told him that I was going to do so. I explained that I felt I had an ethical duty to save his life, regardless of what he wanted to do. I ended the meeting as it was becoming too intense. This was essentially the end of our professional relationship. From that time on he saw me not as his lawyer but as his enemy - part of the system that was conspiring to convict him of a crime he believed that he had not committed.

10. I next went to see Robert at Bossier Max on the weekend before trial was due to start. Robert came out to the interview but expressed surprise and frus-

tration that I was there. He told me that he had already fired me and that I had no business on his case anymore. Robert told me that he had arranged for two other lawyers to come onto the case to replace me. He remained very angry with me and felt that I had betrayed him. Robert made it very clear that he believed that he was entitled to discharge me as his counsel and that he had done so. This was a relatively short interview. I tried to see him again on the Monday but he refused to see me.

11. I know that Robert was completely opposed to me telling the jury that he was guilty of killing the three victims and telling the jury that he was crazy but I believed that this was the only way to save his life. I needed to maintain my credibility with the jury in the penalty phase and could not do that if I argued in the guilt phase that he was not in Louisiana at the time of the killings, as he insisted. I consulted with other counsel and was aware of the Haynes case and so I believed that I was entitled to concede Robert's guilt of second degree murder even though he had expressly told me not to do so. I felt that as long as I was his attorney of record it was my ethical duty to do what I thought was best to save his life even though what he wanted me to do was to get him acquitted in the guilt phase. I believed the evidence to be overwhelming and that it was my job to act in what I believed to be my client's best interests.

12. On Tuesday, July 26, 2011, we had a hearing to determine whether Robert would be permitted to discharge me. The court ruled that I would continue to represent Robert. I raised with the court again the fact that I did not intend to present the defense that Robert wanted but would do what I considered best. The trial judge directed me that this is what I should do.

13. Robert was very determined to go to trial and concerned to avoid any delay. He was looking forward to the day finally arriving and was excited about the prospect of confronting and challenging what he saw as the lies and corruption in the case. Robert believed that he would be successful at trial and would be released. Robert would not have agreed to me seeking any further continuance of the case and very much wanted to go to trial on July 28, 2011. I am certain the Robert did not seek to discharge me as his counsel and either seek a substitute attorney or seek to represent himself for the purpose of delay. I firmly believe that Robert sought to replace me because I would not present the defense he wanted and was going to concede that he was the killer. It is essentially the same reason that he dismissed his earlier appointed attorneys; because they did not accept his claim of innocence and were not investigating and preparing the defense he wanted.

14. I firmly believe that Robert McCoy is insane and was not competent to be tried. Robert knew who I was, who the prosecutor and the judge were, what our roles in the courtroom were supposed to be, that he was accused of three murders and was facing a trial in which he could get a death penalty. However, he could not assist counsel or participate effectively in the proceedings due to his mental illness. He could not rationally understand the proceedings because he saw the evidence, the procedures and the rulings through the lens of his delusion that law enforcement, the prosecutor, the judge and ultimately myself were conspiring against him. Robert could not consult with me with any reasonable degree of rational understanding both because his paranoia and delusions destroyed our pro-

fessional relationship and also because all information was distorted or obscured by his delusions.

15. During my representation I could meet with Robert and talk to Robert and he would cooperate in these conversations as best as he was able. However, Robert was unable to deal rationally with the evidence of his guilt and the case against him. Robert could not recall and relate facts pertaining to his actions and whereabouts at the time of the crime because he truly believed that he was elsewhere at the time of the crime. He could not assist in locating and examining relevant witnesses because his witnesses were a part of his delusions in some cases or their relevance was dictated by his paranoia and his belief in a large scale conspiracy against him. Robert could not review discovery or listen to evidence and assist in assessing any distortions or misstatements because he could not grapple with the evidence in the real world. He could not make rational decisions despite my efforts to clearly explain his alternatives and could not testify except to give vent to his delusions and paranoia.

16. As a direct result of his delusions and paranoia Robert was unable to accept a plea offer that I believe was in his best interests. Not only was Robert incapable of providing or discussing useful factual information about the crime, his extreme paranoia meant that efforts on my part to discuss the case realistically caused him to see me as a part of the conspiracy against him, destroying our working relationship.

17. Robert's delusions regarding his innocence and the conspiracy against him also impaired my ability to prepare for the sentencing hearing. He did not initially refuse to discuss things we needed to prepare for the penalty phase, but he cut off cooperation after I told

him I would concede his guilt in the killings despite his objections. However, even before that he could not discuss the circumstances of the offense in any realistic way and his paranoia had already undermined the relationship of trust needed to work on the sentencing hearing. When I told Robert he needed to plead guilty and began to strongly urge him to do so· he developed a profound distrust of me and anyone working with me.

I declare the following to be true under the penalty of perjury, this 4th day of December, 2011.

/s/ Larry English
Larry English

12-4-2011

MR. & MRS. ROBERT MCCOY, SR.
7323 ALTUS LOOP.
SHREVEPORT, LA. 71106

The Honorable Judge Jeff Cox
26th Judicial District
Bossier Parish Courthouse
204 Burt Blvd # 3
Benton, LA 71006

Dear Judge Cox,

We are the parents of Robert McCoy, Jr. who will be appearing before your honorable Court on or around July 21, 2011. The case is a capital murder case. On July 12, 2011 we met with our son's attorney, Mr. Larry English at the Bossier Parish Courthouse prior to the hearing to get undated on the defense. After listening to Atty. English and seeing him go into what we believe was a tirade we became very disturbed. We are taken aback with Atty. English behavior. Not only could he not answer any of our questions regarding our son's case Atty. English insulted us by talking to us as if we were children, a total disrespect.

We are convinced Your Honor that Atty. English is neither prepared nor capable of adequately representing our son in this case. Because this is a matter of life and death, and in the interest of our son we would like to respectfully request that Mr. English be removed from our son's case, and that a capital murder attorney should be allowed to defend him. In spite of what has been alleged, we love our son and owe it to him to seek the best defense available to him.

In closing, we advanced Atty. English $5,000 (money borrowed against our car title), to represent our son. No question to us that he has put very little time into

this case. If Atty. English is removed as we hope, we also ask the Court to order him to refund us part of the $5,000 ($2,500) given him.

Our pray is that this Court grant our request. Thank you for your greatest consideration.

Sincerely,

Mr. & Mrs. McCoy, Sr.

Cc: D.A. Skylar Marvin

EXCERPT OF NOVEMBER 14, 2008 TRANSCRIPT RE SANITY HEARING

* * *

FRIDAY, NOVEMBER 14, 2008

SANITY HEARING

MR. JACOBS:

Your Honor, McCoy. Your Honor, that's going to be a death penalty case.

THE COURT:

I need the reports on Mr. McCoy. Both of the reports. Y'all have got copies of the reports, don't you? Y'all approach just a minute.

(SIDEBAR CONFERENCE OFF RECORD)

THE COURT:

All right, Ms. Smart, this is Mr. McCoy, Mr. McCoy, step forward, please.

MR. JACOBS:

Your Honor, this is at the bottom of page eight, top of page nine, dockets number one-six-three-five- seven-two (163,572) and also docket number one-six-four- six-four-six (164,646). The matter comes before you today on a Sanity Commission report. And it's my understanding by agreement with counsel — Ms. Smart, please correct me if I get anything wrong, that those sanity reports will be submitted into the record; it's my understand that you're to make a ruling. It's my understanding both psychiatrists who examined Mr. McCoy found him competent to stand trial in this mat-

ter. The state would also add that this is a first degree murder case, there will be no plea offers in this, and we will proceed with this in the death penalty matter. And we would ask to set the matter for trial on June 1, 2009.

THE COURT:

All right.

MS. SMART:

Your Honor, for the record, I did receive both reports. Dr. Richard Williams and Dr. Mark Vigen were appointed to evaluate Mr. McCoy. I did receive both reports and reviewed both and at this time since both doctors were in agreement we'll submit on those reports. And the trial date, we can agree to it at this point with the understanding that if we get in a bind depending on — since it is so far out if we need to ask for a continuance at that point we'll do so. But we will make ever effort to get any motions resolved, hopefully right after the first of the year. But we are trying to get some of that done, some of those files so we can take those up.

THE COURT:

All right. And Mr. McCoy, I need you to state your name and address for the record, sir. Come close to the microphone, please.

MR. MCCOY:

My name is Robert McCoy the second, address 7323 Altus Loop.

THE COURT:

And what city, sir?

MR. MCCOY:

Shreveport, Louisiana.

THE COURT:

Thank you, sir.

MR. MCCOY:

You're welcome.

THE COURT:

Mr. McCoy has been present at all of these proceedings. He was present at the beginning when Mr. Jacobs made his statement and when Ms. Smart made her statement. I want to make that known for the record. The Court does find that Mr. McCoy is competent to assist his — his attorney in this matter and is competent to stand trial according to Dr. Richard Williams and according to Dr. Mark Vigen. The Court finds this case is able to go forward, so therefore, that ruling will be rendered at this time.

MS. SMART:

Thank you, Your Honor.

THE COURT:

Thank you. Mr. McCoy, just be back on June 1st, thank you.

(END OF SANITY HEARING)

EXCERPT OF JANUARY 12, 2010 TRANSCRIPT RE MOTION TO QUASH SUBPOENAS

* * *

That's what - that's what I would like to do. Mr. McCoy, -

MR. JACOBS:

What other motions are pending? I'm just -

THE COURT:

Mr. McCoy, I believe, has a Motion to Change Venue that has been filed by Mr. McCoy. He also has several other motions that I need to rule on at that time. And Mr. McCoy, I would like to take them up all at the same time.

MR. McCOY:

Yes sir.

THE COURT:

Now I know that there is some question as to who represents you. Ms. Smart has been representing you in the past from the Public Defender's Office.

MR. McCOY:

Yes, but if you - May I speak, Your Honor?

THE COURT:

Mr. McCoy, now this is - this is where I want you to be very careful. Let me -

MR. McCOY:

I understand.

THE COURT:

- just explain to you. I'm trying to protect your rights.

MR. McCOY:

Yes sir.

THE COURT:

That's my duty.

MR. McCOY:

Yes sir.

THE COURT:

I'm kind of like the referee trying to protect your rights.

MR. McCOY:

I understand.

MR. JACOBS:

And Your Honor, before the - before he speaks I just want to put it on the record to make sure he understands. I mean if he speaks he speaks, and he is charged with a First Degree Murder and we are seeking the death penalty, so he needs to be very careful what he says if he addresses the Court.

THE COURT:

And that's what I am - that's what I'm going to advise Mr. McCoy. Mr. McCoy, I just want to explain to you that you have the right to remain silent during all of these proceedings. I want you to understand that.

MR. McCOY:

I understand.

THE COURT:

You - anything that you can say, anything you say can and will be used against you in a court of law. I want you to understand -

MR. McCOY:

I understand.

THE COURT:

- that this is being recorded.

MR. McCOY:

I understand.

THE COURT:

And I'm just doing this, Mr. McCoy, because I'm protecting the record.

MR. McCOY:

I understand.

THE COURT:

You understand that you have the right to talk to a lawyer and you have a right to have that lawyer present with you while you are being questioned or while you make any statement, which this case - Ms. Smart has been appointed to represent you during all of these proceedings.

MR. McCOY:

I understand that.

THE COURT:

If you could not afford to hire an attorney, then you understand that one would be appointed to representing you and that's before any questioning or before anything is being stated. Mrs. Smart is here today and acting as your attorney because she has been appointed

to represent you at this time. I have not removed Mrs. Smart from these proceedings or Mr. Hillman or the Public Defender's Office at this time. And you can decide at any time to exercise those rights to not make any statements or not to answer any questions. And Mr. McCoy, I am going to let you make your statement but I want to make the record very clear because of the nature of the charges -

MR. McCOY:

Yes sir.

THE COURT:

- and because of what is happening I want to make it very clear that I have advised you of those rights once again and you understand those rights.

MR. McCOY:

Yes sir.

THE COURT:

And you do acknowledge that you understand those rights.

MR. McCOY:

Yes sir, I do.

THE COURT:

All right. Mr. McCoy, then I -

MS. SMART:

If I may state on the record it's - he's also speaking on the record against his attorney's advice as well.

MR. McCOY:

Okay.

THE COURT:

Then I will let that statement be made.

MR. McCOY:

Okay.

THE COURT:

Mr. McCoy, then I will let you make a statement if you need to make a statement.

MR. McCOY:

Okay. Yes, Your Honor, the filings of my subpoenas, -

THE COURT:

Yes sir.

MR. McCOY:

my subpoenas are validated - witness and validated alibis. The DA is going through the process to quash my subpoenas which are declared under the penalty of perjury, which is validated upon the federal law. And I want to know by what grounds he's moving to quash my subpoenas.

THE COURT:

Well, Mr. McCoy, I mean that is why I'm going to give you a hearing. You're going to get to - the DA is going to get to put on their reasons why they are trying to quash the subpoenas -

MR. McCOY:

Uh-huh (affirmative).

THE COURT:

- and then I'm going to give you an opportunity to state why you need these witnesses available, and I'm going to give you that hearing. And that's why I'm setting that hearing for you to be able to state that. Now you will be able to do that with the assistance of your counsel if you talk to your counsel and you'll be able to do that. But that's why I'm granting a hearing because I have to listen to why they want to quash the subpoenas. I'm listening to you why you want these witnesses to be present at your hearing and I'm trying to do this and do it in an efficient manner. And then what I plan on doing is February 11th if I am through with my jury trials by that term, Mr. McCoy, -

MR. McCOY:

Yes sir.

THE COURT:

- then I'm going to have a hearing on that day, February the 11th, which is a Thursday.

MR. McCOY:

Yes sir.

THE COURT:

If I can't have it on that Thursday then I will try to do it on that Friday.

MR. McCOY:

Yes sir.

THE COURT:

Or if I have to continue it because I'm in jury trials and jury trials are taking precedence, then we will set a time when I will have a day to take up your motions.

MR. McCOY:

Yes sir.

THE COURT:

But Mr. McCoy, the other side of this is and I do want to caution you, that you have an attorney and you need to take those motions through your attorney. I know that you're filing pro se motions. The Court has received those pro se motions and the Court is trying to take recognition of what we're doing. We will make rulings on the motions that have merit, but there are some that have not had merit at the present time that we've had to rule on. But it would be good if you would talk to your attorney and try to coordinate those motions. I know that you are wanting to be actively involved in your defense and I don't blame you on that, sir, but you need to go through your attorney and actively coordinate that with your attorney so that y'all's efforts will not be duplicated.

MR. McCOY:

Yes sir. I want to state on the record, if you don't mind. I have a conflict of interest with my attorney. My attorney throughout the processes have not sufficiently subpoenaed information in which I've asked her to. My attorney haven't filed for motions in the credible time in which she should have, and I will say my counsel is ineffective. I've had problems with Ms. Smart and I don't want Ms. Smart representing me.

THE COURT:

Well Mr. McCoy, I -

MR. McCOY:

And I want -

THE COURT:

- am going to make a determination. That will be one of the first things that I will make a determination on on February the 11th. And if I determine that you have a conflict, which I will let you make that statement, again on February the 11th or February 12th, whichever date that we can get to this, if I determine that you have a conflict and it is an unavoidable conflict, then I will make sure that the appropriate conflict counsel is appointed for you. Now the conflict counsel, because of your circumstances, may be a public defender conflict counsel. I want you to understand that. It will be a different person from the office of Mrs. Smart, but it will be a conflict counsel that will come from the public defender's sector. And you have made statements in some of your motions that your family may be hiring an attorney to represent you.

MR. McCOY:

That's correct.

THE COURT:

Mr. McCoy, let me encourage you that if that attorney is going to be hired to represent you that the quicker that they become involved the better off that you are because then the Public Defender's Office can be relieved, your private counsel can take over this and then you can coordinate these motions with your private counsel and help your private counsel in this defense.

MR. McCOY:

Yes sir.

THE COURT:

All right? So that is my encouragement.

MR. McCOY:

Yes sir.

MS. SMART:

Your Honor, may I respond briefly on -

THE COURT:

Yes ma'am.

MS. SMART:

- me as well as several other people in our office that are working on Mr. McCoy's case have repeatedly tried to go visit with him and he has refused to see us. And I just want that straight on the record. And we will get the jail logs and bring those in for purposes of the hearing.

THE COURT:

And I understand that and I will let you present all that on the record. But Mr. McCoy, look, I'm not going to take this up today. This is going to be for February 11th. I'm not trying to - I'm not trying to have a whole hearing right now. I understand that there's a conflict. If you can resolve it, you need to resolve it. If you cannot resolve it then I'm going to take it up February 11th and we're going to take the appropriate actions.

MR. McCOY:

Yes sir.

THE COURT:

Because this case is set for trial on May the 24th -

MR. McCOY:

Yes sir.

THE COURT:

- and I want it in the posture to be able to do that if we can.

MR. McCOY:

Yes sir.

THE COURT:

All right?

MR. McCOY:

Yes sir.

THE COURT:

So I'm trying to move the case forward because I know that that is in your best interest if I can do so.

MR. McCOY:

That's right.

