Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE #005

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **28th day of January, 2022** are as follows:

BY Weimer, C.J.:

2016-KA-00998 STATE OF LOUISIANA VS. DAVID BROWN (Parish of West Feliciana)

AFFIRMED; SEE OPINION.

Retired Justice Chet D. Traylor assigned Justice ad hoc, sitting for Crichton, J., recused.
Hughes, J., dissents in part for the reasons assigned by Justice Genovese.
Genovese, J., dissents in part and assigns reasons.
Griffin, J., dissents in part for the reasons assigned by Justice Genovese.

SUPREME COURT OF LOUISIANA

NO. 16-KA-0998

STATE OF LOUISIANA

VERSUS

DAVID BROWN

ON APPEAL FROM THE TWENTIETH JUDICIAL DISTRICT COURT,
PARISH OF WEST FELICIANA,
HONORABLE JEROME WINSBERG, JUDGE AD HOC

WEIMER, Chief Justice[1]

Defendant David Brown was indicted by a West Feliciana Parish grand jury for the first degree murder of Captain David N. Knapps, a correctional officer at the Louisiana State Penitentiary at Angola. The defendant was tried before a jury selected from St. Tammany Parish. Following the close of evidence, the jury found the defendant guilty as charged and, at the conclusion of the penalty phase of the trial, recommended a sentence of death. Defendant was sentenced accordingly.

This is a direct appeal, brought pursuant to La. Const. art. V, § 5(D)(2).[2] Defendant raises 23 assignments of error, contending his conviction and sentence should be reversed. After a thorough review of the law and the evidence, we find no merit in any of the assignments of error urged by defendant. Therefore, the defendant's conviction and sentence are affirmed.

---

[1] Retired Justice Chet D. Traylor, appointed as Justice *ad hoc*, sitting for Justice Scott J. Crichton.

[2] La. Const. art. V, § 5(D)(2) provides, in 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."

FACTS AND PROCEDURAL HISTORY

On March 15, 2004, a West Feliciana Parish grand jury indicted defendant and co-defendants David "Axle" Mathis ("Mathis"), Jeffrey Clark ("Clark"), Barry "Switzer" Edge ("Edge"), and Robert "New York" Carley ("Carley") for the first degree murder of Captain David N. Knapps in the officers' restroom of the Camp D education building in the Louisiana State Penitentiary at Angola on December 28, 1999, in violation of La. R.S. 14:30.[3] Another involved inmate, Joel "Miaggi" Durham ("Durham"), was shot and killed that evening during the rescue of one of the correctional officer hostages, Sgt. Reddia Walker.[4] In August 2004, the state notified defendant it intended to seek the death penalty and would rely on eight aggravating circumstances.

In February 2010, the state amended the indictment to charge the co-defendants as principals. In October 2011, it also amended the list of aggravating circumstances on which it intended to rely against defendant to six aggravating circumstances.[5] In an oral motion, the state amended the notice to remove the sixth aggravating circumstance, as it was duplicative of the fourth.

---

[3] The grand jury found defendants violated La. R.S. 14:30 by killing Capt. Knapps, "a peace officer engaged in the performance of his lawful duties, and/or during the perpetration or attempted perpetration of an aggravated kidnapping, and/or during the perpetration or attempted perpetration of an aggravated escape."

[4] Co-defendant Mathis was also shot that night during the rescue, but he survived.

[5] The state described the aggravating circumstances as follows: (1) perpetration or attempted perpetration of an aggravated kidnapping of Lt. Chaney and Sgt. Walker; (2) perpetration or attempted perpetration of aggravated escape; (3) victim was a peace officer engaged in his lawful duties; (4) offender has been previously convicted of an unrelated murder; (5) offender knowingly created a risk of death or great bodily harm to more than one person; and, (6) offender was imprisoned for the commission of an unrelated forcible felony at the time of commission of the offense.

The trial court addressed a majority of pre-trial matters in a consolidated manner; however, it presided over each co-defendant's trial separately.[6] Defendant went to trial in October 2011 before Jerome Winsberg, Judge ad hoc.

Although the venue had been transferred to St. Tammany Parish for all defendants for jury selection purposes only, defendant sought to change the venue once again prior to his trial. The trial court denied defendant's motion after a hearing. Jury selection commenced on October 13, 2011, and concluded October 21, 2011. Eight panels of approximately 20 prospective jurors underwent penalty phase qualification voir dire, and three panels of qualified prospective jurors underwent general voir dire. Twelve jurors and three alternates were selected.

The state and defense made opening statements on October 22, 2011. The state described how it believed the crime occurred, summarized the evidence it would present, explained how that evidence established the elements of the crime, and discussed the conditions of confinement at Angola. Defense counsel made opening statements, stressing that defendant neither planned nor led the escape plan, that there was no evidence he ever intended to kill or inflict great bodily harm on Capt. Knapps, and that defendant attempted to withdraw from the plan.

At trial, the state presented the testimony of 25 lay and expert witnesses, and the defense called one witness. In addition to focusing on the timeline of events and defendant's whereabouts as events unfolded, much of the testimony focused on the DNA evidence and whether evidence may have been contaminated by inmates and Angola personnel in the aftermath of the incident. The jury also visited the crime scene during the guilt phase of trial. Although this case involves sprawling, decades-

---

[6] Mathis pled guilty and received a life sentence; Carley and Edge were found guilty as charged and received life sentences because neither jury voted unanimously to impose the death penalty; and, Clark was convicted and sentenced to death.

long litigation, the trial testimony most relevant to defendant's appeal relates to the circumstances of the crime itself. A summary of that testimony follows.

Prior to the evening of the hostage incident, Durham approached defendant about a plan to escape Angola by grabbing Angola personnel, taking their uniforms, and exiting the camp through the sally port.[7] In defendant's custodial statement, he mentioned four people involved in the plan: defendant himself, Durham, Carley, and Edge. The plan was to be executed during evening call-outs in the Camp D education building on December 28, 1999, and the plan was to target correctional officers unlikely to fight back. The plan appeared to be inspired by a situation at a prison in St. Martinville, Louisiana, earlier that month in which several Cuban detainees held correctional officers hostage over the course of several days and successfully negotiated their release via federal and state negotiators.

On December 28, 1999, Carley, Durham, Edge, Mathis, Clark, and defendant were on call-out in the Camp D education building. In addition to several uninvolved inmates attending the AA/NA[8] meeting and legal call-outs, other uninvolved inmates participated in a band practice call-out.

Deputy Warden Vannoy testified he was at his residence on the B line when he received a call about a hostage situation in Camp D. He arrived and spoke with the involved inmates by telephone before Warden Cain arrived. Specifically, he attempted to calm Durham, Carley, and defendant, who were very upset. Warden Vannoy briefly spoke to defendant, who informed him the employees were okay. Warden Vannoy also spoke with Sgt. Walker, who informed him she was okay, but could not speak to the condition of the other hostages. Warden Vannoy stated Carley

---

[7] A sally port is a secure, controlled entry way to an enclosure, e.g., a fortification or prison.

[8] Alcoholics Anonymous/Narcotics Anonymous.

and Durham demanded he call the FBI, the U.S. Attorney, and the news media, and ordered him to keep the tactical team away from the education building, or they would start killing hostages. However, Warden Vannoy noted that defendant did not mention killing hostages or anyone else.

Sometime after Warden Cain arrived, Carley indicated he would talk to Warden Vannoy. The group proceeded to the education building where Carley opened up the door. Thereafter, Warden Vannoy began questioning Carley about the situation, particularly the employees and their safety, while walking a short distance away from the building. Carley told him to look in the bathroom where Capt. Knapps was seriously injured and possibly dead. Warden Vannoy yelled to Secretary Stalder, who was standing near the entrance to the education building, to immediately check the bathroom. The tactical team was called while Warden Vannoy took Carley back down the walk and turned him over to another officer. When Warden Vannoy returned to the entrance door, defendant and Clark were already outside on the walk.

Secretary Stalder testified as to his participation in the efforts to rescue the hostages and retake the Camp D education building. He stated that he arrived between 8:45 and 9:00 p.m. and immediately proceeded to the rear entrance where Wardens Cain, Vannoy, Perkins, and others were located. Warden Cain was at the rear door talking with some of the inmates. Secretary Stalder noted that three inmates exited the building, the first of which spoke with Warden Vannoy. He noted the inmates had left the keys in the lock of the door, and he was able to secure the keys. Secretary Stalder also heard Warden Cain tell the inmates, "What's done is done. We will forget about it. You forget about it and let's get this over with right now." However, at the time, Warden Vannoy had not returned with the information about Capt. Knapps. At some point after Warden Cain assured the inmates "what's done

is done," Warden Cain, Secretary Stalder, and Warden Perkins entered the building. Warden Cain proceeded to the first door, which was the bundle room where two inmates were holding Sgt. Walker hostage. Secretary Stalder and Warden Perkins went to the next door, which was the classroom where Lt. Chaney was located. They removed Lt. Chaney from the room and assisted him down the hallway and out of the building. Secretary Stalder next went down the hall to the officers' restroom and discovered Capt. Knapps' body there. Secretary Stalder signaled to Warden Cain the need to rescue Sgt. Walker, and the tactical team deployed flash bang grenades, rescued Sgt. Walker from Mathis and Durham, and retook control of the education building.

Warden Cain testified he was driving to Baton Rouge when he was notified about the hostage situation. On his arrival at Camp D, the inmates let him speak to Sgt. Walker over the phone, who told him she was okay, but they took the phone from her before she could say anything else. Warden Cain told the inmates, "Just let it go. I'll just let you go. Let's just back up. You can't get away. You're not going to get out. Let's just stop it here before anyone is hurt, including yourselves." Warden Cain promised to write them a note saying no further harm would come to them, and that he would bring it to them.

Warden Cain, along with Wardens Vannoy and Perkins, proceeded to the door of the building, which had white paper over the glass blocking their view. When the door began opening, Warden Cain jerked it open hard, which also jerked the keys out of the inmates' hands. Secretary Stalder reached up and removed the keys from the door while Warden Cain approached a five-foot barricade inside the door, which was composed of locker boxes stacked on top of each other. As Carley ran around the barricade to talk with Warden Vannoy, Warden Cain gave Clark and defendant the

"safe surrender" note to read, sign, and hold.[9] Clark and defendant then exited the building while Warden Cain remained at the door speaking with Mathis. However, Mathis thereafter ran into the bundle room,[10] at which point Warden Cain pushed the barricade down and approached the bundle room door with Secretary Stalder and Warden Perkins.

Warden Cain thereafter spoke with Durham and Mathis, who were inside the bundle room along with Sgt. Walker, who was laying on the floor. As the dialogue continued, Durham told Warden Cain they had not looked into the bathroom yet. Secretary Stalder then informed Warden Cain that the inmates had killed Capt. Knapps, at which point Warden Cain decided to rescue Sgt. Walker with force. Col. Joe Norwood and Capt. Russell Bordelon, the tactical team's trained snipers, opened the bundle room door. As Mathis ran towards the tactical team members at the door, Capt. Bordelon shot Mathis, and he fell to the floor. Durham lunged for Sgt. Walker, who had made her way towards the corner of the room behind the door, and Col. Norwood shot Durham twice through a crack in the door. Durham died, and Mathis survived.

Sgt. Reddia Walker testified she was assigned to the medium gate guard shack on the walkway that evening. At around 8:20 p.m., she observed several inmates running out of the education building, including Michael Robinson (another testifying witness). They looked as though they had been fighting, so she decided to ask Capt. Knapps and Lt. Chaney if they had seen or heard anything before letting the inmates return to their dormitories. As she approached the ramp to the education building, the

---

[9] The note read: "No harm or charges or DB report will be written nor any official document of this event be recorded" and was signed by Warden Cain, defendant, and Clark. The acronym "DB" stands for disciplinary board.

[10] In general, bundle rooms function as storage areas at Angola.

door opened, and she saw Lt. Chaney holding an inmate she did not recognize in a headlock. Someone then pushed her from behind into the building and onto the floor, face down.

Carley tied Sgt. Walker's shoelaces together and told her this was "like St. Martinville," that they had tried to escape and it went wrong, and that she was a hostage. When Sgt. Walker realized Carley had not tied her hands, she pressed her beeper, notifying security of the need for assistance. Carley had a radio and responded to the call for assistance, stating that "D4, beeper is under control." D4 was associated with Capt. Knapps. Carley then kicked Sgt. Walker's beeper away and moved her into a classroom where Edge was guarding the inmates inside. Carley brought in Lt. Chaney next. Clark then entered the classroom and told Sgt. Walker he was not going to hurt her, and that they needed to talk to the attorney general. When Carley came back in, he took her keys, later returning to ask about the key to the lieutenant colonel's door. She informed Carley she did not have that key.

Carley then returned to the room with a weapon in his bloody hands,[11] put it against Sgt. Walker's neck,[12] and forced her to go with him to the bundle room to make a phone call to let the wardens know they had a hostage. Clark and defendant were already in the bundle room, and defendant was holding a telephone, but they could not figure out how to get an outside line. Carley left the room, and eventually the phone rang. As defendant was on the telephone, Clark was telling him to ask for the attorney general and how to get an outside line. Mathis and Durham came into the bundle room at this time.

---

[11] During cross-examination, Sgt. Walker indicated she never saw blood on defendant's hands, but she saw blood on Carley's hands and Clark's clothing before he changed.

[12] Sgt. Walker identified State Exhibit 10 as the weapon Carley had, which is the large icepick-like shank.

At some point, a telephone number came across the radio, and defendant dialed it and started talking. Sgt. Walker stated no one had told or directed him to do so. Defendant directed Clark to get Carley. Carley came into the bundle room with the shank and told Sgt. Walker to get on the phone to assure Angola personnel of her safety. She informed the person on the other end of the line (unknown to her) that she was okay and that the inmate hostage takers had weapons. Carley then jerked the phone away from her. She also observed that Mathis had the half-scissors and a fire extinguisher, and that Durham had a flat object she called a can opener.[13]

After Sgt. Walker sat down in a chair, the phone rang again, and defendant answered, stating it was Warden Cain. Sgt. Walker noted she could not hear much of the conversation, but testified that defendant was in the bundle room the entire time with her, that he never told the others not to hurt her, and when Carley put the shank to her neck, defendant did not do anything or try to stop him.

Sgt. Walker testified that someone suggested putting locker boxes up against the door because people were at the entrance of the building. Also at this time, Warden Cain spoke through the door with the offenders about a paper they signed. Sgt. Walker also heard Clark instruct everyone to change clothes, and noted that he had a bloodstain on his sweatshirt at this time. Clark left and then returned, wearing a different sweatshirt. After Carley left the bundle room, she heard a conversation between him and Warden Cain where he said "you-all ain't going to let us go back to no dormitory after you see what happened in the bathroom."

---

[13] St. Ex. 15 is a photograph of two of the weapons. She testified that on the left-hand side is the weapon Durham had, which she thought was a piece of a can opener (but was actually derived from a metal door hinge arm), while on the right-hand side is the half-scissors Mathis possessed.

When the tactical team entered, Sgt. Walker saw the beam of the gun on Durham; and, the next thing she knew, security was reaching behind the doorway and taking her out of the room. She gave two statements about the incident.

Pat Lane ("Lane") of the Louisiana State Crime Lab, a stipulated expert in crime scene analysis and bloodstain pattern analysis, testified that he and co-worker Alejandro Vara ("Vara") arrived at the Angola Camp D education building around 1:00 a.m. and spoke with Angola and West Feliciana Parish Sheriff's Office ("WFPSO") personnel and began processing the crime scene. At that time, the building was still occupied by both correctional personnel and inmates, who were flexcuffed, kneeling, and lined up against the wall. Lane described the means of processing the inmates individually and collecting evidence.[14] Additionally, they photographed and videotaped various bloodstains, as well as bloody fingerprints, palm prints, and shoe prints found in the officers' restroom. Lane also photographed Capt. Knapps' body during the autopsy.

As to defendant, Lane and Vara collected bags of clothing worn by him at the time of processing. A bloodstain was apparent on the lower right leg of defendant's pants. Defendant's hands were swabbed and photographs taken, with particular attention paid to the nail bed area of two of defendant's fingers, where reddish stains were located in the crevice. Lane also noted that defendant was not wearing shoes

---

[14] Lane and Vara observed and/or recovered: (1) a yellow plastic-headed mallet near a mop bucket on the walkway outside the education building; (2) the half pair of scissors and the door arm hinge; (3) a homemade knife described as "kind of an ice pick-looking device," and a blood-stained denim jacket in a garbage can; (4) another small mallet, and multiple articles of clothing, including a pair of discarded black boots, a sweatshirt found in classroom one; and, (5) Capt. Knapps' jacket in the hallway.

After they released the scene, Lane and Vara received three potential weapons from Angola personnel, described as a U-shaped piece of metal and a punch. The third weapon is not described by the witness, except to the extent that it was actually one piece at the time they received it, but since that time, the handle had broken away.

when he was photographed and that a pair of boots were found in a classroom. Lane also identified a gray sweatshirt that was in the security officers' restroom.

On cross-examination, Lane acknowledged no crime scene log was created, as there were a host of people at Angola that night. He stated a number of inmates were photographed without shoes; shoes and other clothing were visible in other photographs without people associated with them; and, numerous items of evidence and clothing had been gathered and provided to him later. Lane also noted that three inmates, who were not charged in Capt. Knapps' death, had his blood on them. On redirect, Lane noted that uninvolved inmates could have gotten blood on them if Capt. Knapps' blood had been outside the restroom when the inmates were put on the wall. He further testified that he did not see anything to lead him to believe anyone had brought anything into the crime scene that was not already there.

Lieutenant Douglas Chaney testified that on the night of Capt. Knapps' death, he was delivering snack trays to the inmates on the cellblock. In the bundle room, he was attacked by two inmates, who he identified as Durham and Mathis. He said they pushed him into the bundle room, grabbed him around the neck, and started "wrestling and tussling." Lt. Chaney thereafter described being forcibly moved from the bundle room to a classroom with other inmates. He heard Edge telling the inmates he was sorry they had been caught up in this, that Capt. Knapps had gotten hurt, and that he did not know what was going to happen next.

At one point, Carley asked Lt. Chaney specific questions about which keys opened which doors and threatened to kill him if he did not tell him. Defendant also came into the room on several occasions to talk to Edge. On one occasion, he brought with him a wooden mallet that he gave to Edge. Lt. Chaney thought that defendant was involved and that he was giving orders. Just before the tactical team

stormed the building, Lt. Chaney said defendant came into the classroom hollering that security did not want to negotiate with them, and they were going to storm the building and kill them all. Lt. Chaney also stated defendant never offered help or to protect him, and that he came and went at will.

Inmate Michael Robinson ("Robinson") testified he was working as an education building orderly that night and assisting Lt. Chaney. Early that evening, he noticed paper taped over a glass window in the education building door, despite it not being covered minutes before. He asked a group of inmates in the hallway, who he recognized as Clark, Carley, Mathis, and defendant, who had put the paper there. Clark stated it was nothing and not to worry about it. Robinson also stated that earlier, defendant had approached him and asked where the lieutenant and captain were and, when questioned as to why defendant sought them out, defendant responded that he had a headache. In reply, Robinson noted that defendant did not need them and could see the dorm sergeant for that, which Robinson additionally observed was "common knowledge."

Sometime later, Lt. Chaney asked Robinson for his help with snack tray distribution, and they realized they had forgotten to pass out a few trays and to bring property to another unit. Lt. Chaney went to the bundle room for the keys to the kitchen, while Robinson waited by the doorway. During this time, Robinson saw Capt. Knapps coming down the walkway from Hawk Unit before proceeding inside. Robinson also noticed defendant was in the hallway near the entry door, and Clark and Carley were in the area where the security bathroom was located. Robinson and Lt. Chaney then proceeded to the kitchen.

Before delivering the snack trays, Lt. Chaney informed Robinson he was going to put the keys back in the bundle room. Robinson then described finding Lt. Chaney

in the bundle room after the assault.[15] Lt. Chaney called out for Robinson to help him, and Robinson turned to go find some help. Defendant reached out and grabbed Robinson and tried to pull him inside by his coat, but he managed to twist out of his grasp. Robinson also noted that Mathis was at the door, attempting to block his escape.

Robinson ran toward Sgt. Walker's security booth to tell her to hit her beeper, as other inmates started to run out of the building. Carley came out onto the walk with a shank and tried to order everybody back into the building. While Robinson was trying to explain the situation to Sgt. Walker, Carley and another inmate grabbed her and pushed her inside the building. Lt. Chaney had also managed to work his way out of the bundle room and to the doorway, before defendant and Clark pulled him back in. Robinson proceeded to run down the walkway towards another booth to the far side of Eagle Unit. Robinson saw another corrections officer coming out of one of the dorms and yelled at him to get his attention, but he did not get any response. Robinson then jumped the fence in order to tell a person in the sally port what was happening, at which point the sirens began going off.

Inmate Alvin Loyd ("Loyd") testified he was an inmate counsel substitute teaching law that night in the education building. Defendant was in his class. He noted that, during the course of the night, defendant entered and left the class several times. Loyd heard a commotion in the hallway, and a few of the inmates in that class went to the door to look out. The inmates said there was a fight and that some other inmates had gone into the bathroom with Capt. Knapps. At one point, the inmates in the classroom were asking him what to do, and he told them they should get out of

---

[15] As noted previously, Lt. Chaney testified that it was Durham and Mathis who attacked him and pushed him into the bundle room where Robinson discovered them.

the building. As Loyd left, he saw a lot of commotion, including a hand reaching out for Robinson from the bundle room and grabbing his coat. While the inmates in the classroom were trying to get out, Carley blocked their exit and told them, "Go back. Stay in the classroom. Go back to the classroom." Loyd remained in the building during the retaking by the tactical squad.

Inmate Gregory "Numbers" Wimberly testified he was the head inmate counsel substitute and was working in the legal aid office that night. As he was about to leave the building, he saw Durham had a female correctional officer pinned to the floor. When Durham saw him, Durham told him to "get the hell back in the office." He remained in the office and noted that defendant came into the office during the evening. Wimberly testified that though he could guess defendant was involved, he could not say for certain. Defendant asked if they wanted to watch a movie, and then he said, "It's a good time to die," or something similar. Wimberly thought defendant held what he perceived to be a security key. When asked if Wimberly could identify defendant in court, he stated he really could not, and added, "I never really [knew] him; but I made the association with Brown being accused of a crime and Brown being the only black male that came into the office."

Inmate Theodore Butler ("Butler") testified he knew defendant from Falcon Unit, where they both lived. In addition to being a yard orderly at the time, he also played in the Hard Times band, and he noted that Capt. Knapps sometimes played music with them or otherwise assisted them. That night, he was on call-out in the education building practicing with the band when two inmates, defendant and Clark, entered the band room. They announced something to the effect that they had taken control of the building and that if anyone wanted to leave, they could, but they would be at risk of being shot if they did so because men had guns pointed at the building.

Both defendant and Clark had a radio and a set of keys. Butler noted there was some blood on the keys defendant was holding. Defendant also made an announcement on the radio that they had taken control of the building, that they had approximately 26 hostages, and that they had some demands. The inmates in the band room asked the assailants to leave, but when they did not, someone picked up a mic stand and "extended a more violent invitation for them to leave," which they proceeded to do. Butler then advised the men in the band room they should barricade themselves in. During cross-examination, Butler noted that approximately an hour after the two had left the band room, he heard someone asking for help for Capt. Knapps because he was hurt and in need of medical assistance. While his testimony at this trial was that it was "someone" and he no longer remembered who made the request, defense counsel reminded Butler that he testified that he identified defendant as the one who made the request during a deposition in connection with the lawsuit concerning the injuries he suffered that night.

Inmate Earl Lowe ("Lowe") testified he was in the band room that night along with Dennis Butler, "TC," Michael Wardlaw, and Mickey Lannery. He identified defendant, Clark, Mathis, and Carley as having come into the band room and saying they wanted them for a count,[16] and that the assailants later came into the room and said they had taken over the building and that they were their hostages. Lowe and the other inmates were informed that if they wanted to leave they could, but at their own risk, as there were snipers outside. The inmates in the band room opted to stay. Lowe testified that after telling them they could leave if they wanted to, defendant said, "Look, man, we might as well tell them. We got Knapps in the bathroom. We

[16] He noted they had found it strange, as only Capt. Franklin would have them come out on the walk to get a count of them.

knocked his bitch ass out in the bathroom." Additionally, Lowe noted there was a lot of shuffling going on, that Clark was going in and out of the cabinets, and that he saw a long, dark object with a handle on it, but he could not say who had the object. During cross-examination, however, he noted that to his knowledge, defendant did not have a weapon, nor did he recall seeing defendant with keys or a radio. When the offenders left, the inmates in the band room proceeded to barricade the doors until members of the tactical team came in to secure the building.

Former inmate Grayland Taylor ("Taylor") testified he was an inmate counsel substitute and housed on the Falcon Unit. When returning to the education building that evening, he saw some inmates running and hollering. As he walked in, he saw the fire extinguisher in the hallway and Durham and Carley standing around the door. However, the situation did not strike him as peculiar. He eventually found himself in the classroom wherein Sgt. Walker and Lt. Chaney were being kept. He stated that defendant and Carley were also in the room, that they both had keys, and that they were striking Lt. Chaney. Taylor proceeded to the legal aid office. Durham, Clark, Carley, and defendant were standing in the hall with the keys, and they asked him if he wanted to leave. When defendant offered him the keys, he refused and returned to the office. Later, he heard some inmates pushing locker boxes to the back door.

Terry Teetz testified as an expert in corrections investigations and the use of force in a correctional environment. He stated the use of force by the Angola tactical team was appropriate and that none of the injuries sustained that night surprised him, given the circumstances. He further opined that the crime scene investigation and the way the shootings were handled was appropriate.

Captain Darren Bordelon testified that at about 7:30 p.m. that night, he received a call from the control center saying there was a hostage situation at Camp

D. He was part of the restraint team and assisted in securing and clearing out the call-out rooms that evening. Capt. Bordelon explained the process and noted that the team used force to subdue some inmates that night who did not comply, but he did not see any inappropriate use of force among the security officers. Captain Bordelon also testified that despite being friends with Capt. Knapps for 20 years, he could not recognize his face that night. During cross-examination, Capt. Bordelon testified that his responsibility was to preserve the crime scene that night until someone else arrived.

Dr. Alfredo Suarez conducted Capt. Knapps' autopsy. Following a stipulation as to his expertise in forensic pathology, he testified as to Capt. Knapps' injuries before walking the jury through a limited number of photographs of the injuries and linking those injuries to the recovered weapons.

Dr. Suarez testified that Capt. Knapps sustained multiple injuries to his body. The major blows were located at the top of his head, starting mid-frontal, near the hairline; left parietal, to the left of the midline; and then occipital, which is the back of the head. These three blows could have been the fatal blows. Dr. Suarez noted the occipital bone was fractured, depressed, and embedded into the brain, which caused bleeding around the membranes that cover the brain. Dr. Suarez also observed that Capt. Knapps was badly beaten in the face. He noted lacerations around both lips, dislocation of a dental plate, and loose teeth covered with blood. According to Dr. Suarez, those injuries were probably from punches: one or more to the mouth and two around the eyeballs.

Dr. Suarez also testified that Capt. Knapps sustained several penetrating wounds with a sharp object or objects. There were three to the left lateral chest wall; one of those penetrated about two inches inside the abdomen and perforated the

spleen. There was also a penetrating wound to the interior neck, and Capt. Knapps had bruises on the superior aspect at the top of both shoulders. He observed that the contusions to the tops of the shoulders were compatible with somebody putting pressure on those areas of the body, as if Capt. Knapps was held down. On cross-examination, Dr. Suarez noted he did not see fingerprints; but, rather, a lateral line of bruising. Thus, it was possibly consistent with the victim falling into or running into one of the metal poles in the stall or the sink.

Capt. Knapps also had defensive wounds, including multiple injuries to both hands and wrists, and Dr. Suarez noted that handcuffs were on the left hand. During his testimony, he explained that the wound Capt. Knapps received to the back of the head was fatal in 99-100% of cases. Therefore, the blow to the head occurred sometime after he received the defensive wounds. He concluded puncture wounds to the left lateral chest wall were probably the last inflicted.

WFPSO Chief Investigator Ivy Cutrer ("Cutrer") testified that on being notified of the hostage situation, he immediately headed to Camp D, where he found Warden Vannoy on the telephone talking to inmates. Warden Cain took over communication with the inmates upon his arrival. Warden Cain told the inmates not to hurt anybody, and that if they did not hurt anybody, they would be all right. The inmates wanted a promise of this treatment, so Warden Cain wrote out a note and took it back to the education building. Cutrer went to a side door with a tactical team and subsequently made entry on hearing the flash bang grenade. Cutrer noted the tactical team restrained the inmates, but he did not see any inappropriate use of force.

Cutrer contacted the state police to begin the investigation. Prior to the crime lab arriving, he checked over the area and closed rooms off so nobody could go in or out, as well as made a mental note of certain items of evidence. He remained in the

building as the crime lab began processing the scene and instructed Maj. Randy Holden to begin taking statements in the investigator's office. Ultimately, Cutrer sat in on one or two interviews, took photographs of Capt. Knapps and inmate Durham's bodies at the infirmary, and participated in taking Sgt. Walker and Lt. Chaney's statements. On cross-examination, he noted the large number of people staging inside and around the education building. He also acknowledged he did not create a crime scene log or instruct anyone else to do so.

Retired State Police officer and Angola Chief Investigator Warren Melancon ("Melancon") testified he had been notified of the hostage situation around 10:30 p.m. that night. When he arrived at the Camp D education building, he saw inmates kneeling down against the wall. Along with Trooper Brad Cook ("Cook"), the first interview they conducted was with defendant. Defendant was advised of his rights and waived them, agreeing to give a statement. The **Miranda** form was dated 12/29/99 at 3:37 a.m., and the statement was recorded.

On cross-examination, Melancon was asked about the taking of defendant's statement. Melancon testified he was aware during this time that Warden Cain had made some sort of promise to defendant, namely that he would not be prosecuted or harmed. Once the interview concluded, Melancon and Cook personally drove defendant to Camp J because defendant was worried about his safety, which Melancon attributed to his participation in the event as recounted in his statement.

WFPSO Major Randy Holden testified he arrived at the front gate of Angola around 2:33 a.m. and was instructed to go to the Camp D education building. Sheriff Daniel and Ivy Cutrer gave him a brief synopsis of events, and he was told to work with Warren Melancon and Det. Brad Cook with the Louisiana State Police to interview witnesses. Defendant was their first interview. After Maj. Holden briefly

provided an overview of the interview process for potential suspects to defendant, he explained the waiver of rights form. He noted that the interviewers write the subject of the questioning at the top of the form and ensure the interviewees are literate enough to understand the form before signing. Maj. Holden explained that defendant was advised of his **Miranda** rights, initialed that he understood his rights, signed his name at the bottom of the form, and agreed to waive those rights and speak to them. Maj. Holden also noted that no force, threats, or promises had been made to defendant to sign the waiver. The tape of the statement was admitted into evidence and played for the jury over the defense's objection; and, as the recording was not the clearest, the jury was given a transcript to read along. In that statement, recorded from 3:37 a.m. to 4:15 a.m. on December 29, 1999, defendant informed them:

1. Durham approached him about the plan to escape during call out, which involved him, Robert "New York" Carley, and Barry Edge. They opted for that particular shift because they believed the guards would be the easiest to overpower. Also, Durham informed them it would happen that night.

2. The escape plan involved grabbing people, "lay[ing] them down," and getting dressed up in their uniforms. While it involved weapons, the personnel were not supposed to get hurt.

3. After securing the people, they would go out through the sally port gate and take one of the free personnel's vehicles.

4. He was introduced to the other two guys (presumably the two other than Durham mentioned above), and there was supposed to have been another man involved, as well.

5. Capt. Knapps walked into the building, at first in the direction of the bundle room door, but then down the hallway to the bathroom. The inmates migrated back there. Durham and defendant started fighting, and Edge hit Capt. Knapps on his head with a mallet. As defendant approached, Capt. Knapps was bleeding and fell to the ground while, in defendant's words, "they still stabbing him."[17] Durham took the radio and told defendant to help them with Capt. Knapps. At this time, Capt. Knapps said, "Why me, what have I done to y'all."

---

[17] But see claim concerning recorded statement, *infra.*

6. Defendant brought Capt. Knapps into the bathroom while he was still fighting back. Defendant then told him "look, you know, nothing gonna happen to you, nobody's going to hurt you" and "just be cool, you know, relax a little," while Capt. Knapps said, "What I done to y'all?" and when Capt. Knapps calmed down, he asked for an answer from defendant.

