of the case with anyone other than counsel in the case." The trial judge entered such an order. The defendant does not suggest that the witnesses either heard each other testify or violated the order by discussing the facts of the case. The conversations which the victim's mother overheard did not have anything to do with the case. The mere fact that a state witness speaks to other witnesses does not establish a violation of the order of sequestration and does not show possible prejudice. *State v. Armstead*, 432 So.2d 837, 842 (La. 1983).

Defendant's Presence

The defendant argues he was not present at critical stages of his trial, in violation of his constitutional and statutory rights. He points specifically to a conference in chambers during which he claims counsel came to some form of agreement concerning several items of state evidence presented to the jury. The defendant claims his absence violated his constitutional due process rights and La. C.Cr.P. art. 831(4), which requires the defendant's presence "at all times during the trial when the court is determining and ruling on admissibility of evidence."

The record does not show whether the defendant was present at this chambers conference. Assuming the record's silence indicates the defendant's absence, *State v. Walker*, 374 So.2d 1223, 1226 (La. 1979), his counsel was present. Although La. C.Cr.P. art. 832 provides that a capital defendant may object to his temporary voluntary

absence at a proceeding even if his counsel were present, the defense waived any claim based on the error by failing to object. La. C.Cr.P. art. 841; *Taylor*, 93-2201, p. 4-7, 669 So.2d at 367-369.

However, the record shows no violation of La. C.Cr.P. art. 831(4) ever occurred. The admitted evidence of which the defendant complains were the letters written by Strickland to Atkins. The admissibility of these documents was determined pretrial at a suppression hearing attended by the defendant. The record comments of the trial judge and counsel reveal the purpose of the chambers conference was to delete portions of the letters which described other crimes evidence and which were deemed irrelevant or highly prejudicial to the defense. Thus, no determination of admissibility was undertaken at this chambers conference in violation of Strickland's constitutional or statutory rights. The defendant's absence from this chambers conference, wherein the trial judge and counsel excised material prejudicial to the defense from evidence already-determined admissible, resulted in no prejudice to the defendant. Although the defendant claims he was absent at other critical portions of his trial, he is unable to specify when this occurred.

Closing Argument Reference

The defendant argues he was denied due process and a fair trial when the prosecutor referred to matters outside the record, stating in closing argument:

> But what about Donald Baker and Rogena Craven, when they heard and . . . saw a man running across the parking lot in dark clothing wearing **combat boots** or something that-running very heavily on the concrete . . ."

Vol. 7, p. 1604 (emphasis supplied). The defendant argues Rogena Craven never described the footwear of the person she saw running across the parking lot and Donald Baker never saw the person whose footsteps he heard.

Since no objection was made to this statement, the defense waived any claim based on the remark. La. C.Cr.P. art. 841; *Taylor*, 93-2201, p. 4-7, 669 So.2d at 367-369. However, the record contained evidence the defendant wore combat boots, the boots themselves were entered in evidence as well as a photograph of two pair of boots outside the trailer where Strickland and Boyd were arrested. The prosecutor's comment merely asked the jury to draw the permissible inference that the heavy footsteps heard by witnesses as the gunman fled the scene of the shooting came from the same pair of boots police found outside the defendant's door. La. C.Cr.P. art. 774 confines the scope of argument to admitted evidence, lack of evidence, conclusions of fact which may be drawn therefrom, and the applicable law. The prosecutor committed no error in his closing argument.

PENALTY PHASE

Aggravating Circumstance

After the close of the penalty phase, at which the state re-introduced all the guilt phase evidence and testimony, and penalty phase instruction, the jury retired to deliberate. During deliberations, the foreperson sent a note to the judge requesting that the jury be allowed to review letters written by Strickland which were introduced in the guilt phase. The jury was brought into the courtroom. The judge convoked a bench conference at which he decided that allowing the jurors to read the letters might "be getting into something that really is not claimed by the State." Vol. 7, p. 1655. The judge evidently meant by this that the letters might introduce into the deliberations aggravating factors other than the one charged. In explaining his decision not to allow the letters into the jury room, the judge announced to the jury:

> You present a problem to the Court here, and let me explain what that problem is. There is only one aggravating circumstance which was claimed by the State, and that is the armed robbery, *and you have already found the accused guilty of that aggravating circumstance.* If I permit you to read the letters again, of course you have already read them once during the guilt-determination phase of the trial, but if I permit you to read them again, it's possible that we would be getting into some other circumstance which you should not consider at this time. And so, with some reluctance, I am going to deny the request. Would you return to the jury room again, please.

Vol. 7, p. 1656 (emphasis supplied). The defense did not object to this instruction. The jury again retired to deliberate and returned with a unanimous recommendation for the death sentence.

The defendant argues the court usurped the jury's fact-finding obligation and directed the jury that they had already found the threshold aggravating circumstance. The defendant cites this incident as an example of the prejudice he suffered by the offense misjoinder.