THE COURT:

All right. So I am trying to protect your rights, Mr. McCoy.

MR. McCOY:

May I say one more statement on the record, sir?

THE COURT:

Yes sir.

MR. McCOY:

Okay. Only reason I don't - didn't allow Ms. Smart and them to represent me promptly is because I validated information with Ms. Smart and Mr. Forsythe for over a year. Mr. Forsythe cussed me out, I mean verbally up there in front of all the deputies up there. Mr. Smart - Ms. Smart and Mr. Smart, when I filed my motions for - my motion for a fast, speedy trial, Ms. Smart

said she would deny my motions and denied my motions she did. I filed a fast and speedy trial motion, Your Honor, seven days after I was arrested, well basically arraigned. And Ms. Smart - it was supposed to be 15 days after your arraignment, a motion for speedy trial, suppression of evidence supposed to be filed. With Ms. - with the evidence and most of all the years of experience Ms. Smart has as counsel, doing the right thing Ms. Smart should have filed my motions as my counsel.

THE COURT:

Okay. Mr. McCoy, I understand what you're saying to the Court but I want to take all of this up February 11th.

MR. McCOY:

Yes sir. Yes sir.

THE COURT:

Because I'm setting aside a full day for y'all to be able to make these motions and arguments and that will let Ms. Smart make her arguments and statements. But Mr. McCoy, again, the other side of it is if your family is going to hire private counsel, they need to have counsel here on February 11th which that may resolve all of this conflict at that time.

MR. McCOY:

It will be March, Your Honor, when they hire private counsel. It will be March.

THE COURT:

Mr. McCoy, I'm just telling you -

MR. McCOY:

Yes sir.

THE COURT:

- that between now and then I will resolve the conflict if I can.

* * *

EXCERPT OF FEBRUARY 11, 2010 TRANSCRIPT RE MOTION TO QUASH SUBPOENAS

* * *

THURSDAY, FEBRUARY 11, 2010

MOTION TO QUASH

THE COURT:

All right, ready for the McCoy matter, please.

MR. MARVIN:

Yes, sir, Your Honor.

THE COURT:

All right.

MR. MARVIN:

That's number one-six-three-five-seven-two (163,572), the State versus Robert McCoy.

THE COURT:

All right, Mr. McCoy? All right, Mr. McCoy?

MR. MCCOY:

Yes, sir.

THE COURT:

If you'll state your name and address for the record, please.

MR. MCCOY:

I'm pro se, Robert McCoy, 7323 Altus Loop.

THE COURT:

And what city is that, please?

MR. MCCOY:

Shreveport, Louisiana, sir.

THE COURT:

Thank you, sir. All right, we're ready to proceed. You ready to proceed, Mr. Marvin?

MR. MARVIN:

Yes, sir, Your Honor. Your Honor, the state has filed a motion to quash some subpoenas that Mr. McCoy requested in proper person and the state did that for several reasons. One, he is represented by the Bossier Parish Public Defender's Office and we believe that any subpoenas would more -- be more properly requested through counsel of record. Also, there does -- there are, I think, twelve people requested in the subpoenas. The state -- a lot of those individuals contacted the state and state they have no idea who Mr. McCoy is or why they would be subpoenaed. The Attorney General's Office contacted the state on behalf of a Justice of the Peace that the Attorney General's Office is a -- I guess you would call them some -- in some sort of supervisory capacity of all JP's in the state. And they attempted to request if they needed to enroll on the Justice of Peace's behalf. And in discussing that matter we never could determine any valid legal reason even arguably could be used in Mr. McCoy's defense. And then there is a limit on the number of subpoenas that can be requested at the parish's expenses from the defendant. And after talking with Mr. McCoy's counsel of record, I'm very much aware they attend to subpoena other individuals and if those individuals are necessary for a valid defense then it would be -- they -- they may very well be in a position where they have to pay for them, the costs of that witness. So -- and we -- we believe

that all of those subpoenas were — were requested purely for harassment and just for delay of this matter.

THE COURT:

Okay. Mr. McCoy?

MR. MCCOY:

Yes, sir.

THE COURT:

All right, sir, you are represented by the Public Defender's Office at the present time. And just -- let me -- hear me out, please. Okay? You're represented by the Public Defender's Office at the present time. I want to advise you of your rights because I have to advise you of the rights every time because you're going to make some statements.

MR. MCCOY:

Yes, sir.

THE COURT:

So I want you to understand your Miranda warnings before you say anything in this courtroom. You have the right to remain silent. Anything you say can and will be used against you in a court of law. Sir, this is being recorded, you are in a courtroom at this time, anything that you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have that attorney present with you while you're being questioned. I have appointed the Public Defender's Office to represent you on these charges. Mr. Fish is present in this courtroom at the present time and he is here and as acting as your attorney. All right? If you couldn't afford to hire an attorney one would be appointed to represent -- represent you before any ques-

tioning if you wished. Again, the Court has appointed the Public Defender's Office to represent you in these matters. Your attorney is present and I would suggest to you that you talk to your attorney before making any statements because this matter is being recorded. You can decide at any time to exercise those rights and not answer any questions or make any statements. I want you to understand these rights, Mr. McCoy.

MR. MCCOY:

Uh-huh (affirmative).

THE COURT:

Because this is a very serious matter that we're dealing with.

MR. MCCOY:

I understand.

THE COURT:

I want you to understand your rights. I want you to know those rights. Mr. Fish is present. Mr. Fish is ready and able to assist you as your attorney and willing to assist you as your attorney at this time. But if you wish to make any statements, Mr. McCoy, you are doing so at your own jeopardy and at your own risk and I want you to understand that.

MR. MCCOY:

Yes, sir.

THE COURT:

Do you understand those rights, sir?

MR. MCCOY:

I do, sir.

THE COURT:

Do you voluntarily waive those rights, sir?

MR. MCCOY:

Yes, sir, I do.

THE COURT:

And you understand that any statements you made will -- any statements that you make in this court - courtroom will be recorded and that they can be used against you at a future date, sir?

MR. MCCOY:

Yes, sir, I do.

THE COURT:

All right, you understand all of those rights?

MR. MCCOY:

Yes, sir, I do.

THE COURT:

All right, then are you voluntarily waiving those rights?

MR. MCCOY:

Yes, sir, I am. All right, Your Honor, I want --

THE COURT:

Mr. Fish, I advised him of his rights, sir.

MR. MCCOY:

Your Honor, I would like to present to the Court today under Ferret versus Carroll -- California. I've also presented to the Public Defender's Office a valid -- requested document for respective counsel to assist me through the proceeding that I'm going through and not

to collate themselves within my attorney aspects. But I ask them to assist me through it because I am a competent defendant, and I am literate, and I'm up under Ferret versus California. You know, I am eligible for -- to represent myself and not being able to represent myself when I'm eligible is a violation of my Sixth and Fourteenth Amendment right. I've given the Public Defender's Office a year and a half of opportunities to represent me and they did not represent me. And being competent, and being an understanding defendant, I have the right up under the United States Constitution to represent myself and not to be forced to have representation on me. And my subpoenos (sic) that I subpoenaed, also, I have a right to subpoena whomever that I choose in my own favor. And not just in my own favor but to be specified in the -- in the court records. And --

THE COURT:

All right, sir -- sir, Mr. McCoy, you're bringing up two different things at the present time. Mr. Fish?

MR. FISH:

Your Honor, briefly in response to that. We would have of coursed jointed in Mr. McCoy's motion to, if I understand it, is to represent himself. We have attempted through several attorneys, investigators, our mitigation specialist, they -- he has refused to cooperate with all of us. I understand that that refusal is now extending to me, also.

MR. MCCOY:

That's right.

MR. FISH:

As far as the subpoenas go Mr. Marvin is correct if -- if we are to represent him then of course we don't want to use up all of our allowable subpoenas on witnesses that we don't see any purpose for. I would like to be able to make those -- those decisions myself at the appropriate time. And I wouldn't want to be hampered by any numerical limit on those that might be exhausted by these subpoenas. I don't know the significance of many of those -- of these subpoenas that he's requested but I -- I would join in his motion that he be allowed to represent himself and that the Public Defender's Office be allowed to withdraw.

THE COURT:

Mr. McCoy, this is something that I have to question you about, sir, and I want you to understand this because we're getting down to a motion to represent yourself. All right, I've advised you of your Miranda rights.

MR. MCCOY:

That's right.

THE COURT:

I've advised you of the right to remain silent and the right to have an attorney.

MR. MCCOY:

That's right.

THE COURT:

Now you're stating that you want to represent yourself.

MR. MCCOY:

Yes, sir, because representing myself, Judge Cox, allows me the aspect to subpoena my own witnesses in my own favor. And I subpoenaed my own witnesses in my own favor because my witnesses that I subpoenaed are creditable witnesses --

THE COURT:

All right --

MR. MCCOY:

--that has --

THE COURT:

Mr. --

MR. MCCOY:

--validation as far as -

THE COURT:

Mr. --

MR. MCCOY:

--connection --

THE COURT:

Mr. McCoy, I'm not trying to interrupt you but I'm trying to take one motion at a time.

MR. MCCOY:

I understand.

THE COURT:

All right, so give me -- let me handle my courtroom.

MR. MCCOY:

Yes, sir.

THE COURT:

Okay?

MR. MCCOY:

Yes, sir.

THE COURT:

All right, the motion to represent yourself. You understand that this is a murder trial?

MR. MCCOY:

I do.

THE COURT:

You understand that the life sentence -- I mean, that the death penalty is on the table at this time?

MR. MCCOY:

Yes, sir.

THE COURT:

You under -- what grade did you graduate from in school?

MR. MCCOY:

I'm a college -- I'm a college graduate, sir.

THE COURT:

All right, what college did you graduate from?

MR. MCCOY:

University of Rice, sir.

THE COURT:

All right, and what degree did you get from the — from that college?

MR. MCCOY:

Business Administration.

THE COURT:

All right, you're well able to read, write and understand the English language, is that correct?

MR. MCCOY:

Very much so.

THE COURT:

You understand that you have the right to continue with that not guilty plea and you have the right to a trial by jury on this matter?

MR. MCCOY:

I do, sir.

THE COURT:

You understand that the D.A. has to prove his case beyond a reasonable doubt in this matter?

MR. MCCOY:

I do, sir.

THE COURT:

You understand that you're entitled to an attorney?

MR. MCCOY:

I'm going to have one next month as I spoke to you last --

THE COURT:

Mr. --

MR. MCCOY:

I have paid counsel but I don't want to be represented by the Public Defender Board.

THE COURT:

All right, but Mr. McCoy, this is you asking to represent yourself at this time.

MR. MCCOY:

That's right, that's right.

THE COURT:

You understand that an attorney has been appointed to represent you in this matter but you're asking this Court to represent yourself at this time?

MR. MCCOY:

That's right.

THE COURT:

Do you understand, sir, that you have the right to remain silent during all proceedings and the right against self-incrimination?

MR. MCCOY:

Yes, sir.

THE COURT:

And you understand that you or your attorney would have the right to cross examine the D.A.'s witnesses and you have the right to confront any accusers against you?

MR. MCCOY:

Yes, sir.

THE COURT:

All right, I've given you all of those rights. You understand that if you act as your own attorney that you're going to have to maintain the Court rules of evidence and that you're going to have to follow the Court's decorum if you act as your own attorney?

MR. MCCOY:

Yes, sir, I understand that, that's why next month I will have my own paid counsel but too, I'm representing myself at this point, Judge Cox, because my valid evidence if I am not the representor (sic) of myself my subpoenas (sic) won't stand but my subpoenas (sic) are valid rules up under the federal rule of evidence 402, 403 –

THE COURT:

Mr. – Mr. McCoy, this is not a federal courtroom, this is a state courtroom –

MR. MCCOY:

I understand but –

THE COURT:

And they apply – Mr. McCoy, do not interrupt me while I'm talking, sir.

MR. MCCOY:

Yes, sir. Yes, sir.

THE COURT:

That's one of the first rules that you're going to learn.

MR. MCCOY:

Yes, sir.

THE COURT:

All right, I control this courtroom, you do not.

MR. MCCOY:

I understand, Judge.

THE COURT:

All right, so we're going to talk but we're going to talk intelligently.

MR. MCCOY:

Yes, sir.

THE COURT:

All right, first of all you're asking to represent yourself. I believe that you have the education if that is what you want to do but I am strongly and I mean very strongly encouraging you not to represent yourself in this matter, sir. You have to stick to the Court rules, you have to stick to the codes of evidence, and this is a very serious matter. I am strongly encouraging you not to represent yourself because of the complexities of the law in this matter and the evidence regarding this matter. Do you understand that I am strongly encouraging you not to do this, sir?

MR. MCCOY:

Yes, sir, I understand that.

THE COURT:

Okay, are you voluntarily representing yourself?

MR. MCCOY:

Yes, I am, until my counsel enrolls next month, yes, I am.

THE COURT:

Do you knowingly represent yourself? I mean –

MR. MCCOY:

Well, this is the first time I've ever been in a situation like this but I have the law knowledge to proceed forward, and yes, sir, I am currently still presently going to represent myself until the proceeding in March when my paid counsel enrolls in.

THE COURT:

And do you know who your paid counsel is going to be, Mr. McCoy?

MR. MCCOY:

Yes, sir, but I don't want to state it on record, I'll just wait until he enrolls because I've been having –

THE COURT:

When is he planning on enrolling, Mr. McCoy?

MR. MCCOY:

No later than March the 1st.

THE COURT:

Mr. McCoy, you understand that this is a May 24th trial date?

MR. MCCOY:

And I understand.

THE COURT:

That it will not be upset?

MR. MCCOY:

I understand, I'm prepared to go, Your Honor.

THE COURT:

All right, you are prepared to go on that date?

MR. MCCOY:

I'm prepared. I'm ready.

THE COURT:

Is your –

MR. MCCOY:

I've been ready to go, Your Honor.

THE COURT:

All right, Mr. Marvin?

MR. MARVIN:

Could we ask the Court to just inquire if he doesn't want to give the name of his counsel in the event that something happens and that gentleman or lady does not voluntarily enroll what his intentions are?

THE COURT:

Mr. McCoy, that is a valid question.

MR. MCCOY:

To still proceed forward, Your Honor.

THE COURT:

You would still proceed forward?

MR. MCCOY:

Yes, sir.

THE COURT:

Representing yourself?

MR. MCCOY:

Yes, sir.

THE COURT:

And you understand, sir, that the death penalty is on the table?

MR. MCCOY:

Yes, sir, I do.

THE COURT:

Do you understand that your life is at stake in this trial?

MR. MCCOY:

Yes, sir, I do.

THE COURT:

And you understand that you'll be held to the same rules of standards as an attorney if you represent yourself?

MR. MCCOY:

Yes, sir, I do. And I know this is a complex situation, Your Honor, but this is my life and this is very, you know, this is a very complex situation but I know the steps that I'm taking. I know the, you know, the advantages and disadvantages but I choose to proceed forward because this is for my best interest.

THE COURT:

Mr. McCoy, you understand how much I am strongingly – strongly encouraging you not to do this, sir?

MR. MCCOY:

I under – I understand, Your Honor.

THE COURT:

Then you –

MR. MCCOY:

But I must proceed forward.

THE COURT:

Mr. McCoy, you understand that I am trying to protect your rights in every manner in this – in this trial in this proceeding?

MR. MCCOY:

I understand, Your Honor, but to quash my subpoenos (sic) of due validated witnesses that has very strong ties to this case will be unconstitutional and the only way to protect –

THE COURT:

Mr. McCoy, I'm not on that right now.

MR. MCCOY:

All right.

THE COURT:

I'm fixing to go to that in just a minute.

MR. MCCOY:

All right.

THE COURT:

But you understand that I am trying to protect your rights in this matter and you understand that I am strongly encouraging you not to represent yourself?

MR. MCCOY:

I understand your – your concern, Your Honor, but I'm – I will still proceed forward until my counsel enrolls next month.

THE COURT:

And you're doing this voluntarily and nobody has forced you to do this?

MR. MCCOY:

Nobody is forcing me, Your Honor.

THE COURT:

And even if your counsel does not enroll in March as you predict –

MR. MCCOY:

But I'm a hundred percent sure he is.

THE COURT:

All right, but if he does not –

MR. MCCOY:

I'm still ready to proceed forward, Your Honor.

THE COURT:

You're still ready to proceed forward on May 24th?

MR. MCCOY:

Yes, sir.

THE COURT:

The minute that your counsel enrolls, Mr. McCoy, he has a duty to contact Mr. Schuyler Marvin with the district attorney's office and consult with Mr. Marvin –

MR. MCCOY:

Yes, sir.

THE COURT:

-- regarding this case --

MR. MCCOY:

I understand.

THE COURT:

-- so that we can move it forward.

MR. MCCOY:

I understand.

THE COURT:

Okay, Mr. McCoy, based on you knowingly, intelligently, and voluntarily waving your right to counsel, sir. Based on the Sixth Amendment of the Constitution of the United States. Based on that you have represented to me that you will represent yourself on May 24th that this matter will go forward regardless, I will allow you to represent yourself because you do know the penalties that you're facing. You understand that you have to follow the decorum of the Court and you also understand, sir, that you are going to be held to the same standards as an attorney. However, I will appoint Mr. Randall Fish with the Public Defender's Officer to be ready to assist you in this matter. And he will be able to assist you on matters of law and in this case. All right?