7. When asked if Edge hit Capt. Knapps again when he was in the bathroom, defendant stated, "I can presume it was Barry. You know, I can say it was him because that was the last person I seen with the mallet." When asked again"[d]id [Edge] hit him with the mallet again in the back of the head, is that what you saying?" defendant responds, "Yeah, that's, that's the only person I can say. Uh, he still down there (inaudible), you know, just talking like I told you. So, I leave the bathroom, I leave the bathroom, go down [to the bundle room], Joel and uh—" before he was asked who he left in the bathroom with Capt. Knapps.

8. Defendant left Capt. Knapps in the bathroom with "some white guy" he thought was Edge. Edge later told him he wiped up blood with his shirt.

9. Lt. Chaney came in right after. Durham started fighting with Lt. Chaney in the bundle room, and defendant helped. Durham grabbed his radio. At this point, a few other inmates began to notice. Defendant remembered grabbing an inmate, while Mathis (armed with a knife) tried to round everybody up and move them back into the building. Defendant brought Lt. Chaney to a room and tied his shoelaces. Additionally, somebody told defendant to gag Lt. Chaney. When Sgt. Walker was brought to the room, he tied her shoelaces.

10. At that point, "everything ... erupted" and they heard about the hostage situation on the radio. (He noted they had Capt. Knapps' and Lt. Chaney's radio.)

11. Defendant was prompted again about Capt. Knapps and claimed that he was bleeding whenever defendant left him–which was where the blood on his hands came from–but was still moving.

12. Defendant stated, "[e]verything going crazy (inaudible) they had some, like a hostage situation with the Captain, sort of like shit, get the (inaudible) gather all of the keys, and um everybody's like flipping." Defendant asked Sgt. Walker which one of the keys locked the door, but Lt. Chaney was the one to show them the correct key ring. They proceeded to lock the door and cover the windows.

13. Defendant closed classroom windows in case they shot gas in there and thereafter, attempted to leave the classroom for the bathroom, but Durham grabbed him and told him to stay out of there. Instead, he went

to the law library before returning to the hallway where Durham was talking on the radio.

14. Defendant noted they all talked on the phone. As to Durham, defendant said he talked a little on the phone, but "it was basically a suicide trip."

15. Defendant explained that the inmates stacked locker boxes up as Angola personnel approached the building. Defendant talked to Warden Cain and then to Edge, who said he did not want to die.

16. At this point, defendant was again asked about Capt. Knapps. He said he did not know for sure where Capt. Knapps was at the time, and that the last time defendant had seen him was in the bathroom.

17. Defendant tried to talk Durham into giving up, but Durham just went back, so he and Clark talked to Wardens Cain and Vannoy about surrendering under the condition that no one would hurt them. He then went down the walk while Angola personnel went into the building.

18. Carley tried to convince personnel to let him talk to Durham so he could persuade him to come out of the bundle room.

19. Warden Cain briefly came out to speak with them while they sat handcuffed on the walk, and a "free man" came out and told them "the man is dead." In response, defendant said something like "you know, you playing, I know that."

During cross-examination, Maj. Holden noted defendant did not mention any agreement or promise from Warden Cain, nor did Melancon discuss it. Defense counsel then showed him the safe surrender note, and Maj. Holden stated he was unaware of it until a 2008 suppression hearing. He explained that if he had a suspect in his custody who had been promised something and accepted the deal, the investigation would likely be compromised. While Maj. Holden observed defendant was soft spoken and seemed to be a little nervous, he also noted he was not crying.

The testimony of Alex Vara, a stipulated expert in forensic DNA analysis, was consistent with Lane's testimony regarding the collection of evidence from the crime scene. In processing the evidence, it was discovered that:

1. Defendant's pants exhibited many discolorations that appeared to be bloodstains.

2. The homemade implement had blood on the hilt where the metal connected to the wood. This blood matched Capt. Knapps. The DNA collected from the handle was insufficient to draw any conclusion.

3. A hammer found in classroom one was negative for blood.

4. The sweatshirt defendant was wearing when he was processed had a small amount of blood that matched Durham.

5. The pair of boots discovered in classroom one had DNA that matched Capt. Knapps on one of the shoestrings.

6. A gray sweatshirt collected from the security bathroom contained bloodstains which matched Capt. Knapps.

On cross-examination, Vara noted the lab had no control over what happened prior to their arrival at the scene, and explained that they do not maintain crime logs when the lab is called out to assist. Rather, the duty of keeping a log would belong to the people who called them out. He further explained how they secured the scene and how many people were allowed in and around it. He also denied any knowledge of how the boots got into the classroom or how exactly they were positioned. Furthermore, Vara admitted he was not present for Durham's autopsy; thus, he did not swab his hands, nor did he see a swab done of his hands. Additionally, he took the clippings of the clothing items, noting he would not expect dry blood to transfer from one piece of clothing to another. Vara further acknowledged that several bags of inmate clothing had been mislabeled, but that the mislabeling primarily concerned one of the co-defendants and that the infirmary had collected that evidence (not him).

Carolyn Booker ("Booker"), a DNA analyst at the Acadiana Crime Lab, conducted DNA testing. Her expertise in DNA analysis was stipulated to at trial. She testified that blood from the Q-tip swabs from defendant's fingers matched Capt. Knapps' DNA profile. Additionally, a pair of white pants from among the clothing collected from defendant that night was tested. Booker testified that a cutting taken

from the bottom cuff of the right leg of the pants contained blood that matched Capt. Knapps' DNA profile. A blood stain collected from the outside toe area of the right foot of a pair of black boots also matched Capt. Knapps' DNA profile.[18] Bloodstains that matched Capt. Knapps' DNA were also found on Carley's, Clark's, and Durham's shoes. Additionally, bloodstains that matched Capt. Knapps' DNA were found on the clothing of three inmates who were not defendants in this case. Booker also noted that no DNA evidence was linked to Mathis.

George Schiro ("Schiro"), a DNA technical leader at the Acadiana Crime Lab, was stipulated to as an expert in forensic DNA and bloodstain pattern analysis. He testified the bloodstains on defendant's socks and the right leg of his blue jeans matched Capt. Knapps' DNA profile. The bloodstain on the pants was a heavy stain, indicating that the wearer would likely have been in contact with the blood source for at least several seconds. Schiro added that an active bleeding source might have contributed to the stain.

Alan Keel ("Keel"), employed at Forensic Analytical Specialties in California, was stipulated to be an expert in forensic DNA and bloodstain pattern analysis. He testified that putting all the clothes a particular person was wearing in the same bag does not compromise the evidence, and it is not uncommon to have multiple specimens packaged together. He conducted additional DNA testing on samples from several items of clothing to determine the habitual wearer of the items and additional testing on weapons found at the crime scene.

Keel testified that the size 14D boots, which had Capt. Knapps' blood on them, contained user biology in the areas most often handled repeatedly. As to a portion on

---

[18] The witness noted the bloodstain was not in a position where it would indicate somebody might have walked through the blood.

the inside of the boot, the cellular material contained a mixture from at least four different people. Defendant was unable to be eliminated as a potential contributor to the mix and was among the more prominent alleles in the mix. On the inner back portion, biological samples included a complex mixture of at least five different contributors, including defendant. Keel also found a complex mixture of biology on the insole of the left boot from at least four males, two of which matched Capt. Knapps' and defendant's DNA profiles.

Keel then testified that the sweatshirt found in the security bathroom contained individual transfer wipes and swipes, as well as a few spatter stains of blood, the latter of which indicated close proximity. He found a well-defined deposit of what was likely nasal mucous on the right sleeve, as well as a second small mucous deposit, which matched defendant. The left cuff on the sleeve showed a complex mixture of at least four people, and defendant and Capt. Knapps were potential contributors to that mixture. The right sleeve cuff contained a small, but concentrated wipe transfer from where the sweatshirt contacted wet blood, with dozens of spatter stains from Capt. Knapps' blood around it. Keel attributed these stains to blood moving through the air. He approximated, based on the size of the spatters, that the blood would have traveled no more than two to three feet. The front inside of the shirt had an epithelial cell deposit coming from the mouth or nose that contained a complex mixture of at least three males, and defendant was a potential contributor. After testing for user biology, Keel testified there was no doubt in his mind that this sweatshirt was worn by defendant.[19]

---

[19] Keel testified that the chances of another black male having the same DNA profile as defendant would be 1 in 139 million trillion, while the chance of another white male having the same DNA profile as defendant was 1 in 125 billion trillion.

Keel also tested the homemade knife, which previously had been tested and found to have Capt. Knapps' blood on it. However, he was unable to find non-blood biology on it from anyone who might have handled the knife. Three additional items were submitted to the Louisiana State Police and were tested, including a metal rod and a curved metal object. Keel was not able to match any DNA from any of the known parties in the case, but he did find a result belonging to the same unknown person on the metal rod and the curved metal object. As to the mallet, Capt. Knapps' blood was present on the head of it, but he was not able to recover biology from the handle. Similarly, there was no usable DNA found on the half scissors or the door piece.

Keel also testified that the sweatshirt found in classroom one had impact spatter stains of Capt. Knapps' blood on the central portion of the front outside, and there was a small bloodstain smear located on the inside. The biological samples from areas fertile with the habitual wearer's DNA contained a mixture of DNA profiles, the majority of which were associated with Clark and Capt. Knapps.[20]

Returning to the sweatshirt discovered in the security bathroom with the spatter impact, Keel testified the person wearing it would have been within two feet of Capt. Knapps' blood source. Additionally, defendant was the source of most of the biology he would expect to find from a habitual wearer of that garment. During cross-examination, Keel stated that he could not tell who was wearing the item when the spatter occurred, that they frequently find mixtures of biology on garments from prison, and that blood was not found on the bottom of the boots linked to defendant.

---

[20] On redirect, following questioning from defense counsel concerning testing protocols and techniques and potential contamination, Keel testified a radio was tested, where a complex mixture of DNA from at least four individuals was found and where the majority of the DNA came from one person, and that person belonged to no one he had reference data for. Additionally, as to the control knobs on top, there was a low-level mixture from at least three people, including the witness himself, who was the primary contributor of the biology.

Col. Tim Scanlan qualified as an expert on crime scene reconstruction and bloodstain pattern analysis, despite the defense's objection on the latter. He testified he traveled to Angola twice to reconstruct the scene. He testified that the attack started at or near the restroom, continued inside the restroom inside and outside of the stall, and ended where Capt. Knapps' body was found along the back wall of the restroom. He noted that the predominant bloodstains at the scene occurred at doorknob height or lower, meaning the victim was not standing when he received the blows. While discussing blood flow and spatter patterns, Col. Scanlan noted that blood pooled on the wall, meaning someone bleeding had been pressed against it for an unspecified period of time. Furthermore, there was blood consistent with the victim being struck with an object in the proximity of that wall near the stall, partial spatter pattern and transfer under the sink, blood near the back corner of the wall, and blood consistent with the face and head being pressed against the toilet. The blood was consistent with Capt. Knapps crawling into the stall, and clear marks from fingerprints showed him being yanked away. He also noted that shoe prints from Clark were discovered in the bathroom.

Col. Scanlan also discussed Capt. Knapps' jacket, which was found outside the bathroom. While there was blood on the jacket, it was missing the puncture wounds to the left side. Therefore, he was likely not wearing it during the portion of the attack that occurred in the bathroom. Capt. Knapps' pants were not saturated with blood, meaning he likely did not bleed heavily while in an upright position. Therefore, a majority of the injuries he sustained occurred while he was at or near a prone position on the ground.

Col. Scanlan also testified that the sweatshirt defendant was wearing during processing lacked any traces of the victim's blood, which did not accord with the

statement that he held someone down during a beating. However, this was typical of a person who had control of the scene and was trying to distance themselves from the crime. As to the bloodstains on the shoes, Col. Scanlan testified that the stains indicated proximity to a victim shedding blood. A likely scenario for the blood being on the boots was that the owner was holding the victim down, head right between the legs, while the victim moved his head back and forth. Similarly, defendant's pants had several transfer and saturation stains at the base of each leg with the blood soaking all the way through to the inside of the jeans. There was also a bloodstain pattern going toward the back of the leg on the side, wrapping around as though someone was grabbing the leg. Col. Scanlan also noted that inside defendant's wallet was a statement that read: "Remember you're nobody until you beat the living hell out of somebody."

Col. Scanlan also testified that several items of clothing with Capt. Knapps' blood were found scattered throughout the scene, such as the security restroom and a classroom. The sweatshirt discarded in the security bathroom was a size 2XL and was linked to defendant by wearer biology. The left sleeve had areas of transfer and spatter on the cuffs, meaning it could have occurred while the victim was being held down. It was also consistent with the wearer bending over a profusely bleeding victim, holding him down by both of his shoulders, while the victim grabbed the wearer's hands and tried to push hands off his shoulders. In other words, the stain was consistent with a victim fighting to get free.

There were other areas of bloodshed, but two stains were noticeably diluted, presumably in an effort to cover or clean it up. The sweatshirt also exhibited transfer patterns with a void pattern in the middle on the front left collar consistent with a folding wipe or the garment itself being folded, and there were several bloodstains

on the rear of the shirt consistent with the half scissors. Capt. Knapps' blood was also found on the inside of the sweatshirt, which could have been deposited by someone taking off the sweatshirt. Based on defendant's statement and the evidence, Col. Scanlan concluded defendant was holding the victim down by both shoulders and that defendant, Clark, Carley, and Durham were in the bathroom.

During cross-examination, the defense emphasized that the sweatshirt was found on the floor by the sinks in the security bathroom, and the transfer of blood from the weapon more likely than not would have taken place after the garment was removed. It was also possible, but unlikely, the garment was there before the blood hit it. The defense also highlighted that the perpetrators had control of the scene for an hour and a half and made efforts to cover up the crime scene, which had a deleterious effect on the evidence itself. Col. Scanlan further testified that while there was blood on the top of the boots, there was no blood on the soles, and he did not identify any footprints from those boots in the blood pool in the bathroom. He also noted he could not tell if they had been cleaned. Col. Scanlan did not find any evidence that any type of conflict had taken place in the hallway prior to going in the bathroom, but it was possible EMT efforts and clean up could have covered or masked evidence that was outside the bathroom prior to the photographs being taken. Furthermore, 33 additional bloodstains were collected, but they were sent off for DNA analysis before he was able to examine them. Those bloodstains analyses showed several uninvolved inmates had Capt. Knapps' blood on them, as well.

Following Col. Scanlan's testimony and the presentation of the evidence to the jury for viewing, the state rested its case. The defense then called one witness, Larry Renner ("Renner"). The parties stipulated as to his expertise in crime scene reconstruction and bloodstain pattern analysis. Renner critiqued certain decisions

made in the investigation, namely: (1) he would have requested the building be cleared upon arrival at the crime scene; (2) he would have created a crime scene log and crime scene diagram, as it would aid in getting everything right in terms of the reconstruction effort and would refresh the memories of the people who processed that scene or any witnesses that may have seen it; and, (3) he would have photographed the crime scene differently than Pat Lane. Additionally, he cited to the FBI as the premier forensic authority in the United States, and noted that it recommends that every item be put in its own separate bag.

Renner also testified there were bloodstains occurring outside the bathroom itself and in the general area of the entrance to the bathroom, but he did not have photographs to indicate if there were any medium velocity impact spatters, which could confirm if something occurred at that location. He agreed with Col. Scanlan that the majority of the incident took place in the bathroom, but without additional information, he could not definitively say the attack originated in the bathroom. He also testified he could not disprove defendant's statement based on the physical evidence. On cross-examination, Renner reiterated there were no bloodstains that contradicted defendant's statement, and no bloodstain evidence was identified that would indicate that defendant was directly involved in stabbing or beating Capt. Knapps. The bloodstain on the base of defendant's pant leg could have been from a wound on Capt. Knapps' head, or it could have occurred either while defendant was holding him down by the shoulders or while he was dragging him. Following the conclusion of Renner's testimony, the state did not present rebuttal evidence.

Following closing arguments, the court instructed the jury. The jury commenced guilt phase deliberations at 12:31 p.m. on October 27, 2011. At approximately 1:22 p.m., the jury questioned whether it was possible for them to be

given 12 copies of defendant's statement taken on December 29, 1999. The court answered in the negative, and the jury returned to deliberations at 1:26 p.m. The jury returned at 1:46 p.m. with a unanimous verdict of guilty as charged.

The penalty phase commenced on October 28, 2011. After opening arguments by both the state and defense, the state called Carolyn Whitstine ("Whitstine"), Capt. Knapps' sister, to testify. Whitstine testified her brother was one of 11 children, had two children of his own, and cared for his fiancée's child before he died. Whitstine further testified that Capt. Knapps' mother, his sister Cynthia, and his fiancée passed away before defendant's trial. Growing up, their family lived at Angola, and Capt. Knapps' father died when he was 41. Their mother remarried an alcoholic and an abuser. Whitstine testified they had a rough childhood and that Capt. Knapps was like a father to her. She also explained that family life revolved around Capt. Knapps, that he was the "entertainer" of the family, and that the family would enjoy weekend get-togethers where Capt. Knapps would play guitar and sing.

Shannon Herring ("Herring") testified that he married into the Knapps family 25 years prior, and Capt. Knapps was his wife's uncle. Herring testified Capt. Knapps was one of his best friends, and he and Capt. Knapps would play guitar and write songs together. He reiterated that Capt. Knapps was the focal point of all the family get-togethers and, after his death, the frequency of the get-togethers dramatically decreased. Herring noted Capt. Knapps would sometimes take his guitar to the prison and let the inmates play it, and that Capt Knapps gave a red guitar to the Hard Times band at Camp D. The jury also observed a few minutes of an edited video of Capt. Knapps at a family function.

The parties then stipulated that Vicki Poche, an expert in the field of fingerprint examination with the Louisiana State Police, would have testified that the fingerprints

in defendant's penitentiary pack, which contained records from the DOC concerning defendant's previous crimes, would match defendant.

The state also called Kim McElwee ("McElwee"), an assistant district attorney from St. Charles Parish. She testified that between 1992 and 1997, she worked at the Jefferson Parish District Attorney's Office and was the prosecutor in the case in which defendant pled guilty to the second degree murder of Harvey Reese. McElwee further testified that defendant also had two prior felony theft convictions in Orleans Parish. He had received a diminution of sentence on his theft case and was released early on good time parole on May 15, 1992, and the murder of Reese occurred two days later. Thereafter, the state rested.

Defendant presented voluminous testimony concerning the extreme neglect and abuse he suffered as a child, particularly in the care of his mother, Katie Brown ("Katie"). The defense first called Debra Brown ("Debra"), defendant's aunt. She testified she had known defendant all his life. Debra noted that defendant's grandmother (the mother of Katie), Margaret Williams, was killed by her husband, John Williams, at a baseball game, in front of Katie and defendant. Debra's mother, Margie Brown, subsequently raised defendant's mother. Debra mentioned that defendant was in and out of his mother's custody during a stint in reform school.

Debra testified regarding many instances of abuse and violence perpetrated by Katie towards defendant, but noted defendant always loved his mother in spite of the abuse. She noted she personally witnessed Katie's violence towards defendant. Debra additionally noted Katie had hit defendant when he was about 10 or 11 with a shotgun and broke his shoulder. Katie also put a shotgun to his head and, following phone calls from neighbors, Investigative Services arrived and took defendant from the home. Debra testified her sister had seen Katie put defendant's hand on the

counter and stick a knife in it because she was upset with him. Additionally, Katie had a violent temper with other men; she stabbed each of her partners, and there was violence by them against her as well, including an instance where one of the men cut her ear off. During a different encounter, one of Katie's spouses stabbed defendant, and afterwards, defendant's mother stabbed her husband. Debra believes at one point Katie loved her son; but, when she realized his father was not interested in her anymore, her feelings toward her son started changing.

Debra acknowledged that defendant was in and out of school and their home, other family member's homes, and various foster homes. She also noted there were instances of mental illness in the family: Debra's mother had several nervous breakdowns and went to a mental institution two or three times; defendant's maternal uncle was institutionalized three or four times; and, Debra's sister was in and out of mental institutions.

Joyce Henry Allen ("Allen") testified that defendant is her maternal second cousin. His father is her first cousin, and she has known defendant all his life. Allen noted defendant was well-mannered and respectful to her, but repeated that he was in and out of foster homes, family homes, and group homes, as well as his mother's care.

Linda Woodard ("Woodard") testified that defendant is her cousin. She reiterated that Katie's behavior towards defendant was cruel, and that Katie herself was angry and bitter. Woodard's uncle and aunt, Henry and Margie, who had defendant for the first 3-4 years of his life, further emphasized Katie's abuse and neglect of defendant, as well as his unstable living situation. They noted Katie would put defendant in a closet for days without anything to eat because she did not want to be bothered, but defendant would always cover for his mother. Woodard further

stated that Katie would give each child to their father, but she never wanted to give defendant to anyone who would take care of him. At one point, the father wanted defendant to come live at his home, but she would not let the father take him.

Carlton Stokes ("Stokes") testified he was a teacher for 37 years and defendant's foster parent for a while when defendant was about 14 years old. Stokes had another foster child at the time. Defendant was brought to Stokes by Child Protective Services ("CPS") with his arm in a sling. CPS told Stokes defendant's mother had called the police and told them to come get him or she was going to kill him. Defendant acclimated well to this home, was provided a loving environment, and got along well with the other foster child, despite the typical fussing by teenagers about chores. Defendant was not violent or aggressive towards the other child.

Cairissian Alston ("Alston") testified that he works in marketing at AT&T and was a University of New Orleans student. He stated defendant was his oldest brother and that he was the fourth child. He explained that one sibling was abandoned, two others were in jail, and one had recently been released from foster care. Alston testified he lived with defendant, Katie, and her other children, until he was about five or six years old, in a 250 square foot shack. It had one room with one bed, and no bathroom facilities, and rain would infiltrate the house.

Alston testified defendant did more for them than their mother did because defendant would cook and make sure they all had something to eat, as their mother would leave them alone without food. She also disciplined them with hot water and a bullwhip, and would also lock them outside at night without clothes or underwear. When Katie disciplined them, she wanted to see "results," namely, tears and wounds. Alston testified he saw her cut defendant one time with a knife and also witnessed the shotgun incident involving defendant, wherein Alston's father came and took the gun

while defendant was being taken away by CPS. He discussed other incidents of abuse, and noted that because he had been taken to live with his grandmother, he turned out better than his siblings.

Johnell Armer ("Armer") testified that defendant lived with her for about eight months when he was about 17 or 18 years old. She stated when defendant was living with her, he was a very respectful and loving person. She never had any problem with him, and he would help around the house. Armer testified that defendant attributed his mother's problems to her young age when she had him.

Before Capt. Knapps' murder, Armer had received calls from defendant about who he was running around with at Angola, and he told her about Durham. Armer told defendant that Durham was a bad person and to stay away from him, but "David, unfortunately, is attracted to the wrong people a lot of times." Armer further stated defendant was a very loyal person, sometimes blindly so. She thought defendant was under Durham's spell: "It was like he was a Svengali of some kind. That's the way David talked about him, you know. It was like he was mesmerized by this person."

The defense then called Dr. Sarah Deland, who was qualified as an expert in forensic psychiatry. She testified she was contacted by the defense and asked to perform an evaluation of defendant, specifically with an eye towards the penalty phase. She visited with defendant on three occasions for a total of about 11.5 to 12 hours. She also spoke with family members, as well as reviewed interview notes from the mitigation investigator, records on Katie Brown, and the record from the Louisiana Office of Family Services documenting the chronology and difficulties with Katie. Additionally, Dr. Deland reviewed Angola mental health and disciplinary records, the psychiatric consultations, and Dr. Reinbold's records concerning defendant.

Dr. Deland noted she did not have any concerns with Dr. Reinbold's handling of defendant or the use of medications. Dr. Reinbold had diagnosed defendant with an impulse control disorder, which she noted included people who have some pathological problem where they act first and think later. Dr. Reinbold also diagnosed defendant with depression. Since 1999, Dr. Reinbold had indicated defendant was not a risk to others. More specifically, there were times where defendant harmed or threatened to harm himself and had been placed on suicide watch, but there was never a time that Dr. Reinbold indicated he felt defendant was a risk to others. Additionally, the intake evaluation at Elayn Hunt Correctional Center indicated defendant had been diagnosed with substance abuse and antisocial personality disorder. Dr. Deland indicated she believed defendant had a personality disorder with antisocial[21] and borderline traits.[22]

Dr. Deland indicated there was an incredibly well-documented record from the state about defendant's childhood. Defendant was born to a 13-year-old girl, who learned she was pregnant while she was at Louisiana Training Institute. Katie–defendant's mother–never really took care of him, particularly after she realized she was not going to have a relationship with the father. There was documentation of Katie with defendant at about age two at the welfare office, and she was screaming and slapping him in the lobby area. There were frequent violent incidents between Katie and her husband, Bernie Howard ("Howard"), while

---

[21] During cross-examination, she noted antisocial personality disorder is diagnosed in individuals that have shown a repetitive pattern of disregard for the rules, the norms of society, the rights of others, not taking responsibility for themselves, not meeting their financial responsibilities, and breaking the law, etc.

[22] She described borderline personality disorder as a disorder that mainly involves relationships. These are people that have great trouble forming normal attachments and relationships with people. She indicated that many times they come from homes where they have been abused, have volatile and difficult relationships with people, and can be manipulative.

defendant and his sister, Sacagawea, were present. There was a documented incident of Howard firing a gun through the floor of the house when everyone was present. There was documentation of another incident that occurred when defendant was three years old involving Katie coming in with a gun while Howard, defendant, and Sacagawea were there and threatening to kill them all. Dr. Deland next discussed an incident involving Katie and Warren Scott ("Scott"), indicating ongoing violence when Katie was in that home with defendant. Ultimately, defendant witnessed Katie and Scott stab each other and, thereafter, Scott burned all of Katie's clothes. Dr. Deland indicated there was a notation in the CPS records that defendant may have also been stabbed by Scott "and it just, it continues."

Additional documentation included defendant and others being put outside in the cold in their underwear; Katie slicing defendant with a butcher knife; and, an incident where Katie held defendant at shotgun point on the porch while screaming she was going to kill him if the state did not come and get him.[23] Dr. Deland testified defendant was also left by Katie with her great grandmother, who was already senile at the time. When the social worker went to Katie's home, there was no food in the house. In another visit to Katie's home, defendant was found covered with oozing sores and was not in the care of anyone.

Dr. Deland testified defendant resided in a series of foster homes when he was around five and that, in some of those, he was only there for a matter of days. In the first one, they did not say why he was removed from that foster home, but they simply noted he had a fear of monsters when he left. In the second one, the woman said defendant was not a behavior problem, except that he was so fearful, and he wanted

---

[23] Dr. Deland again noted, "And it's really–all the years I've done this, I've almost never seen this good of documentation."

her to be with him all the time. He followed her everywhere and got upset if she tried to go to the bathroom by herself. The woman had trouble tolerating that, so he was removed from that home after about six days. Defendant was placed in another foster home the next week, and he stayed there a little longer, but those people were concerned because he kept crying and saying he wanted his mother. Additionally, defendant was moved around so often that he was never in school for a significant period of time. When he was staying with Lillie Smith, who was in her 80s and becoming senile, he did not attend school as he should. When he was eventually placed in a group home situation, he did get a regular education. He was placed in special classes for behavior disorder; and, when he was tested, the results indicated he was seriously lacking academically. He eventually dropped out of school.

Dr. Deland diagnosed defendant with post-traumatic stress disorder ("PTSD") based on extreme childhood physical abuse and substance abuse, on the self-reports of defendant and other available reports and police records, as well as personality disorder problems with antisocial and borderline traits. While noting she would not say it occurred on a regular basis, defendant did have write-ups and was disciplined for fighting, including one very serious fight where another inmate's jaw was broken. Based on notes from the incident, she stated it could be described as inmate behavior of coming into a large population of people and trying to establish his manhood or sphere of influence. Dr. Deland further testified there were a couple of other fights and write-ups for defiance relating to not wanting to go to work, which was consistent with borderline and antisocial traits. During the 12 years after Capt. Knapps' death, there was one incident where defendant was accused of throwing a container of deodorant at another inmate, but no other acts of fighting or violence. After the

murder, he was placed in closed-cell restriction for about four to five years, and then returned to Camp D.

Dr. Deland gave a risk assessment which revealed that, compared to the general population, defendant was a very high risk, even relative to the population at Angola. However, at his current level of security, she did not believe he was a significant risk, noting that in the 12 years at that level of security, there really had been no incidents, and personnel at Angola are very well versed in how to deal with it. His risk would significantly go up if he was removed to a less restricted environment.

On cross-examination, Dr. Deland noted that defendant's full scale IQ was 95, and that she has diagnosed PTSD a number of times. She observed that, in defendant's records from around 1986 or 1987, he had been diagnosed with a chronic anxiety disorder, and PTSD is a form of an anxiety disorder. She testified defendant has received a diagnosis of conduct disorder (under-socialized and nonaggressive type) in the past, but the current day assessment of conduct disorder[24] cautions the clinician to take into account the social context of the behavior, for instance running away to escape abuse. She stated that, after his mother's abuse, defendant went to Madonna Manor, Hope Haven, and Harmony Center, which were group homes/residential facilities starting at the age of 13. Dr. Deland did not see indications that defendant was diagnosed with PTSD while there. However, at Madonna Manor, he was described as having no regard for other's feelings, which she noted could be a symptom of either PTSD or conduct disorder. She acknowledged that he failed to take responsibility for his actions, which was not a

[24] She explained that conduct disorder was basically a disorder that one could diagnose children with who demonstrated poor conduct: running away, starting fights, stealing, and disregard for others and rules. They may bully, threaten, or intimidate others, but an individual does not have to meet every single one of those criteria to make a diagnosis.

PTSD symptom. Dr. Deland noted she could not remember if nightmares were documented at those facilities, but no flashbacks were noted, and records did indicate he was detached from other people at times. At Hope Haven, defendant was noted to be a bully, which is not a PTSD symptom. He was also physically violent towards staff and peers, which could be associated with either conduct disorder or PTSD, and he had a tendency to lie, which was not a sign of PTSD, but was a conduct disorder symptom. She also noted defendant was only at Harmony Center for about a week and, by that point, had been introduced to illegal drugs.

Dr. Deland also noted defendant had some close relationships and associates in the prison system. He exchanged letters and tried to order other inmates around, as well as instructed other inmates to watch who defendant perceived to be his significant other. She testified he did seem to have some kind of fixation on Durham, and he did not really talk about anybody else in his life the way he talked about him.

As to his risk factors of future dangerousness, Dr. Deland noted defendant only had a ninth grade education, was first arrested before the age of 16, had four felony convictions, was single, and had not maintained any employment other than a two-week stint before he was incarcerated. Additionally, he had antisocial peers and had gotten into a number of fights in prison. Dr. Deland concluded that defendant probably does have antisocial personality disorder.

During the last portion of its cross-examination, the prosecution asked Dr. Deland if she had ever spoken to the two men from Angola who transported defendant to and from prison. The prosecutor then asked if her opinion as to defendant's future dangerousness would change if she was aware that defendant had lost weight recently and had told the two men transporting him that he was losing weight so he could possibly escape. The prosecutor also noted that defendant then

asked if they had a gun on them because he needed it for a prosecutor and one of the state's witnesses. Dr. Deland answered she had already said defendant was a dangerous person, but did not think he was a big risk in his current security situation.

During re-direct, Dr. Deland noted probably 60-70% of inmates at Angola would carry an antisocial personality disorder diagnosis, and substance abuse would be at least as common. From her review of the records, Katie Brown likely had borderline personality disorder/antisocial personality disorder, and children of borderline mothers typically have attachment disorders. She noted defendant did have some kind of attachment with Durham that he did not have for anyone else, and he would go along with things Durham wanted to do. However, Dr. Deland noted that he was not forced to do things. She did note that, ultimately, he was a follower of other people, and that Durham had a bad influence on him. Following the conclusion of Dr. Deland's testimony, the defense moved for a mistrial pertaining to the prosecution's reference to defendant's purported threats to attempt escape again and kill another inmate and a prosecutor, which the trial court denied.

