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NO. 08-1358

IN THE

Supreme Court of the United States

BRANDY AILEEN HOLMES,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

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

BRIEF IN REPLY TO OPPOSITION

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BRIEF IN REPLY

1. The *Opposition Brief* suggests that the Court should not grant certiorari because *Pulley v. Harris*, 465 U.S. 37 (1984), provided a once-and-for-all answer to the question of whether the federal constitution compels proportionality review. This is not the case. *Pulley* assessed one state's sentencing scheme at one point in time. 465 U.S. at 45 ("We take statutes as we find them."); *id.* at 51 (assuming that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review," but finding that "the 1977 California statute is not of that sort"). A state's sentencing scheme can be, as Louisiana's scheme is, insufficiently calibrated to prevent arbitrary death sentences. In these circumstances, *Pulley* informs, but does not control. The absence of controlling precedent drives the question presented here: whether proportionality review is required where a state scheme contains insufficient internal checks to guard against the arbitrary imposition of the death penalty.

2. Louisiana does not contest that Justice Stevens' statement concerning the denial of certiorari in *Walker v. Georgia*, 129 S.Ct. 453 (2008), states that the arbitrary imposition of the death penalty would be the "likely result" of insufficient proportionality review. Instead, Louisiana counters on the merits, siding with Justice Thomas' concurrence in *Walker*, which suggests that though states may elect to afford capital defendants the extra protections associated with proportionality

review, the federal constitution does not compel such review in any form. Opp. Br. at 13. Thus, the State's suggestion that the Eighth Amendment never requires proportionality review is a proposition debated not only throughout the landscape of state cases identified by *amici*[1]-- *see e.g.*, *Brief of The Constitution Project* and *Brief of the Louisiana Association of Criminal Defense Lawyers* -- but also reflected in a deep divide within the Court. This is a reason to grant, not deny, certiorari.

3. The *Opposition Brief* also identifies another important reason for the Court to intervene: to evaluate what type of proportionality review suffices to cure an otherwise deficient capital sentencing scheme. The State suggests that comparison with other cases where a death sentence is imposed suffices to establish that a death sentence is not arbitrarily imposed. Petitioner disagrees. *Cf. Zant v. Stephens*, 462 U.S. 880 n.19 (1983) (noting approvingly that Georgia's proportionality review compares "not only similar cases in which death was imposed, but similar cases in which death was not imposed."). This disagreement is also reflected in the varying views of states throughout the country. *See Holmes v. Louisiana, Brief of The Constitution Project* at 7-8, at n.5, and Appendix I, conditionally filed 6/4/2009 (noting that nineteen states require different types of proportionality review); *see also id.*

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[1] Respondent refused to consent to the filing of any Amicus Briefs in this case, and as such, each identified *amici* filed a *Motion for Leave to File Amicus Brief*, along with a conditionally filed Amicus Brief, to which Petitioner refers.

at 10, (noting reversals of death sentences based upon meaningful comparative appellate review). *See also Holmes v. Louisiana, Brief of The Louisiana Association of Criminal Defense Lawyers*, at 13-14, and Appendix B, conditionally filed 6/4/2009 (noting, since *Pulley*, the "widespread failure of state appellate courts" to fully consider "mitigating circumstances."). Certiorari is warranted to provide the states with guidance as to what type of proportionality review the Eighth Amendment requires where other statutory controls are insufficient to prevent the arbitrary imposition of the death penalty.

4. Petitioner's claim is that her death sentence is excessive and arbitrary, and that the Louisiana Supreme Court's failure to conduct an adequate proportionality review violates the Eighth Amendment. The State's position that this issue is not properly before the Court is simply breathtaking. Petitioner has taken every available opportunity to raise this claim, and has even gone as far as to suggest the manner in which a sufficient excessiveness review should be conducted. *Defense Opposition to Factual Contents of Uniform Capital Sentence Report and Capital Sentence Investigation Report, filed 03/16/07, at 1-2; Appellant's Capital Sentence Review Memorandum, filed 02/25/08,* located in *State Opposition, Appendix 2, at 86-87, 123-24, 133, 142; Application for Rehearing, filed 12/16/08, at 5-6.* The *Opposition Brief* mistakes Petitioner's discussion of the elements of Louisiana's capital sentencing scheme for independent

constitutional claims. Opp. Br. at 13-19.[2] Petitioner has identified a number of facets to Louisiana's sentencing scheme – a lack of internal controls, an ever-expanding universe of aggravating factors, a lack of any standard for determining which death-eligible defendants should be sentenced to death, and the broad expansion of the range of evidence admissible at the penalty phase – in order to demonstrate that proportionality review in Louisiana is a necessary component to a

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[2] The State also takes umbrage with several of Petitioner's factual representations. Opp. Br. at 9-12. But the record could not be clearer. Evidence that Ms. Holmes suffered from FAS was uncontested. *See* R. 6138 (Dr. Williams: "I think under axis III that she has brain damage and brain dysfunction as a result of fetal alcohol syndrome."); R. 6199 (Defense: "Let's get this straight. I didn't retain you to make a final diagnosis of fetal alcohol syndrome or anything like that, correct?" Dr. Patterson: "Correct."); *see also* Pet. at 27 n.12. Indeed, while the *State's Brief* now makes the claim that "it was not proven by a preponderance of the evidence that petitioner . . . has FAS", Opp. Br. at 22, in closing arguments to the jury the prosecutor accepted that the issue was uncontested: "I've already told you that our position is that she *does* suffer some of the effects of Fetal Alcohol Syndrome. . . . But no doctor . . . ever came in here and said she didn't have her own free choice." R. 6237. In any event, the State's argument is premature. The gravamen of petitioner's constitutional claim is that the Louisiana Supreme Court did not address these issues at all. Regardless of which set of facts the Louisiana Supreme Court ultimately would credit, the issue here is whether that court's decision not to address the relative culpability of the co-defendant and the comparative weight of Petitioner's mitigating evidence is of constitutional moment.

constitutional capital punishment scheme.[3] *Cf. Walker*, 129 S.Ct. 453, 457 ("And the likely result of such a truncated review—*particularly in conjunction with the remainder of the Georgia scheme, which does not cabin the jury's discretion in weighing aggravating and mitigating factors*—is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.")(emphasis supplied). The issue is properly preserved and warrants this Court's review.[4]

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[3] Petitioner's claim is carefully cabined to address the Louisiana capital sentencing scheme. The case does not address the issue of whether proportionality review is required in states that have other methods to narrow the class of offenders who receive the death penalty. See *Jurek v. Texas*, 428 U.S. 262 (1976).

[4] In any event, the Louisiana Supreme Court decided the issue. Pet. App. A. at 107a. ("[T]he federal Constitution does not require proportionality review."). This alone is enough to dismiss the State's preservation concerns. See, e.g, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided.").

CONCLUSION

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

Respectfully submitted,

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