MR. MCCOY:

Yes, sir.

THE COURT:

But I am making that appointment.

MR. MCCOY:

But he is my assistant?

THE COURT:

Yes, sir, you're in charge of your case, sir.

MR. MCCOY:

Thank you, sir.

THE COURT:

All right, Mr. McCoy, now I will go to the motion to quash the subpoenas. Mr. McCoy, the subpoenas have to be done in good faith. They have to be apart of your case in chief.

MR. MCCOY:

And they are, Your Honor.

THE COURT:

All right, then I — Mr. McCoy, I'm not asking you

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EXCERPT OF MARCH 3, 2010 TRANSCRIPT RE MOTION FOR CONTINUANCE

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[MR. ENGLISH:]

Your Honor, we filed a motion to continue and I -- and I laid out -- I laid out in the reasons why I'm asking the Court for a continuance. I was hired in this in the middle of a three week civil jury trial over in Judge Scott Creighton's courtroom. I had originally when Mr. McCoy was first became -- was first detained in this matter, I had some initial representation of him way back when. That was the last contact I ever had with Mr. McCoy or -- or about this case. It really didn't come back to me again until his family approached me last month about retaining my services, which I agreed to do, Your Honor. And I'm -- you know, I'm saying, I'm basically handling this case pro-bono but it is what it is. Given the fact, Your Honor, I've not reviewed one file; I don't even know the names of the victims in this case, Your Honor. And I understand this case has a -- has a -- has a trial date set in May. Mr. McCoy has filed a number of motions; I understand he filed a speedy trial motion. I've talked to Mr. McCoy today; I'm going to adopt all the motions that he filed except that one. That one we're withdrawing, that motion for a speedy trial. I'm asking that the Court would consider upsetting for the reasons stating in my -- and I'm not going to read -- go through all of them you have them in front -- in my motion. I'm going to ask that the Court would consider upsetting that trial date and sitting a trial -- new trial date in March -- in the fall, Your Honor, preferably after September because I have a heavy trial docket in the month of September. I would ask the

Court to do that given what the gravity of this case is. Mr. McCoy is going to go on trial for his life and given what the gravity of the trial -- of the case is; I understand that I'm coming into this case late. I understand that there's been a lot of motions filed and a lot of lawyers and a lot of people fired and all of that. I've been doing this a pretty good -- a pretty long time though, Your Honor, and I -- and I -- I think I've gained the ability to come in and come up to speed fast and get control of a case as well as a client, Your Honor, and Mr. McCoy and I have talked. Based upon our conversations, I'm confident that he will rely on my counsel and allow me to be the counsel in this case. We had a very candid conversation about this. That I would be the only voice from this day forward speaking for Mr. McCoy; it would be the only voice that would be heard in this case until we go to trial. And given what, the gravity of this case is and given the -- the -- not only to Mr. McCoy but for the entire community. As I stated in my motion, I think Mr. McCoy has the right to have the lawyer that he wants, which I'm in this case now and I'm the lawyer that he wants. But given the gravity, Your Honor, I need proper time to prepare for this case and so that if this case comes to trial that Mr. McCoy gets the best representation that he can, given what the stakes are.

THE COURT:

All right, thank you, Mr. English. Mr. Marvin?

MR. MARVIN:

Your Honor, we're going to defer to the Court, I -- I'm -- I'm aware of the order that you signed that says, basically, I believe it said, that you wouldn't even entertain a motion for continuance but -- and I discussed that with Mr. English prior -- earlier this morning. We

will be ready for trial on May the 24th. I understand everything of what he said and I do realize that this is a capital murder case. But I'm also aware of the Court's stern language previously and I'm also aware of Mr. McCoy's representation to the Court that he didn't want a continuance and he was proceeding forward. But whatever the Court rules, or however, the Court rules, we would like there to be some inquiry as to the relief that Mr. Randall Fish is. Whether he is -- if Mr. English continues as counsel that Mr. Fish should be relieved of his duties. And also some inquiry, even though he has retained counsel and not Court appointed counsel, to whether or not Mr. English is certified in death penalty cases and let Mr. McCoy acknowledge that. Whether he is or he isn't, I don't know, but I don't want that to become an issue later. But —

MR. ENGLISH:

May -- may I address the state for the record, Your Honor?

THE COURT:

Yes, sir.

MR. ENGLISH:

I am not certified in -- in death penalty cases but I have already made calls to bring on board lawyers, are you with me, Your Honor? Who are -- who are certified and I will be assembling a legal team together to try this case. Mr. McCoy is -- is -- he's aware of that and I think that Mr. McCoy is prepared to state on the record that he understands that -- that I'm not certified in death penalty cases but that I will be assembling a team of lawyers that are that will be assisting me in this case that I -- that does have experience in capital

murder cases to make sure that all of his rights are protected, Your Honor.

THE COURT:

Mr. McCoy, you understand that Mr. English, and I'm asking you this, that you understand that Mr. English is not certified in death penalty cases, is that correct?

MR. MCCOY:

Yes, sir, that's correct, Your Honor.

THE COURT:

And you're satisfied that he will assemble the team that he needs in order to assist him in this case?

MR. MCCOY:

Yes, sir, Your Honor.

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EXCERPT OF APRIL 23, 2010 TRANSCRIPT RE MOTION FOR CONTINUANCE

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FRIDAY, APRIL 23, 2010

MOTION FOR CONTINUANCE

MR. JACOBS:

Your Honor, are you ready for Mr. McCoy?

THE COURT:

Yes, sir, anytime.

MR. JACOBS:

Let me call that up at this time.

(BENCH CONFERENCE OFF THE RECORD)

THE COURT:

All right, Mr. McCoy, come forward and state your name and address for the record.

MR. MCCOY:

My name is Robert McCoy; my address is 7323 Altus Loop, Shreveport, Louisiana.

MR. ENGLISH:

Your Honor, Larry English, representing Mr. McCoy. Your Honor, I'm respectfully going to re-urge the Court to grant our motion to continue. For the reasons that were stated previously but also I'm having trouble, Your Honor, putting together a legal team to represent Mr. McCoy because nobody wants to step into a capital murder case that they've got to go to trial within such a short period. I'm still reviewing files and

evidence in this case, Your Honor. We're still trying to – I'm still not up to speed or nearly ready to undertake the representation of Mr. McCoy. Given that Mr. McCoy is facing the ultimate justice that can be put down by society, I'm asking the Court strongly and re-urging the Court to please grant my motion to continue so that I'm able to adequately represent Mr. McCoy. I think to to – to – do so otherwise would – would jeopardize Mr. McCoy's representation but also, Your Honor, cost the state a lot of money in terms of – as this case would move forward as most of these cases do. So I'm going to re-urge the Court and ask that the Court grant my motion to continue.

THE COURT:

All right, Mr. Jacobs?

MR. JACOBS:

Your Honor, Charles Jacobs, on behalf of the 26th JDC District Attorney's Office. I do agree with Mr. English that Mr. McCoy is facing the ultimate penalty which is the death penalty in this matter. However, on behalf of the district attorney's office, Your Honor, this case has been pending for a long time. And Mr. McCoy has gone through several different attorneys and has been adamant that he, you know, he intends on going to trial and the case will not be pled. We are prepared at this time to move forward, however, we understand the Court's consideration in this matter. We understand that – the con – the conscripts that the Court is under but at this time we would respectfully note and I respectfully object to the continuance.

THE COURT:

All right. Mr. English, any other statements?

MR. ENGLISH:

Your Honor, I – I – again, I would – I understand. I just got involved in this case and I understand that Mr. McCoy – Your Honor, we're all lawyers; he's been representing himself. And we don't need to address that issue because we're all lawyers in this courtroom and we understand certainly that alone, Your Honor, causes me a lot of concern. I'm not like taking this case over from another lawyer; I'm taking this case over from Mr. McCoy. And so given that, Your Honor, I would again ask the Court – re-urge the Court to grant my motion to continue.

THE COURT:

Mr. English, Mr. McCoy understands that – and this is something that I will ask, May 24th, I promised Mr. McCoy that he would go to trial. He is withdrawing his motion for a speedy trial, is that correct?

MR. ENGLISH:

We did that the last time we were here.

THE COURT:

I know but I'm making sure –

MR. ENGLISH:

Yes, he is – he is withdrawing his motion.

THE COURT:

He understands – and this is the consideration that the Court has. The Court understands that this is the ultimate penalty because the death penalty is on the table. The Court understands that this will go up and down the chain many different times if the death penalty is handed down. And the Court understands that you have just recently gotten involved. The Court is faced with trying to save the taxpayers money because

Mr. McCoy has been with us for a period of time and I understand that the state is ready to go. But then the ultimate decision is will it save the taxpayers money by allowing this continuance because it may have to be retried if you're not allowed the opportunity to be prepared. Which may be returned back to this Court for another trial and we would have to go through this procedure again. So the Court is caught between a rock and a hard place. Mr. English, I want you to understand that if I grant this continuance you will not be allowed to withdraw.

MR. ENGLISH:

I understand, Your Honor.

THE COURT:

You understand that I am going to set a hard and fast date; it will be tried on that date. And it will go on that date and we will go forward until such time as this trial is completed. I will set a date, any pre-trial motions will need to be filed, if there are any motions, and they will all be taken up well in advance.

MR. JACOBS:

Your Honor, and we understand the Court's ruling in that matter.

THE COURT:

I haven't – I'm just still – I'm just still going through my reasons and –

MR. JACOBS:

Yes, sir.

THE COURT:

– back and forth with why I'm in – between the rock and the hard place. At the present time I will grant the motion for continuance.

MR. JACOBS:

Yes, sir.

THE COURT:

Because I believe that ultimately it will save the taxpayers money and expense so that we can attempt to try this only one time and reach a resolution on that date. I know that Mr. McCoy has been with us for a period of time but the other side of it is Mr. English has recently enrolled. Mr. McCoy, I did keep my promise to you, sir.

MR. MCCOY:

Yes, you did, sir.

THE COURT:

And I gave you my word but then in this situation Mr. English is representing you. I will not allow him to withdraw but I will allow him to have opportunity to get prepared for this trial. I believe my date in 2011, and this – and let me put on the record why I have to go to 2011. Every other date I do not have a two week period. I believe that this trial will take two weeks. The first time that I have available to try this trial for two weeks is February the 7th, and I believe that that – do you have a 2011 calendar? Does anybody have a check book with a 2011 calendar on the back? Let's just make sure of this.

MR. ENGLISH:

I got –

MADAM CLERK:

I do but I just don't have a court calendar.

THE COURT:

All right, I believe that date is February the 7th, which is a Monday. It was February 8th of this year –

COURT REPORTER:

February 7th is a Monday in 2011.

THE COURT:

February 7th. This matter will be set for trial on February the 7th. I will set this as a hard and fast

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EXCERPT OF NOVEMBER 16, 2010 TRANSCRIPT RE MOTION IN LIMINE AND SUPPLEMENTAL MOTION FOR DISCOVERY

* * *

the state may be attempting to do that anyway.

MR. MARVIN:

That's correct, Your Honor. He – Mr. English has filed a Motion in Limine. Do you have that?

THE COURT:

Yes sir, I do. I just got it up here, sir.

MR. MARVIN:

Okay. Spartacus McCoy is Robert McCoy's brother and after Mr. Spartacus McCoy gave a taped statement he died and, you know, we did not intend to present that taped statement into evidence at the trial of this matter, so we have no objection to that. The second part of his motion involves the prior bad acts of Robert McCoy, and to me it looks like specifically the underlying battery charge that gave rise to the original arrest warrant before the deaths of the victims in the present matter against Yolanda Colston. But the state would argue, and we can take that up at this time, that that is – you know that's evidence of the whole res gestae of why the police were looking for Robert McCoy and why he came looking for Ms. Colston and her relatives. So, you know, we very much intend to present that evidence and believe it's necessary for the trier of fact to get a full understanding of what was going on between Ms. Colston and Robert McCoy.

THE COURT:

All right.

MR. ENGLISH:

We filed, Your Honor, for any – to prevent the state from bringing in any previous bad acts by Mr. McCoy. We specifically highlighted that one because we knew that the state had already, I believe, filed an intention to use that, highlighted it. While we don't believe that it has any relevance as to whether or not Mr. McCoy committed the murders of which he is charged with. We don't believe that represents any material issue. Those are two separate total issues, has absolutely nothing to do as to whether or not the state can prove its case or not. We believe to put that evidence in front of a jury is so prejudicial that it would cause Mr. McCoy not to have a fair trial. It has absolutely no relevance as to whether or not Mr. McCoy committed those murders on that particular day.

THE COURT:

Mr. Marvin, I'll let you respond please.

MR. MARVIN:

Well, Detective Kevin Humphries was the detective assigned to the alleged battery on Yolanda Colston by Mr. McCoy. Mister – Detective Humphries obtained an arrest warrant for Robert McCoy and was actively looking for Robert McCoy. And Mr. McCoy knew that, it is our understanding, and Mr. McCoy was attempting to find Ms. Colston for either one of two things, to either try to convince her to drop her allegation that he had battered her or to harm her. And we can argue either of those two things independent of each other because when he went to these victims' house he, and the 9-11 tape bears this out, he was looking for her. Now what happened to the victims in this case after he ar-

rived at their house is, you know, certainly the issue at the heart of this matter. But, you know, he went there for one of those two reasons only. I can't think of another reason why he would have. But either of those two reasons is necessary for the jury to understand why Robert McCoy came into contact with those victims on this particular night.

THE COURT:

And let me ask this. The only thing that you're attempting to present is the prior bad act of the battery on Ms. McCoy; is that correct?

MR. MARVIN:

That's right.

THE COURT:

And you're stating that that is part of the res gestae?

MR. MARVIN:

Yes. And, I mean, to be quite honest I don't intend to go into, you know, minute details of what happened in that aggravated battery. That's not even at trial or anything like that, but to know why Robert McCoy went to the victims' house that night and why he was searching for Yolanda Colston that night is, I mean, directly relevant. That's what happened. That's why. It's on the 9-11 tape.

THE COURT:

Okay, Mr. English, I'll let you respond, sir.

MR. ENGLISH:

Your Honor, there's – first of all, there's no evidence that Mr. McCoy went there that night looking for – Please.

MR. McCOY:

Okay.

MR. ENGLISH:

That Mr. McCoy went there looking for Yolanda Colston. There is a 9-11 tape. It speaks for itself, but again it does not in any way infer – There's no evidence that Mr. McCoy went there looking for those people. If fact, Your Honor, there's no evidence that Mr. McCoy was there, okay. And to allow that evidence to come in is so prejudicial that it's going to prevent Mr. McCoy from having a fair trial. There was no act of violence committed against Yolanda Colston on May 5, 2008. None whatsoever. There was no threat made to her on that date. There is no evidence that there was any threat made to her on that date. It is a – Those were two independent acts that has absolutely no relevance. Mr. McCoy is on trial for the murders of three individuals that were in that house. He's not on trial in any way for undertaking any criminal action against Yolanda Colston. It is – it bears no material issue. It is a totally independent issue that happened earlier and it does not bear any incident up to this particular case, Your Honor.

THE COURT:

Why does it not go to the res gestae of what, if this is as the state says, why does it not go to the res gestae of Mr. McCoy?

MR, ENGLISH:

Because, Your Honor, there is no evidence – there is no evidence to suggest, which is what the DA is trying to suggest, Your Honor, there is no evidence to suggest that Mr. McCoy went to that house looking for Yolanda Colston. There's no evidence, Your Honor, that Mr. McCoy – nobody, nobody, there's not one eye witness that has put Mr. McCoy at that site. There is not one piece of DNA evidence that has put Mr. McCoy at that site. So the state has no evidence that Mr. McCoy was ever in that room, none whatsoever. To allow them to bring in that – Well, he allegedly by the way. He's never been convicted. He allegedly committed. He's never been tried for that. He allegedly committed an aggravated battery of which he's never been able to come into court and defend himself on, by the way. To allow the state to bring that evidence in does what they don't – gives them what they don't have. They don't have any DNA evidence putting him in that room. They don't have any eye witnesses put him – putting him in that room. It is so prejudicial to his case, Your Honor, that it does not go to res judicata. The state is attempting to do what they don't have is to put Robert McCoy in that room and there's no evidence to say that he was ever in that room, Your Honor.

THE COURT:

Okay, Mr. Marvin?

MR. MARVIN:

Your Honor, that's not really true. There is evidence of Mr. McCoy being present in that room and that's by the 9-11 tape of Christine Colston and she calls him by name. And he is – the part that he is correct about there isn't no eye witness. There's no eye witnesses because he killed them all. That's what we're here for.