Dr. Randy K. Otto ("Otto"), an expert in clinical psychology, forensic psychology, and violence risk assessment, testified he reviewed a variety of documents in assessing defendant. These documents included defendant's medical records, the "adjustment" record (which involves where he was placed and problems and trouble he got into), some reports chronicling his and his mother's history of involvement with social services, transcripts from related prior cases, interview summaries from penalty phase witnesses, reports summarizing the investigation into Capt. Knapps' death, defendant's own interviews, presentence investigations and psychological evaluations, and case materials involving the maternal grandfather

(Katie Brown's father). He also met with defense counsel and reviewed relevant professional literature and studies.

Dr. Otto testified that he understood Dr. Deland's assessment and did not dispute it. He stated he was reluctant to offer an opinion as he did not conduct an independent examination or evaluation of defendant, although he agreed with her opinion and with her qualifier that you do have to take it in the context of the secure environment. He did not disagree with the diagnosis of antisocial personality disorder, and that such a condition makes defendant more dangerous than someone without that diagnosis. Additionally, Dr. Otto did not have an opinion on whether defendant had PTSD, as he would want to interview him before he offered a diagnosis. He did note that Dr. Deland did, in fact, interview defendant, and the events defendant experienced would qualify as traumatic enough for a PTSD diagnosis.

On rebuttal, the state called Dr. Michael Welner, who was qualified in the field of forensic psychiatry. Dr. Welner testified that he based his opinions on numerous sources, including evidence and testimony from the Capt. Knapps' murder investigation and proceedings, defendant's prison records (including disciplinary, psychological, medical, and pharmacological), telephone transcripts and letters defendant wrote, prior statements by defendant's friends and family, the case file from earlier criminal convictions, and defendant's OCS and foster care file and record from residential settings. However, he noted he did not interview defendant.

Dr. Welner was provided with letters written by defendant that were generated as part of a corrections investigation, which were communications with another inmate at Angola and other people whom he sought to influence at Angola. According to Dr. Welner, it gave him insights into how defendant connects to others,

how he was able to extend his influence or attempt to extend his influence well beyond his own cell, how he expressed himself, and what his sensitivities and concerns were. He noted that defendant had figured out how to evade detection using mail by sending letters to fictitious addresses so they would be returned to sender, who would be listed as someone he had a close relationship with. In the letters, Dr. Welner noted defendant expressed intense concern about a close acquaintance, George Schaeffer, and that the relationship exhibited some element of control. He found those letters evidence of defendant's ability to manipulate his environment. He also indicated that security staff, social workers, and psychiatrists he spoke to at Angola did not share information with each other. Additionally, Dr. Welner found defendant did not comply with instructions to take certain medications and, on the other hand, possessed medication that was not prescribed to him.

Dr. Welner noted defendant was not diagnosed with PTSD as a teenager in an in-patient setting. However, he noted that there were consistent notes that defendant refused to yield to authority, frequently tested boundaries, behaved manipulatively, instigated fights, bullied others, and behaved in a physically aggressive manner towards staff. Defendant continued to be "unbowed and outspoken to authority" from his teenage years to his prison years. Furthermore, in his opinion, defendant had not experienced or exhibited remorse and had maintained the same personality qualities he exhibited in the escape attempt that killed Capt. Knapps. The depression noted in the chart was short-lived and limited to December 2004.

As to whether defendant presented an increased risk, Dr. Welner noted defendant was not seeking any kind of treatment to change himself. He was uneducated past the ninth grade, had no visits from family, and did not have any support system. Additionally, he committed violence in prison, which involved

multiple victims. Defendant also demonstrated the capacity to act beyond himself and to work with proxies in order to get his desires met, and he had expressed an urge to start a war. On the other hand, Dr. Welner observed that as defendant got older, the likelihood of violence in custody substantially decreased. He further noted that while he professed to be in the gang known as Latin Kings when he came into custody, he was not in an official gang, and it had been many years since he committed a homicide. Dr. Welner also noted defendant was comfortable with the environment and knew how to navigate and negotiate within it.

However, Dr. Welner opined defendant would try to escape again if presented with the opportunity (to which an objection by defense was overruled). Another objection was sustained before Dr. Welner could answer the question of whether defendant would kill again if presented with the opportunity or believed it to be necessary.

On cross-examination, Dr. Welner testified there were quite a number of opportunities for defendant to express remorse. In fact, in defendant's 12 years of interactions with mental health professionals and correctional officers, Dr. Welner had not seen any documented expressions of remorse. He did not believe defendant quoting Capt. Knapps' questions of "why me? What have I ever done to you?" twice in his interview following the hostage situation indicated remorse. Instead, he opined that it demonstrated defendant's ability be cruel to the people who were kind to him, going so far as to murder them.

During re-direct, Dr. Welner opined that defendant did not fit the definition of PTSD. During re-cross, Dr. Welner also noted he had read essays defendant had written in a course on Freedom and Captivity, wherein defendant recounted the first memory of his childhood being his mother leaving him in a store parking lot where

a car almost ran him over, and being unable to cry since that time. While Dr. Welner observed that defendant articulated himself well, he had not had the opportunity to meet with him, and disagreed that the essay was a reliving of trauma.

Following closing arguments and the trial court's charge, the jury deliberated from approximately 8:23 p.m. to 9:21 p.m. and, thereafter, unanimously imposed the death penalty. The defense requested a polling of the jury. Defendant objected to the verdict and reurged his earlier motion for mistrial, which was denied. The trial court imposed the death sentence on November 16, 2011. Defendant also filed and argued a motion for new trial on that same date concerning his purported threats made to transporting officers, which was denied.

On February 10, 2012, the state disclosed the 37-page transcript of a 2011 statement taken from inmate Richard Domingue ("Domingue"). In that statement, Edge was said to have confessed to Domingue that he and Clark were the ones who made the decision to kill Capt. Knapps. As a result, defendant filed a second motion for new trial based on state suppression of favorable evidence and attorney conflict of interest. Following a hearing at which Domingue testified, and further argument following post-hearing briefing, the trial court granted a new trial on the penalty phase. The state then sought review in the first circuit, which reversed the trial court's ruling over a dissent from Judge Theriot. **State v. Brown**, 15-0591 (La.App. 1 Cir. 9/2/15). This court subsequently denied writs. **State v. Brown**, 15-2001 (La. 2/19/16), 184 So.3d 1265 (Johnson, C.J., dissenting and assigning reasons) (Weimer, J., dissenting and would grant and docket) (Hughes, J., would grant and docket).

This direct appeal followed.

LAW AND ANALYSIS

Sufficiency of the evidence

In his first assignment of error, defendant asserts the state failed to present sufficient evidence of his specific intent to kill or inflict great bodily harm as required by La. R.S. 14:30(A)(1) and (2). In reviewing the sufficiency of evidence to support a conviction, "the appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt." **State v. Captville**, 448 So.2d 676, 678 (La. 1984) (citing La. C.Cr.P. art. 821); **Jackson v. Virginia**, 443 U.S. 307, 318-319 (1979).[25] Specific criminal intent is defined as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1); **State v. Broaden**, 99-2124, p. 18 (La. 2/21/01), 780 So.2d 349, 362. It may be formed in an instant. **State v. Wright**, 01-0322, p. 11 (La. 12/4/02), 834 So.2d 974, 984. Specific intent may be inferred from the circumstances surrounding the offense and the conduct of the defendant. La. R.S. 14:10(1); **State v. Butler**, 322 So.2d 189, 192-193 (La. 1975). However, circumstantial evidence must "exclude every reasonable hypothesis of innocence." La. R.S. 15:438.

Before this court, defendant argues the state's case was comprised exclusively of circumstantial evidence. Specifically, defendant avers that the state's case relied

---

[25] Here, to prove defendant was a principal to first degree murder, the state had to show that defendant had the specific intent to kill or inflict great bodily harm while engaged in the perpetration or attempted perpetration of an aggravated kidnapping or aggravated escape or that the victim was a peace officer engaged in the performance of his lawful duties. La. R.S. 14:30(A)(1) and (2). Further, "[a]ll persons concerned in the commission of the crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals." La. R.S. 14:24.

on evidence that defendant was involved in the alleged escape attempt, that he had Capt. Knapps' blood on his pant legs and boots, and that he admitted in his statement that he pulled Capt. Knapps into the officer's restroom where he was later found dead. There was no testimony from anyone who witnessed Capt. Knapps' fatal beating nor any surveillance of what occurred in the restroom. In his own statement, defendant did not implicate himself in the murder, but rather asserted he left the restroom with Capt. Knapps bleeding from a blow that had been inflicted in the hallway, but still alive. Defendant argues that in endeavoring to prove that defendant had the requisite specific intent to kill or inflict great bodily harm as a principal to the first degree murder of Capt. Knapps, the state was required to exclude every reasonable hypothesis of innocence, but failed to make the required showing. Defendant asserts that testimony from the state's witnesses failed to exclude the reasonable hypothesis at the core of the defense; namely, that defendant did not have the specific intent to kill Capt. Knapps or seriously injure him, but instead that Capt. Knapps was killed in a fatal attack by other inmates left behind in the restroom, whose actions were at odds with the escape plan, and that defendant was not "brought into this ... to kill anyone," but rather to help "grab guards for their uniforms so that ... they could put the uniforms on and escape the building itself."

It is well-settled law that appellate courts will not review the credibility determinations of the trier of fact. La. Const. art. V, § 10(B); **State v. Williams**, 448 So.2d 753, 755 (La.App. 2 Cir. 1984). The jury's decision to accept or reject a witness's testimony is given great deference. **State v. Rogers**, 494 So.2d 1251, 1254 (La.App. 2 Cir. 1986), writ denied, 499 So.2d 83 (La. 1987). In this case, the jury determined the testimony of the state's witnesses was more credible than the defendant's statement and the testimony of his single witness. **State v. Musall**, 523

So.2d 1305, 1311 (La. 1988) (the trier of fact makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony of any witness).

In this case, an abundant amount of circumstantial evidence supports the finding that defendant was a principal to the murder of Capt. Knapps, acting with specific intent to inflict great bodily harm upon, if not to kill, the victim. From defendant's own statement and the evidence adduced at trial, it was established that defendant participated in the initial attack on Capt. Knapps as part of a plan to escape from Angola–a plan that involved subduing the guards and the use of weapons. Defendant observed co-defendant Barry Edge use a mallet to strike Capt. Knapps on the head in an effort to gain control of the officer. Defendant then dragged an injured and bleeding Capt. Knapps from the hallway and into the restroom, while Capt. Knapps kept asking "Why me, what have I done to y'all."

While in his statement, defendant maintained that Capt. Knapps was still alive and talking when he left the restroom to assist in capturing Lt. Chaney, leaving Edge and "some white guy" behind with Capt. Knapps, defendant had Capt. Knapps' blood on his pant legs–enough blood to soak through the outside of his jeans and reach the inside of the long underwear he was wearing. Additionally, there was a bloodstain pattern extending toward the back of the pants leg on the side, wrapping around, which Col. Scanlan testified was consistent with Capt. Knapps grabbing defendant's leg. Capt. Knapps' blood was found on defendant's fingernail beds and on the top of his boots, although notably, not on the soles.[26] While defendant was not wearing shoes at the time he was processed, testimony linked an abandoned pair of size 14 boots found in classroom one to defendant. Col. Scanlan testified the blood on the

[26] As noted previously, Col. Scanlan testified he did not identify any footprints from this pair of boots in the blood pool in the restroom. However, co-defendant Jeffrey Clark's footprint was found there.

boots was consistent with defendant holding Capt. Knapps down, his head positioned between defendant's legs.

The sweatshirt defendant was wearing at the time of processing was absent of blood, which is inconsistent with Col. Scanlan's theory that defendant was holding Capt. Knapps down as he was being attacked. However, an abandoned 2XL sweatshirt was found in the security restroom. That sweatshirt was subsequently linked to defendant by user biology. Blood spatter and transfers were found on that sweatshirt, which were consistent with defendant holding Capt. Knapps down, while Capt. Knapps was bleeding profusely and trying to push defendant's hands off his shoulders to free himself. Further, the blood spatter on the cuffs of the sweatshirt indicate that at least one blow was inflicted on an already bloodied Capt. Knapps. There was also blood found on the inside of the sweatshirt, which Col. Scanlan testified could have been deposited by someone taking off the sweatshirt, as well as a transfer patter from a weapon (such as half scissors) on the rear of the shirt, which "probably more likely than not" occurred after the garment was removed. Finally, inmate Lowe testified that defendant came into the band room with Clark, Mathis, and Carley. After telling the inmates they could leave (though none did), defendant said, "Look, man, we might as well tell them. We got Knapps in the bathroom. We knocked his bitch ass out in the bathroom."

Viewing the evidence in the light most favorable to the prosecution pursuant to the **Jackson** standard, it is clear that sufficient evidence links defendant to the first degree murder of Capt. Knapps. This assignment of error is without merit.

Pre-trial

Voluntariness of custodial statement in light of promise of immunity and fear of retaliation by prison guards

In his fifth assignment of error, defendant argues that his custodial statement was rendered involuntary by a promise of immunity from charges and discipline and a promise of protection for his own safety, as well as by fear of retaliation from prison guards. More specifically, defendant asserts that Warden Cain promised him immunity from charges and discipline in exchange for his surrender–a promise on which he relied–in addition to protection from retaliation by prison guards–a protection that he received–and, further, that he was not read his **Miranda**[27] rights prior to his interview. Defendant argues that these circumstances, considered in their totality, rendered his custodial statement involuntary.

For a confession to be admissible, the state must show that it was freely and voluntarily given without influence of fear, duress, intimidation, menace, threats, inducements, or promises. La. R.S. 15:451; La. C.Cr.P. art. 703(D); **State v. Simmons**, 443 So.2d 512, 515 (La. 1983). This "voluntariness" determination is based on the totality of the circumstances under which the statement was given, **State v. Lewis**, 539 So.2d 1199, 1205 (La. 1989), and if the accused gave the statement while in custody, he must have first been advised of his constitutional rights and executed a knowing and intelligent waiver of those rights. **Miranda v. Arizona**, 384 U.S. 436 (1966).

The analytical framework for evaluating the voluntariness of a defendant's confession is well-settled. Voluntariness is determined by the totality of the circumstances, with the ultimate inquiry focused on whether "the statement was 'the

---

[27] **Miranda v. Arizona**, 384 U.S. 436 (1966).

product of an essentially free and unconstrained choice' or the result of an overborne will." **Lewis**, 539 So.2d at 1205 (quoting **United States v. Grant,** 622 F.2d 308, 316-317 (8th Cir. 1980)); see also, **Schneckloth v. Bustamonte**, 412 U.S. 218, 226 (1973) ("In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances–both the characteristics of the accused and the details of the interrogation."). Nevertheless, it remains the rule that a confession of guilt induced by a government promise of immunity is "coerced" and may not be used against the accused. **Shotwell Manufacturing Co. v. United States**, 371 U.S. 341, 347 (1963) ("We have no hesitation in saying that this principle [that the prosecution may not by coercion convict a defendant with words out of his own mouth] also reaches evidence of guilt induced from a person under a governmental promise of immunity, and where that is the case such evidence must be excluded under the Self-Incrimination Clause of the Fifth Amendment.").

As regards discussions of leniency during interrogations, the jurisprudence reflects that "voluntariness" hinges on whether an actual promise of leniency was made. For example, in a recent case, this court found that an interrogating officer's statements holding himself out as a "lifeline" for a defendant were not a promise of immunity from the death penalty. **State v. Turner**, 16-1841, pp. 100-101 (La. 12/5/18), 263 So.3d 337, 401-02. In making this determination, the court examined the totality of the circumstances and concluded that it was not avoidance of the death penalty that ultimately swayed defendant to confess; rather, it was the fact that defendant was presented with increasingly incriminating evidence linking him to two murders that broke down his earlier denials of any involvement therein. ***Id.***

In another recent case, detectives promised defendant he would not be prosecuted for capital murder and sentenced to death if he confessed. **State v. Bartie**, 19-1727, p. 9 (La. 9/9/20), __ So.3d __. This promise was reduced to writing and signed by the prosecutor, despite the fact that defendant was 17 years old at the time he was alleged to have committed the crime, and, thus, ineligible for the death penalty. ***Id.*** The promise was the dominant theme of the police interview, and defendant was threatened repeatedly that he would be sentenced to death if he did not confess. ***Id.*** Based on the totality of the circumstances, the court concluded that (unlike the situation in **Turner**), it was the repeated threat of a death sentence that moved defendant to confess. ***Id.*** at 9-10.

Here, in denying defendant's motion to suppress, the trial court stated:

> The Court finds that the circumstances surrounding the warden's note and conversation including what was actually said, the warden's incomplete picture of what had actually happened, and the circumstances under which the note and conversation played out did not rise to the level of an inducement or promise which would render the written confession inadmissible.

A trial court has considerable discretion in determining the admissibility of a statement, and its ruling should not be disturbed unless it is unsupported by the evidence. **Turner**, 16-1841 at 91; 263 So.3d at 396. In the present case, during the hostage situation on December 28, 1999, and in an attempt to convince the hostage-takers to surrender and release Angola personnel unharmed, Warden Cain wrote a note stating "no harm or charges or a DB report will be written nor any official document of this event be recorded." The note was signed by Warden Cain, Jeffrey Clark, and defendant. Warden Cain testified that at the time he wrote the note and delivered it to the inmates, he was unaware that anyone had been hurt. However, he

acknowledged that the note placed no conditions on the agreement regarding the status of any of the hostages.

Following his surrender, defendant was transported to the Investigations Office and was the first inmate to be interviewed by investigators. Major Melancon, an interviewing officer, noticed that defendant seemed to be trembling, and, in response to his inquiry, defendant told him he was scared and that he was afraid of security personnel. Major Melancon asked defendant whether anyone had harmed him, and defendant responded in the negative. However, defendant also relayed that he was afraid to return to Camp J unless Major Melancon and Major Holden transported him there. Major Melancon testified that his willingness to transport defendant was not conditioned on defendant's giving a statement and, after giving his statement, defendant was transported to Camp J by Majors Melancon and Holden.

Notably, as the state argues, the hostage takers, who all had previous experience in the criminal justice system as a result of prior murder convictions, were likely aware that Warden Cain had no power over either their convictions and/or the terms of their sentences. In fact, during the hostage negotiations, the inmates were skeptical of the offer, although Warden Cain assured them it was legitimate.[28]

Major Holden advised defendant of his **Miranda** rights from a written form in the presence of Major Melancon and Trooper Brad Cook. By all accounts, defendant appeared to understand those warnings and initialed as such in acknowledgment before giving his statement concerning the incident.[29] The **Miranda** form, which defendant both initialed and signed, advised defendant that anything he said could be

---

[28] Warden Cain testified as follows: "And they said, Well, how do we know you're going to do that, and I said, Because I don't ever lie to you. I always keep my word to you, and if I tell you I'm going to do something, I'm going to try to do it the best of my ability. They said, Okay, well, how we going to know, and I said, I'm going to give you a note. I'll write it down for you."

[29] Defendant has a ninth-grade education and could read and write.

used against him in court, and he confirmed therein that no promises or threats, or pressure of any kind, had been utilized.

Given the totality of the circumstances as recounted above, the trial court correctly determined that the "safe surrender" note in this case, under the circumstances it was tendered, does not rise to the level of a promise or inducement rendering defendant's custodial statement involuntary. As the trial court concluded, it was not the note that appears to have prompted defendant to give his statement. The trial court did not abuse its discretion in denying the motion to suppress.

Furthermore, to the extent defendant argues that extreme duress from the use of force or beatings (or fear of retaliation by prison guards) made his statement involuntary, the investigators who interviewed defendant testified they did not observe any indication of injury or physical discomfort on defendant's part. Defendant did not tell the investigators that anyone had threatened or harmed him and specifically denied having been harmed. At the hearing on his motion to suppress, two Angola security officials who transported defendant to the Investigations Office to be interviewed denied beating or abusing defendant. On this point, defendant demonstrates no error.[30]

In any event, the erroneous admission of a confession or inculpatory statement is subject to harmless error analysis, even if the statement is involuntary. An error is harmless beyond a reasonable doubt if it is unimportant in relation to the whole, and

---

[30] Defendant did not raise the issues of his statement being induced by a promise for safe transport to Camp J and from ongoing reprisals, or of a pre-**Miranda** interrogation before subsequently being advised of his rights and then interrogated, in pre-trial proceedings, nor did he object at trial to the admission of his statement on these grounds. The absence of these arguments in his motion to suppress and, concomitantly, the lack of opportunity for the trial court to rule on such a motion precludes this court from considering on appeal whether the defendant's confession was inadmissible on these grounds. **State v. Brown**, 434 So.2d 399, 402 (La. 1983) (a defendant may not raise new grounds for suppressing evidence on appeal that he did not raise at the trial court in a motion to suppress).

the verdict rendered is surely unattributable to the error. **Arizona v. Fulminante**, 499 U.S. 279, 295-296 (1991); **Chapman v. California**, 386 U.S. 18, 24 (1967); **State v. Sanders**, 93-0001, p. 25 (La. 11/30/94), 648 So.2d 1272, 1291.

At trial, the state relied on defendant's statement to establish that defendant was directly involved in Capt. Knapps' murder, as it used the statement to show that defendant helped hold Capt. Knapps down during the attack and to connect defendant to the physical evidence. Defendant's statement was clearly important to the jury in its deliberations: approximately 51 minutes after beginning deliberations, the jury questioned whether it was possible for them to be given 12 copies of defendant's statement taken on December 29, 1999. When the trial court answered in the negative, the jury resumed its deliberations and returned with a unanimous guilty verdict only 20 minutes later. The jurors appeared concerned about the statement at another point in the trial as well, specifically asking, "Since the statement taken of David Brown was allowed to be presented in Court, are we to assume that it is accepted that no deal was made with him since he initialed and admitted that no deal was made?" Notably, during closing statements, the state argued, "if there was something wrong with this statement, you would have never heard it. If this statement would have been given because he was promised something or forced or intimidated or coerced in any way, you would have never heard it."

No one witnessed the murder itself, although inmate Michael Robinson did testify he saw and talked with defendant, along with some of his co-defendants, in the hallway prior to the attack. Neither defendant's fingerprints nor his DNA were found on any of the weapons; instead, the state relied on defendant's statement to show defendant participated in the murder by holding Capt. Knapps down by the shoulders. Furthermore, the state averred that defendant participated in the attack not just in the

hallway, but in the restroom as well. The state used the statement to establish a connection with the physical evidence as well as to show specific intent.

In addition to the statement, the state also presented voluminous evidence that demonstrates defendant's involvement in the crime. As noted in the sufficiency of evidence discussion, defendant had Capt. Knapps' blood on his hands, his nails, and his boots, as well as his jeans, and the blood had saturated through his jeans onto his long underwear. There was an area on the jeans where the bloodstain wrapped around the leg, as if someone had grabbed that leg. Additionally, there is the statement from inmate Lowe that defendant said he and other inmates "knocked [Capt. Knapps] out" in the restroom.

In sum, while defendant's statement was an important piece of evidence utilized by the prosecution in establishing defendant's direct involvement in the attack and the murder, it was far from the only evidence presented. Testimony of other inmate witnesses, as well as ample physical evidence–including extensive blood and DNA evidence–were sufficient to establish defendant's involvement in the crime and, therefore, any potential error in admitting the statement was harmless.

This assignment of error lacks merit.

Promise of immunity from prosecution

In his sixth assignment of error, defendant asserts that Warden Cain's promise of immunity from prosecution, which contained no conditions or limitations, should have been enforced, and that the trial court erred in denying defendant's motion to quash the indictment on this ground. He argues that the prosecution provided no legitimate reason for breaching the agreement made with defendant, as defendant satisfied each request contained in the written agreement.

In opposition, the state asserts that the agreement only addressed the Angola disciplinary process and not any future criminal prosecutions; and, it was executed before Warden Cain learned that Capt. Knapps had been killed or that any of the hostages had been physically harmed. The state also points out that defendant has failed to identify any statute or jurisprudence granting the warden of a correctional institution the power or authority to make an enforceable offer of immunity to anyone.

Louisiana C.Cr.P. art. 61 provides that "[s]ubject to the supervision of the attorney general, as provided in Article 62, the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute." Louisiana C.Cr.P. art. 8 extends this authority to assistant district attorneys.

In lieu of identifying any authority granting Warden Cain the power to make an enforceable offer of immunity, defendant points to contract principles and the right to due process. He argues that he is entitled to specific performance of the agreement he signed, which he asserts is, in effect, an enforceable plea agreement.

As a general rule, the cases analyzing plea bargain agreements under the principles of contract law may be utilized in analyzing cases involving immunity agreements. **State v. Tanner**, 425 So.2d 760 (La. 1983); **State v. Nall**, 379 So.2d 731 (La. 1980). In **Nall**, the court was presented with a question of the right to specific performance of a plea agreement. The prosecuting attorney promised to reduce the charges against the defendant in return for his testimony against his co-defendant. However, the statement given by the defendant in fulfillment of his part of the deal was completely different from the one the prosecutor had been led to expect. As a result, the prosecutor refused to be bound by his promise. The court

analyzed the agreement under civil law obligations principles and found the plea bargain void for lack of cause due to defendant's misrepresentation of his testimony.[31]

Similarly, in **Lewis**, *supra*, the court relied on contract principles in interpreting the scope of a plea agreement. In **Lewis**, the defendant agreed to give information to the Rapides Parish district attorney in exchange for that district attorney's agreement to charge him with only one count and not to use the information he provided against him. Defendant, who substantially complied with the terms of the deal, apparently believed he was being granted immunity from prosecution in other jurisdictions, a belief fostered by the Rapides Parish district attorney's representation that he was signing the plea bargain on behalf of the state of Louisiana and the U.S. Attorney for the Western District of Louisiana. ***Id.*** at 1203. The defendant provided evidence believing he would be immune from prosecution in other jurisdictions, a guarantee the district attorney had no authority to give. The court ruled the agreement could not stand because neither party ended up getting what they had bargained for. ***Id.*** at 1205. Most importantly for the present case, the court ruled that the agreement did not bar the filing of charges in Avoyelles Parish, although defendant's statements could not be used against him there because they were not voluntary in light of the promise of immunity.

In **Nall** and **Lewis**, the court dissolved the agreements between the defendants and the state for failure of cause, since in both the parties signed the agreements in the belief they had bargained for something other than what they actually received. The court did not determine whether the agreements were breached, but only that the

---

[31] Additionally, the court noted that immunity was not bargained for in the plea agreement, and the case did not involve compelled testimony; therefore, the question of immunity was not validly applicable. **Nall**, 379 So.2d at 733-734. However, because Nall gave the statement in the belief he would receive a reduced charge, the court also found that the statement was not voluntary and could not be used by the state. ***Id.***

statements made by the defendants when performing their side of the failed bargain could not be used against the defendants in a subsequent prosecution.

Here, while defendant might have believed he would receive some sort of immunity from prosecution on the basis of the deal with Warden Cain, Warden Cain lacked the authority to enforce the agreement. Furthermore, Warden Cain, in turn, made the agreement under the belief the hostages had not been harmed. There was clearly no meeting of the minds and a failure of cause. Under these circumstances, defendant shows no grounds for quashing the indictment.[32]

This assignment of error has no merit.

Evidence obtained following physical abuse of inmate witnesses

In his seventh assignment of error, defendant argues the trial court erred in denying his motion to quash the indictment or, alternatively, suppress the statements of inmates, including his own, based on allegations of correctional officer brutality against inmates effected during the retaking of the educational building at the close of the hostage crisis.[33] Notably, defendant does not allege that he was treated brutally. Rather, he argues that pursuant to the due process clause, the prohibition against cruel and unusual punishment, and international law, the trial court should have prohibited the prosecution from using either the statements or testimony of the affected inmate witnesses. Defendant argues that the trial court erroneously accorded undue weight to the purported "truth" of the statements the inmates ultimately gave to prison and law enforcement authorities the night of the attempted escape and

---

[32] As to the voluntariness of defendant's statement in the face of the promise of immunity, see discussion in connection with defendant's assignment of error number five, *supra*.

[33] Defendant adopted co-defendant Mathis' Motion # 36, entitled "Motion to Quash Indictment Due to Outrageous Misconduct by State Agents Including a Vicious Pattern of Violence and Maltreatment Aimed at the Defendants and Other Inmates and for an Evidentiary Hearing; Alternatively, Motion to Suppress as Involuntary Any Evidence From Inmate Witnesses and for Evidentiary Hearing." He also filed his own motion to suppress.

thereafter, and improperly discounted the suppression hearing testimony of the inmates. He asserts that neither the statements taken from inmate witnesses in the immediate aftermath of the event nor those taken in 2003 were sufficiently attenuated from the abuse to be admissible, and that the trial court erroneously prevented the defense from presenting expert testimony on the issue of torture in a custodial setting.[34]

We note that defendant presented no argument regarding the basis on which the indictment should have been quashed in the trial court, and he presents no argument on that issue before this court. As a result, we do not address that aspect of defendant's assignment of error herein.

With respect to suppression of the statements of uninvolved witnesses, a person adversely affected by an incriminating statement of another unlawfully obtained under the United States Fifth or Sixth Amendments or La. Const. art. I, § 16 has no standing to assert its invalidity. **State v. Burdgess**, 434 So.2d 1062 (La. 1983). As the court explained in **Burdgess**:

> A person adversely affected by a confession unlawfully obtained from another has no standing to raise its illegality in court. This principle has been applied where ... [the statement was obtained] ... without proper compliance with the procedural requirements of **Miranda** or otherwise in violation of that party's Fifth or Sixth Amendments rights. ... The failure of the 1974 Louisiana constitution to provide for such standing, while explicitly granting any person adversely affected by a search or seizure conducted in violation of the constitution standing to raise its illegality in the appropriate court, indicates that the framers did not

---

[34] The defense sought to present the testimony of David Debatto, a retired U.S. Army Counterintelligence special agent, as an expert in conducting interrogations in a custodial setting, in the consequences of the use of abuse in interrogations in a custodial setting, and the reliability of statements obtained through interrogations in a custodial setting. After extensive questioning as to his background, and after noting he "may very well be an expert in some areas, but from the standpoint of offering opinions to the court about the reliability of whether someone was telling the truth or not," the trial court declined to recognize Debatto as an expert. Defendant has not shown the trial court abused its discretion in refusing to accept this witness as an expert. **Kumho Tire Co. v. Carmichael**, 526 U.S. 137, 152 (1999) (admission of expert testimony reviewed for abuse of discretion).

> consider that the additional benefit of extending the exclusionary rule to persons adversely affected by others' involuntary confessions would justify further encroachment upon the public interest in having criminal cases decided on the basis of relevant evidence. Compare La. Const. art. I § 5 with art. I § 16.

Burdgess, 434 So.2d at 1064-65. However, the court expressly "reserve[d] judgment on the question of whether gross police misconduct against third parties in the overly zealous pursuit of criminal convictions might lead to limited standing." ***Id.***, at 1065 (citing **United States v. Fredericks**, 586 F.2d 470, 481 (5th Cir. 1978)). Rather, the court concluded that in the case before it there was no justification for suppressing defendant's statement allegedly prompted by his co-defendant's illegally obtained confession where "the conduct of the police in the taking [of co-defendant's statement] was far from the sort of third-degree physical or psychological coercion that might prompt [this court] to exclude the defendant's confession." ***Id.***

In the present case, the trial court held a lengthy evidentiary hearing involving over 40 witnesses. Thereafter, the court provided reasons for judgment denying the motion in open court. In those reasons, the trial court first pointed out that the reservations expressed by this court in **Burdgess** were what prompted the hearing, and then noted the following:

> [T]he Court still must examine the first principle–first and long standing principle of law relating to whether or not the authorities did something which would call into question the truthfulness of the statements which the defendants seek to suppress. In deciding this question, the Court has to take into account the credibility of the witnesses and the circumstances surrounding the statements. From the outset the defendants urge the Court to accept a pattern of misconduct by prison authorities which would, in this Court's view, amount to a vast institutional conspiracy to abuse inmates and then maintain an institutional wide cover-up of such abuse.