A judge is prohibited from commenting on the evidence or giving an opinion as to what has been proved. La. C.Cr.P. art. 772. When the judge's comment was made in this case, the jury had already found Strickland guilty of first degree murder. In order to make that determination, the jury had to unanimously decide that Strickland committed the underlying felony of armed robbery. The offense misjoinder did not contribute any prejudice to this determination; the jury necessarily had to find Strickland guilty of the underlying felony before it could convict him of first degree murder.

The judge's statement did not constitute a prohibited comment on the evidence. The unanimous jury had already made its determination from the evidence in the guilt phase that Strickland was engaged in the commission of an armed robbery when he killed his victim. By this decision, the jury was aware it had met the threshold requirement which allowed it to consider the death penalty. La. C.Cr.P. 905.3. Further, the judge properly instructed the jury of its option to impose a life sentence even if it did find an aggravating circumstance. Vol. 2, p. 312.

Mitigating Circumstances

The defendant argues the trial court gave inadequate guidance for juror consideration of mitigating circumstances. He asserts this created the risk that the jury would think that mitigating circumstances have to be found beyond a reasonable doubt.

This argument has previously been rejected. *See State v. Tart*, 93-0772, p. 41-42 (La. 2/9/96), 672 So.2d 116, 149, *cert. denied*, __S.Ct.__, No. 96-5549 (U.S., 10/15/96); *State v. Jones*, 474 So.2d 919, 932 (La. 1985), *cert. denied*, 476 U.S. 1178 (1986). Although the Louisiana capital sentencing scheme, La. C.Cr.P. art. 905 *et seq.*, does not set any standard of proof for mitigation evidence, this Court has determined that the lack of a standard actually gives defendants an advantage by allowing jurors to consider any amount of mitigating evidence in their determinations.

Objections to the UCSR

The Court submitted the proposed Uniform Capital Sentencing Report (UCSR) to defense counsel on October 26, 1993 and invited objections within 15 days. This was already an extension of the seven day time limit imposed by La. C.Cr.P. art. 905.9 and Rule 905.9.1 § 3(c) pursuant to Supreme Court Rule 28. A further extension of one week was granted orally. The trial judge filed the report December 1, 1993, without having received any objection from defense counsel. On December 2, 1993, defense counsel filed objections to the UCSR and requested a contradictory hearing.

The trial court ordered that the defendant's objections be filed into the record but denied the requested hearing.

The defendant argues the trial judge erred in failing to hold a hearing on his objections to the UCSR. Rule 905.9.1 § 3(c) provides in pertinent part:

> If the opposition shows *sufficient grounds*, the court shall conduct a contradictory hearing to resolve any *substantial factual issues* raised by the reports. (emphasis supplied)

Clearly, the objections were filed untimely. Further, a review of the objections shows no error in the trial judge's decision. None of the claimed errors raise a substantial factual issue which is compelling enough for this Court to remand for further development. *State v. Tart*, 93-0772, p. 50 (La. 2/9/96); 672 So.2d 116, 152, *cert. denied*, __S.Ct.__, No. 96-5549 (U.S., 10/15/96).

Ineffective Assistance of Counsel

The defendant argues he received ineffective assistance of counsel at the penalty phase. He bases this assignment on counsels' failure to present an opening or closing argument, failure to request funding for or to use mitigation experts, failure to investigate the defendant's social history for mitigating evidence, and failure to prepare the witnesses who testified on the defendant's behalf.

The defendant must demonstrate counsel error and prejudice to prevail. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Claims of counsel ineffectiveness are usually reviewed in post-conviction proceedings after an evidentiary hearing. These claims are addressed on direct review only if the record discloses sufficient evidence to decide the issues. *State v. Mitchell*, 94-2078, p. 6 (La. 5/21/96); 674 So.2d 250, 255, *petition for cert. filed*. The record as it now exists is insufficient to determine these issues; yet, the ineffective assistance claim warrants an evidentiary hearing. At this time, it is impossible to determine whether trial counsels' action not to present or argue available mitigation evidence or to argue for a life sentence

> was a choice dictated following consultation with defendant or was a tactical decision of counsel that such action was the best means of prevailing at the sentencing hearing. Nor can we determine the existence, character and weight of mitigating evidence that might have been available.

State v. Fuller, 454 So.2d 119, 124 (La. 1984).

Thus, the trial court is ordered to hold an expeditious evidentiary hearing on the defense's claim that Strickland received ineffective assistance of counsel relating to the penalty phase of his capital trial. If the trial court concludes that a new penalty hearing is required, the trial court should order one. If the trial court denies relief, the defendant may again appeal to this Court for review of that decision. *State v. Wille*, 559 So.2d 1321 (La. 1990); *State v. Williams*, 480 So.2d 721 (La. 1985); *State v. Fuller*, 454 So.2d 119 (La. 1984).