MR, ENGLISH:

Your Honor, the 9-11 tape does not put Robert McCoy in that room. It's just a 9-11 tape. That's all. That's all. It does not put Robert McCoy in that room. It's a 9-11 tape. And quite frankly. Your Honor, the tape speaks for itself, but, again, that tape – that's a question for the jury to determine as to whether or not that tape puts Robert McCoy in that room. Okay? That's what the jury – that's a factual finding for the jury. But in terms of eye witnesses, DNA evidence, they don't have any. They don't have any, and the DA is attempting to introduce – If he introduces that evidence, it is so – it is so – in my opinion, Your Honor, so prejudicial at trial that Mr. McCoy cannot get a fair trial at that particular point. He cannot get a fair trial. I'm going to state succinctly there was no act of violence committed against Yolanda Colston on 5-05-2008. None whatsoever.

THE COURT:

All right, final response, Mr. Marvin.

MR. MARVIN:

Like I said, Your Honor, to give the jury, the trier of fact in this matter, the whole picture of why the state believes, I know Mr. English doesn't believe it, but why the state believes that Robert McCoy went to the Colston's residence that night and killed numerous people was because of that warrant and his conflict with Yolanda. There is no other reason for him to go to that residence. He didn't live there. He didn't have any belongings there that he was going to retrieve. He didn't have any other reason to go there except to search for Yolanda. And what he – what he intended to do with her, like I said, you can argue both ways. We have the

ability to argue both ways; that he intended to either convince her to drop the battery allegation or he intended to do away with her, too. But that's what caused him to come into contact with these victims on that particular night.

THE COURT:

All right. Give me just a minute please. All right, to the defendant1s Motion in Limine as to the taped statement of Spartacus McCoy the state has already agreed that they're not going to use that statement, so that is granted. As to the prior bad acts of Robert McCoy regarding this evidence that has been argued this morning, I'm hereby allowing that. That does go to res gestae and to the motive in this situation, and I believe that it's very relevant to the trier of fact. And I believe that it will be – I believe that it does go to res gestae and to the motive in this case, so I'm allowing that to be heard. So to the taped statement of Spartacus McCoy, that is granted. To the prior bad acts, that is denied.

MR. ENGLISH:

I believe the law allows me to take a writ on that ruling, Your Honor.

THE COURT:

Yes sir, I'll allow you to take a writ.

MR. ENGLISH:

And I'll take a writ on that. The other thing, Your Honor, is we filed a Supplemental Motion for Discovery. We just wanted to make sure that we had in the record of evidence that we in no way say that the DA is not providing that to us. But I just want to put in the record at the reviewing the file of evidence that I think

that we – the DA has or may have that we need, and so I filed a Supplemental Motion for Discovery into the record. It speaks to itself and I've talked to the DA about that. Some of the stuff he may have, he may not, Your Honor.

THE COURT:

And you just filed a Supplemental Motion for

* * *

EXCERPT OF JANUARY 4, 2011 TRANSCRIPT RE MOTION IN LIMINE AND PLACING OF JURY EXCUSES ON THE RECORD

* * *

for a list of the names of all witnesses under the Freedom of Information Act and basically producing it to Mr. McCoy. And I don't know if it brings – if he's aware of it. We just became aware of it.

THE COURT:

All right, Mr. English, just one second. Let me get Mr. McCoy just to identify himself for the record so I have him here.

MR. ENGLISH:

Mr. McCoy?

THE COURT:

All right, Mr. McCoy.

MR. McCOY:

My name is Robert McCoy. I stay at 7323 Altus Loop, Shreveport, Louisiana.

THE COURT:

All right, Mr. McCoy. Now Mr. English, I'll let you –

MR. ENGLISH:

May I respond?

THE COURT:

Yes sir.

MR. ENGLISH:

The state is correct. I did file a defendant motion to submit a jury questionnaire as well as a motion for indigent, to declare Mr. McCoy indigent in order for the Public Defender's Office to provide us funds for experts. Mr. McCoy has directed me, Your Honor, not to argue that motion to declare him indigent and to declare him experts of which I refuse to do. I believe that Mr. McCoy, Your Honor, is suffering from some serious mental issues. That is important in this case. I've explained to Mr. McCoy that I will not, unless other order wise by the Court. That is not in his best interest. This is a capital murder case that I am attempting – that I have to move forward in order to defend him if there is a guilty verdict and he face a capital sentencing. Mr. McCoy has ordered me not to do that. I told Mr. McCoy that I'm going to refuse to do that unless the Court here orders me to do otherwise. I believe that those experts are important. Mr. McCoy has filed more motions, Your Honor, other than the ones I think that the state has filed today. I do not adopt those motions. I've asked Mr. McCoy not to file those motions. He's filing them. I do not adopt those motions, so that – Quit moving. Okay. So that if he wants to argue them, he can argue them. I do not believe it's in his best interest to do so. I believe that my client is suffering from some severe mental and emotional issues that has an impact upon this case. Mr. McCoy is not recommending that I take a course of action that I do not believe is in his best interest. That I believe as a lawyer that I have an ethical duty given the ramifications of this case to not follow that advice that I am charged with at the end of the day. I have tried to explain to Mr. McCoy whether he accepts it or not, I'm one of the few people that may be standing between him and a death sentence. And when given – given the ramifications of this case I believe that I cannot follow that advice. I do not – I'm not

asking this Court to continue. The state has provided us with all of the evidence in this case. I have reviewed every piece of that evidence with Mr. McCoy. There's several pieces that I could not review with him we're going to review this morning. I've asked the state to assist me in getting the 9-1-1 tapes available. That's the one piece we would be because I simply was not able to play it on my laptop when I met with him yesterday. So I'm here to argue the motion of the jury questionnaire. I'm asking the Court to declare him an indigent defender. I'm asking the Court to order that Mr. McCoy submit to the experts that are required in a capital murder case in order to defend him. If Mr. McCoy wants to argue those motions, he can argue those motions. I do not adopt those motions. I've asked him not to do that because there may be some statements or documents in there that I believe that may be detrimental to his case given the overwhelming –

THE COURT:

Mr. English, I can't –

MR. ENGLISH:

I'm sorry. – given the overwhelming evidence that is against him. So having said that, Your Honor, I stand to the side.

THE COURT:

Mr. McCoy, before – before I let you say any words, I'm going to stop you right here. Mr. McCoy, I want you to understand, sir, you absolutely have the right to remain silent. Anything you say can and will be used against you in a court of law. This is being recorded, sir. I don't want you to say a word without understanding this. Number two: You have the right to

talk to your attorney, which Mr. English has strongly advised you not to state a word in this courtroom, and have him present with you while you're being questioned or while you're making any statement. Mr. English has strongly advised you not to make any statements. Mr. English is your attorney. He is your attorney and he is here with you and he has strongly advised you not to make any statements. You can decide to exercise these rights at any time before you answer any question or make any statement, sir. If you make a statement I want you to understand the district attorney is in this courtroom listening at this time. These statements are being recorded at this time. Mr. McCoy, if you decide to go forward and make any statements they may be used against you in the court of law and it may be very detrimental to your case. I want you to understand these rights before you even open your mouth because, sir, I am trying to protect your rights. Do you understand those rights, Mr. McCoy?

MR. McCOY:

Yes, Your Honor, I do.

THE COURT:

Did you get that, Madam Court Reporter? Get in front of the microphone. You understand those rights?

MR. McCOY:

Yes, Your Honor, I do.

THE COURT:

You understand that this is a death penalty case, that your life is on the line, that any statement you made may help the state be able to put you to death?

MR. McCOY:

Yes sir, I do.

THE COURT:

Do you understand, sir, that you are telling this Court that you wish to go forward and make a statement if I allow you to make a statement?

MR. McCOY:

Yes sir, I am.

THE COURT:

You understand the ramifications of making these statements?

MR. McCOY:

Yes sir.

THE COURT:

You understand that this may hamper Mr. English in being able to defend you in any way?

MR. McCOY:

Your Honor, I under –

THE COURT:

Mr. Eng – Mr. McCoy, answer my question to that please.

MR. McCOY:

Yes sir.

THE COURT:

You understand, sir, that Mr. English has advised you not to make any statement?

MR. McCOY:

Yes sir.

THE COURT:

You understand constitutionally that you have the right not to make any statements?

MR. McCOY:

Yes sir, I do.

THE COURT:

You understand constitutionally that you're protected from self-incriminating yourself?

MR. McCoy:

Yes sir; Fifth Amendment right.

THE COURT:

You understand that this goes to a jury trial?

MR. McCOY:

Yes sir.

THE COURT:

You understand that that jury trial cannot be waived in any way and that a jury will determine your sentence and your guilt?

MR. McCOY:

Yes sir.

THE COURT:

All right. Mr. English, before – Mr. McCoy, before I allow you to make the statement, Mr. English, I'm going to allow you –

MR. ENGLISH:

Your Honor, I want to state back up on the record, I'm advising Mr. McCoy not to make any statements in this courtroom today, not to argue any motions. It is

my belief after spending my time with Mr. McCoy and my almost 20 years of practice given the overwhelming evidence that is presented in this case or that I have taken over with Mr. McCoy, I believe, Your Honor, that Mr. McCoy is suffering from some severe mental and emotional issues. I understand that there was a sanity hearing done, but I need capital experts who are trained in these cases to evaluate Mr. McCoy. Mr. McCoy has refused to do that. My last statement is, Your Honor, because of that I'm advising Mr. McCoy I do not believe that Mr. McCoy is capable of making value judgments in this case about his defense and I ask him and I want to state on the record again, Your Honor, that he not make any statements in this courtroom. Now I'm through.

THE COURT:

Mr. McCoy, I'm now letting you make a statement at this time because of your representations by Mr. English. Give me just a minute. Mr. Marvin, any statements that you would like to make at this time, sir.

MR. MARVIN:

Your Honor, I don't really know where we're going with this, but I would just submit we can take up the Motion for the Jury Questionnaire and get that out of the way. I don't think it requires much of a response because we're not objecting to it. Number two, the motion for the other matters, the mitigation experts that he's referring to, I think Mr. English has made it clear that he intends to argue for those funds and they're available. I've talked to Ms. Smart of the Public Defender's Office and I don't see how in the world Mr. McCoy could be prejudiced by the granting of these two unopposed motions. And then that leads us to the only other motion that I'm aware of was the discovery

motion that he filed in proper person and I think we can address that in short order. And that's the only other motion that I'm aware of. I've looked at the clerk's office computer screen and we don't see any other motions, but we can deal with these three motions pretty quickly. If Mr. McCoy wants to make a statement after the Court has ruled on those motions, he can do so.

THE COURT:

All right. Mr. Marvin, the state does not object to the jury questionnaire form that Mr. English has submitted?

MR. MARVIN:

I don't object to it but I would submit this, Your Honor. There is a lot of questions that are just general questions about you know the person employment and things like that, and I personally like to use that opportunity to develop a rapport with the jury, with that particular juror. And if I get into asking some of the same questions that are on here, I do not – I mean I don't intend to object to Mr. English's questions if he's repetitive for a question that's in here and I would expect the same courtesy. But other than being lengthy you know is all I'm pointing out to the Court that it may during our time with the jury, the only time that we're allowed to converse back and forth with the juror, is during voir dire and I would – I do not want this to say for the Court or to opposing counsel to say, no, no, no, you can't answer that question. You can't ask that question. But having said that, I don't oppose to anything he submits as far as a questionnaire.

THE COURT:

Mr. English, and let me ask you this, the Court has proposed a jury questionnaire which comes out of the capital trial book.

MR. ENGLISH:

Your Honor, I'm – to be quite candid with you, if – what the Court proposes I will review. I would not quibble with the Court about that questionnaire.

THE COURT:

The only – the only reason I'm stating this to Mr. English, and I'll let you get in front of the microphone, –

MR. ENGLISH:

Yeah.

THE COURT:

– this has come out of the capital trial book from the State of Louisiana. It's been one of the questionnaires. It is a lengthy questionnaire that has been tried and been supported by case law and been allowed by the case law. It goes through numerous of these questions. Now one of the questions that you asked about in your questionnaire was dog fighting and other things of that nature.

MR. ENGLISH:

It needs to be amended, Your Honor.

THE COURT:

Okay.

MR. ENGLISH:

So Your Honor, I would, you know, –

THE COURT:

Would you be agreeable –

MR. ENGLISH:

Yes.

THE COURT:

– to allow the Court to use the jury questionnaire –

MR. ENGLISH:

Yes.

THE COURT:

– from the capital – Louisiana Capital Trial Notebook?

MR. ENGLISH:

Yes, Your Honor, with the caveat that with the Court and if the DA does not oppose that I may have some opportunity to amend or add something that I believe that may be important. Is that –

THE COURT:

As long as you do that – Let me do this, Mr. English, so that I can make sure that –

MR. ENGLISH:

Right.

THE COURT:

– we – because I intend on giving these questionnaires out –

MR. ENGLISH:

This week.

THE COURT:

No sir. I intend on giving these questionnaires out when we meet on those dates that we've discussed, but I would ask that you amend, if you have any amendments, that that be done by next Tuesday.

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

And that would be January the 11th.

MR. ENGLISH:

That's no problem, Your Honor.

THE COURT:

Is that agreeable, Mr. Marvin?

MR. MARVIN:

Yes sir.

THE COURT:

Okay. Now the next motion is your motion for the indigency and for mitigation experts; is that correct, Mr. –

MR. ENGLISH:

That's correct, Your Honor.

THE COURT:

All right.

MR. MARVIN:

Your Honor, if I could, I know it's his motion but I spoke with Pam Smart this morning. She informed me that there does need to be a declaration of indigency upon Mr. McCoy by the Court. After that, the court orders really don't matter. It's simply an application to

the state public defender's office for funds. And if they feel – if Mr. English feels that he's been shortchanged or not given enough funds for a certain expert, he certainly can come back to the Court and ask for whatever relief. But she has informed me that the state public defender's office is not opposing this request. I'm sure they have limits, I don't know what they are on the amount, –

THE COURT:

All right.

MR. MARVIN:

– but they – until we get to that point you know all that's required is the declaration of indigency.

THE COURT:

Okay.

MR. ENGLISH:

That's correct, Your Honor, and the state public defender's office has advised me and worked with me and provided me with a list of experts, so I'm confident that we can work that out. I must state again my client has advised me not to take this action, but I am not listening. I am at this point, Your Honor, opposing that.

THE COURT:

Mr. English, you are – Mr. English, you are Mr. McCoy's attorney at this time. I will therefore declare him indigent at this time, order that the appropriate experts be hired based on the basis of your statements to this Court and based on no opposition by the State of Louisiana at this time.

MR. ENGLISH:

All right.

MR. MARVIN:

Thank you, Your Honor.

MR. ENGLISH:

Thank you, Your Honor.

MR. MARVIN:

Your Honor, there is a motion that's in the form of the clerk converted to a subpoena duces tecum to our office basically asking for a list of the names of all witnesses under the Freedom Information Act and Code of Criminal Procedure Article 716. It appears to be just a blanket discovery motion. We have provided open file discovery to Mr. English even to the extent that we're loaning him one of our personal computers to listen to some DVDs or CDs, and we have open file discovery in this case as we have in every other case in my office. So we would ask that that subpoena be deemed satisfied as Mr. McCoy's attorney – through Mr. McCoy's attorney.

MR. ENGLISH:

May I just state, Your Honor, the state – I have reviewed all of the discovery that the state has provided me. It appears to be thorough. Everything that I've requested that they give me I have received. I would only ask of it is is that I think that there may be some, for a lack of better words, the correspondence from particular jailhouse snitches in this case. I would ask that the DA would give me copies of everything that they have in that particular instance. At this particular point, I'm satisfied with what the district attorney has provided me. It has been very thorough. I think it lays out quite clear what – I have a full understanding at

this point unless the district attorney is hiding something from me and I don't know any reason why he would in this particular case be hiding anything from me. It is thorough and I believe at this point, Your Honor, I have everything. They've satisfied my discovery request.

THE COURT:

All right. Mr. Marvin, any objection to providing him any other discovery?

MR. MARVIN:

No. We got a letter yesterday from some other inmate offering to help us with this case. We don't need his help. We don't intend to respond to it. We showed that letter to Mr. English yesterday afternoon, but if we get another correspondence like that we'll certainly provide it.

MR. ENGLISH:

I'd just like to have a copy of it, that's all.

MR. MARVIN:

That's fine.

THE COURT:

Mr. English, if you believe that the subpoena has been satisfied at this time, if you need to file any additional need for discovery or if the Court can assist you in any need for discovery, you can file the appropriate motion. I would ask that it just be filed

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EXCERPT OF JANUARY 24, 2011 TRANSCRIPT RE MOTION FOR CONTINUANCE

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MONDAY, JANUARY 24, 2011

MOTION FOR CONTINUANCE

MR. MARVIN:

Your Honor, this is docket number one-eight-three-five-seven-two (183,572), State versus Robert McCoy.

THE COURT:

I'm sorry?

MR. MARVIN:

I meant — I'm sorry, one-six-three — my motion in the file has the wrong docket number but you do have that, Madam Clerk?

MADAM CLERK:

I have the correct one. We put the correct one on the —

MR. MARVIN:

If you'll correct that for me.

MADAM CLERK:

Yes, sir.

THE COURT:

Okay, thank you.

MR. MARVIN:

Your Honor, the state –

THE COURT:

And let me — let me — excuse me just a second, Mr. Marvin. Mr. English, you're present with —

MR. ENGLISH:

Yes, Your Honor.