In refusing to accept the defendant's view of what occurred, the trial court found the following facts undermined defendants' claims: the fact that Warden Cain

ordered, and Mathis received, immediate medical care after he was wounded during the rescue of Sgt. Walker; the lack of medical evidence to support the many claims of abuse and torture; the ability to defendants to have differing recall of certain events in a civil lawsuit as compared to the criminal trial; and the relative strength of evidence that was offered with respect to three inmates who actually were injured. Ultimately, the trial court reasoned:

> Almost without exception the inmates testified that even if they were beaten, *it had no bearing on their statements which were true and were not related to state misconduct. There was no testimony that the beatings and abuse, even if true, were designed to extract a statement or information from the potential witness*, and if any conclusion can be drawn from that, it would have to be that, if true, that some officers were emotional and anything that they may have done were gratuitous responses to the death of one of their own. But, again, I have to go back and state that the inmates universally testified that whatever they said, whatever the guards might have done, didn't have any bearing on what they had to say. [Emphasis added]

Here, while defendant asserts that the tactical team's entry into the building preceded "a series of acts of brutality against the inmates that lasted unabated for more than 9 hours and had lasting effects far beyond the long night of brutality," amounting to torture, the hearing and the trial court's conclusions do not bear out these allegations.[35] A review of the record reveals that the circumstances herein do not provide justification for this court to address the issue left open in **Burdgess** as to whether defendant even has standing to seek suppression of uninvolved witness statements based on allegations of gross governmental misconduct in obtaining those statements, nor does it disclose any error in the trial court's ruling. In sum, defendant

---

[35] In a substantially similar issue raised in **State v. Clark**, 12-0508, p. 74 (La. 12/19/16), 220 So.3d 583, 647, cert. granted, judgment vacated on other grounds sub nom. **Clark v. La.**, 138 S.Ct. 2671, 201 L.Ed.2d 1066 (2018), this court found "no error in the trial court's conclusion that, although members of the tactical team used force against uncooperative inmates in regaining control of the education building, that force was not used for the purpose of obtaining, or resulted in, coerced statements by inmates."

fails to present any reason to justify overturning the trial court's denial of his motion, especially given the fact that the uninvolved inmates testified consistently that their statements were in no way influenced by the alleged abuse.

This assignment of error lacks merit.

Failure to indict defendant for more than four years

In his thirteenth assignment of error, defendant argues the delay of over four years in bringing the indictment (from the December 28, 1999 murder until March 15, 2004) violated his right to due process and, as a result, the trial court erred in denying the motion to quash the indictment filed by defendant and his co-defendants.[36] He claims the defendants were prejudiced by the delay because the state conducted extensive ex parte "depositions" of the inmate witnesses during the delay in order to produce recorded statements it could subsequently assert were untainted by prior abuse (namely, the allegations surrounding the takeover of the Camp D education building the night of December 28, 1999). He also asserts that the delay hampered the defense's ability to conduct any meaningful investigation or litigation and led to the degradation of forensic evidence. Defendant also argues that the delay caused certain witnesses to become permanently unavailable to the defense. Additionally, defendant avers the personnel files of Capt. Knapps and Sgt. Walker were lost, and Camp D witnesses Henry Hadwin and Norman Brown died.

Louisiana C.Cr.P. art. 571 does not place any time limitations on the prosecution for a crime punishable by death or life imprisonment. Nonetheless, this court has held that pre-indictment delays may violate due process, and that "'[t]he proper approach in determining whether an accused has been denied due process of

---

[36] Defendant adopted co-defendant Mathis' Motion # 45, entitled "Motion to Quash Indictment Due to Inexcusable and Prejudicial Delay."

law through a preindictment or pre-arrest delay is to measure the government's justifications for the delay against the degree of prejudice suffered by the accused.'" **State v. Schrader**, 518 So.2d 1024, 1028 (La. 1988) (quoting **State v. Malvo**, 357 So.2d 1084, 1087 (La. 1978)).

At the close of the evidentiary hearing on the co-defendants' motion to quash, the trial court noted that no evidence regarding the deaths of any inmate witnesses had been introduced. The court also found the state's reasons for delay legitimate in light of testimony from several former prosecutors describing the circumstances causing the delay (such as the complex, sprawling nature of the case involving voluminous DNA evidence and the fact that all defendants were serving life sentences).

Before this court, defendant argues that the timing appears carefully orchestrated to give the prosecution a tactical advantage over the defense in that the state was able to conduct multiple rounds of DNA testing and conduct further interviews prior to the indictment. Defendant claims these interviews would be used later to rebut the defense's allegations that the custodial statements given by the inmates were the product of abuse by corrections officers, while the defendants were unable to conduct their own meaningful investigation or litigation regarding this issue.

It appears that this argument was not made before the trial court and, in any event, defendant fails to show any specific prejudice. Additionally, he has not cited to any portion of the record that indicates any attempt was made to present any evidence to the trial court related to the deaths of inmates Hadwin and Brown, or to demonstrate any prejudice suffered as a result. Further, defendant has not cited to any portion of the record related to the missing personnel files of Capt. Knapps and/or

Sgt. Walker that establishes any prejudice suffered therefrom. Finally, whatever prejudice may have been suffered appears to be outweighed by the state's justifications. The trial court did not err in denying the motion to quash the indictment.

This assignment of error is without merit.

Jury Composition

Change of venue

In his sixteenth assignment of error, defendant complains of the trial court ruling denying his motion for change of venue.

Prior to trial in this case, the trial court granted a change of venue for all of the co-defendants' prosecutions from West Feliciana Parish to St. Tammany Parish. However, defendant was the only African American of the five co-defendants accused of killing Capt. Knapps, a white corrections officer, and defendant subsequently moved to change the venue once more prior to trial. Defendant asserted that, in light of St. Tammany Parish's racially divided history, venue should be changed to a parish where African Americans had not been intentionally excluded over generations and, thus, were more fairly represented in the jury pool. Defendant also sought discovery regarding the composition of jury rolls in St. Tammany Parish. Both motions were denied. As to the selection of the jury itself, defendant notes that one prospective juror commented on the lack "of representation of the races here" and expressed a concern about potential bias.[37] Following jury selection, an all-white jury was seated to hear the case against defendant, who is African American, and defendant's motion for mistrial based on the exclusion of all black venire members for cause was denied.

[37] Prospective juror Donate Henry stated that she was "a little bit uncomfortable that there is not a better representation of races here," after also noting that if she was being tried in an entire courtroom full of men, and the lawyers and jury were all men, she would be uncomfortable with that.

This court has long recognized the procedural device for alleging that "the petite jury venire was improperly drawn, selected or constituted" is a motion to quash. La. C.Cr.P. art. 532(9); **State v. Edwards**, 406 So.2d 1331, 1347 (La. 1981); **State v. Collins**, 359 So.2d 174, 177 (La. 1978). Defendant did not file a motion to quash on this basis in accordance with the form or timeliness requirements set forth in La.C.Cr. P. arts. 521, 535(C), and 536, and, therefore, waived his objection. La. C.Cr.P. art. 535(D); **Edwards**, 406 So.2d at 1347; **Collins**, 359 So.2d at 177.

Moreover, La. C.Cr.P. art. 419(A) provides, "[a] petit jury venire shall not be set aside for any reason unless fraud has been practiced, some great wrong committed that would work irreparable injury to the defendant, or unless persons were systematically excluded from the venires solely upon the basis of race." The burden of proving purposeful discrimination in the selection of grand and petit jury venires rests on the defendant. **State v. Sheppard**, 350 So.2d 615, 651 (La. 1977); see also **State v. Lee**, 559 So.2d 1310, 1313 (La. 1990); **State v. Loyd**, 489 So.2d 898, 903 (La. 1986); **State v. Liner**, 397 So.2d 506, 516 (La. 1981); **State v. Manning**, 380 So.2d 54, 57 (La. 1980). Furthermore,

> [T]he defendant [must] show more than the underrepresentation of blacks on the petit jury venire in order to prove a systematic exclusion of blacks. The law requires that there must not be a systematic exclusion of blacks in the source or sources from which jury venires are chosen. However, that does not mean that a defendant is entitled to a petit jury which reflects the population of the community in every respect.

Lee, 559 So.2d at 1313-14 (citations omitted).

Defendant argues that the venue of this offense, West Feliciana Parish, had an African American adult population of 46.5%, with 32.4% of that population eligible to serve. The racial composition of the entire state was 32.6% African American. By contrast, St. Tammany Parish had an African American adult population of 10.4%,

even before considering eligibility. However, defendant also noted that jurors are selected from voter registration and argued the reason for the disparate representation of African Americans in the venire was directly related to the historic use of housing laws in St. Tammany Parish to discriminate. The combination of "white flight" and UNO studies conducted in 2008 reflecting racial attitudes both in Jefferson Parish and St. Tammany Parish, as well as the parish having been David Duke's base in the years prior when he ran for governor in 1991, led the defendant to argue the only African American defendant charged with this crime could not get a fair cross-section for purposes of his trial.

Previously, the five co-defendants moved to have the highly publicized trials changed to another venue. The presiding trial judge, Judge Ware, granted the motion insofar as venue was changed to St. Tammany Parish solely for purposes of jury selection.[38] He ruled the selected jurors would be transported back to West Feliciana Parish on the days of trial. At the time of his ruling, Judge Ware stated:

> Therefore, venue is transferred to St. Tammany Parish for jury selection only. Thereafter, if necessary, an additional Motion for Change of Venue can be filed with the trial judge if it turns out, after one or two or three or four trials, the jury pool is just not going to promote elemental fairness, and it just proves impossible to get a fair and unbiased jury tainted [sic] by publicity or what's taken place before that. I have spoken about this with the chief judge in St. Tammany Parish, and the chief judge basically supplied me with some of the base information concerning lack of corrections facilities, the population base in the parish, the courthouse facilities which are available[,] and so on and so forth. So[,] for that reason, that's the parish of transfer.

---

[38] Judge Ware articulated the following factors he considered when selecting a parish: (1) try to minimize travel for the lawyers; (2) try to minimize transport for the defendants; (3) try to minimize travel for the victim's family; (4) find a parish without a state corrections facility; (5) find a parish with a minimal number of corrections employees; (6) find a parish with a population base large enough to absorb five consecutive death penalty cases; (7) find a parish not part of the East Baton Rouge Parish media market which had and would continue to cover the case; and (8) find a parish which was in the First Circuit Court of Appeal because of pretrial issues that had been routed through that court.

In ruling on the defendant's change of venue request from St. Tammany Parish to elsewhere, the trial court did not find the defendant's reasons persuasive, but noted the change of venue could be reurged if there were problems in the voir dire process. Furthermore, as the state argued in opposition, defendant's historical argument was not compelling in the face of the prevalent use of restrictive covenants and school segregation elsewhere, and not just in St. Tammany Parish. Additionally, the trial court noted that only a small number of people were measured from St. Tammany Parish for the UNO study on racial attitudes (approx. 74 people), and a mere statistical measure of a venue's demographics cannot by itself lead to the presumption that a person of a given race would be unable to receive a fair trial in that venue. Furthermore, during voir dire, the jury pool was questioned concerning racial attitudes. While one juror noticed the lack of African American representation on the pool, the prospective jurors' voir dire responses fail to show any indication that race was an issue the prospective jurors considered in the matter.

Similarly, defendant shows no error in the denial of his motion seeking to access the state DMV/jury management database. While he cited to federal cases in support of his motion, those cases pertain to the Jury Selection and Service Act of 1968, which grants defendants an unqualified right to inspection pursuant to 28 U.S.C. § 1867(f). See **Test v. United States**, 420 U.S. 28 (1975). Defendant has not shown that he could not get a fair and impartial trial by a jury selected in St. Tammany Parish.

This assignment of error lacks merit.

Curtailment of voir dire.

In his nineteenth assignment of error, defendant asserts the trial court repeatedly limited his questioning of prospective jurors, violating his right to a fair

jury and his ability to challenge jurors for cause, or to rehabilitate jurors challenged for cause by the state, as well as undermining his right to intelligently exercise peremptory challenges. Specifically, he argues the trial court improperly prohibited him from asking jurors: (1) whether bloody crime scene photographs and victim impact testimony would prevent them from considering a life sentence; (2) whether they could consider evidence concerning defendant's difficult childhood as mitigating evidence in the penalty phase; (3) whether they would be able to consider a life sentence for a defendant already sentenced to life; and, (4) about the verdicts in his co-defendants' cases.

At the outset, we note that defendant failed to lodge an objection to the first, second, and fourth issues, and therefore, has not preserved those issues for appeal. La. C.Cr.P. art. 841.

Regardless, this claim fails. Although the accused is entitled to full and complete voir dire, La. Const. art. I, § 17, the scope of counsel's examination rests within the sound discretion of the trial judge, and voir dire rulings will not be disturbed on appeal absent a clear abuse of that discretion. La.C.Cr.P. art. 786; **State v. Cross**, 93-1189, pp. 6-7 (La. 6/30/95), 658 So.2d 683, 686. The right to a full voir dire does not afford the defendant unlimited inquiry into possible prejudices of prospective jurors, *i.e.*, their opinions on evidence or its weight, hypothetical questions, or questions of law that call for prejudgment of facts in the case. **State v. Ball**, 00-2277, p. 23 (La. 1/25/02), 824 So.2d 1089, 1110. Rather, Louisiana law provides that a party interviewing a prospective juror may not ask a question or pose a hypothetical which would demand the juror's pre-commitment or pre-judgment as to issues in the case. ***Id.***; see, e.g., **State v. Williams**, 230 La. 1059, 1078, 89 So.2d 898, 905 (1956) (McCaleb., J., dissenting) ("It is not proper for counsel to interrogate

prospective jurors concerning their reaction to evidence which might be received at trial."); **State v. Smith**, 216 La. 1041, 1047, 45 So.2d 617, 618-619 (1950) ("Hypothetical questions and questions of law are not permitted in the examination of jurors which call for a prejudgment of any supposed case on the facts.").

In the first claim, defense counsel questioned a juror who was in favor of the death penalty and did not believe it was used enough. Defense counsel described the circumstances of this case (first degree murder involving inmates killing a guard), and the juror noted she would be open to hearing everything first and was still in favor of the death penalty, but would be open to life. Then, defense counsel pushed further, asking, "[w]ell, in this case, let's assume that you saw gruesome photographs of a terrible murder scene of where a man was beaten to death. You heard his family —." The court sustained the state's objection on the basis that the defense was asking for commitment, and the defense noted it would move on. The questioning ultimately culminated in the juror answering in the affirmative that it would depend on what she would hear, the facts, and the nature of the murder itself. Ultimately, defendant shows no abuse of discretion on the part of the trial court where counsel was seeking to elicit a pre-commitment from the juror and the juror's reaction as to specific evidence.

As to his second claim, defendant argues the trial court improperly prohibited him from asking jurors whether they would consider mitigating evidence concerning defendant's difficult childhood. Prior to trial, defendant had asked the trial court to include a question in the juror questionnaire about childhood abuse, which the state opposed. The trial court refused to include the question on the questionnaire itself and noted, after discussion, that he would permit it on voir dire after there had been some type of explanation as to what was involved with aggravating and mitigating

circumstances. Defendant now argues he attempted (but was not permitted) to ask a prospective juror whether she would consider evidence concerning defendant's difficult childhood as mitigating evidence in the penalty phase. In asking the prospective juror at issue what mitigating evidence would sway her one way or the other, or what would affect her regarding someone's upbringing, defendant was seeking an opinion on certain evidence and its weight, particularly in light of the fact that the juror had already answered that she thought a person's poor childhood would be a factor to consider. Defendant failed to prove an abuse of discretion by the trial court in its ruling.

Next, defendant argues the trial court improperly prohibited him from asking jurors whether they would be able to consider a life sentence for a defendant already sentenced to life. Defendant had filed a motion for case specific and case categorization voir dire. A hearing was held on the motion on October 17, 2011, after which the trial court denied the motion.[39]

Even assuming that defendant was precluded from asking about the effect of a life sentence or a "relatively long sentence," the jury questionnaire included a description of the nature of the case and crime charged:

> This case involves the killing of Captain David Knapps, who was a prison guard working at the Louisiana State Penitentiary at Angola. Five Angola inmates have been charged by the State of Louisiana with first-degree murder for the stabbing and beating death of Captain Knapps during an alleged escape attempt [….] This trial concerns one of these five inmates, David Brown.

The jurors were all questioned extensively as to their views on the death penalty and mitigating factors and were already aware that defendant was an inmate

---

[39] There are 14 pages missing from the record at this juncture; however it appears both parties were working from this portion of the transcript, as both quote from it. In his reply, defendant does not contest the accuracy of the state's transcription.

housed at Angola. Defendant admits that during voir dire, the prospective jurors were aware that the inmates were likely serving long sentences at the time of the escape attempt. Defendant points to no instances where he was hampered in voir dire. In **Ball**, this court drew a distinction between counsel presenting jurors with a permissible "one or two circumstances which might play a critical role in the trial" on the one hand, and, on the other, presenting a detailed "narrative summary of what the undisputed evidence would show at trial," noting that the more descriptive and detailed the narrative summary, the more likely counsel will run afoul of this court's general rule barring pre-commitment of jurors to a particular result. **Ball**, 00-2277 at 24, 824 So.2d at 1110. Even without the full transcript, and assuming defendant was precluded from asking questions concerning a defendant who was serving a life sentence as opposed to a relatively long sentence, defendant fails to show any abuse of discretion on the part of the trial court.

In the fourth claim, defendant argues the trial court improperly prohibited him from questioning jurors about the verdicts in his co-defendants' cases. The state had filed a motion in limine to exclude evidence concerning the convictions and sentences of the co-defendants from the guilt and penalty phases of defendant's trial, the grant of which defense counsel had acquiesced in. Following defense counsel's explanation of the consequences of a non-unanimous penalty phase that mentioned two of the co-defendants briefly, and the trial court's interruption and admonition, defense counsel acknowledged he had misspoken and stated: "I will refrain from any reference to the two prior trials and jury conduct in these cases;" and, thus, he fails to show any abuse of discretion in the trial court's curtailment of his questioning.

This assignment of error is without merit.

Request for individual, sequestered voir dire

In his twenty-first assignment of error, defendant complains of the trial court's failure to grant his motion for individual, sequestered voir dire.

Defendant adopted co-defendant Mathis' "Motion for Individual, Sequestered Voir Dire in this High Profile Capital Case," in which he requested individual, sequestered voir dire relating to publicity and capital punishment. Defendant also made a further request that he be permitted to conduct individual, sequestered voir dire concerning the issue of race, based on concerns about the possibility of racial animus against defendant in St. Tammany Parish. The trial court denied the motion and the additional request for individual voir dire.

The manner in which jury selection is conducted is left to the trial court's discretion. La. C.Cr.P. art. 784. Likewise, the court has held that "[t]here is no provision in our law which prohibits or requires the sequestration of prospective jurors for individual voir dire." **State v. Bourque**, 622 So.2d 198, 224 (La. 1993). The burden is on defendant to show that there will be a significant possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material. ***Id.*** The fact that a case is a capital case does not alone establish the existence of special circumstances. ***Id.*** (citing **State v. Copeland**, 530 So.2d 526, 535 (La. 1988).

In this case, defendant requested individualized, sequestered voir dire for the following reasons: this was a rare prison guard murder case; the jury would know defendant was already serving a sentence for another serious offense; it was a death penalty prosecution; there was significant pretrial publicity; the offense was cross-racial in nature; and, the trial was to occur in a parish with a history of racial tensions.

The voir dire on death qualification was conducted in panels of approximately 20 people, with the next panel seated in the audience of the courtroom. In addition to being asked about their feelings on the death penalty, prospective jurors were also asked whether they had heard any media coverage of the case, and whether race would affect how they would consider the case.

The court noted the extensive pretrial publicity in this case was a key factor in the jury selection being held in, and jurors being selected from, St. Tammany Parish. Defendant avers that the absence of individual voir dire led to trial counsel alienating various jurors during the death qualification phase–such as juror Thieler who stated that he was "insulted" by defense counsel's questions and juror Onstad who explained that defense counsel's questions made him "mad"–forcing counsel to apologize to jurors "for anything that I said that might have offended you or put you on the offensive." Notably, however, those comments by the jurors followed defense counsel's use of the phrase "not going to follow the law" to describe the jurors' views on capital punishment. At that point, the trial court stepped in to explain what the law requires of jurors in a capital case and to clarify that the phrase had been used in that context. Prospective juror Thieler responded, "It's not just you. It's been said from the outset."

Ultimately, defendant fails to show that he suffered any prejudice from being denied individualized, sequestered voir dire, as a complete review of the transcript indicates that few jurors had heard much, if any, information about the case outside the courtroom, and the jurors selected indicated that they could be fair and base their decision on the evidence heard at trial rather than on the race of the parties or anything they may have heard due to pretrial publicity. Under the circumstances,

there was no abuse of the trial court's discretion in denying the defense motion for individual, sequestered voir dire.

This assignment of error lacks merit.

Constitutionality of Louisiana's death qualification procedure

In his twentieth assignment of error, defendant asserts the death qualification procedure is unconstitutional, arguing that it undermined his right to the presumption of innocence and a jury drawn from a fair cross-section of the community.[40] He argues the death qualification process reflected in La. C.Cr.P. art. 798, and in **Witherspoon v. Illinois**, 391 U.S. 510 (1968), is inconsistent with the historical understanding of the Sixth Amendment and, therefore, unconstitutional. Defendant also raised objections to Article 798 and **Witherspoon** during voir dire, after the trial court granted cause challenges of several jurors who expressed religious and moral scruples against the death penalty,[41] and argues the defense was subject to a more onerous standard than was required of the state when it came to challenges under La.C.Cr.P. arts. 797 and 798.

The basis of exclusion under La. C.Cr.P. art. 798(2), which incorporates the standard of **Witherspoon**, as clarified by **Wainwright v. Witt**, 469 U.S. 412 (1985), is that the juror's views "would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath." **Witt**, 469 U.S. at 424.[42] **Witherspoon** further dictates that a capital defendant's rights

---

[40] Defendant adopted co-defendant Mathis' "Motion to Bar Death Qualification of Jurors and to Hold Article 798 of the Louisiana Code of Criminal Procedure Unconstitutional," which sought to bar the death qualification of prospective jurors and asserted that La. C.Cr.P. art. 798 is unconstitutional.

[41] These jurors were prospective jurors Baker, Anderson, Simmons, Rinaudo and Warden.

[42] The "substantial impairment" standard applies to reverse-**Witherspoon** challenges. In **Morgan v. Illinois**, 504 U.S. 719, 738-739 (1992), the Supreme Court held that venire members who would automatically vote for the death penalty must be excluded for cause, reasoning that any prospective

under the Sixth and Fourteenth Amendments to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." **Witherspoon**, 391 U.S. at 522.

A prospective juror whose views would either lead him to vote automatically against the death penalty or would substantially impair his or her ability to follow the instructions of the trial court and consider a sentence of death is not qualified to sit on the jury panel in a capital case. **Witt**, 469 U.S. at 424; La. C.Cr.P. art. 798(2). Exclusion of such jurors when their views stem from religious beliefs does not constitute discrimination in violation of La. Const. art. I, § 3. **Sanders**, 93-0001 at 20, 648 So.2d at 1288 ("the 'single attitude' of opposition to the death penalty 'does not represent the kind of ... religious ... characteristic that underlies those groups that have been recognized as being distinctive") (quoting **State v. Lowenfield**, 495 So.2d 1245, 1254 (La. 1985)); see also, **State v. Robertson**, 97-0177, pp. 19-21 (La. 3/4/98), 712 So.2d 8, 25-26.

In viewing the entirety of the prospective jurors' voir dire responses, it is clear that the state challenged these particular jurors solely based on their aversion to capital punishment and that religious discrimination played no part in jury selection here. See, **Sanders**, 93-0001 at 20, 648 So.2d at 1288; **Turner**, 16-1841 at 90, 263 So.3d at 396 (stating, "article 798 does not run afoul of prohibitions against religious discrimination").

---

juror who would automatically vote for death would fail to consider the aggravating and mitigating circumstances and, thus, violate the impartiality requirement of the Due Process Clause. The **Morgan** court adopted the **Witt** standard for determining if a pro-death juror should be excused for cause.

In **State v. Odenbaugh**, 10-0268 (La. 12/6/11), 82 So.3d 215, this court rejected the defendant's argument that Louisiana's death qualification process is unconstitutional because it violates the right to an impartial jury, unfairly leads to a death-prone jury, and denies a fair cross-section of the venire available to non-capital defendants. The court explained:

> [T]here should be no question of the constitutional validity of LSA-C.Cr.P. art. 798 since it was drafted to conform to the constitutional requirements set forth in [**Witherspoon**]; *see also*, [**Witt**]. In **Lockhart v. McCree**, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), the Supreme Court held that the Constitution does not prohibit excluding potential jurors under **Witherspoon** or that "death qualification" resulted in a more conviction-prone jury. Likewise, this Court has repeatedly rejected the claim that the **Witherspoon** qualification process results in a death-prone jury. **State v. Robertson**, 97-0177, pp. 19-20 (La. 3/4/98), 712 So.2d 8, 25-26; **State v. Sullivan**, 596 So.2d 177, 186-87 (La. 1992); **State v. Lindsey**, 543 So.2d 886, 896 (La. 1989); **State v. Brown**, 514 So.2d 99, 103-04 (La. 1987); **State v. Bates**, 495 So.2d 1262, 1272 (La. 1986); **State v. Ford**, 489 So.2d 1250, 1259 (La. 1986); **State v. Ward**, 483 So.2d 578, 583-83 (La. 1986); **State v. Jones**, 474 So.2d 919, 927 (La. 1985); **State v. James**, 431 So.2d 399, 402 (La. 1983). This Court finds no need to revisit this longstanding principle of law.

Odenbaugh, 10-0268 at 48-49, 82 So.3d at 248-49.

Before this court, defendant presents no valid argument as to why the reasoning in **Odenbaugh** does not apply to his case, or why this court's longstanding jurisprudence should be disturbed.

This assignment of error is without merit.

Guilt Phase

Inconsistent crime scene testimony from the same expert witness at different trials

In assignment of error number three, defendant asserts that inconsistent statements from the same expert witness at his trial and at the trial of co-defendant Barry Edge violated his right to due process.

According to defendant, the only disputed issue at his trial was whether he participated in the murder of Capt. Knapps. Central to his defense was his statement to prison officials that his only physical contact with Capt. Knapps' blood was in the hallway where he came upon other inmates attacking him and that he dragged Capt. Knapps, who was alive, out of the hallway and into the restroom, where defendant left him. In turn, the state sought to disprove any exculpatory implications flowing from the statement. Defendant asserts that Col. Scanlan, the state's crime scene reconstruction and blood spatter expert, testified there was no physical evidence corroborating defendant's description of the events occurring in the hallway. Defendant explains that he presented the expert testimony of Larry Renner specifically to rebut Col. Scanlan's conclusion that Capt. Knapps was not attacked in the hallway and to show that the crime scene technician, Pat Lane of the Louisiana State Police, did not adequately document the blood found outside of the restroom, making it difficult to confirm whether a bleeding event occurred in the hallway.

However, at Edge's trial, defendant asserts the state sought to disprove any exculpatory implications flowing from Edge's own statement and emphasized the inculpatory ones, which defendant asserts would have had the effect of exculpating defendant from involvement in Capt. Knapps' death at his own trial. Defendant specifically points to the state seeking to prove that, consistent with Edge's inculpatory custodial statement, Edge hit Capt. Knapps in the head with a mallet in the hallway, but the blow involved significantly more force than Edge admitted to–and more than one hit–which would have caused bleeding in the hallway. In Edge's case, Col. Scanlan testified that the blood evidence in the restroom established with certainty that the attack–and the shedding of blood–started in the hallway. That testimony, defendant argues, would have corroborated his exculpatory statement that

he was only involved in moving the already-bleeding Capt. Knapps from the hallway into the security restroom.[43]

"As a general matter, due process forbids the state from employing inconsistent and irreconcilable theories to secure convictions against individuals for the same offenses arising from the same event." **State v. Dressner**, 08-1366, p. 19 (La. 7/6/10), 45 So.3d 127, 140 (citing **Smith v. Groose**, 205 F.3d 1045, 1048-49 (8th Cir. 2000) (convictions of murder-robbery accomplices obtained at separate trials through diametrically opposed testimony from third participant; such manipulation of evidence rendered trial fundamentally unfair and required reversal)).

In **Dressner**, the court reiterated its view that in a situation in which the state has adopted fundamentally inconsistent positions in co-perpetrators' separate trials, basic fairness may require the trial court to permit the defendant to expose the inconsistencies. **Dressner**, 08-1366 at 19-20, 45 So.3d at 140 (citing **State v. Lavalais**, 95-0320, p. 13 (La. 11/25/96), 685 So.2d 1048, 1056); **State v. Wingo**, 457 So.2d 1159, 1166 (La. 1984). Thus, absent discovery of significant new evidence, the state cannot offer inconsistent theories or facts regarding the same crime in seeking to convict co-defendants at separate trials. **Dressner**, 08-1366 at 20, 45 So.3d at 140 (citing **Thompson v. Calderon**, 120 F.3d 1045, 1058 (9th Cir. 1997)).

In assessing "inconsistent theories" claims, this court has generally distinguished the use of mutually exclusive theories from selective emphasis on evidence relating to the culpability of the defendant on trial. **Dressner**, 08-1366 at 20, 45 So.3d at 140; **Wingo**, 457 So.2d at 1166. This court explored the distinction in **State v. Scott**, 04-1312 (La. 1/19/06), 921 So.2d 904, overruled in part on other

---

[43] Defendant adopted co-defendant Mathis' Motion # 47, entitled "Motion to Bar Inherently Inconsistent Prosecutions." The trial court declared the motion moot and deferred any action on that point until trial, to be raised by contemporaneous objection, or until post-trial.

grounds by **State v. Dunn**, 07-0878 (La. 1/25/08), 974 So.2d 658, a case in which three men robbed a bank while armed with weapons and fatally wounded two tellers. Defendant Scott was convicted of first degree murder and sentenced to death. On appeal, he assigned as error that the state had argued at his trial that he was responsible for both tellers' deaths, although the state argued at co-defendant Dunn's trial that Dunn was the shooter. Finding no due process violation, the court relied on the fact that the prosecutor who tried both Scott and Dunn did not argue a division of their culpabilities at either trial. Rather, at both trials, the state argued that both defendants possessed specific intent to kill or inflict great bodily harm. Moreover, nothing the state had articulated at Dunn's trial exculpated Scott–both he and Dunn were equally guilty as principals. Thus, there was no due process violation because the state's theories of the case were not mutually exclusive. *Cf.* **State v. Watkins**, 659 N.W.2d 526, 532 (Iowa 2003) (recognizing Iowa's right "to rely on alternative theories in criminal prosecutions albeit that they may be inconsistent").

This distinction highlights the general consensus that to violate due process, the inconsistency must exist at the core of the state's cases against the co-defendants. **Groose**, 205 F.3d at 1052 ("We do not hold that prosecutors must present precisely the same evidence and theories in trials for different defendants. Rather, we hold only that the use of inherently factually contradictory theories violates the principles of due process."). Several jurisdictions have employed the requirement that the inconsistencies go "to the core" of the state's case. See, Brandon Buskey, If the Convictions Don't Fit, You Must Acquit: Examining the Constitutional Limitations on the State's Pursuit of Inconsistent Criminal Prosecutions, 36 N.Y.U. Rev. L. & Soc. Change 311, 327 (2012) (and cases cited therein); **Sifrit v. State**, 857 A.2d 65, 81 (Md. Ct. App. 2004) ("The [requirement of] an inconsistency at the core of the

state's case before finding a due process violation runs throughout the majority of cases that have addressed the issue."). It follows that although a defendant has a right to a fair proceeding before an impartial fact-finder based on reliable evidence, he does not have a right to prevent the state from arguing a justifiable inference from a complete evidentiary record, even if the prosecutor has argued for a different inference from the then-complete evidentiary record in another trial. **Stumpf v. Robinson**, 722 F.3d 739, 751 (6th Cir. 2013).

Applying this framework here, nothing argued from Col. Scanlan's testimony at Edge's trial appears inconsistent with the evidence presented at defendant's trial. From the beginning, the state's theory of the crime, as set forth in its opening statement at defendant's trial, was that when Capt. Knapps exited the security restroom, he was attacked and beaten in the hallway, before ultimately being dragged inside the restroom and beaten and stabbed to death.

Defendant suggests that Col. Scanlan denied the hallway was part of the crime scene, as he testified in defendant's case that the "primary" crime scene was the security restroom and denied there was any evidence supporting defendant's assertion that the attack began in the hallway. But years later, at the Edge trial, Col. Scanlan testified the "primary" attack on Capt. Knapps occurred in the hallway, while the "secondary" attack occurred in the officers' restroom. However, based on the transcribed portion of that testimony from Edge's trial, Col. Scanlan states, "[T]he primary attack, that initial attack, took place at or near the entrance to the bathroom," with bloodshed starting outside in the hallway and proceeding into the bathroom. At Edge's trial, his use of the word "primary" appears to be in reference to place in time–i.e., the order of the attacks–not where the most substantial part of the attack

occurred. Furthermore, on direct examination, Col. Scanlan testified that the "attack start[ed] at or near the entrance to the restroom."