Cumulative Error

The defendant argues the cumulative error in this case requires reversal. This Court has carefully examined each of the errors assigned by both trial counsel and appellate counsel. The Court has also read the entire record for unargued error. Where error has been found, it has been determined to be harmless. Since the record is insufficient to decide the claim of ineffective penalty phase counsel, the Court has ordered an evidentiary hearing. This Court is "unwilling to say that the cumulative effect of assignments of error lacking in merit warrants reversal of a conviction or sentence." *State v. Tart*, 93-0772, p. 55 (La. 2/9/96); 672 So.2d 116, 154, *cert. denied*, __S.Ct.__, No. 96-5549 (U.S., 10/15/96), quoting *State v. Sheppard*, 350 So.2d 615, 651 (La. 1977) (interior citations omitted). A defendant is not entitled to a perfect trial, only a fair one. *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968) (citation omitted); *State v. Martin*, 550 So.2d 568 (La. 1989). The record reflects that, with the possible exception of his penalty phase counsel assistance, Strickland received a constitutionally fair trial.

CAPITAL SENTENCE REVIEW

This Court is required to review every death sentence to determine whether the sentence is constitutionally excessive. Supreme Court Rule 28; La. C.Cr.P. art. 905.9. The Court must consider (1) whether the sentence was imposed under the influence of

passion, prejudice or arbitrary factors; (2) whether the evidence supported a finding of a statutory aggravating circumstance; and (3) whether the sentence, in view of both the offense and the offender, is disproportionate to the penalty imposed in other cases.

At the time of the crime, Strickland, an only child, was a twenty-two year old white male. He was married while on Army duty in Germany and has a daughter by that marriage. He completed the eleventh grade and received his GED in 1990. His intelligence level (IQ of 70 to 100) is in the medium range. Before the current offense, Strickland faced burglary, theft, and escape charges but had no prior convictions. He was not under the influence of narcotics or dangerous substances at the time of the offense.

Passion, Prejudice, or Other Arbitrary Factor

The record does not provide any indicia of passion, prejudice, or arbitrariness. Defendant is a white male. The victim was a twenty-three year old white male. Defendant and the victim did not know each other prior to the murder. This Court has rejected the defendant's argument that defense trial counsel's use of peremptory challenges to eliminate prospective male jurors violated constitutional law.

Aggravating Circumstance

The state relied on and the jury found one aggravating circumstance, the defendant was engaged in the commission of an armed robbery at the time of the

victim's murder. La. C.Cr.P. art. 905.4(A)(1). The state presented more than sufficient evidence to demonstrate the aggravating circumstance of armed robbery.

Proportionality Review

The state's Sentence Review Memorandum reveals that of the twenty-three cases since 1976 in which the state has charged first degree murder in the 30th Judicial District Court, only one other jury has sentenced a defendant to death. *State v. Busby*, 464 So.2d 262 (La. 1985), *cert. denied*, 474 U.S. 873 (1985), involved the planned killing and armed robbery of the perpetrator's neighbor for a perceived slight. This Court reversed the conviction on collateral review, finding that Busby received ineffective assistance of counsel during the penalty phase. *State ex rel Busby v. Butler*, 538 So.2d 164, 168-173 (La. 1988). The state and the defense then agreed to a life sentence. Thus, *Busby* offers no support for the proportionality of the penalty returned here.

The state's Sentence Review Memorandum otherwise does not comply with this Court's rules because it fails to provide "a synopsis of the facts in the record concerning the crime and the defendant" for other first degree murder prosecutions in the district as required by Rule 28, § 4(b)(i). Meaningful comparison of this case with other similar first degree murder prosecutions within the district is therefore impossible.

However, the jurisprudence throughout Louisiana provides ample support for the proposition that armed robbery-murders survive proportionality review. *See State v. Lindsey*, 543 So.2d 886, 905-907 (La. 1989), *cert. denied*, 494 U.S. 1074 (1990); *State v. Messiah*, 538 So.2d 175, 189-190 (La. 1988), *cert. denied*, 493 U.S. 1063 (1990); *State v. Thompson*, 516 So.2d 349, 356-357 (La. 1987), *cert. denied*, 488 U.S. 871 (1988); *State v. Bates*, 495 So.2d 1262, 1276-1278 (La. 1986), *cert. denied*, 481 U.S. 1042 (1987).

DECREE

For the reasons assigned, the defendant's first degree murder conviction is affirmed. The death sentence is conditionally affirmed. However, a final determination of the appeal is pretermitted. The case is remanded to the district court for an evidentiary hearing to determine the claim of counsel's ineffective assistance during the penalty phase, in accordance with this opinion. Defendant's right to appeal from an adverse decision on the issue is reserved.

FIRST DEGREE MURDER CONVICTION AFFIRMED; DEATH SENTENCE CONDITIONALLY AFFIRMED; REMANDED TO THE DISTRICT COURT FOR EVIDENTIARY HEARING.