THE COURT:

And, Mr. McCoy, you are present in the courtroom, is that correct?

MR. MCCOY:

Yes, sir.

THE COURT:

All right, thank you, sir. All right, I'm sorry, Mr. Marvin, I hate to interrupt you, sir.

MR. MARVIN:

Your Honor, I believe sometime approximately in late December Mr. English on Mr. McCoy's behalf filed a motion for — to — to obtain funds to hire mitigation witnesses. And that act — that motion was heard and decided on January the 4th. And I — but prior to that I had talked to Pam Smart, who's the head of the public defender's office, to ask them about their position on this motion in which she informed me that they didn't object to it; I reported back to the Court to the — to that affect. What Ms. Smart further told me was that it was necessary for the Court to declare Mr. McCoy indigent. And after that Mr. English, as his private attorney, could make an application for funds directly to the state public defender's office. But that declaration of indigent — indigency was, I guess, critical or even mandatory before the state P.D.O. office would release those funds. So at that January 4th hearing the Court

declared him to be indigent. And I assume Mr. English has made his application for those funds and there may be some more discussion about that later this morning. After that I became — I — I was aware but I didn't realize that Supreme Court Rule 31 provides that in any capital case in which a defendant is determined to be indigent the Court shall appoint no less than two attorneys to represent the defendant. And there's further language in that rule but that declaration of indigent — indigency for the purpose of his private attorney getting P.D.O. funds for his witnesses raises an issue or a potential issue on our part. That — now that Mr. McCoy has been declared indigent is the Court under any obligation to appoint no less than two attorneys? And I — and to argue that, I guess full circle, does that mean that, the Court has to appoint two more lawyers? Because he's certainly got a right to Mr. English as his private attorney. But I know that the reason the Court declared Mr. McCoy to be indigent was not or had nothing to do with appointing him extra counsel. But it's an issue that we wanted to — to flush out prior to the trial of this matter. Our research doesn't reveal any cases in where — in most death penalty cases there is the public defender's office or the CAPOLA or one of their conflict attorneys as counselors. There's not that many cases where there's private counsel in a death penalty case, unfortunately. But our research indicated the closest we got to it was State versus Walter Koon, which is a Louisiana Supreme Court case 704 So.2d 756. And in that case Mr. Koon had two court appointed lawyers and one of them after she was appointed she just didn't do anything. She didn't take any part in the guy's defense. Didn't meet with the defendant. Didn't interview any witnesses. Didn't do anything. And so about two days before the trial of that matter she asked to be relieved. And the Court, and the defendant, and

his primary counsel discussed all this, and in that case Mr. Koon, the defendant, actually stepped up and said, I would rather waive her appearance, Your Honor. And that that disposed of that issue. But in — when it came up on appeal this came back out as an — as an issue. And the Court said — cited that rule but they said: (quoted as read) "However, as other sections of this rule make clear this does not give rise to affirmative right to multiple attorneys in capital trials, see Rule 31R." And it quotes: "The Rule shall not — this Rule shall not be construed to confer substances or procedural rights in favor of any accused beyond those rights recognized or — or granted by the United States Constitution, Louisiana Constitution Laws of this state and in the jurisprudence of this Court." And they just kind of disposed of it by saying whatever -whatever the — the matter that the defendant waived it. And so we filed this motion to — to kind of just flush this issue out pre-trial and get Mr. English and/or Mr. McCoy's position. Now I do think, I don't have the record, the clerk record in front of me, and correct me if I'm wrong, Mr. English, didn't another attorney enroll as co-counsel with you?

MR. ENGLISH:

Yes, he is. He's been help — assisting me and advising me on the case, yes, he has. But

MR. MARVIN:

Who's that?

MR. ENGLISH:

Attorney, James Gray.

MR. MARVIN:

No, that's not the one I had. I thought there was a motion –

THE COURT:

Didn't Mr. —

MADAM CLERK:

Carlos.

THE COURT:

Carlos Prudhomme? Wasn't he –

MR. ENGLISH:

Oh, Carlos, I didn't realize that Carlos was

MR. MARVIN:

Yeah, he —

MR. ENGLISH:

Carlos was.

MR. MARVIN:

He and — he filed a written motion that I found but to my knowledge he's never –

MR. ENGLISH:

He's never —

MR. MARVIN:

— participated.

MR. ENGLISH:

He's not been involved in the case; I apologize.

MR. MARVIN:

But if he has co-counsel — private co-counsel then I think that — that may put this to bed, but I think —

MR. ENGLISH:

But I can — Mr. — Mr. Prudhomme will not be helping me handle the trial. So I want to be clear about that. I mean, -

MR. MARVIN:

But, Mr. —

MR. ENGLISH:

— Your Honor —

MR. MARVIN:

Okay.

THE COURT:

James Gray will be helping you in this trial?

MR. ENGLISH:

He — he will not be here for the trial, Your Honor. He will not be here for the trial either.

MR. MARVIN:

Okay.

MR. ENGLISH:

They — they been helping — Mr. Gray's been helping me — just advising me on the case.

THE COURT:

All right.

MR. MARVIN:

Obviously the purpose of the rule, I mean, the intent of the rule in having two attorneys is, if one attorney gets up there in the guilt phase and the jury finds the defendant guilty there is a theory out there that that attorney has lost his quote "creditability" close

quote with the jury. And then another attorney should step up to handle the — the penalty phase. I know that's not absolute and there are situations where the — the attorney may not have necessarily loss creditability with the jury but that's the theory behind the rule in — in our opinion. But because of that declaration of indigency that — that everybody agreed to, I didn't what to, you know, box our — the state into — to later come back and allow Mr. McCoy to complain that he did not get second counsel. But if — but if Mr. English has another counsel that intends to participate that, again, that may resolve that.

MR. ENGLISH:

I do not have another counsel that intends to participate at trial, Your Honor.

THE COURT:

All right.

MR. ENGLISH:

I mean, I'm comfortable moving forward, that's up to Mr. McCoy, Your Honor. I know what the facts of this case is. So he may want to address that.

THE COURT:

Mr. McCoy, and I just want to be specific when I tell you this. And I'm advising you, I don't want you to talk anything about this case. Anything about the merits of this case in anyway. I don't want you to talk anything other than the counsel on this case. Because this is being recorded. I want you to understand that. You have an attorney. You have the right to consult with that attorney. You have the right to remain silent on all things and I want you to understand that, I'm trying to protect your rights, Mr. McCoy. So I mean, I'm do-

ing everything I can. I don't want you to talk about any merits of this case.

MR. MCCOY:

I need to address the record, Judge Cox.

MR. ENGLISH:

You — wait — wait you haven't acknowledged yet. Do you understand what he's saying?

MR. MCCOY:

I — I —

MR. ENGLISH:

Only about the — only about the lawyer.

MR. MCCOY:

I'm — no, sir.

THE COURT:

All right.

MR. MCCOY:

I'm fully competent upon understanding everything Judge Cox has to say to me, sir.

MR. ENGLISH:

I'm talking –

THE COURT:

Mr. McCoy, and I'm being real specific, you have counsel with Mr. English. All right, you understand what Mr. Marvin has stated, is that correct?

MR. MCCOY:

I understand everything Mr. Marvin has stated, Your Honor.

THE COURT:

Okay. I only want you to address that issue.

MR. MCCOY:

I need to address more than that, Judge Cox. I will — I would like to –

THE COURT:

Can we address that issue first, before we address any other issue, Mr. McCoy?

MR. MCCOY:

Yes, sir.

MR. ENGLISH:

And — and — and, Your Honor, let me — let me put on the record, again, I'm going to strongly advise Mr. McCoy to not make any statements in this courtroom about this case other than the issue as to whether or not what that Mr. Marvin has raised.

THE COURT:

Okay.

MR. ENGLISH:

Other than that, Your Honor.

THE COURT:

All right, Mr. English.

MR. ENGLISH:

Okay.

THE COURT:

This — and just to make sure that you understand your rights. You have the right to remain silent during all proceedings. You have the right to have an attorney

present with you. If you cannot afford an attorney one will be appointed to represent you but in this case you have Mr. English which is your attorney and he's advising you not to talk. You don't have to answer any questions. You don't have to make any statements in this courtroom at all. You can advise through your attorney and not make any statements. Anything you say can and will be used against you in the court of law. And I want you to understand this is all being recorded. That anything you say Mr. Marvin can use against you at your case. Or it can be used against you at your case. Do you understand those rights, Mr. McCoy?

MR. MCCOY:

Yes, sir, I fully understand it, Your Honor.

THE COURT:

Okay, Mr. McCoy, I am, again, advising you to list — listen to your attorney but you may proceed but I would like to just address the co-counsel situation if possible at this moment then I will let you proceed after your attorney talks to you. Mr. English?

MR. ENGLISH:

Your Honor, is it possible me and Mr. McCoy just to have three minutes outside of the courtroom?

MR. MCCOY:

I don't want to talk, Your Honor. I need to proceed and address something on the record, Your Honor.

THE COURT:

Mr. McCoy, can I let you — do you want to talk to Mr. English outside of the presence of the Court? Would you —

MR. MCCOY:

If — if I do, Your Honor, I still want to address the matter to the Court.

THE COURT:

I'm going to let you — I'm going to let you address whatever you want to address on the record, but I would feel better if you go and talk to your attorney first.

MR. MCCOY:

I will, Your Honor.

THE COURT:

All right, thank you.

MR. ENGLISH:

Thank you, Your Honor.

THE COURT:

Three minutes or five minutes. Mr. English?

MR. ENGLISH:

Yes, Your Honor?

THE COURT:

All right. They'll let you in in just a second.

(COURT IN BRIEF RECESS)

(COURT BACK IN SESSION)

MR. ENGLISH:

Your Honor? Your Honor, I have spoken to Mr. McCoy. It is my understanding that if the Court appoints a co-counsel, that co-counsel will be the public defenders — would be a public defender. Mr. McCoy has — has — has stated to me that he does not want

the public defender's office appointed as co-counsel in this case. Okay. I want to state for the record, Your Honor, as we put on the record, when Mr. McCoy and I first spoke. I'm not capital certified; we waived that. I have — I have — I am confident, Your Honor, that if I'm allowed to have all the tools that I can adequately give him a defense. But — and I have other lawyers who are advise — Ms. Pam Smart and other lawyers are advising me on — on this case and — and I feel confident moving forward. But Mr. McCoy has advised me, Your Honor, that he does not want a public defender appointed to his case.

MR. MARVIN:

Your Honor, that's fine; Mr. McCoy just makes that declaration. I think in the State versus Koon, that solves it.

THE COURT:

All right, Mr. McCoy, you've heard that statement made by Mr. English, is that correct?

MR. MCCOY:

Yes, sir.

THE COURT:

And is that your declaration? That you do not want another co-counsel appointed in this case?

MR. MCCOY:

Well, not a public defender co-counsel, Your Honor, because on March of 2010 –

THE COURT:

Mr. McCoy, just a second.

MR. MCCOY:

— it was established that Mr. English was going to put a legal team together, in your courtroom, because it validated that he was not legal certified. And I have the judicial documents before me.

THE COURT:

Yes, sir.

MR. MCCOY:

And due to the fact that judicial document it was on record. Mr. English made it known to me that he was going to obtain an attorney from New Orleans. Now it comes to play, Your Honor, that Mr. English wants to appoint a public defender to make — a public defender is not going to properly represent me. I've had problems with the public defender's office, Your Honor, from day one.

MR. ENGLISH:

Okay, stop talking. You've made your point; stop and listen.

MR. MCCOY:

No. No, sir.

MR. ENGLISH:

Stop, please.

MR. MCCOY:

No, sir.

THE COURT:

Mr. McCoy?

MR. ENGLISH:

Stop, please, okay?

THE COURT:

Mr. McCoy? The only option that I would have, if I appointed anyone, would be the public defender's office.

MR. MCCOY:

I can't get a conflict of interest attorney, Your Honor? Outside the public defender's office? From what I understood, Your Honor, I am entitled to a conflict of interest attorney, Your Honor.

MR. MARVIN:

Your Honor, there's never been any conflict of interest.

THE COURT:

Not that I know of.

MR. MARVIN:

I mean in this case.

THE COURT:

Mr. McCoy, there has not been a conflict of interest. The public defender's office would have been appointed in your case and has been appointed in your case. You retained private counsel through Mr. English.

MR. MCCOY:

Yes, sir.

THE COURT:

And then you stated that you wished to waive his capital certification on the record. The other side of that is that if this Court were to appoint anyone the Court would have to appoint the public defender's office. That's the only persons that the Court could ap-

point. There has not been a conflict of interest. The public defender's office, as I understand, has always been willing to represent you and been willing to proceed forward. You retained private counsel and Mr. English has been your private counsel. So the Court would only have the option to appoint the public defender's office. If the public defender's office felt that there was a conflict in any way then they would appoint conflict counsel at that point. But I would have to go back to the public defender's office to appoint someone as a co-counsel, Mr.McCoy.

MR. MCCOY:

Okay, Your Honor, on judicial document of February 11, 2010, the state supposed to -appointed Mr. Randall Fish as a conflict of interest attorney. And when I presented that to the judicial board Ms. Pam Smart validated Mr. Randall Fish is not a conflict of interest attorney.

THE COURT:

Well, Mr. Fish is with the public defender's office.

MR. MCCOY:

I understand, but Mr. Fish is not a conflict of interest attorney, Your Honor.

THE COURT:

Mr. McCoy, again, there has been no conflict with the public defender's office representing you. So I would have to appoint the public defender's office. If they felt that there was a conflict of interest they would appoint a conflict of interest attorney at that time and that is how it would work.

MR. MCCOY:

I — I fully understand, Your Honor. But do you remember, Your Honor, when I first had Ms. Pam —

THE COURT:

Mr. McCoy, I'm telling you how it works.

MR. ENGLISH:

Your Honor, I will discuss this with Mr. McCoy. I will discuss further, I think he understands, I will discuss this further with Mr. McCoy, Your Honor.

MR. MCCOY:

Okay. I — okay. I understand, Your Honor. I have further things that I want to address to the record.

MR. ENGLISH:

Please, Mr. McCoy. Mr. McCoy, please.

THE COURT:

Mr. McCoy, I will let you discuss those in a minute.

MR. MCCOY:

Okay.

THE COURT:

Do you wish this Court to appoint a public defender office attorney as a second attorney? That is up to you, Mr. McCoy.

MR. ENGLISH:

It's up to you.

MR. MARVIN:

And, Your Honor, I spoke with Ms. Smart and obviously the Court's aware of her capabilities, so.

MR. ENGLISH:

I would — Your Honor, I would not object to a co-counsel being appointed but that's up to Mr. McCoy.

MR. MCCOY:

Your Honor, I'm undecided at this moment.

THE COURT:

Sir?

MR. MCCOY:

I'm undecided at this moment, Your Honor. That's a — that's a hard decision to make, Your Honor. This decision that I make, Your Honor –

THE COURT:

Mr. McCoy?

MR. MCCOY:

— will be a decision that will mitigate the rest of my life, Your Honor.

MR. ENGLISH:

Your Honor, may I — may I — may I speak? May I speak?

THE COURT:

Yes, sir.

MR. ENGLISH:

I think in the order of — to make sure that we move forward with this that the Court appoint a public defender as a second counsel in this case, Your Honor.

THE COURT:

Mr. Fish?

MR. FISH:

Your Honor, on behalf of the public defender's office we're going to certainly object –

MR. ENGLISH:

Okay.

MR. FISH:

— to being appointed as co-counsel.

THE COURT:

On what bases, Mr. Fish?

MR. FISH:

Your Honor, if Mr. McCoy –

THE COURT:

Mr. Fish, I need you next to a microphone.

MR. FISH:

Mr. McCoy has private counsel –

THE COURT:

Mr. Fish, I need you by a microphone, please.

MR. FISH:

Mr. McCoy has private counsel, Your Honor, and this —

MR. MARVIN:

Your Honor, I guess on behalf of the state the Rule — the Supreme Court Rule 31 that we're talk — talking about clearly, clearly concerns situations where there is a court appointed indigent defender in a capital case and the rule states that they shall appoint two attorneys. If it's not applicable to a situation where there's a private attorney or I would submit that we don't believe that it applies. Despite the fact we filed

this motion to situations where there is private counsel. And Mr. McCoy whatever displeasure he has with Ms. Smart at the public defender's office, I'm not aware of what his reasons are nor is it relevant, I think. But he has chosen Mr. English as his attorney and, you know, made a waiver of certain things regarding Mr. English's representation. And again, we just don't believe that the rule applies.

MR. ENGLISH:

Could I — let me — let me just say because the public defender's office objects, Your Honor, I withdraw that — that request.

MR. FISH:

I — I — our office —

MR. ENGLISH:

Okay, I mean, I will — because they object and I don't have any problem with them objecting by the way, I withdraw that request. So, I think that takes care of that.

THE COURT:

Okay, then that request has been withdrawn.

MR. MARVIN:

Your Honor, if Mr. McCoy is comfortable proceeding forward with Mr. English as his attorney just like in State versus Koon, if he just simply states, I waive the right to second counsel under Rule 31 that's fine. This issue's over with and we can move on to whatever Mr. McCoy wants to bring up next.