However, during cross-examination at defendant's trial, Col. Scanlan stated he did not find evidence of any type of conflict or struggle that took place in the hallway prior to going into the restroom, as most of the bloodshed from the photographs was observed inside the restroom. He did admit that resuscitation efforts outside of the restroom may have covered up or masked what other evidence could have been there prior to the crime scene photographs being taken. Additionally, Capt. Knapps' jacket was found in the hallway, which Col. Scanlan admitted could be evidence that the struggle began in the hallway. However, at Edge's trial, Col. Scanlan testified he could say the bloodshed started outside in the hallway, based on the amount of blood shed and its location at the crime scene (specifically, certain blood deposits on surfaces upon entrance into the bathroom). Ultimately, however, the exact location alone of the initial attack on Capt. Knapps does not appear to be an issue of core relevance sufficient to disturb defendant's conviction. All inferences made by Col. Scanlan were based on a complete evidentiary record, and during defendant's case, he conceded that the attack occurred at or near the entrance of the restroom, which does not differ significantly from his testimony at Edge's trial.

The assignment of error lacks merit.

Recording and transcript of defendant's custodial statement

In assignment of error number 4, defendant asserts that the state's failure to provide the defense with an audible recording of defendant's custodial statement until mid-trial, coupled with the inaccurate transcript of that recording that was given to jurors, denied defendant his right to due process, his right to confront the evidence against him, and his right to assistance of counsel.

Defendant argues that his custodial statement was the centerpiece of the state's case. Because the state belatedly provided an enhanced version of the recording of that statement and a new version of the transcript, defendant avers that he could not confirm its accuracy; and that the transcript was in fact materially inaccurate. According to defendant, the late disclosure deprived him of the opportunity to present the entirety of his statement and to mount a meaningful challenge to the evidence.

In the version of the transcript presented to jurors, defendant said:

> Yeah, like I said, I was coming down the hallway he was bleeding, as I got close to him he was bleeding, shit, uh, he goes to the ground, *they still stabbing him*, [Durham] takes the radio, [Durham] has the radio. Tell me help them with Knapps, Knapps nodding like to them, "Why me, what have I done to y'all." I got in the bathroom. Bring him into the bathroom — [Emphasis added][44]

By contrast, defendant argues the correct transcription of the statement[45] was that defendant said he came upon Capt. Knapps when someone was "scuffling" with him:

> Yeah. Like I said, as I was coming down the hallway he was bleeding. As I got closer to him he was bleeding. Shit. He goes to the ground, *they still scuffling,* [Durham] takes the radio. Tell me, "Help them with Knapps." Knapps' nodding to them like, "Why me? What have I done to y'all?" Go in the bathroom, bring him to the bathroom — [Emphasis added].[46]

As a general matter, Louisiana's general discovery rules are intended to eliminate unwarranted prejudice arising from surprise testimony and evidence. **State v. Toomer**, 395 So.2d 1320, 1329 (La. 1981), *abrogated on other grounds by* ***State v. Guillory***, 10-1231 (La. 10/8/10); 45 So.3d 612. When the defendant is lulled into

---

[44] The emphasized remark occurs around 7:03 of the redacted audio of defendant's statement.

[45] After trial, defense counsel obtained a transcript prepared by a certified court reporter.

[46] In addition, eight lines later in the transcript provided by the state, Deputy Randy Holden asks "He was still scuffling, he was kinda fighting like?" Deputy Holden also uses the word "scuffling" in defendant's transcript.

misapprehension of the state's case through the prosecution's failure to disclose evidence timely or fully and the defendant suffers prejudice when undisclosed evidence is used against him, basic unfairness results which constitutes reversible error. **State v. Mitchell**, 412 So.2d 1042, 1044 (La. 1982); **State v. Davis**, 399 So.2d 1168, 1171 (La. 1981); **State v. Meshell**, 392 So.2d 433, 435 (La. 1980). Louisiana C.Cr.P. art. 716(A) provides that a defendant may inspect and reproduce "any relevant written or recorded confession or statement of any nature ... of the defendant in the possession, custody, control, or knowledge of the district attorney."

Here, the complained-of deficiencies in the inaudible recording and/or the non-matching transcript appeared as early as August 2005. Further, the word "stabbing" appeared in the transcript as early as 2008, at the hearing on defendant's motion to suppress his statement. By this time, defendant had been provided with a copy of the enhanced recording. In the immediate lead up to trial, the state provided defense counsel with other volume-enhanced versions of defendant's statement, and gave notice that a new transcript was being prepared from the latest version. That transcript was subsequently provided to defendant. The defense team had the opportunity to listen to the recording overnight prior to its introduction and asked that the state remove "ping" sounds and certain blacked-out portions of the transcript. However, the defense itself stated:

> Well, Judge, we could listen to the tape they provided only through state-of-the-art headphones. If we play the tape itself, it is–it's incomprehensible to us.
>
> The redacted statement is–I mean, I think it does track when we were able to listen to on those fancy headphones. But *we would urge that the jury be given the written statement itself for review, rather than have to listen to the tape, which is, in our opinion, not going to be helpful*. [Emphasis added].

After the state informed the court it would be introducing the statement the following day, the trial judge indicated he would listen to it himself. Following review, which involved listening to the tape while reading the transcript, the trial court allowed the jury to hear the recording as enhanced and to read along with the transcript. In objecting to this ruling, defense counsel stated he felt the background noise would be a distraction, and added that he had only received the tape at 11:00 that morning and had not had an opportunity to play it again, nor to review the redacted transcript that was provided and, thus, was unaware if anything was different. However, defense counsel neither asked for a recess to review, nor made any allegation of changes in the transcript from the one that was initially provided in the lead up to trial.

As to the specific inaccuracy defendant points to, defendant may well be correct that the word he used was "scuffling" and not "stabbing." It is also true that the state repeatedly referred to defendant being present while the others were "stabbing [Capt. Knapps] and beating him." However, to the extent defendant refers to specific inaccuracies as opposed to general changes that may have been made in the final version of the transcript, or overall difficulties with the sound quality and transcription, he did not make a contemporaneous objection to such inaccuracies and, therefore, failed to preserve this issue for appeal. La. C.Cr.P. art. 841.

In any event, defendant had been aware of the audio difficulties with the recorded statement for some time and, neither in the lead up to trial nor during trial, did defendant request time or a recess to further review the materials, including the final enhanced recording of the statement or the transcript. Thus, even accounting for defendant's theory that he did not participate in the murder, in light of the copies of

the earlier enhanced versions in his possession and the physical evidence presented at trial, defendant fails to show any prejudice.

This assignment of error lacks merit.

Concession of guilt

In his eighth assignment of error, defendant maintains that the trial court erred in failing to direct defense counsel to accede to defendant's express wish that his lawyers not concede he was guilty of second degree murder in the killing of Capt. Knapps. In a nutshell, he asserts that he was denied his Sixth Amendment right to counsel in presenting his defense to the state's charges that he murdered Capt. Knapps, and that the trial erred in failing to direct counsel to accede to his express desire to present a not guilty defense to the charge of second degree murder. He argues that court appointed guilt phase counsel, Mark Marinoff, neglected his constitutional duty to engage with defendant as his client and failed to meet with him at all in the seven years leading up to his trial in this case, and that the trial court failed to take any corrective action.

In **McCoy v. Louisiana**, 584 U.S. ___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018), the U. S. Supreme Court held that trial counsel's concession of guilt, against defendant's clearly and persistently stated wishes, violates the defendant's Sixth Amendment autonomy rights and amounts to structural error entitling defendant to a new trial without the need to demonstrate prejudice. The Supreme Court reasoned that although some aspects of the defense, such as trial management including strategy, objections, and evidentiary matters, are within counsel's purview, the Sixth Amendment provides a defendant with "[a]utonomy to decide that the objective of the defense is to assert innocence ... at the guilt phase of a capital trial. These are not strategic choices about how to best *achieve* a client's objectives; they are choices

about what the client's objectives in fact *are*." **McCoy**, 138 S.Ct. at 1508 (emphasis in original).

In support of his argument that the dictates of **McCoy** were not observed in this case, defendant points to a July 4, 2011 letter and a hearing conducted in October 2011. In the letter, he expresses frustration with his attorneys and, despite noting that he is not attempting to delay or hinder proceedings and acknowledging that he cannot get rid of his attorneys, he states "[m]y attorneys and I do not see eye to eye." He also says he "must accept the narrow barbed path before me. There's no turning back at the urging of my ushers. I must except [sic] what little defense that's done for me. What has been clearly demonstrated is that, my voice isn't meant to be heard." After a brief mention of seating arrangements at prior hearings where defendant and his attorneys were separated, defendant recounts a recent visit from one of his lawyers. "My lawyer basically told me that he's selling me out. His words were 'You already have a life sentence and not going anywhere. So what would another one (life sentence) hurt.'" Defendant continues:

> This mentality has been the continuous rift between us. I wish to fight my case. They're only just trying to sidestep the death penalty. How could you or anyone else ask me to hold any confidence in their ability to defend me? Clark tried to remove his lawyers for the same reasons.
>
> Through these long years and many court hearings. On a few occasions that that I've been beside my attorneys. They have never once asked me what I think. They've never asked any question(s) that put forwards.
>
> I didn't want to believe or was just blind to the facts. My lawyer was selling me out. In that visiting room my world just caved in. This is what's prompting me to write this letter. The mucus is no longer blocking my sight.

While defendant claims counsel does not believe he can think for himself or understand the legal proceedings, he provides little context for the discussion he is apparently referencing. However, defendant's statements about defense strategy and

the invocation of the "same reasons" that co-defendant Clark tried to remove his own lawyers clearly point to dissatisfaction and disagreement on defendant's part.

The court made no inquiry of defendant as to his letter and only on two occasions did the court reference it. On the first occasion, where defendant and defense counsel were not present, the court simply placed the letter in the record. On the second occasion, in the judge's chambers, where the state and defense counsel were present, but not defendant (his presence having been waived), the court noted the letter had been discussed previously in chambers prior to the recorded proceedings, and copies of the letter were provided to both state and defense counsel. The court then stated: "the Court's understanding at this time is that Mr. Marinoff and Mr. Calhoun will meet with Mr. Brown in reference to [the letter] sometime, sometime next week. And if there is a problem, that they will notify the Court of it and, and we will have a hearing in regard to it if need be." While there were two other pre-trial hearings on August 30, 2011, and September 15, 2011, the trial court made no further inquiry of defendant.

However, on October 18, 2011, the third day of jury selection, the issue of defendant's conflict with his attorneys came up once again, and the court conducted an in camera ex parte hearing.

At that hearing, the court gave the attorneys an opportunity to speak. Attorney Calhoun explained that he and Marinoff had divided the work: Calhoun mainly handled the mitigation portion of the litigation; and Marinoff handled the guilt phase. While Calhoun acted as the conduit between defendant and Marinoff, both attorneys believed they had given defendant competent representation. Defendant expressed his distress as to the lack of communication with respect to Marinoff and Marinoff's intentions as regards the guilt phase. Defendant stated that while he had resolved

some of the issues with penalty phase counsel, the issues expressed relating to guilt phase counsel remained unresolved. During the ex parte hearing, defendant stated that Marinoff had only come to meet with him twice, and he had not seen him since around 2004. He expressed concern that they had never discussed the case and stated he still did not know "where [Marinoff]'s going with anything." He also explained that Calhoun had misinterpreted some of the things he was going to do with the case because they had never fully discussed it.

However, the brunt of defendant's dissatisfaction appeared to stem from Marinoff's involvement, not Calhoun's, and defendant continued by saying that he "just wanted to be involved in the case and have discussion with Mr. Marinoff, Mr. Calhoun at the same time, and we building strategies, and that was, that was the complaint. Now, I mean, I'm not trying to get rid of Mr. Marinoff at this point, it would be too late, too far gone." The court, in response, noted it was confident that Marinoff had investigated the case and was prepared to represent defendant. Later, defendant stated: "I explained from the beginning, I don't need them—I mean, I don't need him running up to Angola every week or once a month. I didn't need him to hold my hand and see me. It's just keep me in the loop of what's going on and, every now and then, let's discuss this and, and get it moving,"although he continued by noting that he has been blind to what Marinoff was planning. The only discussion as to the theory of the defense in the transcript occurs in a brief aside where attorney Marinoff discusses his personal confidence in the case: "But, it doesn't, it doesn't impact my confidence on my knowledge of the facts of the case, on our selected and shared theory of the defense for Mr. Brown, nor my confidence of going forward and trying to select the best jury at this stage and then present the best defense for Mr. Brown."

Ultimately, guilt phase counsel Marinoff essentially conceded guilt for second degree murder in his opening and closing statements, which the state seized on. Defendant argues that any inquiry by the trial court was too late, focused entirely on the wrong issues, and failed to meaningfully inform defendant about his constitutional rights or to determine if he knowingly, voluntarily, and intelligently waived those rights. In **McCoy**, the Supreme Court made it clear that defense counsel had a duty of "[p]reserving for the defendant the ability to decide whether to maintain his innocence ... ." **McCoy**, 138 S.Ct. at 1509. To fulfill this obligation, defense counsel must "develop a trial strategy and discuss it with her client, ... explaining why, in her view, conceding guilt would be the best option." ***Id.*** Then, "[i]f, after consultations with [defense counsel] concerning the management of the defense, [the defendant] disagreed with [counsel's] proposal to concede [the defendant] committed ... murder[], it was not open to [counsel] to override [the defendant's] objection." ***Id.***

In both **McCoy** and **State v. Horn**, 16-0559 (La. 9/7/18), 251 So.3d 1069, the defendants objected to proceeding with defense counsel's theory. In **Horn**, defendant specifically objected to the argument that he was guilty of the responsive verdict of second degree murder, but not first. In **McCoy**, the defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." **McCoy**, 138 S.Ct. at 1505. However, in this case, there is little indication that defendant objected to the admission of guilt, which is defendant's choice; rather, it appears he objected to trial strategy, which is in counsel's purview. Defendant's objections to counsel arguably stem from a lack of communication and discussion between him and Marinoff, rather than from disagreement as to a specific objective, such as the decision to concede guilt for second degree murder. However, it is unclear whether defendant ever had the opportunity "to insist that counsel refrain

from admitting guilt," **McCoy**, 138 S.Ct. at 1505, if he was truly as blind to counsel's strategies as he claimed. There is little context as to what led defendant to write the initial letter to the court and the nature of defendant's invocation of the "same reasons" that Clark[47] tried to remove his own lawyers, along with his disagreement as to strategy, and it is not clear that defendant objected to counsel's concession of his guilt. Ultimately, without defendant's explicit objection to an admission of guilt and with little evidence that defendant objected to something more than a lack of communication with counsel, this claim fails.

This assignment of error lacks merit.

Defense counsel's reference to defendant as "boy"

In assignment of error number nine, defendant asserts that defense counsel's reference to him as a "boy" during trial was an impermissible reference to race that violated La. C.Cr.P. art. 770 and rendered counsel's representation per se ineffective. Defendant points out that he was the only African American of the five defendants charged in the murder of Capt. Knapps, a white Angola prison guard, and that almost everyone else involved in the case–from the jurors to the judge to the prosecutors and the defense attorneys–were white. During the guilt phase closing argument, attorney Marinoff referred to defendant, then 38 years old, as "a big, old, strong boy." Defendant argues the "clear and derogatory invocation of [defendant's] race by his own lawyer amounted to per se ineffective assistance of counsel and cannot be tolerated" in this capital case.

---

[47]In the case of co-defendant Clark, following remand from the United States Supreme Court in light of **McCoy,** this court found that the record did not establish that counsel planned to concede defendant's guilt in a homicide over appellant's objection in an effort to save appellant's life. **State v. Clark,** 12-0508, p.9 (La. 6/28/19), 285 So.3d 414, 419. The court also found that the "record shows that appellant and counsel were aligned in their strategy to deny involvement in the murder while admitting participation in the attempt to escape. While the nature of their disagreement is not clear, it is clear that this record does not reflect an intractable disagreement about the fundamental objective of the representation." ***Id.*****,** 12-0508 at 10; 285 So.3d at 420.

Louisiana Code of Criminal Procedure art. 770 states that "[u]pon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official" refers directly or indirectly to race "if the remark is not material and relevant and might create prejudice against defendant in the mind of the jury."[48] However, as noted in comment (e), "[t]he article does not deal with defense counsel's remarks that are prejudicial to the defendant. The defendant cannot get relief from that sort of error any more than he can from other errors made by his counsel." Thus, La. C.Cr.P. art. 770 is inapplicable, and this claim fails.

In addition, defendant argues that defense counsel's comment amounts to per se ineffective assistance of counsel and cites to **Buck v. Davis**, 580 U.S. ___, 137 S.Ct. 759, 777, 197 L.Ed.2d 1 (2017). Once the right to counsel has attached, a defendant is entitled to the assistance of counsel at all "critical stages" of the proceedings. **State v. Hattaway**, 621 So.2d 796, 802 (La.1993); see also, U.S. Const. Amend. VI; La. Const. art. I § 13 (which guarantees an accused the right to assistance of counsel "at each stage of the proceedings."). Under the familiar test for ineffective assistance set out in **Strickland v. Washington**, 466 U.S. 668 (1984), a conviction must fall if (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and, (2) the inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect.

Separately, **United States v. Cronic**, 466 U.S. 648 (1984), decided the same day as **Strickland**, created a narrow exception for limited situations in which a

---

[48] No motion for mistrial was made as a result of the remark by defense counsel, which is to be expected given that the comment came from the defense.

defendant suffers a complete denial of counsel. Those instances "are so likely to prejudice the accused that the cost of litigating their effect in the particular case is unjustified." **Cronic**, 466 U.S. at 658. The Supreme Court identified three such situations in which prejudice is 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 are situations in which a defendant's trial counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing ... ." ***Id.*** at 659. Finally, prejudice is presumed when the circumstances surrounding a trial prevent a defendant's attorney from rendering effective assistance of counsel. ***Id.*** at 659-60.

The correct standard here is the familiar **Strickland** test. In **Buck**, which defendant cites in support of his argument,[49] defense counsel introduced evidence at the penalty phase suggesting that defendant's race had bearing on his future dangerousness. Analyzing the issue under **Strickland**, the Supreme Court found that counsel's performance fell outside the bounds of competent representation. Despite knowing that the expert's report reflected the view that Buck's race disproportionally predisposed him to violent conduct and that the principal point of dispute during the penalty phase was whether Buck was likely to act violently in the future, defense counsel nonetheless called the expert to the stand and specifically elicited testimony about Buck's race and his likelihood of future violence. In **Buck,** the Supreme Court concluded that it was "reasonably probable–notwithstanding the nature of Buck's crime and his behavior in its aftermath–that the proceeding would have ended

---

[49] Defendant also cites to **Ash v. Tyson Foods, Inc.**, 546 U.S. 454 (2006), wherein the Supreme Court concluded that it was improper to require a racial modifier in order for the term "boy" to be considered racial in nature. It also concluded that "[a]lthough it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." **Ash**, 546 U.S. at 456.

differently had counsel rendered competent representation." **Buck**, 137 S.Ct. at 776. There, the effect of the expert testimony at Buck's sentencing could not be dismissed as de minimis, and therefore, he had demonstrated prejudice.

Here, during closing argument, defense counsel recounted the testimony of Dr. Suarez, who had testified there was bruising on Capt. Knapps' shoulders and that the bruising could be consistent with somebody holding him down. Defense counsel noted that during his cross-examination of Dr. Suarez:

> And when it was my turn to talk to the doctor, I said, doc, a man with hands like David Brown, a big old strong boy, if he grabbed a man with the fingers, that would leave individual finger bruises that would be showing or could be showing. And he said, yes, that could also happen. And I said, well, that linear line of bruising on that shoulder, that could have come from [Capt. Knapps] coming in contact with either the bathroom stall door or the kitchen sink ... something of that nature. And he said. That's possible, too.

Defense counsel focused on the weakness in the state's argument as to the source of the victim's injuries, and counsel's use of the term "boy" arguably did not draw the jury's attention to the issue of race. Under these circumstances, defendant cannot show that the use of the word "boy" amounted to "per se ineffective assistance of counsel," nor does he meet his burden pursuant to **Strickland**.

This assignment of error lacks merit.

Attendance at crime scene viewing

In assignment of error number 10, defendant asserts the trial court's handling of the crime scene viewing violated his rights under the Sixth and Fourteenth Amendments, as it excluded counsel and defendant from a critical stage in the proceedings. Defendant also argues that the trial court improperly advised defendant that his presence could be waived while misinforming him of the nature of the proceeding. Thus, even though he waived his presence, his waiver could not be

voluntary. Additionally, defendant alleges the trial court engaged in ex parte, unrecorded testimonial communications with the jury at the crime scene, which the defense only became aware of after it was too late to intervene. Finally, defendant argues the trial court erroneously denied the defense motion for mistrial after the jurors, in response to the trial court's solicitation, submitted written questions about the facts of this case.

Every defendant has a state and federal constitutional right to be present during his felony trial. See, **Illinois v. Allen**, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); La. Const. art. I, § 16; La. C.Cr.P. art. 831(5) (requiring that a defendant charged with a felony "shall be present ... [i]n trials by jury, at all proceedings when the jury is present"). A tribunal's viewing of the scene of a crime constitutes the taking of evidence, and defendant and his counsel therefore have a right to be present. **State v. O'Day**, 175 So. 838, 841 (La. 1937) ("It is only reasonable that, viewing the scene, the physical facts and the circumstances surrounding the scene is as much the taking of evidence as taking the testimony of witnesses.") The holding of **O'Day** has been incorporated in La. C.Cr.P. art. 762(2), which permits a jury or a judge "to view the place where the crime or any material part thereof is alleged to have occurred, or to view an object which is admissible in evidence but which is difficult to produce in court." Article 762(2) further provides that "[a]t this view, the court shall not permit the taking of evidence except in connection with the place or object." The article presupposes "that the judge, the district attorney, the defendant, and his counsel have to be present." La. C.Cr.P. art. 762, Official Revision Comment (d).

However, even though La. C.Cr.P. art. 832 purports to forbid a capital defendant's waiver of his presence,[50] and assuming the trial court therefore erred in not insisting on defendant's presence at the viewing of the scene as opposed to allowing him to waive his and his attorneys' presence, defendant failed to object contemporaneously to the procedure allowing jurors to view the crime scene. Specifically, he failed to object to the absence of counsel and of the court reporter, as well as to the trial court's comments that outlined the procedure by which the jury could later submit questions. Therefore, defendant is not entitled to assign error on this basis. La. C.Cr.P. art. 841.

In any event, 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. See, **Rushen v. Spain**, 464 U.S. 114, 117-19, n.2 (1983). Thus, for example, in **State v. Matthis**, 07-0691 (La. 11/2/07), 970 So.2d 505, this court held that counsel was not ineffective for waiving the defendant's presence during a viewing of the crime scene, even though it was a critical stage of the proceeding. The court analyzed counsel's actions pursuant to the **Strickland** test and ultimately concluded that defendant failed to meet his burden of proof, as the details of the crime scene did not implicate any of the evidence on which defendant's conviction rested and the evidence in support of his guilt was substantial. ***Id.***, 07-0691 at 7-10; 970 So.2d at 509-10.

In tandem with his argument concerning defendant's absence at the scene viewing, defendant avers that the trial court's statements at the viewing violated La.

---

[50] The waiver of a defendant's presence permitted in Article 832 "is limited to *noncapital cases*, thus, codifying the apparent majority rule that in capital cases the defendant's presence at the important stages of the trial is an absolute requirement and cannot be waived." La. C.Cr.P. art. 832, Official Revision Comment (a).

C.E. art. 605, which precludes the presiding judge from testifying at trial. To violate this rule, it is not necessary that the judge actually be sworn as a witness and formally testify, and no objection is necessary to preserve the error. Statements from the bench of a testimonial nature made during the presentation of evidence may violate the prohibition. In this case, contrary to defendant's position, it appears that the nature of the trial court's comments more appropriately implicate La. C.Cr.P. art. 772, which prohibits comments on the evidence by the judge whether "recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted." See, **State v. Williams**, 375 So.2d 1379, 1381 (La. 1979) (it is reversible error if the judge makes any comment expressing or implying his or her opinion with regard to a material issue).

Although La. C.Cr.P. art. 772 precludes the judge from commenting on the facts of the case in the presence of the jury, in order to constitute reversible error, improper comments must have influenced the jury and contributed to the verdict. **State v. Johnson**, 438 So.2d 1091, 1102 (La. 1983). A trial judge's remarks constitute harmless error if those remarks do not imply an opinion as to the defendant's guilt or innocence. **State v. Joseph**, 437 So.2d 280, 282 (La. 1983).

Additionally, defendant argues the failure to record the scene viewing requires a new trial. Specifically, he points out that La. Const. art. I, § 19 guarantees defendants a right of appeal "based upon a complete record of all the evidence upon which the judgment is based." In addition, La. C.Cr.P. art. 843 provides:

> In felony cases ... and on motion of the court, the state, or the defendant in misdemeanor cases tried in a district, parish, or city court, the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel.

Although this court has found reversible error when material portions of the trial record were unavailable or incomplete, a "slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal" does not require reversal of a conviction. **State v. Brumfield**, 96-2667, pp. 14-16 (La. 10/20/98), 737 So.2d 660, 669. A defendant is not entitled to relief because of an incomplete record absent a showing of prejudice based on the missing portions of the transcript. **State v. Castleberry**, 98-1388, p. 29 (La. 4/13/99), 758 So.2d 749, 773.

In this case, on October 24, 2011, at the close of that day's proceedings, the trial court, defense counsel, defendant, and the state discussed the jury's visit to the crime scene, which was to occur the following morning. The state would arrive first and cover the existing door labels in the education building with paper labels to indicate what the rooms were used for at the time of the offense. Then the trial court explained:

> The way it works is I go in with them, along with Ms. Wheeler. And I do point out certain things to them, but I don't testify. And if they have questions that I feel I can answer, I will. Procedural questions, nothing that has any substance I may answer. But they are going to go into the building just with myself and Ms. Wheeler, and that's what we've done the last couple of times.

The state noted that it and the defense would both be given access to the building before the jury arrived and a chance "to come to an agreement as to how the jury will see it," and the state would give the defense the opportunity to "make sure [they didn't] have an objection." After a brief comment by attorney Marinoff that he would need to confer with co-counsel to determine how they wanted to handle their presence or non-presence at the scene, attorney Calhoun stated he had consulted with defendant, who wanted to waive his presence at the walk-through. Defendant then

confirmed to the court himself that he was waiving his presence and his attorneys' presence as well.

The next morning, upon return from the viewing of the scene, the trial court memorialized its observations in the record. The court noted that jurors asked questions at the scene and that some were answered and some were not. Specifically, the trial court stated:

> Let me put on the record that we toured the education building with the jury and a couple of things I feel should be put on the record in regard to the visit. It was some questions that were asked. Some were answered. Some weren't. But last thing is first. Two of the jurors said they had questions and they wanted to ask me and they said, what can they do, and I said, if you still want to ask them, I'll give you a pad and a pencil, you can write them down and submit them to the Court just as we had talked about. That's No. 1.
>
> The jurors were interested in the fence that Robinson jumped and that was shown to them by me. It also was pointed out by me that there is now a razor wire and there was just barbwire.
>
> In the education building the jurors were interested–unfortunately, the rear door to the visiting entry was open and they were asked whether that was locked and I said, "yes." They wanted to know on the outside if the gates were as they were where we were standing down towards–if you come out the education building, it will be to the right. We were down in that area and they were looking at the various gates and they wanted to know if the gates were as they were and I said, "yes."
>
> What is next? This question was not answered. They wanted to know where the rules were posted. That question wasn't answered. One of them asked how the keys worked in the locks. They were looking at the key holes. One of them asked and I wouldn't answer it.
>
> And the last thing is one of the jurors asked whether they would be able to ask for portions of a transcript. There were told, no, not likely. Perhaps with permission of both sides and me, but don't count on it. And that's what happened at the jail.

Just as in this case, in **Matthis**, there were comments made outside the presence of a court reporter and later memorialized on the record:

> According to the account provided by the trial judge for the record, he simply asked Detective Adams to point out the three locations

> represented in the state's photographic exhibits and described by the officer in this testimony: the spot where "[y]ou could see actual scuff marks in the dirt, as well as the victim's money and identification;" the "impact section" "where the victim's scalp and hair was;" and the location where the victim dragged "himself from that location to the point where his body was found." As described by the officer, and even assuming that he and the trial judge entered into an extended discussion about the scene as they viewed it, these various locations could not resolve the question of whether the victim had in fact been struck or run over by respondent's vehicle, a matter about which the pathologist who performed the autopsy could find no objective evidence despite the various injuries sustained by the victim, much less settle who was driving at the time.

Matthis, 07-0691 at 7-8, 970 So.2d at 509.

In the present case, even assuming counsel erred in allowing their and defendant's presences to be waived, defendant fails to show this error undermined confidence in the reliability of the verdict. Additionally, defendant has not shown prejudice based on the lack of a court reporter at the scene viewing, and, at any rate, the trial court memorialized the visit on the record. The court's answers and/or comments were minimal and did not bear on any contested issues at trial. Furthermore, a review of the record does not reveal that the trial judge's comments implied an opinion or otherwise influenced the jury.

This assignment of error lacks merit.

Trial court's invitation to jurors to submit questions

In his eleventh assignment of error, defendant asserts that the trial court's impromptu procedure permitting jurors to submit questions about the case during the trial is unsupported by state law, degraded the state's burden of proof and production, and violated defendant's Sixth Amendment and Due Process rights, prompting a motion for mistrial, which was erroneously denied.

Defendant correctly notes that the procedure was devised outside of the presence of both defendant and defense counsel, which deprived them of the

opportunity to object. However, it bears noting that defendant failed to contemporaneously object when the opportunity to do so did present itself. Although the crime scene viewing was not recorded, when the trial judge returned to court, he did place on the record that "[t]wo of the jurors said they had questions and they wanted to ask me and they said, what can they do, and I said, if you still want to ask them, I'll give you a pad and a pencil, you can write them down and submit them to the Court just as we had talked about." Later that day, the trial court invited the jurors to submit written questions and sent them back to the jury room to think about it. Defense counsel did not object then or while the jurors were out of the room. The jury returned, and the court noted it had received three pieces of paper with eleven distinct questions.[51] The court then stated that the attorneys were welcome to read the questions before they were sealed. Before handing over the questions, the trial court asked, "[I]s there anything else from the state or anything else from the defense?" Defendant counsel replied no, but later moved for a mistrial.

Assuming defendant's objection was timely, defendant's claim still fails because he cannot demonstrate that any prejudice resulted from allowing the written

---

[51] The questions were marked as Court Exhibits Nos. 1 to 3.

Court Exhibit No. 1 includes the questions: (1) was there any DNA evidence linking the shoes (assumed to belong to David Brown) to David Brown? (2) There was discarded clothing on the floor. Were they tested and, if so, what were the results? Was clothing, other than what the inmates were wearing, tested for blood?

Court Exhibit No. 2 includes the questions: (1) Since the statement taken of David Brown was allowed to be presented in Court, are we to assume that it was accepted that no deal was made with him since he initialed and admitted that no deal was made? (2) Also, will the laws be read to us again that were presented during jury selection?

Court Exhibit No. 3 includes the questions: (1) What is David Brown's shoe size? Size 14 was mentioned in opening remarks. (2) Mr. Pat from Crime Lab said there were several pairs of empty shoes found–what were the shoe sizes and have they been matched to individuals? (If close in size to Mr. Brown). (3) What was the shoe sizes of the inmates without shoes? (Only if any were close in size to Mr. Brown). (4) Monday: The doctor who performed the autopsy said Captain Knapps was punched. Was there any trauma to the hand of David Brown consistent with a punch? Was there any trauma to the hands of the other alleged participants in the escape plot consistent with a punch? Should there be?

questions. In the trial court, focusing predominately on the questions concerning shoe size, defense counsel argued the jury questions were "prejudicial and injurious" and "alert[ed] the prosecution to the questions that they [were] struggling with. And I think it alerted the prosecution to certain aspects of their case which they may not be able to bolster or certainly center on for the purposes of answering those questions." Defense counsel objected to the admission of any prosecution evidence that would attempt to answer those questions or that would bolster the prosecution's case. Later, the state elicited testimony concerning defendant's shoe size. While the testimony from Alan Keel concerning the size of the boots was elicited after the juror questions were submitted, the testimony was also elicited in conjunction with testimony concerning the user biology of the unattended, bloodstained boots, finding defendant amongst the prominent contributors of material to those boots.[52] After Col. Scanlan testified, defense counsel reurged his earlier objection, and moved for a mistrial when the state referenced the size of the boots again during questioning.

Ultimately, defendant does not show any abuse of discretion by the trial court in allowing handwritten questions to be submitted by jurors. Defendant had the opportunity to object numerous times and to challenge the procedure the trial court outlined before the jury submitted its questions. Moreover, even excluding evidence of shoe size, other physical evidence demonstrated that unattended boots were found bloodstained with Capt. Knapps' DNA, that defendant was shoeless when he was processed, and that user biology connected the boots to defendant. Defendant is

[52] Keel's report was also introduced into evidence. As the state pointed out, it had provided defense counsel with a copy of Keel's PowerPoint presentation prior to the juror questions, therefore, defense counsel was aware that evidence was going to be introduced before those questions were asked by the jury.

unable to show that allowing the questions prejudiced the defendant to a greater extent than the rest of the testimony related to the boots.

This assignment of error is without merit.

Reliability of bloodstain pattern analysis

In assignment of error number 14, defendant argues the trial court improperly denied a **Daubert** hearing,[53] contending that bloodstain pattern analysis does not satisfy the **Daubert** test and quoting a 2009 report by the National Academy of Sciences which casts doubt on the entire discipline, finding that "the uncertainties associated with bloodstain pattern analysis are enormous" and that experts' opinions were generally "more subjective than scientific." In light of the shaky origins of bloodstain analysis and the questions raised by the National Academy of Sciences and others about its reliability, defendant asserts this court should require trial courts to engage in the gatekeeping function required by **Daubert** to assess the admissibility of bloodstain analysis pretrial. Defendant also argues the trial court failed to meaningfully engage in an assessment of Col. Scanlan's knowledge, skill, experience, training, or education as required for expert qualification under La. C. E. art. 701, and over defendant's objection, the trial court permitted Col. Scanlan to comment positively about the work of Pat Lane, another prosecution expert in the case.

Under the standards set out in **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579 (1993), which this court explicitly adopted in **State v. Foret**, 628 So.2d 1116, 1121-22 (La. 1993) (also finding La. C. E. art. 702 "virtually identical to its source provision in the Federal Rules of Evidence., F.R.E. 702"), the trial court is required to perform a "gatekeeping" function to "ensure that any and all scientific

---

[53] Defendant adopted co-defendant Mathis' Motion # 33 entitled "Motion for **Daubert** Hearing to Determine Admissibility of Expert Testimony by Jefferson Parish Crime Lab Technician in the Areas of Crime Scene Reconstruction and Bloodstain Pattern Analysis."

testimony or evidence admitted is not only relevant, but reliable." **Daubert**, 509 U.S. at 589. In performing this function, "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." **Kumho Tire Company**, 526 U.S. at 152. While **Daubert** specifically addressed scientific evidence, **Kumho** made clear that the trial court's essential gatekeeping function applies to all expert testimony, including opinion evidence based solely on special training or experience. ***Id.***, 526 U.S. at 148-49. In the end, "the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" ***Id.***, 526 U.S. at 149 (quoting **Daubert**, 509 U.S. at 592). "[W]hether **Daubert**'s specific factors are, or are not, reasonable measures of reliability ... is a matter that ... the trial judge [has] broad latitude to determine," and a decision to admit or exclude is reviewed on an abuse of discretion standard. ***Id.***, 526 U.S. at 153.

On July 2, 2008, the trial court heard oral argument and denied defendants' motion because (1) crime scene reconstruction and bloodstain pattern analysis has been a recognized and accepted science in this state and nationwide "for many, many years"; (2) the court had already authorized each of the five co-defendants to hire his own expert in those fields, and each defendant had access to the relevant evidence and reports on which the state intended to rely; and, (3) the parties could challenge the qualifications and methodologies of each expert at trial and discrepancies in the experts' methods and findings could be explored on cross-examination.[54] At trial, defense counsel cross-examined Col. Scanlan thoroughly and, in addition, called their

[54] In response to a misstatement by the state that the motion had been deferred, Judge Winsberg denied it as well, for the same reasons.

own expert in those fields to challenge the methods and findings of the state's experts.

Furthermore, while defendant objected to Col. Scanlan qualifying as an expert in the field of bloodstain pattern analysis, he shows no abuse of discretion in the trial court finding Col. Scanlan qualified to testify concerning bloodstain analysis and crime scene reconstruction.[55] Col. Scanlan testified he was the director of the Jefferson Parish Sheriff's Office Crime Laboratory and the Director of Forensic Science for Loyola University. He has been accepted numerous times as an expert in the fields of crime scene reconstruction and bloodstain pattern analysis, including in Jefferson, St. Tammany, Orleans, West Feliciana, Lafourche, and Lafayette Parishes. He graduated with a master's degree in Forensic Science and, while there were no specific courses wholly dedicated to bloodstain pattern identification and analysis on his transcript, Col. Scanlan testified that the subject was covered extensively in forensic biology. On several occasions, prior to the report in this case, he has authored reports wherein he conducted bloodstain pattern analysis. Additionally, he noted he has taken numerous courses with regard to bloodstain pattern analysis training, including a one-week workshop on bloodstain pattern analysis, a multi-day advanced criminal investigation seminar on bloodstain pattern analysis and crime scene reconstruction, and a bloodstain pattern evidence seminar in Mississippi. He is also a member of relevant professional organizations, including the International Association for Bloodstain Pattern Analysis (of which he is a provisional member), among others.

Additionally, defendant argues that over his objection, the trial court permitted Col. Scanlan to comment positively about the work of Pat Lane, another prosecution

---

[55] The witness was also qualified as an expert in crime scene reconstruction.

expert in the case. Defendant's claim relates to the following testimony by Col. Scanlan:

> Q: Now let's talk about Pat Lane for a minute. How do you know Pat Lane?
>
> A: I have worked with Pat Lane both as a firearms and tool marks examiner and doing crime scenes, working behind him at crime scenes he's processed, working with him, attending training with him, things of that nature.
>
> Q: Are you familiar with his work?
>
> A: Oh, absolutely.
>
> Q: Okay. And how do you—how would—
>
> MR. MARINOFF: Your Honor, I object. I object, Your Honor. First of all, this expert is trying to, is trying to boot-strap the work of another witness who has come before the jury and trying to bolster any type of work that he might have done.
>
> THE COURT: It's overruled.
>
> MR. MARINOFF: Note my objection for the record.
>
> THE COURT: Noted.
>
> MR. BLOCK: Thank you, Your Honor. May I proceed, Judge?
>
> By MR. BLOCK:
>
> Q: How would you characterize his level of experience and expertise?
>
> A: Oh, he's, he's—Pat Lane is very—his level of expertise is extremely, extremely good.
>
> THE COURT: All right. Hold it. Ask your next question.

Even assuming there has been an error in the admission of expert testimony, it is subject to harmless error review. **Foret**, 628 So.2d at 1130. The reviewing court must determine "whether there is a reasonable possibility that the evidence might have contributed to the verdict, and whether the reviewing court is prepared to state

beyond a reasonable doubt that it did not." ***Id.*** (quoting **State v. Walters**, 523 So.2d 811 (La.1988)).

In the present case, defendant stipulated to the expertise of Pat Lane in crime scene analysis and basic blood pattern analysis. Defendant questioned him, as he did other expert witnesses, on the presence of numerous other people at the crime scene prior to their arrival and how they processed the crime scene itself, in an effort to show that evidence could have been diminished, destroyed, or altered in that time, or that cross-contamination of the evidence could have occurred. In light of the substantial evidence indicating defendant's level of involvement in the crime, the extensive questioning by defense counsel concerning possible cross-contamination issues, and the brevity of the comment relating to Lane, it is reasonable to conclude that Col. Scanlan's comments had no effect on the verdict.

In light of the foregoing, the trial court did not abuse its discretion in denying defendant's motion for a **Daubert** hearing on this well-accepted subject or in qualifying Col. Scanlan as an expert in bloodstain pattern analysis, nor did the brief statement from Col. Scanlan concerning Lane have any substantial or injurious effect on the verdict.

This assignment of error lacks merit.

Admission of gruesome photographs

In assignment of error number 15, defendant argues that the admission of 17 graphic, post-mortem photographs of Capt. Knapps served no purpose other than to inflame the passions of the jury and thus was overly prejudicial and injected an arbitrary factor into this proceeding.

Both Judge Ware and Judge Winsberg denied pre-trial motions to exclude or limit the photos, subject to the individual co-defendants' right to raise an objection

at trial if warranted.[56] Despite ample opportunity to do so, defendant did not raise an objection at trial.[57]

Under La. C.E. art. 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." As a general rule, photographs are "admissible if they illustrate any fact, shed any light upon an issue in the case, or are relevant to describe the person, thing or place depicted." **State v. Jackson**, 30,473, p. 15 (La.App. 2 Cir. 5/13/98), 714 So.2d 87, 96, writ denied, 98-1778 (La. 11/6/98), 727 So.2d 444. Even when the cause of death is not at issue, "[t]he state is entitled to the moral force of its evidence and postmortem photographs of murder victims are admissible to prove corpus delicti, to corroborate other evidence establishing cause of death, location, placement of wounds, as well as to provide positive identification of the victim." **State v. Letulier**, 97-1360, p. 18 (La. 7/8/98), 750 So.2d 784, 795. The cumulative nature of photographic evidence does not render it inadmissible if it corroborates the testimony of witnesses on essential matters. **State v. Lane**, 414 So.2d 1223, 1227 (La. 1982). Thus, photographic evidence will be admitted unless it is so gruesome as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient evidence (*i.e.*, when the prejudicial effect of the photographs substantially outweighs their probative value). **Broaden**, 99-2124 at 23, 780 So.2d at 364; **State v. Perry**, 502 So.2d 543, 558-559 (La. 1986). "The trial court has considerable discretion in the admission of

---

[56] Defendant adopted co-defendant Mathis' Motion # 69, entitled "Motion to Exclude or Limit the Introduction of Gruesome or Prejudicial Photographs and Bloody Evidence." On July 2, 2008, Judge Ware deferred ruling until the individual trials of the co-defendants because resolution would depend on the specific photographs the state sought to introduce based on the agreement of counsel. On October 26, 2010, Judge Winsberg denied the motion, subject to the individual co-defendants' right to raise an objection at trial if warranted.

[57] On October 23, 2011, during the testimony of Pat Lane, the photographs (state's exhibits 132 through 149), which were photographs taken at the infirmary and autopsy, were admitted into evidence, but not published to the jury until the following day when Dr. Suarez testified.

photographs; its ruling will not be disturbed in the absence of an abuse of that discretion." **State v. Gallow**, 338 So.2d 920, 923 (La. 1976).

In this case, the trial court permitted the state to introduce a limited set of photographs of the victim taken by Pat Lane at the autopsy for the purpose of corroborating the testimony of forensic pathologist Dr. Suarez. Notwithstanding the defendant's lack of objection at trial, given the state's burden of showing the defendant had the specific intent to kill or inflict great bodily harm to support the first murder charge and the highly relevant nature of each of the photographs to demonstrate the extent and placement of Capt. Knapps' injuries and his cause and manner of death, the trial court did not abuse its discretion in permitting the limited set of photographs.

This assignment of error lacks merit.

Jury instruction defining "great bodily harm"

In his sixteenth assignment of error, defendant maintains that the trial court's failure to instruct the jury in accordance with defendant's proposed jury instruction defining great bodily harm violated defendant's right to due process and to present a defense.

Defendant requested that the trial court instruct the jury as follows:

> In the case of a first degree murder, the state has the burden to prove beyond a reasonable doubt that the defendant himself had the specific intent to kill or cause great bodily harm. Great bodily harm is more than mere "serious bodily harm," which is defined as "bodily injury which involves unconsciousness, extreme physical pain ..."

Defendant argues that this court has remarked that "great bodily harm" is "somewhat analogous" to "serious bodily harm," which is defined by the Criminal Code as "bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function

of a bodily member, organ, or mental faculty, or a substantial risk of death." **State v. Hampton**, 98-0331, p.14 (La. 4/23/99), 750 So.2d 867, 881 n.10. In light of **Hampton**, and the pertinence of the definition of "great bodily harm" to his defense that he was involved with nothing more than moving the injured Capt. Knapps out of the hallway and into the officers' restroom, defendant argues the trial court should have provided an instruction to the jurors regarding the definition of "great bodily harm."

The state argues this claim is not properly preserved, as the record does not reflect a ruling by the trial court on defendant's request for the special jury instruction nor an objection to the charge. However, defendant submitted "proposed jury instruction 2." The trial court denied the charge as written, noting that "the proposed charge as to 'great bodily harm' is not considered to be accurate as to the law." See, **State v. Marmillion**, 339 So.2d 788, 795-796 (La. 1976) (accused did not waive his right to complain, in regard to trial judge's refusal to give accused's requested special charge, by failing to object to such refusal before jury retired to deliberate); See also, **State v. Mack**, 403 So.2d 8, 10 n.1 (La. 1981) (when defendant is contesting a special charge, burden is on defendant to timely submit a proposed charge, and his failure to do so bars appellate review; once defendant has submitted his proposed charge to the judge, however, he need not thereafter object if the trial judge rejects his proposed charge and substitutes an erroneous statement of law).

Louisiana C.Cr.P. art. 807 states that a requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. See also, **Johnson**, 438 So.2d at 1097. The charge, moreover, must be supported by the evidence. **State v. Telford**, 384 So.2d 347, 350 (La. 1980). The failure to give a requested instruction constitutes reversible error

only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. See **State v. Marse**, 365 So.2d 1319, 1324 (La. 1978); La. C.Cr.P. art. 921.

The Criminal Code does not define "great bodily harm." However, the somewhat analogous "serious bodily injury" was previously found in the second degree battery statute. It now appears in the general definition section of the title.[58] No reported Louisiana case, however, has equated "great bodily harm" for purposes of the first degree murder statute with "serious bodily injury" as defined elsewhere.

Furthermore, this court has considered and rejected the argument that the phrase "great bodily harm" is unconstitutionally vague. See, **Mitchell**, 412 So.2d at 550, wherein the court found the phrase "inflict great bodily harm" not unconstitutionally vague or too indefinite to provide a clear standard.

Here, defendant does not show the requested instruction is wholly correct and pertinent. This court has said "great bodily harm" is somewhat analogous to "serious bodily harm," not that it is "more than mere 'serious bodily harm.'" Accordingly, the defendant cannot demonstrate the court erred when it failed to offer a definition of "great bodily harm" to the jury in its instructions. *Cf.* **State v. Corley**, 97-0235, p. 9 (La.App. 3 Cir. 10/8/97), 703 So.2d 653, 661, writ denied, 97-2845 (La. 3/13/98), 712 So.2d 875 ("The fact that the victim's injuries could be considered serious bodily injury does not prevent them from being considered great bodily harm.").

This assignment of error is without merit.

---

[58] Prior to 2019, the definition could be found in second degree battery, La. R.S. 14:34.1. However, as a result of 2019 La. Acts 2, the definition of "serious bodily injury" was moved to La. R.S. 14:2(C), definitions. In any event, serious bodily injury means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.

Penalty Phase

Prosecution's reference to defendant's purported threats to attempt to escape again and to kill another inmate and a prosecutor

In assignment of error number 17, defendant maintains that the prosecution's reference to defendant's purported threats to attempt to escape again and to kill another inmate and a prosecutor, without any notice to the defense or substantiation of the purported threats with evidence, violated defendant's right to due process, his right to confrontation, and his right to a fair and reliable sentencing hearing.

Because the instant prosecution involves the killing of an Angola correctional officer while the defendant was serving a life sentence, the penalty phase of defendant's trial necessarily focused on whether he poses a future danger to other prison security personnel and inmates. Defendant called two expert witnesses, Dr. Sarah Deland and Dr. Randy K. Otto, to explain the effects of defendant's childhood abuse and neglect, as well as to address the risk of future violent behavior were defendant to receive a life sentence.

Dr. Deland reviewed defendant's prison records, including the prison psychiatrist's notes compiled since the attempted escape for which defendant was on trial. Based upon her review, Dr. Deland concluded that the records revealed no evidence that defendant poses a risk of violence to others. She testified that the only evidence of violence on defendant's part in the 12 years since the instant offense involved defendant throwing deodorant at another inmate.

During the state's cross-examination of Dr. Deland, defendant argues that prosecutor Hugo Holland improperly introduced a previously undisclosed allegation concerning defendant; namely, that defendant told the officers transporting him to and

from court that he was planning to escape again and that he wanted to kill one of the prosecutors as well as an inmate who had testified against him.

> ADA HOLLAND: All right. And Doctor, the last couple of questions here. They have to do with your claim that, as far as on this risk assessment thing, Mr. Brown might not be dangerous. Have you ever spoken to a gentleman by the name of Kendall Varner?
>
> DR. DELAND: No.
>
> ADA HOLLAND: What about Trent Barton?
>
> DR. DELAND: No.
>
> ADA HOLLAND: They are the two gentlemen here from Angola that are constantly with Mr. Brown, getting him back and forth. Are you aware of any conversations they may have had with Mr. Brown over the last couple of weeks?
>
> DR. DELAND: No.
>
> ADA HOLLAND: All right. Let me just ask you if this changes your opinion. You do notice – or did you know that Mr. Brown has lost weight recently?
>
> DR. DELAND: Well, I've only known him since September, so ...
>
> ADA HOLLAND: All Right. Would it change your opinion about him being dangerous in the future if you learned that he had a conversation a couple of weeks ago discussing with these two guys about how he's losing weight so he could maybe escape?
>
> DR. DELAND: Not really. It's not a very good plan for him to tell them, is it?
>
> ADA HOLLAND: Nobody ever claimed he was really smart. I'm asking if that changes your opinion.
>
> DR. DELAND: No. I think he's on about as many precautions as you can be on.
>
> ADA HOLLAND: Does it change your opinion if just within the last couple of days he told one of those two gentleman [sic] that he wanted to know if they had a gun on him, because he just needed a gun with two bullets, one of them for one of the prosecutors, and another one for Earl Lowe, one of the inmates that testified against him?

DR. DELAND: That he made a statement that he would like to kill somebody? No.

ADA HOLLAND: That doesn't change your opinion about him being dangerous?

DR. DELAND: No. I already said he was a dangerous person. I just don't think he's a big risk in his current security situation.

ADA HOLLAND: I don't think I have any other questions.

Following re-direct, and the conclusion of Dr. Deland's testimony, a brief recess was ordered by the court. Upon the jury's return, defendant moved for a mistrial. The court took the motion under advisement and continued with trial. After the conclusion of evidence, but prior to closing arguments, the trial court denied the motion for a mistrial.

Subsequently, on November 16, 2011, defendant filed a written motion for new trial on grounds of prosecutorial misconduct. Specifically, the motion alleged that "[t]he highly improper and prejudicial remarks of the prosecutor in the mitigation phase, attributing current criminal planning and preparation and constituting evidence of other crimes and infractions by the defendant, undisclosed to the defense, in spite of continuing discovery obligations, prevented a fair trial under state and federal constitutional, jurisprudential and statutory law," citing to La. C.Cr.P. arts. 716, 720, 729(5), 768, 770(2), and La. C.E. art. 404. The defendant's motion was denied the same day following a hearing.

At the outset, we note that there was no objection to the prosecutor's initial question to Dr. Deland or to his follow-up questions. The state completed its cross-examination, the defense conducted its re-direct, and the witness was excused. Thereafter, a recess was taken. It was not until the jury was returning from that recess that the defendant moved for a mistrial. At this point, the objection came too late.

Pursuant to the Code of Criminal Procedure, "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence." La. C.Cr.P. art. 841(A). The contemporaneous objection rule (as the article is commonly known), was expressly extended to capital cases in two decisions of this court: **State v. Taylor**, 93-2201 (La. 2/28/96), 669 So.2d 364, and **State v. Wessinger**, 98-1234 (La. 5/28/99), 736 So.2d 162. **Taylor** applied the rule to alleged errors occurring in the guilt phase of a capital trial. **Taylor**, 98-2201 at 4-7, 669 So.2d at 367-69. Three years later, **Wessinger** extended the rule to the penalty phase of a capital trial, explaining that "we will no longer consider alleged errors occurring in the penalty phase of a capital trial absent a contemporaneous objection." **Wessinger**, 98-1234 at 20, 736 So.2d at 181.

Since **Wessinger**, the contemporaneous objection rule has been consistently applied in both the guilt and penalty phases of capital trials, with one exception. In **State v. Coleman**, 14-0402, pp. 75-76 (La. 2/26/16), 188 So.3d 174, 227-28, the court, without explanation, found a motion for mistrial filed a day following the introduction of objectionable other crimes evidence timely despite defendant's failure to contemporaneously object to the testimony. **Coleman** was a departure from prevailing jurisprudence. See and compare, **Broaden**, 99-2124 at 16-17; 780 So.2d at 361 (motion for mistrial was untimely where there had been no objection to the initial question or follow-up queries, the state completed its redirect , the witness was told she could step down, and the jurors were removed for a lunch break.) We decline to follow **Coleman** here.[59]

---

[59] To the extent **Coleman** departs from prevailing jurisprudence applying the contemporaneous objection rule in the penalty phase of a capital trial, it is overruled. Likewise, we decline defendant's invitation to revisit our decisions in **Taylor** and **Wessinger** insofar as they extend the contemporaneous objection rule to the guilt and penalty phases of a capital trial.

The **Wessinger** court's rationale for extending the contemporaneous objection rule to the penalty phase of capital trials was based on a number of policy considerations. Among those considerations was the availability to the accused of qualified and able counsel who "should have no problem recognizing and lodging contemporaneous objections to reversible errors," the independent duty of the court under La. Const. art. I § 20, La. C.Cr.P. art. 905.9 and La. S.Ct.R. 28 to determine whether the sentence imposed is constitutionally excessive, and the availability of an ineffective assistance of counsel claim in postconviction proceedings. **Wessinger**, 98-1234 at 19-20, 736 So.2d at 180-81. Apart from these safeguards, the court noted that the contemporaneous objection rule serves "two related and equally sound policies." ***Id.*** In the context of the penalty phase of a capital trial, the court explained:

> A contemporaneous objection to an error occurring during the penalty phase of a capital trial will either allow the trial judge to correct the error before it "infects" the entire penalty phase or, in the case of a serious error, allow the judge to immediately stop the proceedings and immediately give the defendant a new penalty phase, free of error, rather than make the accused go through the entire, contaminated penalty phase, and then go through yet another penalty phase after appeal.

Wessinger, 98-1234 at 19; 736 So.2d at 180.

The present case demonstrates how this policy goal was thwarted, as the trial judge, in denying defendant's motion for new trial, explained that "[i]f it had been made–the objection had been made contemporaneously with, with the objectionable activity, the Court certainly would have admonished the jury." The lack of a contemporaneous objection foreclosed that opportunity.[60] The objection raised subsequently through the motion for mistrial was untimely.

---

[60] Of course, La. C.Cr.P. art. 770 provides that an admonition to the jury to disregard an objectionable remark or comment is not sufficient to prevent a mistrial, unless the defendant requests that only an admonition be given. Here, there is no way of knowing whether defendant would have been satisfied with an admonition, as no contemporaneous objection was lodged. In any event, an opportunity to immediately rectify the alleged error was lost and the policies of judicial efficiency that underpin the contemporaneous objection rule were stymied.

Alternatively, even if we were to conclude that the objection was timely, and even if we assume the questioning by the prosecutor violated La. C.Cr.P. art. 770(2), we nevertheless find that the reference to unsubstantiated threats by defendant to attempt to escape again and to kill another inmate and a prosecutor was harmless error.[61] See, **State v. Johnson**, 94-1379, pp. 12-17 (La. 11/27/95), 664 So.2d 94, 100-02 (The mandatory mistrial provisions of La. C.Cr.P. art. 770(2) are a directive to the trial court only and do not preclude a reviewing court from applying a harmless error analysis to determine whether the erroneous mention of other crimes had no bearing on the jury's verdict.).

In the bifurcated sentencing phase of a first degree murder trial, the character of the defendant is automatically at issue. **State v. Jackson**, 608 So.2d 949, 953 (La. 1992); La. C.Cr.P. art. 905.2.[62] Evidence of unadjudicated other crimes is relevant and probative evidence of the defendant's character and propensities. **Jackson**, 608 So.2d at 954-56; **State v. Brooks**, 541 So.2d 801, 813 (La. 1989).

Normally, before evidence of unadjudicated other crimes is admissible, notice and a determination of admissibility by the trial court are required. **Jackson**, 608 at 957. As regards rebuttal evidence, the **Jackson** court explained: "If the defense offers evidence in the sentencing hearing which warrants the prosecutor's rebuttal with evidence of bad character, the trial judge must determine the relevance of the rebuttal evidence according to the nature of the evidence brought by the defense."

---

[61] The alleged threats arguably implicate the crime of obstruction of justice. La. R.S. 14:130.1(A)(3) prohibits "[r]etaliating against any witness, victim, juror, judge, party, attorney, or informant by knowingly engaging in any conduct which results in bodily injury to or damage to the property of any such person or the communication of threats to do so with the specific intent to retaliate against any person."

[62] La. C.Cr.P. art. 905.2 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."

Id. The hearing to determine whether other crimes evidence is admissible is commonly referred to as a **Jackson** hearing. **State v. Draughn**, 05-1825, p. 31 (La. 1/17/07), 950 So.2d 583, 606.

No **Jackson** hearing was conducted in this case to determine the admissibility of the alleged threats by defendant. This is because at no point in the proceedings did the state disclose to the defense any purported threats made by defendant during his transport to and from court proceedings. When questioned by the trial court, prosecutor Holland stated he did not know what Dr. Deland would be testifying to and, thus, could not make a determination as to whether defendant's statements would be "admissible" until hearing her testimony. As the trial court pointed out, the prosecutor's claim in this regard was simply not credible, as the state "certainly knew" future dangerousness would be an issue, and even had an expert (Dr. Welner) prepared to testify in rebuttal. Moreover, and again as the trial court pointed out, there was nothing to prevent the prosecutor from approaching the bench and indicating to the court that this information had been imparted to the state and that the prosecutor was considering using it in the cross-examination of Dr. Deland. The prosecutor's conduct, which we in no way condone, prevented the court from conducting the required **Jackson** hearing in this case.

Nevertheless, and despite the inappropriate conduct by the state, this court reviews **Jackson** errors for harmless error. **State v. Tart**, 93-0772, p. 40 (La. 2/9/96), 672 So.2d 116, 132. The inquiry is whether the capital sentence actually rendered in this trial was surely unattributable to the error. ***Id.*** With respect to the admission of other crimes evidence at the penalty phase, this court has explained:

> A defendant must show a "substantial risk of grave prejudice" arising out of inadmissible or surprise admission of other crimes evidence. The purpose of limiting evidence of unadjudicated criminal activity is to

> prevent surprise, undue prejudice, and the injection of an arbitrary factor into the jury's deliberations. There is no presumption of prejudice.

State v. Langley, 95-1489, p. 20 (La. 4/14/98), 711 So.2d 651, 667 (citations omitted).

Here, the state presented the alleged threats in rebuttal to defendant's evidence regarding his character and propensities. There is no doubt that the defendant's alleged threats to attempt to escape again and to kill another inmate and a prosecutor are directly relevant to his bad character and violent propensities, even while confined in prison. See, e.g., **State v. Cooks**, 97-0999 (La. 9/9/98), 720 So.2d 637, 654 (Calogero, C.J. concurring) (jurors were entitled to consider defendant's capacity for violence, reflected in the circumstances of the present crime, and his continuing capability for acting on his violent propensities within and without prison walls through his gang affiliation, in determining the choice between capital punishment and a term of life imprisonment).

As to any undue prejudice resulting from the lack of proper notice, it is notable that under questioning regarding the alleged threats, Dr. Deland's testimony did not change. She stated that she still considered defendant a dangerous person, but did not believe he presented a risk in his present security situation. Dr. Deland's testimony was followed by that of Dr. Otto, who reinforced her testimony. The state did not question its own witness, Dr. Welner, about the alleged threats. With the exception of a vague allusion to the threats in Dr. Welner's testimony that, in his opinion, defendant would attempt to escape again if presented with the opportunity, the threats were not brought up again.

Considering these circumstances, and the totality of evidence presented, including the circumstances of the present crime (an attempted aggravated escape

resulting in the death of a peace officer), the consensus of the experts that defendant is a dangerous person, even among those in the prison population, and the properly admitted evidence of defendant's previous conviction of the second degree murder of Harvey Reese just a few days after his release from prison, we find that the brief reference to defendant's alleged threats did not interject an arbitrary factor into the jury's deliberations at sentencing which would thereby render the jury's deliberations at the penalty phase unreliable, and that the capital sentence rendered in this case was surely unattributable to the error.

This assignment of error lacks merit.

Acceptance of Dr. Michael Welner as an expert

In assignment of error number 18, defendant maintains that the improper acceptance of Dr. Michael Welner as an expert permitted wholly unscientific testimony that violated defendant's statutory discovery rights and confrontation clause rights and inserted arbitrariness into the penalty phase. According to defendant, Dr. Welner's testimony exceeded the permissible bounds of expert opinion testimony, was wholly unscientific, purported to be able to predict whether defendant would attempt to escape in the future, improperly invoked defendant's race and sexuality, and was overwhelmingly prejudicial. Compounding these errors, defendant argues, was the failure of the state to comply with its discovery obligations with regard to expert witness testimony, which unfairly prevented defendant from effectively countering Dr. Welner's improper testimony.

The state retained Dr. Michael Welner, a forensic psychiatrist, to offer opinions and testify in rebuttal to the testimony of defendant's two experts, Dr. Deland and Dr. Otto. Defendant complains that the trial court erred in qualifying Dr. Welner as an expert under La. C.E. art. 702 and **Daubert**, arguing that Dr. Welner's opinions and

methodology are unreliable, invade the province of the jury, and fail to satisfy **Daubert**'s gatekeeping test. However, defendant failed to raise a **Daubert** challenge in a pre-trial motion, and did not object to the trial court's ruling accepting the witness as an expert. As a result, absent this court's Rule 28 review, this issue is not preserved for review. La. C.Cr.P. art. 841.

In any event, it was only after the defendant presented Dr. Deland as an expert in the field of forensic psychiatry and questioned her as to her opinion regarding defendant's character and propensities and as to her own risk assessment with regard to defendant's future dangerousness that the state called Dr. Welner to testify as an expert in forensic psychiatry in rebuttal. Having conceded the reliability and relevance of forensic psychiatry to the penalty phase of the trial by presenting Dr. Deland as an expert, the only issue that remained to be resolved when Dr. Welner was offered as an expert was his qualification to testify competently in the field. Following a thorough examination, the trial court accepted Dr. Welner as an expert. That examination included testimony from Dr. Welner explaining that he is a physician, a psychiatrist and a forensic psychiatrist, board certified in psychiatry, psychopharmacology and disaster medicine. After describing these various disciplines and his educational background, Dr. Welner revealed that he has been in practice since 1992, is an associate professor of psychiatry at NYU School of Medicine and an adjunct professor of law at Duquesne University School of Law, has authored materials on forensic psychiatry and psychology for textbooks, supervised and trained graduate and postgraduate students in the field of forensic psychology, and conducted research in "evidence-based appraisal of the severity of the crime," amongst other qualifications. Based on the foregoing, it does not appear, and the

defendant does not demonstrate, that the trial court abused its discretion in accepting Dr. Welner as an expert in forensic psychiatry.

As regards his testimony, defendant asserts that the trial court improperly allowed Dr. Welner to testify as to defendant's lack of remorse and that defendant would attempt to escape from prison again. With respect to the issue of remorse, the court has recognized that lack of remorse is relevant to the character and propensities of the defendant. See, **State v. Juniors**, 03-2425, p. 63 (La. 6/29/05), 915 So.2d 291, 336 ("Evidence that a capital defendant shows lack of remorse does not inject arbitrariness into the proceedings, as a lack of remorse is 'relevant to the character and propensities of the defendant.'"). In this case, while defendant declined to give Dr. Welner permission to interview him, Dr. Welner did note the sources he relied on in formulating his opinion regarding the lack of remorse, including prison records and mental health records. Dr. Welner testified to the absence of any references to remorse in any of the records, as well as a lack of change in defendant's personality after the incident, defendant's failure to speak out about violence, his failure to suffer a prolonged depression, and his failure to stop the murder of Capt. Knapps, all of which he testified were indicia of lack of remorse.