(MR. ENGLISH AND MR. MCCOY WHISPERING OFF RECORD)

MR. ENGLISH:

Your Honor? Your Honor, Mr. McCoy wants me to put on the record I have other lawyers who are advising me on this case, including the public offender's office has been very — has been very helpful, Your Honor, in advising me on this case. I will be the only lawyer that will be handling the trial, Your Honor, but in terms of — of helping prepare me for this case, I have — I have relied on both Pam Smart, James Gray, the public — the state public defender's office, and — and several mitigation experts, Your Honor. I feel very comfortable, I'm -I've been doing this for twenty years. If I wasn't feeling comfortable that I was — where I'm at in this case and that I can handle this case, Your Honor, I would be up there right now filing a motion to withdraw out of this case. I want to put on the record that I — that I think we are — we are — the only issue is what I discussed with the case and we discussed moving forward. And I'm putting it on the record and I believe Mr. McCoy is now — is now going to state, Your Honor, that he waives appointing a second person to the case. Correct, Mr. McCoy?

MR. MCCOY:

You're correct.

MR. ENGLISH:

Okay.

THE COURT:

That is correct, Mr. McCoy?

MR. MCCOY:

Yes, sir.

MR. MARVIN:

That's fine.

THE COURT:

All right, then that issue has been resolved.

MR. MARVIN:

All right.

MR. ENGLISH:

Now may I — may I take my shot, Your Honor?

THE COURT:

Yes, sir, Mr. English.

MR. ENGLISH:

Your Honor, as — as the D.A. has so eloquently stated we have had to declare Mr. McCoy to be an indigent in order to get experts appointed in this case. Simply because Mr. McCoy nor his family has the finances to — to fully fund this case. I'm essentially representing Mr. McCoy for free, Your Honor. We filed a motion to declare him to be indigent. It was filed in early December, the Court did not hear it until early January the 4th. Worked diligently with the state public defender's board to get the experts in place. We've gotten them in place, but Your Honor, they have indicated to me despite my pressing them that they cannot be ready for trial.

THE COURT:

Who are your experts, Mr. English?

MR. ENGLISH:

Mr. John Craft and Dr. Mark Vigen. Okay. Mr. John Craft is a mitigation specialist; will be here working with me on mitigation issues. Dr. Mark Vigen, as you're aware, Your Honor, he was actually on Mr. McCoy's sanity commission. The D.A. waived — the district attorney waived him agreeing to come on board to try to facilitate this. But having said this — that, Your Honor, they cannot be ready. Given the fact that this is a capital murder case and given what the facts of this case is, Your Honor, I'm moving, I reluctantly, reluctantly, on the advice of those two mitigation experts, I'm moving for a continuance in this case, Your Honor. I — I — I apologize to the Court. I want this case moved forward but I — but I -but I — in order to protect my client, I have to follow the advice of those two mitigation experts, Your Honor. And I'm respectfully requesting that this matter be continued to a future date to allow them to do what they need to do.

THE COURT:

Mr. Marvin?

MR. MARVIN:

Your Honor, we object to a continuance. There was a scheduling order issued by the Court many months ago. Aside from that scheduling order I don't know how many, I'll phrase admonishments that the Court's given both me and Mr. English regarding the calendar of this matter. And I know Mark Vigen, I don't know John Craft, I — to my understanding John Craft is a person that works for the state public defender's board that has some control over the disbursement of funds. I don't know that he's —

MR. ENGLISH:

I'm not — I'm not — I'm sorry, he's right, Your Honor, Dr. Craig Forsyth, I'm sorry, I'm moving Dr. Craig Forsyth is the other mitigation expert. He's correct; Mr. John Craft is working with me in retaining the expert. Dr. Craig Forsyth out of Lafayette, Louisiana is my other mitigation specialist, Your Honor.

MR. MARVIN:

Okay. Well, that being the case, I have not heard from either of those two people, nor has the Court to my knowledge, about their ability to be ready in February. But now the state has the scheduling order that the Court issued to -to us. Seemed to be pretty much absolute and I think that we need to stick to it. And we'll be ready for trial on February the 7th.

MR. ENGLISH:

Your Honor, let me just add, I don't want to drag this out, let me just add one other thing. I came into this case late. Normally lawyers have several years to prepare for a capital murder case, because capital — This is not a routine case. This is not a second-degree murder case or this is not a manslaughter case. This is a capital murder case. And there are a lot of moving parts to this case. And based upon that, Your Honor, it's just pulling all of this together. This is the ultimate and I just believe that Mr. — that it would — that - that to move forward without those mitigation experts, Your Honor, would almost certainly dictate the outcome of this case. I think it would dictate the outcome of this case before it even starts, Judge. That's all I have to say on that, Your Honor.

THE COURT:

Mr. Marvin, any other response, sir?

MR. MARVIN:

Your Honor, I believe Mr. English enrolled back in March of last year, which is just about a year ago, and so to us that's plenty of time to be prepared for any type of case. And we're very much aware that this is a death penalty case, but a year is a long time. That's all we have.

THE COURT:

Mr. McCoy, I will advise you again, like I've advised you all morning, but I'm going to let — Mr, English is your attorney.

MR. McCOY:

I understand, Your Honor, but —

THE COURT:

You understand all of your rights which I've stated to you a hundred times.

MR. McCOY:

Yes, sir.

THE COURT:

And I mean I know you want to speak, sir —

MR. McCOY:

I understand.

THE COURT:

— but I'm doing everything I can to protect your rights, sir.

MR. McCOY:

I understand, Your Honor.

THE COURT:

And after I've warned you about all those rights you still wish to make a statement, is that correct?

MR. McCOY:

Yes, I do, Your Honor.

THE COURT:

Mr. English, I have advised him. I know that you have advised him on the record.

MR. ENGLISH:

Let's go, Your Honor. Let's go.

THE COURT:

All right. Mr. McCoy —

MR. McCOY:

Okay.

THE COURT:

— you've heard the nature of the argument made by Mr. Marvin and by Mr. English. I will let you address that if you want to address it.

MR. McCOY:

Okay. Your Honor, first and foremost, I want to address to the Court — I want to bring proof of evidence, Your Honor. And I want to -yes, sir, proof of evidence. I want to validate some things on the judicial docket here today. Your Honor, on the evidence docket of the Bossier City Police Department of property evidence there has been, from what I've last heard, a DVD of the 911 call. The evidence log, Your Honor, is here before me. If the bailiff would assist in giving you a copy, the DA a copy and my attorney a copy that I have here and provided here today, Your Honor, it will validate, Your Honor, that this is not a 911 DVD. It was a

911 cassette tape that was given to Lieutenant — or Detective Darren Barclay on 5-5-08. And two years from now we have some type of DVD the public defender — I mean the District Attorney's office has came up with. You can't get a recording from a cassette tape, Your Honor, to a DVD. It has to be a cassette tape to a cassette tape or a DVD to a DVD. The property log is right here, Your Honor, that Mr. Schuyler Marvin had entered into the record a DVD — a burnt DVD of a 911 call, Your Honor. But judicial records or evidence validate different. And not only that, Your Honor, I have also validated on court docket — on court minutes when I spoke to you about retaining or subpoenaing Ms. Shonda Stone, subpoenaing FBI Agent J. T. Coleman, you told me I didn't go through the proper procedures. Your Honor, from the basic understanding of Criminal Code of Procedure and from what I understand out of the Criminal Code of Procedure book, Your Honor, I'm entitled to subpoena anybody that's going to validate, you know, for my witness aspect on my behalf. And Ms. Shonda Stone and Mr. J. T. Coleman are linchpins to my case. And you validated on record when I became my own attorney that I couldn't subpoena these people, Your Honor, but to the best of my knowledge, Your Honor, I can subpoena –

THE COURT:

I didn't deny you subpoenaing them, Mr. McCoy.

MR. McCOY:

You quashed the subpoena, Your Honor. You — you allowed Mr. Marvin to.

THE COURT:

Mr. — Mr. McCoy, I did not deny you subpoenaing them. There is a proper procedure that you have to follow to be able to subpoena an FBI agent and a sitting judge. I did not deny you your subpoenas, sir. I just said that you had to go through the proper procedure. You did not properly subpoena those witnesses. You are still entitled to properly subpoena those witnesses through your attorney. You're still properly able to subpoena those witnesses through your attorney, sir.

MR. McCOY:

And I validated that to Mr. Larry English and Mr. Larry English told me that I cannot subpoena a sitting judge. And I know that is very contrary to the record.

THE COURT:

Mr. — Mr. McCoy, you are being advised by Mr. English on that, but I —

MR. McCOY:

I understand, but –

THE COURT:

If proper procedure is followed, Mr. English will follow your instructions, or not follow your instructions, based on his advice.

MR. McCOY:

But Mr. English works for me, Your Honor.

Mr. English is –

THE COURT:

I understand that, Mr. McCoy.

MR. McCOY:

— required to follow the instructions that I give Mr. English, Your Honor.

THE COURT:

I understand that, Mr. McCoy, but that's between you and your attorney.

MR. ENGLISH:

Your Honor, I need to state something on the record.

THE COURT:

Yes, sir.

MR. ENGLISH:

I believe that Mr. McCoy has severe mental issues.

MR. McCOY:

No, sir, that is not going to work on the record, Your Honor.

MR. ENGLISH:

I — I believe — I believe –

THE COURT:

Now, wait a minute, Mr. McCoy.

MR. ENGLISH:

Let me finish.

THE COURT:

Mr. English, I'm going to let —

MR. ENGLISH:

Let me finish. Let me — let me — let me - - let me –

THE COURT:

— Mr. English talk and then you.

MR. ENGLISH:

Let me finish, Your Honor. I believe Mr. McCoy has severe mental issues. Mr. McCoy has made statements to me that has caused me to have some concerns even though I know there's been a sanity commission been put in place. I'm going to reiterate to the case — the Court again,Your Honor, I believe Mr. McCoy has severe mental issues. That is a mitigating factor in this case as the reason why my motion to continue to allow Dr. Mark Vigen to do a full evaluation of him, Your Honor, to bring those issues forward. Mr. McCoy has made statements to me, Your Honor. He is — he is irrational. I cannot — He's asking me to do and — to do things which I — I cannot do that goes to counter what his interests are in this trial. I believe, Your Honor, it is imperative that this Court grant me a continuance so that I can have Mr. McCoy evaluated in some detail by Mark Vigen to present that evidence as mitigating facts in this case, Your Honor. We're all in this courtroom. It is what it is. All of us in this courtroom, we had an opportunity to evaluate Mr. McCoy, Your Honor. I have — I have tried to give Mr. McCoy the best counsel I can. Mr. McCoy, Your Honor, continues to make statements that are irrational. He continues to ask me to do things, Your Honor, that if I followed his advice would almost certainly lead to a conviction and a jury issuing the death penalty in this case. That is the reason why I am asking Mr. McCoy — Your Honor, for a continuance in this case given that — given that Mr. McCoy has exhibited very bizarre behavior to me that warrants being put -warrants being further evaluated, Your Honor, and — and there are mitigating circumstances in this case.

MR. McCOY:

And, Your Honor —

THE COURT:

Go ahead, Mr. McCoy.

MR. McCOY:

Your Honor, to address that matter, Mr. English is putting on the judicial record that there is something wrong with me and I defer that to Your Honor. Let me share what my problem is with Mr. English, Your Honor, and what my problem will be judicially advising the Court. When I first hired Mr. English, Mr. English told me that they had on April the 28 of 2010, when they did — when we came into your courtroom –

MR. ENGLISH:

I'm advising Mr. McCoy not to –

MR. McCOY:

No, no, no.

MR. ENGLISH:

I'm going to — I'm going to advise Mr. McCoy, Your Honor, not to discuss conversations between me and him; that it will go to undermining his case; that the District Attorney is sitting here; that it's on the record. I'm going to advise him not to do it, Your Honor.

THE COURT:

Mr. McCoy, you — Mr. McCoy, please, listen to me.

MR. McCOY:

Judge Cox, is this —

THE COURT:

Mr. McCoy, please listen to me. You're fixing to reveal attorney/client privilege. You're fixing to put this all on the record and this is going to seriously — this is — Sir, if ever a person needed to exercise their rights to be quiet and to use their right to remain silent, this is one of those cases, sir. And I am — Mr. English has advised you. I'm advising you. I cannot stop you from making a statement, Mr. McCoy.

MR. McCOY:

But, Judge Cox, this — this really needs to be heard though. This really needs to be put on record, not just for court documents but for validation. When your own attorney, Your Honor, tells you that the District Attorney brung a plea saying that you got your fingerprints on the gun; that the victims' blood is on your clothing; that other — other mitigating aspects happened when it comes to evidence that there is no victims' blood on your clothing; that there's no fingerprints on the gun; that he had a 911 tape that validated other different aspects. Mr. English has been very deceptive towards me. Mr. English do not want me to talk, Your Honor, because Mr. English has fed me nothing but a whole bunch of mishaps since we have been in this. Did he say I'm irrational, Your Honor? Because, I'm not going to let him tell me anything, Your Honor. I know what I've done and I know what I didn't do, Your Honor. Mr. English has told me there is no way he can win this case. Mr. English has told me even –

MR. ENGLISH:

I'm going to — I'm going to again advise Mr. McCoy — Mr. McCoy, Your Honor, not to continue to divulge attorney/client conversations. And I'm going to reiterate to the Court, Your Honor, why I'm making a Motion to Continue. I apologize to the Court while I'm

making a Motion to Continue. Mr. McCoy, Your Honor, is not — is severely mentally compromised.

MR. McCOY:

No, sir.

MR. ENGLISH:

He is — he is — he is continuing, Your Honor, against all advice of counsel to not listen to me when his life is on the line. He continues to — If I followed Mr. McCoy's advice, I'd be put in a position, Your Honor, that I've never been put into my time as a lawyer of not following my client's advice. Your Honor, what we — this is a predictor. You're watching this man's behavior. It is bizarre.

MR. McCOY:

No, it's not, Your Honor.

MR. ENGLISH:

I need a mental expert appointed to evaluate Mr. McCoy, Your Honor, because, listen, this is going to be the trial because I'm not going to follow his advice. I am not going to follow his advice. He has a right as a client. He is going to come to trial and he is going to basically walk into the District Attorney's hands, get a conviction and get the death penalty. And when he gets the death penalty, Your Honor — because Mr. McCoy's not going to listen to me. Mr. McCoy is going to attempt to take over this trial and argue in front of the jury. And when he does that, Your Honor, I have the responsibility of then standing in front of the jury and fighting for his life. This man is not irrational — This man is irrational. He is severely emotionally and mentally compromised. I understand that the Court wants to move forward. The DA wants to move for-

ward. I want to move forward. But I have a higher ethical duty here. This man is irrational, Judge. He will not and cannot assist me. He is going to fight me. He is going to take over this trial. He is going to take over the trial, Judge. I am — during — On the questioning, he is going to take over this trial. This man needs to be evaluated, Judge, and that evidence needs to be brought before a jury at the proper time. Mr. McCoy has told me some bizarre stuff about the DA, myself and this Court. Mr. McCoy wants me to argue theory, Your Honor, that would almost certainly hand him to the DA. Mr. McCoy is angry at me –

MR. McCOY:

No, I'm not.

MR. ENGLISH:

— because I refuse — I refuse, Your Honor, as someone who has been practicing law for close to twenty years now, to walk this man into a death penalty when he's incapable of making rational decisions. Judge, I just saw — you just told this man to be quiet. I'm sitting there telling this man to be quiet. This man is divulging attorney/client conversations. And if I don't intervene now he's going to tell the whole case. He's going to tell everything we every talked about.

MR. McCOY:

That's not so, Your Honor. I have a freedom of speech. It's the United States Constitution versus –

MR. ENGLISH:

And I'm going to be quiet and let him go, Judge.

MR. McCOY:

No, Your Honor. Mr. English is validating and bringing up a whole charade in front of the courtroom, Your Honor. It is not — In that typical aspect, Your Honor, I also have a witness, Your Honor, in Houston that I asked Mr. English to address and subpoena through court that validates that I –

MR. ENGLISH:

I'm going to again tell you, Mr. McCoy —

MR. McCOY:

— that I was with her –

MR. ENGLISH:

I'm going to tell you, Mr. McCoy, you are bringing evidence into this courtroom that the District Attorney is going to use against you. You are divulging information that only you and I ought to be discussing.

THE COURT:

Mr. McCoy —

MR. ENGLISH:

Now, go ahead, Mr. McCoy.

THE COURT:

Mr. McCoy, I'm going to strongly caution you again that you are divulging information that's attorney/client privilege that should only be discussed by you and Mr. English and your attorney has advised you not to do this. This is all being recorded, sir.

MR. McCOY:

I understand, Your Honor.