With respect to the issue of whether defendant would attempt to escape again if presented with the opportunity, Dr. Welner's opinion in this regard was elicited in the context of reviewing the various factors that would both increase and decrease defendant's risk of future dangerousness, an issue introduced by defendant. Similar to the issue of lack of remorse, this court has indicated that future dangerousness is

relevant to the character and propensities of the defendant during the penalty phase of a capital trial. **Clark**, 12-0508 at 86-87, 220 So.3d at 655.[63]

Defendant also argues that aspects of Dr. Welner's testimony were speculative, as well as included impermissible testimony. Pursuant to La. C.E. art. 703, experts may testify as to the basis of their opinion testimony, and "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." However, La. C.E. art. 705(B) precludes an expert, on direct examination, from relating inadmissible evidence that may have formed the basis for his or her opinion. Should hearsay testimony be improperly admitted, the error, if any, may be considered harmless if the reviewing court determines beyond a reasonable doubt that the improperly admitted hearsay did not contribute to the verdict. **State v. Wille**, 559 So.2d 1321, 1332 (La. 1990).

During the state's examination of Dr. Welner, it was brought out that defendant was the subject of a corrections investigation in 2005 involving letters that he authored.[64] Dr. Welner testified that he sought guidance from Angola staff as to lingo, people who were mentioned in the letters, and how things operate at Angola. According to Dr. Welner, defendant showed "a lot of concern and intensity" for one of the inmates mentioned in the letters. Dr. Welner testified that "[w]hether the relationship was homosexual or not, I have no opinion .... But it was clearly a close relationship of some element of control," as defendant made it quite clear to that

---

[63] To the extent defendant's argument regarding Dr. Welner's testimony with respect to defendant's lack of remorse and his likelihood to attempt another escape is premised on the argument that such testimony exceeds the scope of permissible expert opinion under **Daubert** and La. C.E. art. 702, defendant's failure to raise a **Daubert** challenge forecloses this argument. La. C.Cr.P. art. 841.

[64] Apparently, defendant would send letters to fictitious addresses so the letters would be returned to the sender. Defendant would name the sender as someone he had a close relationship with, essentially utilizing a "boomerang" method for sending mail that might otherwise be discovered.

inmate that he should not follow another inmate, because "he's trying to get at you." Defendant objected to the testimony and the trial court sustained the objection. The state moved on to the next letter. Dr. Welner later testified, in connection with other letters, that he learned from Angola officials that the slang terms "powder" and "trees" appearing in the letters reference cocaine and marijuana.

Assuming for the sake of argument that the information gleaned from Dr. Welner's interviews with Angola personnel regarding the contents of the letters and the statements with regard to the meaning of the terms "powder" and "trees" were inadmissible, we find that the admission of this information was harmless error. In light of and considering the admissible evidence presented during the penalty phase, we find that the verdict in this case was surely unattributable to the error. The information gleaned from Angola personnel did not introduce an arbitrary factor into the jury's deliberations.

Finally, defendant complains that late discovery hampered his ability to effectively counter Dr. Welner's testimony. Defendant argues that he lodged numerous complaints about the adequacy of the state's discovery with regard to Dr. Welner, and, when the state belatedly provided voluminous discovery during trial, he objected to the late disclosure.

Louisiana's criminal discovery rules are intended to eliminate unwarranted prejudice arising from surprise testimony and evidence, to permit the defense to meet the state's case, and to allow a proper assessment of the strength of the state's evidence in preparing a defense. **Toomer**, 395 So.2d at 1329; **State v. Statum**, 390 So.2d 886, 890 (La. 1980). When the defendant is lulled into a misapprehension of the state's case through the prosecution's failure to disclose timely or fully, and the defendant suffers prejudice when undisclosed evidence is used against him, basic

unfairness results which constitutes reversible error. **State v. Harris**, 00-3459, p. 8 (La. 2/26/02), 812 So.2d 612, 617.

In the present case, on the second day of voir dire (October 18, 2011), defendant raised concerns regarding the adequacy of pre-trial discovery regarding Dr. Welner. The defense noted they had no report from Dr. Welner and no materials underlying his opinion. The trial court ordered the state to inform the defense of the areas, including future dangerousness, that Dr. Welner would testify to. On October 21, 2011, the state turned over 25 pages of Dr. Welner's notes. On October 22, 2011, the state turned over 188 pages of discovery, although the state noted the materials were cumulative of discovery already turned over. The defense was unable to confirm or deny this representation. The trial court informed the defense that it could re-urge its discovery objection later if necessary. Finally on October 26, 2011, the state turned over seven pages of notes from Dr. Welner's interviews.

After receipt of the discovery materials, and after defendant had an opportunity to review the materials provided, there was no further objection from the defense. Moreover, there is nothing to indicate that there was a report prepared by Dr. Welner. In the absence of a written report or results, there is nothing the state would be required to provide. See, La C.Cr.P. art. 719(A);[65] **State v. Joekel**, 19-0334, pp. 1-2 (La.App. 5 Cir. 12/20/19), 2019 WL 7044739 (unpublished) (noting the pre-2014

---

[65] At the time of trial, the version of La.C.Cr.P. art. 719(A) in effect provided:

> Upon motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect and copy, photograph, or otherwise reproduce any results or reports, or copies thereof, of a physical or mental examination, and of scientific tests or experiments, made in connection with or material to the particular case, that are in the possession, custody, control, or knowledge of the district attorney and intended for use at trial. Exculpatory evidence shall be produced under this Article even though it is not intended for use at trial.

version of La. C.Cr.P. art. 719 did not require the state to produce a written summary if the expert did not reduce the results to writing).

This assignment of error lacks merit.

Motion for New Trial

Prosecution's suppression of co-defendant Barry Edge's confession

In his second assignment of error, defendant asserts that several months after his trial and conviction, the state revealed that it was in possession of a previously undisclosed interview with an Angola inmate to whom co-defendant Barry Edge confessed, implicating himself and co-defendant Jeffrey Clark, but not defendant, in the actual murder of Capt. Knapps.[66] Defendant argues this statement would have provided compelling evidence supporting his statement that he left Capt. Knapps in the bathroom, injured but alive, and that he was uninvolved with, and did not share the intent of, the men who beat Capt. Knapps to death. Defendant maintains that the failure to disclose this evidence until after he had been convicted of first degree murder and sentenced to death violated his right to due process of law under the Fourteenth Amendment.

Defendant compares his situation to that presented in the seminal case of **Brady v. Maryland**, 373 U.S. 83 (1963), wherein the state suppressed the confession of Brady's co-defendant that he, rather than Brady, fatally strangled the victim of the armed robbery the two men committed together. Defendant argues that, like Brady, he was tried for a capital crime involving multiple co-defendants wherein his guilt and penalty phase defenses were based on the fact that, while he participated in the underlying felony, he did not participate in the fatal beating that led to Capt. Knapps'

[66] The state does not dispute that the statement, taken in a pre-trial interview, was not produced to defendant prior to his trial.

death. And, like Brady, he did not learn until after trial that his co-defendant had confessed to the crime, admitting that he and another co-defendant had made the decision to kill the victim. Further, defendant argues, while the suppressed confession in **Brady** included the inculpatory statement that although Brady did not commit the actual murder, he actively encouraged his co-defendant to do so, the suppressed confession in this case scarcely mentioned the defendant, and was consistent with defendant's statement to law enforcement that he did not share the intent of Capt. Knapps' killers. Defendant argues that, given these circumstances, he is entitled to a whole new trial. At the very minimum, he is entitled to a new penalty phase hearing, consistent with **Brady**.

Procedurally, this **Brady** issue comes before the court via a motion for new trial. Approximately four months after defendant was sentenced, the state gave notice of its intent to use a statement obtained from Angola inmate Richard Domingue at co-defendant Barry Edge's trial. Defendant subsequently learned that, prior to his trial, the state had interviewed Domingue, who had befriended Edge and was housed in the same tier with Edge at Angola. According to Domingue, Edge confided that he and one of the other Angola Five inmates made the decision to kill Capt. Knapps. As Domingue relayed Edge's statement, the other three inmates (including defendant), were neither aware of the plan to kill Capt. Knapps nor were they directly involved in the decision to do so:

> And he [Edge] was like you don't, you don't really understand you know, I'm saying there was more involved. ... But we could have let him live. But me and Jeff [Clark] made the decision at that time because all these other mother fuckers that was involved they couldn't seem to get their head together when they were, you know, everything went down. He [Edge] said me and Jeff decided we're going to kill him. I mean it was just like shhh. It was like he flipped a switch and they killed him.

Defendant moved for a new trial, contending that Domingue's statement constituted **Brady** material that the state was required to provide to defendant in advance of trial. The trial court subsequently held a hearing, at which Domingue testified. Ultimately, the trial court found that defendant was not entitled to a full new trial because the evidence "at the guilt phase of the trial was overwhelming," such that the Domingue statement was not material. The trial court found that defendant's actions "certainly constituted an intent to, at least, inflict great bodily harm on Capt. Knapps."

The trial court went on to determine, however, that defendant was entitled to a new penalty phase only trial, concluding that "there is a reasonable probability that the jury's verdict would have been different had the evidence not been suppressed and further that because of this and, probably more that the Court is not stating, the Court does not have confidence in the jury's verdict as to the death penalty."

The state applied for writs from the ruling granting the new penalty phase trial, and the court of appeal reversed, finding that the defendant had only satisfied two of the three components of a constitutional violation under **Brady**, and had not shown there was a reasonable probability that his sentence would have been different had the Domingue statement been disclosed. **State v. Brown**, 15-0591 (La.App. 1 Cir. 9/2/15) (unpublished.)[67] From this ruling, the defendant applied for writs in this court.

In a 4-3 decision, this court denied writs, finding that the state's failure to disclose Domingue's statement did not constitute "a 'true **Brady** violation.'" **State**

[67] One member of the three judge appellate panel dissented, finding no showing of an abuse of discretion on the part of the trial court in granting the new penalty phase trial.

v. Brown, 15-2001, p. 3 (La. 2/19/16), 184 So.3d 1265, 1267.[68] Specifically, the majority opined, "because (1) the statement is not favorable to Brown, (2) the failure to disclose the statement was not prejudicial to him (i.e., the statement was not 'material' for **Brady** purposes)." ***Id.***

Because a writ denial by this court has no precedential value,[69] and we now have the benefit of a full record and additional arguments advanced on appeal, we examine the defendant's contentions regarding the new trial motion anew.

In **Brady**, the Supreme Court held that suppression by the prosecution of evidence favorable to the accused violates a defendant's due process rights where it is material either to guilt or punishment, without regard to the good or bad faith of the prosecution. **Brady**, 373 U.S. at 87. This rule encompasses evidence which could be used to impeach a witness whose reliability or credibility may determine the defendant's guilt or innocence. **United States v. Bagley**, 473 U.S. 667, 676 (1985); **Giglio v. United States**, 405 U.S. 150, 154 (1972); **State v. Knapper**, 579 So.2d 956, 959 (La. 1991). Furthermore, it extends to both late disclosure and/or non-disclosure of favorable evidence that significantly impacts the defendant's opportunity to effectively present the evidence or compromises the trial's

---

[68] Chief Justice Johnson dissented from the per curiam decision and assigned reasons. Associate Justices Weimer and Hughes voted to grant and docket for full consideration.

[69] This court has repeatedly held that a writ denial by the court has no precedential value. **St. Tammany Manor v. Spartan Bldg. Corp.**, 509 So.2d 424, 428 (La. 1987) ("A writ denial by this Court has no precedential value."). Although a writ denial has no official precedential value, it may nonetheless indicate the court's thinking to bar and bench, but any additional remarks or findings are not binding. See, **Maloney Cinque, L.L.C. v. Pacific Ins. Co. Ltd.**, 10-1164 (La. 5/21/10), 36 So.3d 236 ("once the court of appeal denied the writ, any additional remarks or findings are not binding."). See also, **Davis v. Jazz Casino Co., L.L.C.**, 03-0276, p.1 (La. 6/6/03), 849 So.2d 497, 498 (when a court of appeal "declines to exercise its supervisory jurisdiction by denying the writ, the court was without jurisdiction to affirm, reverse or modify the judgment of the trial court. Thus, any language in the court of appeal's earlier writ denial purporting to find no error in the trial court's certification ruling is without effect.").

fundamental fairness. **State v. Kemp**, 00-2228, p. 7 (La. 10/15/02), 828 So.2d 540, 545.

Nevertheless, as this court has recognized, "not every violation of the broad duty of disclosure constitutes a **Brady** violation." **Brown**, 15-2001 at 2, 184 So.3d at 1266. In fact, **Brady** and its progeny do not establish a general rule of discoverability: the prosecutor does not breach the constitutional duty to disclose favorable evidence "unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." **United States v. Agurs**, 427 U.S. 97, 108; **State v. Bright**, 02-2793, 02-2796, p. 6 (La. 5/25/04), 875 So.2d 37, 42.

In **Strickler v. Greene**, 527 U.S. 263 (1999), the Supreme Court laid out the three components of a true **Brady** violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." **Strickler**, 527 U.S. at 281-282.

Relative to the materiality component of a **Brady** violation, a reviewing court must ascertain not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in the absence of the undisclosed evidence the defendant received a fair trial resulting in a verdict worthy of confidence. **Kyles v. Whitley**, 514 U.S. 419, 434 (1995). See also, **State v. Strickland**, 94-0025, p. 38 (La. 11/1/96), 683 So.2d 218, 234. A **Brady** violation occurs when the "evidentiary suppression 'undermines confidence in the outcome of the trial.'" **Kyles**, 514 U.S. at 434 (quoting **Bagley**, 473 U.S. at 678). Further, while late disclosure or non-disclosure of exculpatory evidence may deprive the defendant of a fair trial, in both instances the impact on the defense "must be evaluated in the context of the entire record." **Kemp**, 00-2228 at 7, 828 So.2d at 545.

With these precepts in mind, we turn to an examination of whether defendant has established his right to a new trial. We begin that inquiry with an examination of the Domingue statement. In that statement, Domingue explains that he and co-defendant Edge were on the same tier at Angola and had become quite close. At one point during their time together, Domingue asked Edge what happened the night of the attempted escape that led to Capt. Knapps being killed:

> I said how did everything turn out so bad to where y'all had to kill Captain [Kn]apps. Because I just can't see, you had Foot [David Brown], who is huge. That's the black guy that was involved and all the rest of y'all. Y'all telling me y'all couldn't overpower little Captain [Kn]apps, you know, to where you don't have to kill him. And he said **oh no**, he said **we didn't have to kill him**. He said **we could have let him live**. He said **we did it. We made a decision to kill him to help our self. It's bigger than you know. It's really bigger than you think**. Bigger than I think or bigger than I know. It's like there is some equation here that I wouldn't understand ...
>
> And I told him, no I explained to him. I said Barry, you telling me by killing a correctional officer in an escape attempt, how are your helping yourself any way, unless you just trying to commit suicide by getting on death row ... if you don't get killed right after y'all do it. Because you're going to have high energy where a lot of people are going to be very mad at you for taking out a man who was just doing his job. And he was like **you don't, you don't really understand you know, I'm saying there was more involved. He's like there's more involved. But we could have let him live. But me and Jeff [rey Clark] made the decision at that time because all of these other mother fuckers that was involved they couldn't seem to get their head together when they were, you know, everything went down. He said me and Jeff decided we're going to kill him**. I mean it was just like shhh. It was like he flipped a switch and they killed him. Now I know there was a struggle involved and everything else. I don't want to speak about anything that I've heard, you know. And, inmates talking about it and everything. I'm telling you specifically what Barry said. [words attributed to Edge in bold]

Investigators then proceeded to question Domingue further as to who made the decision to kill Captain Knapps:

Tommy Block: And Barry Edge told you we could have allowed him to live?

Domingue: Yeah. Barry Edge said **we could have let him live. We could have let him live.**

Tommy Block: But he had to die.

Domingue: No, he said **it was going to help us. It was going to help us** so yeah, he had to die.

Tommy Block: And he and, he and Jeffrey made the decision.

Domingue: He said **him and Jeffrey did, were the only ones that were thinking rationally during this highly charged situation. And they made a decision to help their self to kill Captain [Kn]apps. But they could have let him live**. And he bluntly said **he didn't have to die**. [Words attributed to Edge in bold.]

Defendant reiterates the argument he advanced previously before this court: that Domingue's statement provides compelling evidence that supports his own statement that he left Capt. Knapps in the bathroom injured, but alive, and was uninvolved in and did not share the intent of the men who killed Capt. Knapps. Thus, the statement was favorable and material to the jury's determination of guilt. Further, as evidence supporting his claim to a lesser degree of culpability in Capt. Knapps' murder, defendant argues the statement was both favorable and material to the jury's determination of penalty. We disagree.

After further review, we agree with our previous assessment of Domingue's statement: it simply does not exculpate defendant and in that regard is not favorable to him. **State v. Brown**, 15-2001 at 4, 184 So.3d at 1268. While the statement certainly inculpates Edge and Clark as the individuals who made the decision to kill Capt. Knapps, it provides no additional information as to who actually killed Capt. Knapps. ***Id.*** In fact, when testifying at the evidentiary hearing on defendant's motion for new trial, Domingue agreed that the distinction between the verbs "decided" and "caused" is an important one, and while Edge told Domingue that he and Clark "made

the decision to kill Captain Knapps ... he never told me, and this is what we did." Further, under questioning, Domingue acknowledged that Edge never stated that defendant was not present or not involved in the killing of Capt. Knapps. Other than to implicate defendant as one of the participants, the statement contains little to no elucidation of defendant's role; therefore, the statement is not favorable to defendant.

With respect to materiality, the trial court determined that the evidence at the guilt phase of trial was "overwhelming," and that the Domingue statement was not material to the jury's determination of guilt. Indeed, in order to prove first degree murder the state only had to prove the defendant was a principal in the crime and, at a minimum, had the specific intent to inflict great bodily harm.

At trial, the jury heard defendant's statement that he was involved in the attack on Capt. Knapps in the hallway, where Capt. Knapps was hit in the head with a mallet, and–according to the state's transcript–was also stabbed. Defendant admitted dragging an injured and bleeding Capt. Knapps from the hallway and into the bathroom, while a struggling Capt. Knapps asked, "Why me, what have I done to ya'll." In addition, defendant was found with a substantial amount of Capt. Knapps' blood on him, including on his jeans; so much that it was able to soak through to his long underwear. There was also blood in his fingernails and on his boots. Further, there was a blood stain that resembled a hand being wrapped around defendant's leg that could have occurred when defendant was carrying Capt. Knapps into the bathroom. A sweatshirt connected to defendant through user biology was found in the security restroom. That sweatshirt had spatter stains on the cuffs, indicating Capt. Knapps was already bloody and then was hit again.[70] Bruising was found on Capt.

[70] Expert testimony established that an initial blow creates a blood source; additional blows result in blood spatter.

Knapps' shoulders, which the state connected through expert testimony to defendant's statement that he was holding Capt. Knapps. Finally, inmate Earl Lowe testified that defendant had come into the band room and after telling the inmates present they could leave if they wished to, defendant said: "Look, man, we might as well tell them. We got Knapps in the bathroom. We knocked his bitch ass out in the bathroom."

Given the foregoing abundant evidence linking defendant to the murder of Capt. Knapps, we agree with the trial court's assessment, and find it is highly improbable that the Domingue statement would have altered the outcome of the guilt phase, as the defendant's actions "certainly constituted an intent to, at least, inflict great bodily harm on Capt. Knapps." Thus, we find that Domingue statement was not material to defendant's guilt.

As to the jury's decision to impose the death penalty, we likewise find that the suppressed statement was not material. The evidence, as recited above, was not, as defendant argues, material to the statutory mitigator suggested: that defendant's participation in the crime was "relatively minor," and that, as a result, he bears a lesser degree of moral culpability for Capt. Knapps' death. In fact, it does not corroborate defendant's contention that he left the bathroom while Capt. Knapps was still alive and did not share in the specific intent of his co-defendants to kill or inflict great bodily harm on Capt. Knapps. The statement does not preclude, and indeed does not speak to, defendant's formation of the necessary specific intent independent of co-defendants Edge and Clark. Indeed, it was not the state's position at any stage of this trial that defendant acted alone. And the statement does not place defendant

outside the restroom when the fatal blows were delivered. The statement is actually silent as to which individuals participated in the physical attack.[71]

Moreover, the record evidence contradicts the contention that only Edge and Clark remained calm and "were thinking rationally" throughout, as defendant's conduct – conduct he recounted in his statement–reflects the contrary. Defendant explained that after he left the restroom, he assisted in subduing Lt. Chaney, assisted in securing the area, and participated in negotiations with security.

In sum, as we noted previously, the jury had the benefit of defendant's statement that he reassured Capt. Knapps that he would not be harmed and that Capt. Knapps was alive when the left the restroom, but the jury obviously rejected this account. **State v. Brown**, 15-2001 at 4, 184 So.3d at 1268. Given the copious evidence of the significant role defendant played in the fatal attack, including defendant's own statement that he dragged a bloodied and kicking Capt. Knapps into the restroom and held him while an inmate he assumed was Edge struck him a second time, coupled with the fact that the Domingue statement sheds no light on who actually killed Capt. Knapps, we find there is no reasonable probability of a different result had the undisclosed statement gotten in, and our confidence in the jury's decision to impose the death penalty is not undermined by the suppression of that statement. We agree with our previous assessment that the trial court's decision to grant defendant a new penalty phase trial was an abuse of the court's broad discretion

---

[71] In connection with the hearing on the motion for new trial, the state introduced a December 29, 1999 statement from Edge given contemporaneous to the attempted escape and murder. In that statement, Edge admitted striking Capt. Knapps on the head with a mallet in the hallway, but denied entering the bathroom where Capt. Knapps was subsequently brought. In fact, he denied any further participation in the attack on Capt. Knapps, maintaining that he withdrew from the attack and instead proceeded to clean up the evidence left in the hallway. This statement (which would clearly be admissible in any subsequent retrial), in addition to the lack of any blood evidence connecting Edge to Capt. Knapps, directly contradicts the account Domingue recited ten years later, and undermines any favorable inference that might be drawn therefrom.

in light of our evaluation of the withheld statement–which is neither favorable nor material to defendant–in the context of the full record.

This assignment of error lacks merit.

Supplemental Issues

Conflict of Interest

In his twenty-second assignment of error, defendant maintains that the trial court erred in failing to address his court-appointed attorney's conflict of interest arising from the fact that he and lawyers for two other co-defendants were full-time employees of the same law office. More particularly, defendant claims that his trial counsel, Mark Marinoff, had a conflict of interest given that several other staff members of his law office, the East Baton Rouge Parish Public Defender's Office, represented two of his co-defendants in this case.[72] Moreover, the director of that office, Mike Mitchell, assisted in the representation of co-defendant Edge. As attorney Nevil Hollingsworth (also representing Edge) was also a supervising attorney in the office, defendant maintains that Marinoff essentially had a conflict of interest with his two bosses. Defendant argues that the simultaneous representation of multiple co-defendants with adverse defenses by employees of a single public defender's office created an impermissible conflict of interest, made worse by the fact that at least two of Edge's lawyers were responsible for supervising defendant's lawyers.

The United States Supreme Court and this court have thoroughly examined the relationship between conflicting interests and effective assistance of counsel. See,

[72] Attorneys Nevil Hollingsworth, Fred Kroenke, and Franz Borghardt were appointed to represent Barry Edge at various points, while Attorney Bert Garraway was appointed to represent Jeffrey Clark. According to defendant, they were all full-time employees of the East Baton Rouge Parish Public Defender's Office.

Cuyler v. Sullivan, 446 U.S. 335 (1980); **Holloway v. Arkansas**, 435 U.S. 475 (1978); **State v. Wille**, 595 So.2d 1149,1153 (La. 1992); **State v. Carmouche**, 508 So.2d 792, 797 (La. 1987); **State v. Edwards**, 430 So.2d 60, 62-63 (La. 1983); **State v. Marshall**, 414 So.2d 684, 687-688 (La. 1982). If a defendant raises the issue of a possible conflict of interest before trial, a trial judge must "either ... appoint separate counsel or take adequate steps to ascertain whether the risk [of a conflict of interest is] too remote to warrant separate counsel." **Holloway**, 435 U.S. at 484. If a defendant does not raise the issue until after trial, he "must establish that an actual conflict of interest adversely affected his lawyer's performance." **Sullivan**, 446 U.S. at 350.

To show an actual conflict, a defendant must prove, through specific instances in the record, that his attorney was placed in a situation inherently conducive to divided loyalties. **Tart**, 93-0772 at pp. 19-20, 672 So.2d at 125. The burden of proving an "actual conflict of interest," rather than a "mere possibility of conflict," rests on the defendant. **State v. Franklin**, 400 So.2d 616, 620 (La. 1981).

In **State v. Kahey**, 436 So.2d 475, 484 (La. 1983), this court adopted the definition of "actual conflict of interest" set forth in **Zuck v. Alabama**, 588 F.2d 436 (5th Cir. 1979):

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interest of the other client and the defendant is sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his client.

Zuck, 588 F.2d at 439. The Louisiana Rules of Professional Conduct provide additional guidance on this issue. Rule 1.7(a)(2) states that a current conflict of interest exists if "there is a significant risk that the representation of one or more

clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

As this court made clear in **State v. Tucker**, 13-1631 (La. 9/1/15), 181 So.3d 590:

> Although a defendant generally is required to demonstrate prejudice to prevail on a claim of ineffective assistance of counsel, prejudice is presumed when counsel is burdened by an actual conflict of interest. This presumption is "fairly rigid." Moreover, "once the defendant establishes that there was an actual conflict, he need not prove prejudice, but simply that a 'lapse in representation' resulted from the conflict." To prove a lapse in representation, a defendant must "demonstrate that some 'plausible alternative defense strategy or tactic might have been pursued," and that the 'alternative defense was inherently in conflict with or not undertake due to the attorney's other loyalties or interests."

Tucker, 13-1631 at 37; 181 So.3d at 618-619 (citations omitted).

In order to effectuate a defendant's Sixth Amendment right to effective assistance of conflict-free counsel and the ethical obligation of an attorney associated with other lawyers in a firm to avoid representing a client "when any one of them practicing alone would be prohibited from doing so," La. Rules of Professional Responsibility, Rule 1.10(a), Indigent Defender Boards are treated as the equivalent of private law firms. **State v. Connolly**, 06-0540, p. 6 (La. 6/26/06), 930 So.2d 951, 954, n.1. However, even applying a private law firm model to the IDB lawyers' association, generally such association does not, without more, require the conclusion that a conflict existed. *Cf.*, **Burger v. Kemp**, 483 U.S. 776, 783-784 (1987) (upholding appointment of two lawyers in a two-partner firm to represent capital co-defendants). In **Burger**, each defendant had emphasized his co-defendant's greater culpability to avoid the death penalty in their separate capital trials, but, after noting that conducting separate trial significantly reduced the potential for a divergence of interests, the Supreme Court explained:

> There was undoubtedly a conflict of interest between Burger and Stevens because of the nature of their defenses. But this inherent conflict between two participants in a single criminal undertaking cannot be transformed into a Sixth Amendment violation simply because the community might be aware that their respective attorneys were law partners.

Id., 483 U.S. at 788.

In this case, all five co-defendants were severed before trial, and the defendant failed to raise the issue pretrial.[73] Ten attorneys represented the five co-defendants at trial. Notably, defendant fails to identify any alternative strategies or tactics that his attorneys failed to pursue, nor specific instances in the record where representation was hindered, or any other lapse in representation. As a result, he fails to demonstrate any actual conflicts of interest.

This assignment of error lacks merit.

Constitutionality of Louisiana's death penalty

In his twenty-third assignment of error, defendant alleges that Louisiana's death penalty is unconstitutional.

In pre-trial proceedings in this case, defendant adopted three motions filed by co-defendant Mathis. Those motions set forth the basis for defendant's contention that Louisiana's death penalty is unconstitutional: (1) Mathis' Motion No. 53, entitled "Motion to Exclude Death as a Possible Punishment in Light of Overwhelming Evidence that Louisiana's Enforcement of Capital Punishment is Infected by an Unacceptable Rate of Error Including an Inability to Protect Innocent Prisoners from being Sentenced to Death" and its supplement; (2) Mathis' Motion No. 81, entitled "Motion to Declare the Louisiana Death Penalty Articles Facially Unconstitutional;"

---

[73] The failure to raise the conflict of interest pre-trial distinguishes this case from **State v. Garcia**, 09-1578 (La. 11/16/12), 108 So.3d 1, wherein the conflict of interest was noted by the trial court in pretrial proceedings. Unlike **Garcia**, this case fits precisely within the parameters of **Sullivan**, which requires defendant to establish an actual conflict of interest.

and (3) Mathis' Motion No. 54, entitled "Motion to Bar the Death Penalty Because Louisiana's Capital Punishment System is Unconstitutional Under **Bush v. Gore** [531 U.S. 98 (2000)]." All three motions were denied by the trial court, and the denial of each was challenged by co-defendant Clark in his direct appeal to this court. In each instance, this court found no error in the trial court's rejection of the defendants' challenges. **Clark**, 12-0508 at 132-133, 140-141, 143-145, 220 So.3d at 684-685, 689-690, 691-693. Defendant requests that we re-consider those rulings here.

In our decision in **Clark**, in addressing the argument that Louisiana's death penalty is unconstitutional because persistent legal and factual errors inherent in capital prosecutions in Louisiana result in an unacceptable rate of error and wrongful convictions at odds with evolving standards of decency and the Eighth Amendment, we quoted Justice Scalia in rejecting the idea that the fact that subsequent exonerations occur demonstrates constitutional infirmity:

> As Justice Scalia stated in his concurrence in **Kansas v. Marsh**, 548 U.S. 163, 193, 126 S.Ct. 2516, 2535-36, 165 L.Ed.2d 429 (2006) ..., exonerations do not come about "through the operation of some outside force to correct the mistakes of our legal system, [but] rather ... *as a consequence of the functioning of our legal system*." Moreover, "[c]apital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed." ***Id.***, 548 U.S. at 198, 126 S.Ct. at 2538. Thus, "[r]eversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success." ***Id.***, 548 U.S. at 193, 126 S.Ct. at 2536.

Clark, 12-0508 at 133; 220 So.3d at 685. While defendant requests this court to reconsider its reasoning in this regard, he offers no additional argument that would persuade us to alter our previous analysis and conclusion. As to this challenge, we therefore re-affirm our conclusion in **Clark**.

With respect to the argument that Louisiana's death penalty articles are facially unconstitutional because they fail to require that jurors find a death sentence appropriate beyond a reasonable doubt, we answered this contention in **Clark** as follows:

> **Ring [v. Arizona**, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)] requires only that jurors find beyond a reasonable doubt all of the predicate facts that render a defendant eligible for the death sentence, after consideration of the mitigating evidence. ***Id.***, 536 U.S. at 609, 122 S.Ct. at 2443. Neither **Ring**, nor Louisiana jurisprudence, requires jurors to reach their ultimate sentencing determination beyond a reasonable doubt. **State v. Koon**, 96-1208, p. 27 (La. 5/20/97), 704 So.2d 756, 772-73 ("Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard."). This court rejected the same argument in **State v. Anderson**, 06-2987, p. 61 (La. 9/9/08), 996 So.2d 973, 1015. As the trial court recognized, LSA-C.Cr.P. arts. 905.3 and 905.6 comport with these constitutional requirements.

Id., 12-0508 at 141, 220 So.3d at 690. Again, in the absence of new or additional argument as to this issue, we decline the invitation to re-consider our conclusions in both **Clark** and **Anderson**.