THE COURT:

And, Mr. McCoy —

MR. McCOY:

My attorney is advising me not to discuss it, Your Honor, but when I discuss it with him he brushes it off and says it's irrelevant, Your Honor. How is the aspects of my guilt irrelevant, Your Honor? And that poses a bigger quandry right here, Your Honor, because Mr. Craig Forsyth, if you remember, Your Honor, was the same gentleman that cussed me out in front of Mr. David Shanks at the courtroom. You remember when I fired Ms. Pam Smart — When we got rid of Ms. Pam Smart on February the 11th of 2010, Mr. Craig Forsyth was the gentleman that cussed me out at the Bossier Sheriff's Office. And he's –

THE COURT:

Mr. McCoy, that was –

MR. McCOY:

— the litigation specialist.

THE COURT:

— not in my courtroom, so I —

MR. McCOY:

No. He didn't cuss me out in your courtroom, sir. He cussed me out in —

THE COURT:

Mr. — Mr. McCoy, there's no way that I could have seen that if it didn't happen in my courtroom.

MR. McCOY:

But I turned it in to the disciplinary board, Your Honor. And see these are factual things, Your Honor, that they're divulging your knowledge in the courtroom's knowledge about it. They're trying to intrigue

me in a circle, Your Honor, of things — pretending that things haven't happened, Your Honor, but they have happened, Your Honor. And, Your Honor, that is

THE COURT:

Well, Mr. McCoy — Mr. McCoy, Mr. English is your attorney. He is trying to advise you regarding this case and I know that you may disagree, but you don't need to put that on the record.

MR. McCOY:

But, Your Honor, if I don't put it on the judicial record and Mr. English still don't agree with the things that I'm asking him to do as far as subpoenaing people, Your Honor, if we go to trial without these proper people subpoenaed, Your Honor, that's a worse situation for me, Your Honor. Just like, Your Honor, the eyewitness that gave the description of the person at the scene of the crime, Your Honor, that hasn't been turned over to me for discovery so I could subpoena that person so that person can validate, Your Honor, that that wasn't me at the crime, Your Honor. The District Attorney haven't turned it over to us, Your Honor, and that's exculpatory evidence to prove my innocence. Yet every time a detective, Your Honor, interview a person that person gives them a description of that person and that person gives them the name and address of the person that validated it on judicial record and police report that the description of the person fleeing the scene, Your Honor —

THE COURT:

Is it in the police report, Mr. English?

MR. ENGLISH:

Your Honor — Your Honor — Your Honor –

MR. McCOY:

Mr. English –

MR. ENGLISH:

Your Honor —

THE COURT:

Excuse me, Mr. McCoy, I just –

MR. ENGLISH:

Your Honor — Your Honor, the District Attorney, to my knowledge, turned over all discovery to date.

MR. McCOY:

No, he didn't.

MR. ENGLISH:

May I finish? Your Honor, Mr. McCoy is asking me to subpoena witnesses to put forth a theory –

MR. McCOY:

No theory, thanks.

MR. ENGLISH:

To put — to put — to put forth a theory, Your Honor, that will help the District Attorney send him to the death chamber. I will not follow his advice. I will not subpoena FBI agents. I will not subpoena judges. I will not — I will not run all over the country looking for witnesses that don't exist. Mr. McCoy is severely mentally compromised, Your Honor, and - - and — and I'm asking this Court to grant my Motion to Continue so that he can be evaluated because this is going to be the case. It is going to be a zoo.

MR. McCOY:

No, it's not, Your Honor.

MR. ENGLISH:

It's going to be a zoo, Judge, because I'm not going to do what he wants me to do. I can be relieved from this case. I do not believe this man is rational. I think I have an ethical duty — I have discussed this with — I have sought legal counsel. I have sought legal counsel from other death penalty lawyers on advice on this. I have an ethical duty to this man not to follow his bizarre behavior. And, Your Honor, he will continue to sit here right now and go on and on and on, Your Honor. And I'm asking this Court to please allow me to have this man evaluated, Your Honor, because he is mentally and emotionally compromised.

MR. McCOY:

And, Your Honor, for the record, and I'm going to end my conversation, Your Honor. Your Honor, I've been evaluated. There is any — there is nothing wrong with me, Your Honor. You — Mr. English wants the Court to believe something is wrong with me to further evaluation that has already been evaluated before, Your Honor. There is nothing wrong with me. I'm fully competent. I'm fully understanding of the aspects of this case and —

MR. ENGLISH:

I'm going to advise Mr. McCoy to be quiet, Your Honor.

MR. McCOY:

And, Your Honor —

MR. ENGLISH:

I'm advising Mr. McCoy -MR. McCOY:

Let — let me talk here.

MR. ENGLISH:

— to be quiet, Your Honor. He's now saying stuff, Your Honor, that goes to the heart of his defense and he's compromising his case.

THE COURT:

Mr. McCoy, Mr. English has advised you to stop at this point. He has advised you to stop at a point long ago.

MR. McCOY:

Judge Cox —

THE COURT:

Yes, sir.

MR. McCOY:

— the FBI agent that I asked him to subpoena is imperative to my case. Ms. Shonda Stone is imperative to my case. Ms. Black is imperative to my case. He won't subpoena people that will validate my innocence. He won't subpoena people, Your Honor, that will validate the aspects of the collusion in which I'm involved in. Your Honor, this case is bigger than me, Your Honor, and they don't want the full exposure of what's going on here, Your Honor. I'm only asking my attorney as the client, Your Honor, to subpoena who I ask him to subpoena, Your Honor, so they can get up here and validate the truth, Your Honor. I'm not asking him to validate any theory. I'm not asking him to come across any type of irrational responses, Your Honor. I'm only asking Mr. English to meet me halfway here. I'm only asking Mr. English to give me his best here. But how can he give me his best, Your Honor, when he's giving

me excuses; when he's giving me impartial theories or things; just outright telling me what he's not going to do, Your Honor?

THE COURT:

All right, Mr. McCoy, I've taken the statement. I've let you make a statement –

MR. McCOY:

Yes, sir.

THE COURT:

— even though you've been advised about five hundred times not to make a statement. Mr. English has made a Motion for Continuance. Mr. Marvin, I will listen — I understand that you oppose and I — Anything else that you wish to address to the Court, sir?

MR. MARVIN:

No, sir, Your Honor, that's it. That's all we have.

THE COURT:

Mr. English and Mr. McCoy, this case has been set for trial since March of last year and a scheduling order was placed into effect as of March of last year. The Court has not heard from any doctors that stated that they cannot have their reports ready. And they will be able to meet with Mr. McCoy over the next two weeks.

MR. ENGLISH:

Your Honor, if I file a written motion today with statements from both of my experts indicating that they cannot be ready, will the Court reconsider its ruling here today? Because I'm doing this on their advice, Your Honor. Not mine.

THE COURT:

Mr. English, the experts should have known that when they took this case that they had a short time frame to do it, so I will deny the continuance.

MR. ENGLISH:

That's fine. That's fine, Your Honor.

THE COURT:

And I believe that you had stated on the record that you're ready to proceed forward. Mr. Marvin has stated that he's ready to proceed forward. And I believe Mr. McCoy is — in the past has stated that he was ready to proceed forward with this trial.

MR. ENGLISH:

I'll state for the record again, Your Honor, Mr. McCoy is mentally and emotionally compromised and unable to make rational decisions about it in my opinion.

THE COURT:

Well, this has been scheduled since March of last year –

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

— and had a scheduling order —

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

— so I therefore deny the continuance.

MR. ENGLISH:

That's fine. Thank the Court for the consideration.

THE COURT:

I do.

MR. MARVIN:

Thank you, Your Honor.

THE COURT:

Any other on that? Any other motions, Mr. Marvin?

No, sir, Your Honor.

THE COURT:

Any other motions, Mr. English?

MR. ENGLISH:

No, Your Honor.

(END OF HEARING ON MOTION FOR CONTINUANCE)

EXCERPT OF FEBRUARY 3, 2011 TRANSCRIPT RE MOTION TO APPOINT ADDITIONAL COUNSEL

* * *

THURSDAY, FEBRUARY 3, 2011

MOTION TO APPOINT ADDITIONAL COUNSEL

THE COURT:

Mr. Marvin, you can call your case, sir.

MR. MARVIN:

Your Honor, we'd call docket number one-six-three-three-seven-two (163,372). Your Honor, the Court of Appeal has issued a – granted the writ filed by defendant's counsel in this matter. And we'd ask that a copy of that be placed in the record; I think a copy probably already is. One-six –

MS. NOONAN:

Five-seven-two.

MR. MARVIN:

One-six-three-five-seven-two (163,572) is the right docket number, I'm sorry.

THE COURT:

One-six-three –

MR. MARVIN:

Five-seven-two.

THE COURT:

– five-seven-two, is that correct? Do you mind if I put that on this copy? This correction?

MR MARVIN:

Yeah, correct – correct my copy, please.

THE COURT:

Do you have any objection to that, Mr. English?

MR. ENGLISH:

I'm sorry?

THE COURT:

He just – he just put the wrong number on his on – his document. It's one-six-three-five-seven-two (163,572) on his motion that he filed. Is there any objection to me placing that five –

MR. ENGLISH:

That's – that's not – we're talking about the Motion to Appoint Additional Counsel, Your Honor?

THE COURT:

Yes, sir.

MR. ENGLISH:

That's fine, no problem, Your Honor.

THE COURT:

All right, thank you. And Mr. English, you're present and Mr. McCoy?

MR. ENGLISH:

Yeah, Your Honor, I'm sorry.

THE COURT:

That's all right.

MR. ENGLISH:

I apologize, go ahead – go ahead, Your Honor.

THE COURT:

And, Mr. McCoy, state your name and address for the record, sir.

MR. ENGLISH:

Your Honor – I got it. Attorney, Larry English, 835 Prospect, Shreveport, Louisiana, 318-222-1900. Here representing Mr. McCoy, who's present in court, Your Honor.

THE COURT:

All right, thank you very much. All right, and the Second Circuit has issued a continuance, the writ was granted, the stay has been lifted and has been remanded with instructions at this time. Mr. Marvin has filed a Motion to Appoint Additional Counsel and the Second Circuit Court of Appeal has issued in its instructions that Mr. McCoy, and I will read this into the record. It says: (quoted as read) "In addition, because this Court is not in possession of the entire record of this case, we direct the trial to ensure that Mr. McCoy is, or has been, fully apprised on the record of the benefits of having two capital-defense qualified attorneys and that Mr. McCoy has knowingly and intelligently waived the same." Mr. McCoy, the district attorney's office has filed a motion that would order that additional counsel be appointed to represent you in this case. And these counsel – based on the fact that, and Mr. Marvin if I misrepresent anything please correct me, we discussed this the other day that you have been declared indigent for the purpose, without objection by the state, for purposes of being able to get mitigation experts. There is a Supreme Court rule that is out there that states that if you're declared indigent that you have the right to counsel, which you've already been advised of that

right to counsel, that you would be given – Mr. English would still be your counsel but that death qualified parties would – death qualified attorneys would be appointed to represent you in this matter. That would come through the public defender's office, which they would appoint death qualified personnel to be able to represent you in this case. Mr. Marvin has asked that those two people be qualified and that you be appointed through the public defender's office death qualified individuals. That usually comes through CAPOLA, which is the Capital Assistance Program if I'm stating that correctly, and CAPOLA would be appointed and determine who those counsels are. Am I misstating that?

MR. MARVIN:

I think that the Court should declare, I mean, should appoint the public defender's office with instructions that it should appoint two death qualified people and there may be one from this local PDO and one from CAPOLA or may be more that one.

THE COURT:

Okay.

MR MARVIN:

Just leave that up to them.

THE COURT:

All I need to do is appoint the public defender's office but they will make sure that the parties that need to be appointed are appointed. Mr. English, do you have any statements towards that?

MR. ENGLISH:

Your Honor, I – I don't object, okay? And, I've advised Mr. McCoy – Mr. McCoy here – here is – Mr. McCoy has an objection, Your Honor, but I think if we explain it to Mr. McCoy and he understands certain things, I think we would be all right. Even though the Court – there's just certain rules that has to be followed. In order for the Court to appoint two attorneys the public defender's office has to be appointed.

MR. MCCOY:

No they don't.

MR. ENGLISH:

Let – let me – let me finish. Mr. McCoy has an objection that if – if the counsels come from the public defender's office here locally. I have explained to him that – that the – that the – more likely than not and – and that those two attorneys would be appointed from the Louisiana Capital Defense Association. Which means they do – they do not work for the public defender's office. They are death penalty qualified. More likely than not they will be two attorneys in private practice who – who are – who work with this association. And that the public defender's office will merely be retaining those people. But nobody from the local public defender's office will be involved. in this case and I think – would the local public defender's office agree with that?

THE COURT:

Mr. Fish, do you want to address that since you're with the public defender's office?

MR FISH:

Randall Fish, on behalf of the public defender's office. Your Honor, at this time we don't know. As far as

I know a capital case through the public defender's office would be assigned to me and Larrion Hillman. I do know, at this point, I certainly don't know that the Capital Assistance Project would be secured through the public defender's office –

THE COURT:

Okay.

MR. FISH:

– at the present time. And in addition, we may or may not seek – seek review of being appointed in addition to Mr. English. That's something I have to discuss with Ms. Smart and make a decision on in the next day or two. But I do see some practical problems with appointed counsel being appointed in addition to private counsel. I think it – if – if we're to be appointed, I think it should be our responsibility to solely handle the defense of the case and not share that responsibility with Mr. English.

THE COURT:

Okay. Mr. English, any response to that?

MR. ENGLISH:

Your Honor, the Second Circuit made a certain suggestion, the D.A. has filed a motion, I'm not –I – I – I don't object to additional counsel being appointed to support me. I mean, I'm – my ego is not such as that – that's either – I'm – I'm comfortable; I'm confident that under the facts of this case that I can do what needs to be done. But certainly having two additional attorneys in no way offends me. Mr. McCoy, Your Honor, does believe that – that – that the public defender's office will adequately represent him. And he's asking Your Honor that, and I think that, Your Honor, that if – if he

doesn't, you know, whether, you know, I'm not here to argue and – and nor to say – even suggest that I agree with him that he can because I know the lawyers, and I respect them well, and I think they can. But after all, Your Honor, he has – he should have some say so in – in – in who is his counsel. He would not have an problems, Your Honor, if the lawyers come from the Louisiana Capital Defense Association. In light of everything that Mr. Fish has said, I – I have no response and – and – to that. I'm simply trying to communicate where I believe my client's position is.

THE COURT:

And Mr. –

MR. ENGLISH:

So now if the – and – and having said that, Your Honor, I personally do not have any problem and recommend to Mr. McCoy that you cannot have to many lawyers in a case like this. I don't, you know, I'm perfectly comfortable proceeding as a single attorney because I'm relying upon the expertise – there are other, you know, capital defense lawyers who have been providing me expertise and direction in this case. I understand it is a capital case; I feel confident – confident that I can represent Mr. McCoy. But I welcome any help if the Court so deems so and the district attorney's office deems so. The problem is with Mr. McCoy, Your Honor, and – and he doesn't have any confidences in the public defender's office.

THE COURT:

All right. Mr. McCoy?

MR. ENGLISH:

Have I said that correctly, Mr. McCoy?

MR. MCCOY:

You're exactly right, sir.

THE COURT:

All right. Mr. McCoy, and I'm directing this at you, because I'm trying to follow the Second Circuits directive, sir. And I want to make sure that this is clear for the record. The district attorney has asked that additional capital qualified personnel be appointed to represent you, sir. And I am entertaining that motion at the present time. The only way that I can appoint anybody is that it has to be appointed through the public defender's office. And the public defender's office would of course decide who would be capital qualified to be able to represent you, and assist Mr. English, that is my option. From listening to Mr. English you're stating that you want Mr. English and Mr. English alone to represent you and you do not want the public defender's office to represent you. Is that what this Court is hearing?

MR. MCCOY:

Well what I'm saying today, Your Honor, I would love, you know, to have my prior representation of Mr. English but the assistance of the public defender board, no, sir, it's not needed by myself. I have no confidence in the public defender board. I've had prior run-ins with the public defender board. And if I'm not mistaken, Judge, I mean, please correct me if I'm wrong, there are some outside officials that can be retained through the – the Louisiana Association for other conflict of interest attorneys, Your Honor. I mean, this is my life, Your Honor.

THE COURT:

Mr. McCoy?

MR. MCCOY:

I understand the statements –

THE COURT:

Mr. McCoy?

MR. MCCOY:

– that are validated before the Court, Your Honor, but I have no second chance at this, Your Honor. And I don't want the Court to put counsel on me, Your Honor, that I don't want. object of this, Your Honor.

THE COURT:

Mr. McCoy, I'm not trying to put counsel on you that you don't want. But the only way that I can do this is to put the public defender's office in there.

MR. ENGLISH:

Your Honor?

THE COURT:

Mr. English, I'll let you speak to Mr. McCoy.

MR. ENGLISH:

Yeah, let me – one second, Mr. McCoy.

(MR. ENGLISH CONFERING WITH MR. MCCOY OFF THE RECORD)

MR. ENGLISH:

Go ahead, Mr. McCoy. Go ahead, Your Honor.

THE COURT:

Mr. McCoy, are you telling this Court that you fully waive the public defender's office being appointed? Understanding that Mr. English is not capital qualified. And that you waive these two attorneys, I mean, you

waive the Court appointing the public defender's office with capital qualified attorneys to be sitting on this case? Is that what you're telling this Court?

MR. MCCOY:

Your Honor, I'm telling this Court today that I am confident with Mr. English but with other legal assistance beyond the public defender's office, Your Honor. Beyond the public defender's office, Your Honor. Because if they was to appoint me – Your Honor, this is to better represent the Court as well. If they were to appoint me some counsel from the public defender's office, I'm going to fire them, Your Honor. I'm just putting it qualified on record; I'm going to fire them.

THE COURT:

So you are waiving any representation by the public defender's office fully and voluntarily, is that what I hear you say?

MR. MCCOY:

Yes, I don't want anybody from the public defender's office, Your Honor. But beyond the public defender's office, Your Honor, conflict of interest attorney, I will accept –

THE COURT:

I don't–

MR. MCCOY:

– from the Louisiana Defense Association of the Capital Association, I will accept, Your Honor.

THE COURT:

Mr. McCoy, I don't have that authority. The only authority I can do is appoint the public defender's of-

fice. I will ask you again, are you fully, and knowingly, and voluntarily waiving the public defender's office to be appointed as co-counsel with Mr. English?

MR. MCCOY:

Yes, I am, Your Honor.

THE COURT:

All right. Mr. Marvin, any statements?

MR. MARVIN:

Let me question Mr. McCoy, if I can?

THE COURT:

Mr. –

MR. MARVIN:

Mr. McCoy?

THE COURT:

– English? Just – Mr. Marvin. Mr. English, do you allow Mr. Marvin to question Mr. McCoy specifically –

MR. ENGLISH:

I'm – I'm – I'm uncomfortable, Your Honor, as to – as to – what are we going to ask him?

MR. MARVIN:

Mr. McCoy, you – you don't even know who the public defender's office is going to assign to your case, yes or no?

MR. MCCOY:

It don't matter, Mr. Marvin.

MR. MARVIN:

So you –

MR. MCCOY:

I've – I've had dealings with the public defender's office; I've had dealings with Mr. Fish, Mr. Marvin. I've had personal experience with –

MR. MARVIN:

I– yeah, but you don't know that it's going to be Mr. Fish, yes or no?

MR. MCCOY:

No, I don't but in the same aspect –

MR. ENGLISH:

Okay, all right –

MR. MARVIN:

Okay. But what if it's a public defender attorney that you've never met. That you have full confidence in the way you have confidence in Mr. English?

MR. MCCOY:

No, sir.

MR. MARVIN:

You – you would not accept that representation?

MR. MCCOY:

No, sir.

MR. MARVIN:

Okay. And you understand the reason the Court is trying to appoint two lawyers is if you end up being found guilty and this case proceeds into the penalty phase to determine whether you end up with a death penalty or life in prison. The reason the Supreme Court rule says that you should appoint two attorneys

is because that attorney that handled the guilt phase of the trial has failed.

MR. MCCOY:

Uh-huh (affirmative).

MR. MARVIN:

And the jury might possibly have lost confidence in anything that he or she says and not believe them. So in the penalty phase when that same lawyer stands up there and says, ladies and gentlemen, you only have two options here give my client death or give him a life sentence. There is no not guilty at that point.

MR. MCCOY:

Uh-huh (affirmative).

MR. MARVIN:

And if the jury says well this is the same lawyer that got up there and told us he didn't do this before and I didn't believe that, so why should I believe him now?

MR. ENGLISH:

Let – let me –

MR. MARVIN:

That's the reason. Do you understand that?

MR. ENGLISH:

I– I– I respect what the state's statements are, but the truth of it is, the state does not – doesn't – at this point does not know what– I'll just– this caveat what counsel's defense will be. Okay? I just wanted to make that statement. But overall, I believe the district attorney is giving you good advice.

MR. MCCOY:

And I believe he is too. But it's basically you're– it's just like asking a person to plead in the blind. It's– basically it's asking a person to accept something until that time resonates itself and that I can't do.

MR. MARVIN:

Okay. Let me ask you this – another question, Mr. McCoy. Do you understand that if the Court appoints the public defender's office and you end up with two lawyers that you don't like, whether they're Mr. Fish or anybody else that you don't like, you always have the right to terminate those lawyers?

MR. MCCOYS:

Yes, sir. I just spoke that on record; I'm fully aware of that. But the repercussions of that is this is time consuming, Mr. Marvin, and most of all Mr. Marvin, that is against my best judgment. You know, to even obtain someone that I have no confidence in whatsoever. I have no –

MR. MARVIN:

But you've never met these people.

MR. MCCOY:

But the public –

MR. ENGLISH:

Let it - - all right – okay –

MR. MCCOY:

I've – I've dealt with Ms. Smart, Mr. Marvin.

MR. MARVIN:

Okay.

MR. MCCOY:

And she's the head –

MR. MARVIN:

You don't know that it's going to be Ms. Smart.

MR. ENGLISH:

All right.

MR. MCCOY:

– over the public defender's board.

MR. ENGLISH:

All right.

MR. MCCOY:

That's the– that's the –

THE COURT:

Okay, I'm going to –

MR. MCCOY:

– same circle, Your Honor.

MR. ENGLISH:

All right – all right – all right.

THE COURT:

You can't argue over each other –

MR. ENGLISH:

All right.

THE COURT:

– because we've got to get this on the record, number one.

MR. ENGLISH:

All right, I – do you have any other – any questions?

MR. MARVIN:

I want to make sure that he knowingly, and intelligently waives his right –

MR. ENGLISH:

I – I – I –

MR. MARVIN:

– to the two attorneys.

MR. ENGLISH:

I don't think there's any doubt that my counsel under – that Mr. – that my client understands and he has stated repeatedly that he does not want the public defender's office defending him.

MR. MCCOY:

That's exactly right.

MR. ENGLISH:

My – now – now this, you know, I will attempt in any way I can to go out and – and see if I can look for other means of getting him two counsels, but he doesn't want the public defender's office. I think he's– I think he's –

MR. MARVIN:

Okay.

MR. ENGLISH:

–he's clear about that. I – I disagree with him on that.

MR. MARVIN:

Well – well you keep saying that –

MR. ENGLISH:

Okay.

MR. MARVIN:

– and if the issue is not whether –

THE COURT:

All right.

MR. MARVIN:

– the words that come out of your mouth, the issue of what comes out of his mouth.

MR. ENGLISH:

Go ahead, Mr. McCoy.

THE COURT:

I agree, Mr. Marvin. Mr. Marvin, I agree. Let me – let me try to handle this.

MR. ENGLISH:

Okay. Okay.

THE COURT:

Mr. McCoy, Mr. Marvin has covered, like I tried to cover with you, what the Supreme Court is stating. The Supreme Court has stated that Mr. English, and I don't know what Mr. English strategy is as far as defense or anything else. I don't know what Mr. Marvin's strategy is as to how he's presenting the case. But for some reason you go into the guilt phase and they find you guilty, and then it goes to a penalty phase. If Mr. English is the only attorney the Supreme Court has

stated that he may lose creditability and that may affect you in the penalty phase as Mr. Marvin has stated before. That is the reason behind the Supreme Court statute. Mr. McCoy, before you speak again. I can only appoint the public defender's office once you have been – once you have been declared indigent. That is my only recourse is to declare that the public defender's office represent you once you have been declared indigent. Now from what I've heard from your attorney, and what I've heard from you, but I need to know exactly; no talking about the bush.

MR. MCCOY:

None whatsoever, Your Honor.

THE COURT:

All right. My only recourse is to appoint the public defender's office. Do you want me to appoint the public defender's office as second counsel?

MR. MCCOY:

For the record, again, Your Honor, I'm totally opposed to that and most of all, Your Honor. I mean, if you really look at it, Your Honor, I choose not to be strong armed to take a public defender's aspect of secondary counsel when that's totally against my wishes, Your Honor. I know the Court by verbatim can work some other appointment of capital specialist out – other than the public defender board, Your Honor. Because the public defender board may can finance someone through the public defender's office to represent me in another –

THE COURT:

The only option –

MR. MCCOY:

– jurisdiction.

THE COURT:

Mr. McCoy, and I'm not trying to talk over you and I'm not trying to be rude. The only option this Court has is once you're declared indigent is to appoint the public defender's office. You understand all of your rights, is that correct, Mr. McCoy?

MR. MCCOY:

That's exactly correct, Your Honor.

THE COURT:

You understand that you have the right to have another attorney appointed to represent you through the public defender's office, is that correct?

MR. MCCOY:

Yes, sir, but I don't want that, Your Honor.

THE COURT:

And you are fully and voluntarily waiving those rights, is that correct?

MR. MCCOY:

I'm waiving the right of someone from the public defender's office representing me, Your Honor, because –

THE COURT:

And you're doing that knowingly and voluntarily, is that correct?

MR. MCCOY:

Yes, sir.

THE COURT:

All right, thank you, sir. Then I will not appoint the public defender's office at this time, Mr. Marvin.

MR. MARVIN:

That's fine, Your Honor. We're– we're comfortable with that and we would ask that the matter in accordance with the writ from the Second Circuit that we reset the matter.

THE COURT:

All right.

MR. ENGLISH:

Your – Your Honor, may I make a statement before we go? I think it's important I need to make a statement on the record here.

THE COURT:

Yes, sir.

MR. ENGLISH:

Because, Your Honor, there's– there's a lot about me not having capital experience – capital certified which I'm not. But I just want to put on the record and remind the reason why I'm sitting here, Your Honor, not making any money representing Mr. McCoy because Mr. McCoy's family came to me and Mr. McCoy was representing himself. And I understand what the processes are in cases like this but I ultimately believe, Your Honor, it's better to have me sitting here representing Mr. McCoy than Mr. McCoy sitting here by himself and representing his own self in such an egregious case. So under – it is what it is. I respect the district attorney's motion; I respect the Court's motion, Your Honor. And I will endeavor to do what we try to have to do to – to maybe see if I can't – we can't figure

this issue – fix this issue another way. But I think I need to put that on the record, Your Honor, that I got involved in this case because my client – I'm not being paid and my client was representing himself in a capital murder case.

THE COURT:

Okay. All right, I've allowed that statement to be made.

MR. ENGLISH:

Thank you.

THE COURT:

At this time Mr. McCoy, I believe, has knowingly, voluntarily, and intelligently waived that second counsel to be appointed, therefore, I deny your motion at this time, Mr. Marvin, as Mr. McCoy can choose who his counsel is as long as he knowingly and intelligently does so. And I believe we've had a long colloquy in this situation. So I, therefore, deny that motion. Gentlemen, I am going to enter a copy of the State of Louisiana Court of Appeal's Second Circuit opinion into the record, is there any objection to that, Mr. Marvin?

MR. MARVIN:

No, sir.

THE COURT:

Mr. English?

MR. ENGLISH:

No objection, Your Honor.

THE COURT:

I'll enter that into the record at this time.

MR. MCCOY:

Also, Your Honor, I want to state on the record

MR. ENGLISH:

Wait.

MR. MCCOY:

– that –

MR. ENGLISH:

Wait let him finish.

MR. MCCOY:

Mr. – Mr . English have been paid by my mom and they –

MR. ENGLISH:

Okay.

MR. MCCOY:

We're not totally or indigent aspect on this but they may have not paid him as much as he choose to pay. But he has not just taken this case without any financial contributions, Your Honor.

THE COURT:

All right, Mr. McCoy.

MR. ENGLISH:

Thank you, Your Honor.

THE COURT:

I appreciate that, that's between you and Mr. English.

MR. ENGLISH:

Thank you, Your Honor.

THE COURT:

All right. Mr. English; Mr. Marvin, I want to set this trial date. I'm trying to follow the Second Circuit's opinion; I want to set this for July 28th for jury trial.

MR. ENGLISH:

Hold on just a second, Your Honor.

MR. MARVIN:

That's a Thursday?

THE COURT:

That starts on a Thursday.

MR. MARVIN:

Do the same thing?

THE COURT:

Yes, sir, just like we did before.

MR. MARVIN:

Okay.

MR. ENGLISH:

Your Honor, can I just look at my calendar just to – although, I understand this case takes precedence, I just want to make sure.

THE COURT:

This case will take precedence.

MR. ENGLISH:

I understand, Your Honor.

THE COURT:

And, Mr. – and I am trying to comply because Mr. McCoy has filed a motion for a speedy trial, I'm trying

to do this within the frameworks allowed by the Second Circuit in order to give time for you to be able to get your mitigation experts, Mr. English. But I'm trying to do this expeditiously as possible.

MR. MCCOY:

Also, Your Honor, I would like to speak that –

MR. ENGLISH:

Robert – Robert –

MR. MCCOY:

– I've always –

MR. ENGLISH:

Robert –

MR. MCCOY:

– retained some aspect with Mr. English, Your Honor, that – I've also asked Mr. English to specifically subpoena some people and I just discussed that with him –

THE COURT:

Mr. McCoy –

MR. MCCOY:

– and he haven't did that. Mr. English –

THE COURT:

Mr. –

MR. MCCOY:

I want to just state this on record, Your Honor.

THE COURT:

Mr. McCoy, that is between –

MR. ENGLISH:

Okay.

THE COURT:

Mr. McCoy, that is between you and Mr. English.

MR. MCCOY:

He's–

THE COURT:

I will set a scheduling order for any motions that need to be filed. But that is between you and Mr. English as Mr. English – that is up to his trial strategy as he is your attorney. But you will be able to discuss that with him. Now, Mr. McCoy, I've let you I've let you speak today because I've had to ask you some questions. But at this time, sir, I'm going to ask that you remain silent because this is being recorded and I don't want you to tell any of your case strategy. You have the right to remain silent; I want you to remain silent at this time.

MR. ENGLISH:

Thank you.

THE COURT:

All right?

MR. ENGLISH:

Thank you, Your Honor.

THE COURT:

Thank you.

MR. ENGLISH:

Thank you, Your Honor. So July the 28th is the is that when we – is that when we will start, Your Honor?

THE COURT:

Yes, sir,

MR. ENGLISH:

Picking the jury –

THE COURT:

– that is when we start.

MR. ENGLISH:

– or the trial date?

THE COURT:

Sir?

MR. ENGLISH:

Is that when we start picking a jury?

THE COURT:

Yes, sir.

MR. ENGLISH:

Okay.

THE COURT:

Mr. –

MR. MARVIN:

Okay. Now there's a civil– two civil juries that week, this jury pool won't have anything to do with those?

THE COURT:

No, sir, they will not.

MR. MARVIN:

Okay. And we would ask the same orders; I don't remember if I made that order about additional jurors –

THE COURT:

Yes, sir.

MR. MARVIN:

– for this term. We would ask for that to be carried over to that time.

THE COURT:

Yes, sir.

MR. MARVIN:

Whoever made it, the additional number, I don't remember.

THE COURT:

Yes, sir, we will. So those civil juries will have nothing to do with this jury term and I will subpoena the jurors –

MR. MARVIN:

All right.

THE COURT:

– at that point in time. We will call those jurors in and we will proceed in the same order. I will issue a scheduling order just like I've done; I'll have that to you within the next week and set motion dates and time frames. So.

MR. MARVIN:

Additionally, Your Honor, I'm not – I don't have them in front of me the letters that Mr. English attached to his second writ to the Court of Appeal to –

MR. ENGLISH:

I'll provide them to you.

MR. MARVIN:

– continue. Well, I have them; I just don't have them in front of me. But I don't know exactly what those two experts how they ended their letters with regards to how much time they needed.

THE COURT:

They said approximately six months, I believe. So that would put us at approximately the right time.

MR. MARVIN:

Okay. We would – we would ask that the Court serve the scheduling orders on those two experts who Mr. English provided the letters from.

THE COURT:

Then I will –

MR. MARVIN:

Have them served by the sheriff and a return put in the record.

THE COURT:

We will absolutely do that, Mr. Marvin.

MR. MARVIN:

Thank you.

THE COURT:

All right, Mr. English?

MR. ENGLISH:

Your Honor, let me just ask this question. Is it possible that the Court would – could pick a later date to start than July?

THE COURT:

No, sir.

MR. ENGLISH:

All right.

THE COURT:

Absolutely not. I'm trying to make the Court's – I'm trying to follow the Court of Appeal's order. They said as expeditiously as possible.

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

I'm trying to make it within the six months, Mr. –

MR. ENGLISH:

Your – Your Honor, we – we – we have the – the experts have been retained and approved.

THE COURT:

Yes, sir.

MR. ENGLISH:

Okay. So my only concern of it is that they have enough time to do what they need to do, Your Honor.

THE COURT:

All right.

MR. ENGLISH:

That's all. Okay—

THE COURT:

So –

MR. ENGLISH:

– that's fine.

THE COURT:

All right. Any other matters that need to be taken up on this case?

MR. MARVIN:

Not that we're aware of, thank you, Your Honor.

THE COURT:

All right, thank you. I'll set the scheduling order and send a copy to each party.

MR. MARVIN:

Thank you.

THE COURT:

And I'll file this motion denying that appointment.

MR. ENGLISH:

All right. It's good to see you. Okay.

THE COURT:

All right.

(END OF HEARING ON MOTION)