Finally, defendant urges us to re-consider his contention that the decision in **Bush v. Gore**, 531 U.S. 98 (2000), in which the Supreme Court held that due process requires the states to have uniform standards to prevent arbitrary and disparate treatment of similarly-situated citizens when a fundamental right is at stake, requires all prosecutors to have uniform standards with regard to the pursuit of capital punishment. We rejected this contention in **Clark**, and, finding no new or compelling argument presented here, reiterate our analysis and conclusion therein:

> The defendant's attempt to analogize this case with **Bush v. Gore** to show there is a pattern of disparate treatment of similarly-situated capital defendants in Louisiana is unavailing. In **Bush v. Gore**, the Supreme Court rejected the Florida Supreme Court's attempt to determine voters' intent without uniform rules. 531 U.S. at 104-06, 121 S.Ct. at 530. Whether or not a ballot was counted varied from county to

county and "within a single county from one recount team to another." ***Id.***, 531 U.S. at 106, 121 S.Ct. at 531. Without objective criteria, each county and recount team could apply a different standard in defining a legal vote, resulting in arbitrary and disparate treatment of voters. ***Id.***, 531 U.S. at 105, 121 S.Ct. at 530. The Court's overriding concern was the lack of sufficient guarantees of equal treatment. ***Id.***, 531 U.S. at 107, 121 S.Ct. at 531. The defendant claims that the lack of uniform standards for determining Florida voter intent, in **Bush v. Gore**, is analogous to the alleged lack of uniform prosecutorial standards in Louisiana because, like Florida's electoral regulations, Louisiana affords the prosecutor in each parish discretion as to "whom, when, and how" to prosecute, including in capital penalty cases. See LSA-C.Cr.P. art. 61. See also **McClesky v. Kemp**, 481 U.S. 279, 297, 107 S.Ct. 1756, 1770, 95 L.Ed.2d 262 (1987) (Prosecutorial discretion "is essential to the criminal justice process [and thus] we would demand exceptionally clear proof before we would infer that the discretion has been abused.").

A legitimate and unchallenged explanation for the prosecutor's decision to seek the death penalty in the instant case is fully supported by the record: the defendant committed an act for which the law permits imposition of the death penalty. Moreover, in **Gregg v. Georgia**, [428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)], the Supreme Court found the risk of arbitrary and capricious prosecution in a capital proceeding was minimized by the bifurcated nature of the proceedings, the requirement of an aggravating circumstance, the allowance of mitigating evidence, and the automatic appeal. ***Id.***, 428 U.S. at 199-200, 96 S.Ct. at 2937-38. The Supreme Court elaborated:

> The existence of ... discretionary stages is not determinative ... . At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty ... . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution ... . In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant ... . Such a system in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today ... .

Id. (footnote incorporated). See also **Proffitt v. Florida**, 428 U.S. at 253, 96 S.Ct. at 2967 (rejecting petitioner's contention that the Florida death penalty is arbitrary because the prosecutor decides whether to charge a capital offense and accept or reject a plea to a lesser offense). Until such time as the Supreme Court decides to revisit the issue, **Bush v. Gore** cannot fairly be construed as having overruled **Gregg v.**

> **Georgia**, particularly when the Supreme Court expressly stated its decision was "limited to the present circumstances." **Bush**, 531 U.S. at 109, 121 S.Ct. at 532.

Clark, 12-0508 at 144-145, 220 So.3d at 692-693.

This assignment of error lacks merit.

Capital Sentence Review

Under La. C.Cr.P. art. 905.9 and La. S.Ct.R. 28, this court reviews every sentence of death imposed by the courts of this state to determine if it is constitutionally excessive. In making this determination, consideration is given to the following: (1) whether the jury imposed the sentence under the influence of passion, prejudice, or other arbitrary factors; (2) whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and (3) whether the sentence is disproportionate, considering both the offense and the offender. La. S.Ct.R. 28, § 1.

In the instant case, the trial court has submitted a Uniform Capital Sentence Report ("UCSR") and the Department of Public Safety and Corrections has submitted a Capital Sentence Investigation Report ("CSIR"). In addition, each party has filed a Sentence Review Memorandum. These documents, along with penalty phase testimony from defendant's relatives and foster parents, indicate that defendant is an African American male who was born on January 13, 1973. He appears to have grown up primarily in the Houma area, in a variety of housing situations.

According to the UCSR and CSIR, defendant was one of five known children born of his mother, Cheryl Alston. He completed the ninth grade at O. Perry Walker Senior High School before dropping out of school at age 16. Defendant has a limited employment history, but claims to have worked as a cook at McDonald's for one month in 1990 and otherwise did odd jobs. He is single and has one son.

As a juvenile, defendant was arrested twice as a runaway and once for theft. As an adult, from 1990 until his murder conviction in 1994, defendant was arrested seven times. One of the arrests was for aggravated battery with a dangerous weapon. He was convicted of felony theft and placed on probation, despite his statement that he did not wish to receive a sentence of probation. That probation was revoked as a result of his 1994 murder conviction.

The UCSR notes that while in youth services, defendant was found to be under-socialized without violent tendency. Other psychiatric and psychological information was presented in the sentencing phase through expert witnesses, Dr. Sarah Deland and Dr. Randy K. Otto. Dr. Deland testified that she believes defendant has a personality disorder with antisocial and borderline traits, as well as posttraumatic stress based upon extreme childhood physical abuse, a diagnosis with which the state's expert, Dr. Welner disagreed.

In the sentencing phase, the defense also presented testimony from six family members: Debra Brown (defendant's aunt); Joyce Henry Allen (defendant's maternal second cousin); Linda Woodard (defendant's cousin); Carlton Stokes (defendant's foster parent); Cairissian Alston (defendant's brother); and, Johnell Armer (who defendant lived with for approximately 8 months). These witnesses detailed a tumultuous childhood, substantiated by records reviewed by Dr. Deland. Defendant's mother was 13 years old when she had defendant. In the ensuing years, defendant lived with various family members and foster parents as a result of substantial abuse and neglect inflicted by his mother, and his father was not often in his life. In addition to the abuse inflicted on defendant by his mother, he witnessed abuse between his mother and the men in her life. There were also instances of mental illness in the family that led to family members being in and out of mental

institutions. While the adults who testified indicated they did their best to provide defendant with a loving and stable environment, they remarked that he never had much opportunity to have a childhood or to bond with others, would copy other people and their identities, and was very loyal, sometimes blindly so.

Passion, Prejudice, or Other Arbitrary Factors

The record reveals no indicia of passion, prejudice or arbitrariness. It is clear that the trial court sought to minimize the improper influence of passion in this proceeding by granting defendants' change of venue motion with respect to the jury venire. Given the extent to which Angola touches the lives of the residents of West Feliciana Parish, selecting the jury from St. Tammany Parish reduced the risk of passion influencing defendant's trial considerably.

Admittedly, race was somewhat of an issue as the victim in this case, Captain David Knapps, was a white male, while defendant is an African American male. Prior to trial, defendant moved to change venue a second time. Defendant argued that in light of St. Tammany Parish's racially divided history, venue should be changed to a parish where African Americans have not been intentionally excluded over generations, and thus are more fairly represented in the jury pool. Defendant also sought discovery regarding the composition of jury rolls in St. Tammany Parish. Both motions were denied.

With regard to the selection of the jury itself, defendant notes that one prospective juror commented on the lack "of representation of the races here" and expressed a concern about potential bias. Following jury selection, an all-white jury was seated. Defendant's motion for mistrial based on the exclusion of all black venire members for cause was denied. Both the denial of the second motion to change venue and the selection of an all-white jury were discussed above, and no

error was found in regard thereto. Moreover, no **Batson**[74] challenges were raised during voir dire.

During voir dire, all prospective jurors were questioned about any knowledge they may have possessed about the case, and all those who indicated prior knowledge were questioned further as to whether they could set that knowledge aside and decide the case based entirely upon the evidence presented in court. The jurors were also questioned as to whether race would affect how they considered the case. Jurors who indicated yes during group questioning were questioned further as to their attitudes. The chosen jurors and the alternates were all sequestered during the duration of the proceedings. Considering the foregoing, defendant's trial appears to have been conducted free of racial discrimination, and there is nothing to suggest racial prejudice or community sentiment influenced the jurors' verdicts.[75]

Nor can it be said that questioning during the penalty phase related to unsubstantiated threats defendant allegedly made to transporting officers concerning a plan to escape and kill two more people introduced an arbitrary factor into the proceeding. Defendant's argument in this regard was considered previously in this opinion and found lacking. The same is true with respect to the suppressed statement taken from inmate Richard Domingue, which we have examined at length and found to have been neither favorable nor material to defendant. Finally, we cannot say that remarks made by the prosecutor during penalty phase closing arguments, advocating the appropriateness of the death penalty in this case, but bordering on excessive social

---

[74] **Batson v. Kentucky**, 476 U.S. 79 (1986).

[75] While defendant claims the application of the death penalty in Louisiana and elsewhere is unconstitutionally race-dependent because the killers of white people are statistically more likely to receive the death penalty than those who kill black people, these contentions are effectively foreclosed by **State v. Dorsey**, 10-0216, p. 50 (La. 9/7/11), 74 So.3d 603, 638 (citing **McCleskey v. Kemp**, 481 U.S. 279 (1987)).

commentary, injected an impermissible arbitrary factor into the proceedings or influenced the jury and contributed to the verdict.

Aggravating Circumstances

In light of the evidence presented (and recounted at length above), there is no question that the state presented sufficient evidence of the four aggravating factors found by the jury, to wit: (1) Capt. Knapps was a peace officer engaged in his lawful duties; (2) defendant was the same individual convicted of the unrelated second degree murder of Harvey Reese; (3) defendant participated in the perpetration or attempted perpetration of an aggravated escape and aggravated kidnapping; and (4) defendant knowingly created a risk of death or great bodily harm to more than one person. This consideration does not weigh in favor of excessiveness.[76]

Proportionality

The federal constitution does not require a proportionality review. See **Pulley v. Harris**, 465 U.S. 37 (1984). However, comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. **State v. Burrell**, 561 So.2d 692, 712 (La. 1990).[77]

This court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense

---

[76] Defendant argues that the number of offenders eligible for the death penalty in Louisiana has significantly expanded. However, this court has considered, and rejected, this contention. See, e.g., **State v. Anderson**, 06-2987, p. 55 (La. 9/9/08), 996 So.2d 973, 1012 ("The Louisiana capital sentencing scheme has sufficiently narrowed the definition of capital murder to a finite set of circumstances."); **State v. Bourque**, 96-842, p. 19 (La. 7/1/97), 699 So.2d 1, 13 ("Louisiana's scheme narrows the substantive definition of first degree murder to restrict the class of death-eligible cases and further provides for a sentencing hearing in which the jury may make a binding decision that the defendant receive a sentence of life imprisonment. Thus, it passes Eighth Amendment constitutional muster.").

[77] This court has set aside only one death penalty as disproportionately excessive under the post-1976 statutes, finding in that one case, *inter alia*, a sufficiently "large number of persuasive mitigating factors." **Sonnier**, 380 So.2d at 9; see also, **State v. Weiland**, 505 So.2d 702, 707-710 (La.1987) (in dictum, this court suggested the death penalty was disproportionate).

and the offender. **State v. Sonnier**, 380 So.2d 1, 5 (La. 1979). If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. ***Id.*** at 7.

The state's sentencing review memorandum reveals that, excluding the trials of defendant's co-defendants, there have been two first degree murder prosecutions in East Feliciana Parish and three first degree murder prosecutions in West Feliciana Parish, the jurisdictions that comprise the 20th Judicial District. None of the cases bear even a slight resemblance to the circumstances of Capt. Knapps' death. See, **State v. Reese**, 13-1905 (La.App. 1 Cir. 6/25/14), 2014 WL 3843859 (unpublished) (16-year-old pled guilty to second degree murder of an 8-year-old by a knife in the neck and sentenced to life imprisonment); **State v. Manzella**, 11-0984 (La.App. 1 Cir. 12/21/11) (unpublished), writ denied, 12-0194 (La. 5/18/12), 89 So.3d 1190 (man attempting to buy a pound of marijuana convicted of negligent homicide and sentenced to maximum sentence of five years at hard labor for shooting drug dealer when drug dealer allegedly attempted to rob him at gunpoint); **State v. Kelly**, 08-0443 (La.App. 1 Cir. 10/14/08), 2008 WL 4567283 (unpublished) (23-year-old convicted of two counts of manslaughter on amended second degree murder indictment and sentenced to maximum sentence of two consecutive 40-year sentences for fatally shooting his parents); **State v. Stevens**, 06-0822 (La.App. 1 Cir. 11/03/06), 2006 WL 3110712 (unpublished) (defendant pled *nolo contendre* to manslaughter and sentenced to 40 years imprisonment on amended second degree murder indictment in apparent robbery-murder); **State v. Burge**, 486 So.2d 855 (La. App. 1 Cir. 1986), writ denied, 493 So.2d 1204 (La. 1986) (Angola inmate convicted of three counts of second degree murder on amended indictment and sentenced to life imprisonment for fatally stabbing three fellow inmates with a homemade knife).

Given the scarcity of comparable cases, it is appropriate for this court to look beyond the 20th Judicial District and conduct the proportionality review on a statewide basis. See, **State v. Davis**, 637 So.2d 1012, 1031 (La. 1994). A statewide review of capital cases reveals that juries are prone to impose the death penalty when a peace officer has been killed in the line of duty. This court has affirmed capital sentences in the following cases: **State v. LaCaze**, 99-0584 (La. 1/25/02), 824 So.2d 1063 (Vietnamese brother and sister gunned down, along with off-duty police officer working security detail at a family-owned restaurant); **State v. Frank**, 99-0553 (La. 1/17/01), 803 So.2d 1 (same); **State v. Broadway**, 96-2659 (La. 10/19/99), 753 So.2d 801 (police officer killed in ambush by two armed men while escorting a Piggly Wiggly store manager to the bank to make a night deposit); **State v. Brumfield**, 96-2667 (La. 10/20/98), 737 So.2d 660 (same); **State v. Williams**, 07-1407 (La. 10/20/09), 22 So.3d 867 (police officer killed and risk of death or great bodily harm knowingly created to more than one person during a shoplifting incident at a Wal-Mart).

Returning to a consideration of the present incident, defendant points out that as regards his four co-defendants, three of them received a life sentence. Only defendant and co-defendant Jeffrey Clark were sentenced to death. Defendant argues strenuously there is less evidence of his culpability when compared to his co-defendants. For example, Robert Carley, who was found guilty of first degree murder and received a life sentence when the jury could not reach a unanimous verdict, was depicted by the state as the leader of the escape attempt who came up with the plan, assembled the group, gathered the weapons, and put the plan into action. Carley was seen in the education building with a bloody shank in his hands and blood on his pants and hands. He threatened to kill two other prison guards during the escape

attempt and, during a phone call with one of Angola's wardens, threatened to "kill and dismember the hostages" if his demands were not met. Carley attacked Capt. Knapps in the bathroom with a shank and caused numerous injuries.

In a similar vein, Barry Edge, who was also found guilty of first degree murder and received a life sentence when the jury could not reach a unanimous verdict, was presented by the state as being in on the escape plan from the beginning, as bringing mallets to the education building, and as initiating the attack on Capt. Knapps by striking him in the head with one of the mallets. Further, Edge refused to surrender and tried to hit a warden when Angola guards were retaking the building. While none of Capt. Knapps' blood was found on Edge when he was apprehended, the state contended that he changed clothing and used a mop to clean the blood from the hallway in an effort to conceal the crime.[78]

Co-defendant Jeffrey Clark was the only defendant other than Brown to receive the death penalty. Defendant points out that in affirming Clark's death sentence, this court noted the existence of physical evidence and expert testimony establishing Clark's direct role in the death of Capt. Knapps, as well as Clark's own statement to inmate Christopher Shockley that Joel Durham stabbed Capt. Knapps in the chest and Clark hit him in the head with a mallet. **Clark**, 12-0508 at 28-29; 220 So.3d at 616. In addition, defendant points to the suppressed statement that Edge allegedly made to inmate Domingue to the effect that it was Edge and Clark who made the decision to kill Capt. Knapps.

While defendant argues that Clark's role and culpability are thus clear, and his culpability is no greater than that of his other co-defendants who received life

---

[78] Because co-defendant David Mathis pled guilty, evidence outlining his involvement was not presented at a trial.

sentences, we find that the evidence as respects these individuals in no way diminishes the evidence of defendant's significant role in the death of Capt. Knapps. There is ample physical evidence and expert testimony regarding defendant's role in the offense, to wit: blood spatter on items of clothing linked to defendant showing close proximity and active participation in the attack; substantial saturation and transfer stains of Capt. Knapps' blood on defendant's jeans and long underwear; blood stains on the tops and sides of defendant's boots; and Capt. Knapp's blood on samples taken from defendant's hands. In addition, testimony–including defendant's statement to investigating officers–demonstrates defendant's continuing role in the attempted escape and kidnapping. After leaving Capt. Knapps in the restroom, defendant assisted in subduing Lt. Chaney, made efforts to secure the area, and participated in negotiations. Further, the jury might have found significant and credible inmate Lowe's testimony that after entering the band room, defendant told the inmates present they could leave if they wanted, but they should know "[w]e got Knapps in the bathroom. We knocked his bitch ass out in the bathroom." Thus, there is ample support for rejecting defendant's contention that his role was any less culpable than that of his co-defendants.

Consideration of the proportionality of the defendant's sentence under the circumstances here does not support a finding of excessiveness.

DECREE

For the reasons assigned herein, the defendant's conviction and 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 district court shall, upon receiving notice from this court under La. C.Cr.P. art. 923 of finality on direct appeal, and before signing the warrant of execution, as provided by La. 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 und La. 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.

SUPREME COURT OF LOUISIANA

No. 16-KA-0998

STATE OF LOUISIANA

versus

DAVID BROWN

Appeal from the Twentieth Judicial District Court,
Parish of West Feliciana,
Honorable Jerome Winsberg, Judge Ad Hoc

Genovese, J., dissents in part and assigns reasons.

I agree with the portion of the majority's ruling affirming defendant's conviction; however, I find there was reversible error in the penalty phase of his trial. Specifically, I find merit in defendant's *Brady* claim and the related motion for a new trial involving the suppression of a statement made by co-defendant, Barry Edge, to a fellow inmate. Relatedly, I find no abuse of trial court's discretion in granting a new trial in the penalty phase on the basis of this *Brady* violation. Finally, I find that the statement by the prosecutor regarding threats defendant allegedly made while being transported to his trial undermined confidence in the verdict at the penalty phase. Therefore, I would affirm the defendant's first degree murder conviction, but vacate his sentence, and remand the matter for a new trial as to sentencing only.

The Brady *claim and the associated trial court ruling granting defendant's motion for a new trial at the penalty phase*

As detailed in the majority opinion, several months after defendant's trial and conviction, the state disclosed a statement made by Richard Domingue. Domingue, a fellow inmate at Angola, stated that Barry Edge had implicated himself and co-defendant Jeffrey Clark, but not defendant, in the actual murder of Capt. Knapps

while speaking to Domingue.[11] Defendant argues this statement would have supported the core of one of his main arguments in mitigation—namely, that he did not intend to kill Capt. Knapps. The trial court found merit in defendant's argument and granted a new penalty phase trial on this basis.

The relevant portions of the statement disclosed to defendant are included below:

> **Tommy Block:** And Barry Edge told you we could have allowed him to live?
>
> **Domingue:** Yeah. Barry Edge said we could have let him live. We could have let him live.
>
> **Tommy Block:** But he had to die.
>
> **Domingue:** No, he said it was going to help us. It was going to help us so yeah, he had to die.
>
> **Tommy Block:** And he and, he and Jeffrey made the decision.
>
> **Domingue:** He said him and Jeffrey did, were the only ones that were thinking rationally during this highly charged situation. And they made a decision to help their self to kill Captain [Kn]apps. But they could have let him live. And he bluntly said he didn't have to die.

****

> And he was like you don't, you don't really understand you know, I'm saying there was more involved. He's like there's more involved. But we could have let him live. But me and Jeff made the decision at that time because[,] all of these other mother fuckers that was involved[,] they couldn't seem to get their head together when they were, you know, everything went down. He said me and Jeff decided we're going to kill him. I mean it was just like shhh. It was like he flipped a switch and they killed him. . . . I'm telling you specifically what Barry told me.

While the meaning of "they" appears speculative, ("It was like he flipped a switch and they killed him."), it would be within the province of the factfinder to evaluate this evidence. *See Cannon v. State of Alabama,* 558 F.2d 1211, 1214 (5th Cir. 1977) ("[i]n this context[,] we cannot merely consider the evidence in the light

[1]The state does not dispute that the statement, taken in a pre-trial interview, was not produced to defendant prior to his trial.

most favorable to the government[,] but must instead evaluate all the evidence as it would bear on the deliberations of a factfinder.").[2] The federal Third Circuit recently addressed—and reversed—a *Brady* case in which the government emphasized ambiguity in relation to immateriality. *Lambert v. Beard,* 537 F. App'x 78 (3d Cir. 2013), *cert. denied,* 572 U.S. 1096, 134 S.Ct. 1938, 188 L.Ed.2d 795 (2014). There, the court determined that evidence can still be material, notwithstanding any ambiguity, where it has "*some value* as exculpation and impeachment." *Id.* at 86 (quoting *Kyles,* 514 U.S. at 450 (emphasis in original)). In incorporating the purportedly ambiguous evidence into the materiality analysis, the court looked to how the defendant could have used the suppressed evidence and determined that a new trial was necessary because it was "surely not confident that, had the Commonwealth disclosed the [suppressed evidence], the jury's verdict *would have been* the same." *Id.* at 87.

At trial, the defense relied on defendant's statement to law enforcement to argue that he did not share in the others' intent to kill or cause great bodily harm. In this statement, he said he left Edge, who was holding a mallet, in the bathroom with Capt. Knapps, along with "some white guy." In Edge's statement to Domingue, Edge places himself there along with Clark. Edge's statement supported an otherwise unprovable statement, one in which defendant argued that he had left the bathroom before Edge and Clark fatally attacked and murdered Capt. Knapps.

---

[2] *See also People v. Appelt,* 996 N.E.2d 751, 763 (Ill. App. 4 2013) ("If a personal pronoun follows an antecedent—say, someone's proper name—and corresponds in gender to the antecedent, the personal pronoun is understood to refer to the antecedent unless the context demands some other understanding.")

Notably, Domingue had the opportunity to provide additional clarity to his statement at the hearing on the motion for new trial. Domingue testified that, in this context, "they" referred to Edge and Clark. ("[H]e told me Jeffrey and him made the decision," and[,] "When I said 'they,' yeah. I mean, Jeffrey, that's what he was referring to.") However, on cross-examination by the state, Domingue was asked, "I want to be very clear about what Mr. Edge said to you. He said that he and Clark alone decided to kill Captain Knapps; is that correct?" Domingue's response: "Right," and following that, "But he never said that they—he never told me, and this is what we did."

In turn, the state argued that defendant was present in the bathroom, holding Capt. Knapps down while he was beaten to death, and therefore shared the specific intent to kill with the others. The state in fact argued that defendant lied in his statement to law enforcement:

> He admits to some involvement because he's covered in the victim's blood. … So he admits to dragging Captain Knapps into the bathroom and holding him down while the others are beating and stabbing him, but then he tries to distance himself from the death. 'Oh, I didn't know. I had no idea that they were killing him in that bathroom. When I left[,] he was okay.' … He says Captain Knapps was still alive, still moving when he left the bathroom. But we know from the evidence and from the testimony, we know that part of the statement is a lie.

Similarly, in the guilt phase closing argument, the defense had argued that it was Durham who killed Capt. Knapps in the bathroom, which the state called the "blame it on the dead guy" defense in their closing.

Edge's confession to Domingue could have been utilized by defense counsel—and likely would have been—to corroborate defendant's statement. Domingue's statement would have undermined the state's argument that a portion of defendant's statement was a lie, supporting defendant's argument that he had left the bathroom before the fatal beating and was unaware of what was to occur. Defendant maintains he would have relied on Edge's own statement to Domingue that Clark and Edge were the ones who decided to kill Capt. Knapps, while also pointing to Clark's shoeprint in the blood in the bathroom and evidence that Edge had changed his clothing in order to hide evidence. Instead, defense counsel had to rely on a vague argument that somebody else killed Capt. Knapps, or that Capt. Knapps was killed by Durham, who had died.

The fact that the statement contains no mention of defendant, but inculpates co-defendants, Edge and Clark, does not disprove the evidence's favorability to the defense. Domingue's statement corroborates defendant's account and supports the defense theory that defendant was less culpable because he was allegedly not present

at the time of Capt. Knapps' death and would certainly be a factor for the jury's consideration in deciding whether or not to vote in favor of the death penalty. The Supreme Court has recognized that appeals to the jury's sense of "residual doubt" may constitute a reasonable defense strategy for the penalty phase of a capital case. *Lockhart v. McCree*, 476 U.S. 162, 181, 106 S.Ct. 1758, 1769, 90 L.Ed.2d 137 (1986) ("Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases.") (quoting *Grigsby v. Mabry*, 758 F.2d 226, 248 (8th Cir. 1985) (Gibson, J., dissenting)). Thus, defendant presents a convincing argument that Domingue's statement was favorable evidence. Defendant also presents a strong case that the failure to disclose this statement prejudiced him, especially in the penalty phase of his trial, and thus the statement was material for *Brady* purposes.

During the penalty phase, the state relied heavily on Dr. Welner's testimony concerning defendant's lack of remorse and his future dangerousness, which was based on the premise that defendant had participated in the actual killing.[3] Dr. Welner specifically testified that "[defendant] knew he was going to be party to killing [Capt. Knapps]," and, in testifying to future dangerousness, stated "he killed, and then[,] notwithstanding the low base rate, he killed again after he assaulted again." Dr. Welner's testimony, put on as rebuttal after defense experts Dr. Deland and Dr. Otto, ultimately was the last witness testimony the jury would hear before retiring to deliberate.

Thus, there was little room for defendant to effectively mitigate his culpability during the penalty phase. However, with Domingue's statement, defendant could

[3] In response to defense questioning concerning lack of remorse and defendant's recounting in his confession of Capt. Knapps asking, "[W]hy me?" Dr. Welner testified, "[W]hat it reflected was that what he was capable of doing is going eye to eye with a person who had actually been kind to him[,] and for whom he had no basis to be angry with[,] and who knew he was going to die, and [defendant] knew he was going to be party to killing him, and reflecting on how he still went through it all the way."

have bolstered his own defense theory demonstrating that because he was not involved in the decision to kill Capt. Knapps, he deserved to be sentenced to life imprisonment rather than receive the death penalty. In defendant's statement taken following the murder, he stated that the inmates' plan was to escape without hurting anyone. Defendant claimed that Capt. Knapps was still alive in the bathroom when he left. However, there was no corroborating evidence to support his statement. As the trial court noted, "[t]hroughout the case, he attempted at the guilt phase and at the sentencing phase to present a defense that he was, perhaps, less culpable than others in the case, that others were far more culpable than him." Without corroboration, defendant's argument had little else to rely on, while the state and the jury was free to simply write off his statement as self-serving.[4] Here, defendant was deprived of showing a lesser "moral culpability" for the murder, a defense which "remains one of the significant issues in capital sentencing[.]" *State v. Louviere*, 00-2085, p. 18, n.15 (La. 9/4/02), 833 So.2d 885, 899, citing *Atkins v. Virginia*, 536 U.S. 304, 312–13, 122 S.Ct. 2242, 2247, 153 L.Ed.2d 335 (2002).

In sum, throughout both the guilt and penalty phase, defendant unsuccessfully sought to establish that he was less culpable than the other inmates, but he had little to corroborate that theory, other than his own recorded statement. The statement to Domingue from Edge, withheld from the defendant by the state until several months after defendant's trial, was the only piece of independent and direct evidence that could have corroborated his statement, as well as establish the identity of who actually delivered the fatal blows. That statement also could have been used to challenge the last witness the jury heard, Dr. Michael Welner, who had testified as

[4] In the state's guilt phase rebuttal closing argument, the prosecution characterizes it: "He admits to some involvement because he's covered in the victim's blood. … So he admits to dragging Captain Knapps into the bathroom and holding him down while the others are beating and stabbing him, but then he tries to distance himself from the death. 'Oh, I didn't know. I had no idea that they were killing him in that bathroom. When I left[,] he was okay.' … He says Captain Knapps was still alive, still moving when he left the bathroom. But we know from the evidence and from the testimony, we know that part of the statement is a lie."

to defendant's lack of remorse and his future dangerousness in the face of his direct involvement in the murder. Thus, Domingue's statement is material to the jury's task of determining an appropriate penalty. Evaluated in the context of the entire record, the suppression of Domingue's statement undermines confidence in this penalty phase.

Considering the foregoing, the trial court did not abuse its discretion in granting defendant a new penalty phase of trial. The trial court granted defendant's motion for new trial with respect to the penalty phase based on newly discovered evidence under La.C.Cr.P. art. 851(B)(3). Given the unique vantage point of the trial court judge in determining whether to grant relief under La.C.Cr.P. art. 851(B)(3), this Court has consistently held that such a ruling is "entitled to great weight, and his discretion should not be disturbed on review if a reasonable man could differ as to the propriety of the trial court's action." *State v. Prudholm,* 446 So. 2d 729, 735 (La.1984). The standard of review for an appellate court following this trial court's grant of a new trial on the penalty phase herein is whether the trial judge's ruling was so unreasonable as to constitute an abuse of the great discretion afforded to trial courts in ruling on motions for a new trial based on newly-discovered evidence. Rather than applying this deferential standard of review, the majority in this case erred by reversing the trial court's order and reviewing the newly discovered evidence using the de novo standard of review. This legally impermissible deviation from the required abuse of discretion standard of review renders the judgment of the lower court incorrect.

The inappropriate statements made by the state

As noted in the majority's opinion, the prosecutor made a series of very damaging, unsubstantiated comments while cross-examining a defense witness during the penalty phase of defendant's trial. After the state concluded its cross-examination and the defense concluded re-direct, the trial court called a brief recess.

When the jury returned, the defense moved for a mistrial, which the trial court denied. Defendant also filed a written motion for new trial on the grounds of prosecutorial conduct on November 16, 2011, which the trial court also denied following a hearing.

This Court has found a motion for mistrial related to unadjudicated other-crimes evidence timely when it was made the next day. *See State v. Coleman*, 14-0402, pp. 75–76 (La. 2/26/16), 188 So. 3d 174, 227. Though the majority's opinion has overruled *Coleman* to the extent that it conflicts with the contemporaneous objection requirement, the objection in this case was made after a short recess immediately after the state's cross-examination of defendant's expert and re-direct. It was not made the following day, as in *Coleman*. Thus, the objection herein was timely.

Defendant allegedly expressed a desire to escape from jail and kill the prosecutor and another inmate. Moreover, despite the fact that these comments were not substantiated by evidence, and there was no evidence that defendant took any steps to carry out the plans described, these statements are clearly relevant to his character and violent propensities, even while confined within prison walls.

Though defendant's character and propensities are relevant areas of examination in the penalty phase, defendant demonstrates unfair prejudice owing to the state's lack of proper notice of this unadjudicated act. Defense counsel was not aware of these damaging statements before trial and was not able to prepare a defense to these alleged threats. While Dr. Deland was a defense witness, and defense counsel was allowed rebuttal, counsel could only attempt to redirect the jury's focus back to several mitigating factors. The defense's re-direct examination of Dr. Deland focused on her diagnosis of defendant with post-traumatic stress disorder ("PTSD"), the high percentage of inmates with a diagnosis of antisocial personality disorder, and the fact that children of mothers with borderline personality

disorder—which defendant's mother likely had—typically have attachment disorders. Defense counsel also focused on defendant's attachment to Durham and his willingness to follow Durham, as he had a "follower" personality. Counsel was clearly unprepared to challenge these very specific, damaging allegations by the prosecutor, and his redirect efforts related to mitigating factors did not "cure" this surprise.

Furthermore, these surprise allegations may have affected the credibility of Dr. Deland based upon her lack of knowledge of these alleged threats. Additionally, the allegations strengthened Dr. Welner's testimony that defendant would certainly attempt to escape again. Defendant attempted to instill "residual doubt" in the jury via arguments that he was less culpable for the crime than the other inmates and through mitigating evidence about his childhood. Thus, these unsubstantiated references to his alleged threats had the potential of cementing the jury's views as to his future dangerousness and inflamed the jury such that they decided on the more severe punishment, the death penalty. It cannot be said that under the facts of this case, the verdict was not affected by or unattributable to the prosecutor's misconduct in making surprise, gravely prejudicial allegations regarding defendant's purported plan to escape and commit two murders.

For these reasons—specifically, the validity of the *Brady* violation and the failure of the state to demonstrate an abuse of the trial court's discretion in granting a new penalty phase trial on this basis—as well as the prejudicial statements by the prosecutor discussed above, defendant's sentence should be vacated and the case remanded to the trial court for a new trial on the penalty phase only.