No. 08-1358

Supreme Court, U.S.
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In The
Supreme Court of the United States

BRANDY AILEEN HOLMES,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES REX SCOTT
Counsel of Record
Caddo Parish District Attorney

CATHERINE M. ESTOPINAL
Assistant District Attorney
501 Texas Street
Shreveport, LA 71101
(318) 429-7618

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Brandy Holmes and Robert Coleman entered the Brandon home in rural Caddo Parish during the evening hours of New Year's Day 2003. After pushing their way into the front door of the Brandon residence, Julian Brandon, a retired Baptist preacher, was shot at near contact range under the chin with a .380 caliber handgun. The projectile separated into two pieces. One piece entered his brain, while the other piece exited the top of his head and was later recovered from the ceiling of the dining room adjacent to the front entryway. Julian Brandon collapsed. (Vol. 25, p. 5354, Vol. 26, p. 5528, Vol. 27, pp. 5642, 5674-5677, 5724-5733)

Mrs. Alice Brandon was taken to the rear bedroom and made to lie down. Alice Brandon was interrogated about her valuables and begged for her life. A pillow was placed over Mrs. Brandon's face, and she was shot in the head and left for dead. (Vol. 25, p. 5350, Vol. 27, p. 5731) The attention of the intruders was again focused on Reverend Brandon as they observed him struggling with his wounds, and they attacked Reverend Brandon a second time. At least three separate Chicago Cutlery style knives from the Brandon's kitchen were used in this second attack. Reverend Brandon received slashing cuts to his nose and face in addition to stabbing wounds on the top and rear of his head. The attack to the rear of Reverend Brandon's head was delivered with such force that one of the knives shattered; that knife was found in pieces at the scene. The offenders cut his

throat by multiple starting/stopping incisions starting from the front right, across the front of his neck and around to the back of his head. Reverend Brandon was repeatedly stabbed in the upper chest with wounds penetrating up to six inches, and was also stabbed in the back where a six-inch knife was found imbedded up to the handle. Reverend Brandon also had a large contusion from blunt force trauma on his forehead. (Vol. 26, pp. 5529-5534, Vol. 27, pp. 5734-5737)

Several days passed before the Brandons were discovered. A family friend, who missed the Brandons from regular phone contacts and attendance at morning and evening Sunday services went to the home and found the couple on January 5, 2003. (Vol. 25, p. 5345) Mrs. Brandon was still alive and was transported by helicopter to the hospital. (Vol. 25, pp. 5363-5365) Mrs. Brandon lived in a severely impaired state for almost six years as a result of the gunshot wound to the head, dying in October of 2008. (Vol. 28, pp. 5832-5838)

After the discovery of the crime scene, the Caddo Sheriff's Office investigation gained momentum with a call from persons at a nearby apartment complex. It was learned that shortly after New Year's Day Brandy Holmes was in a nearby apartment complex trying to sell jewelry and making statements about killing an old couple down the road by a church. (Vol. 25, pp. 5399-5400, 5405, Vol. 26, pp. 5480-5484) Detectives went to the Holmes' trailer, which was just around the corner from the homicide scene, and contacted Holmes, Coleman and other family members.

The group agreed to go to the detective office for interviews. Coleman denied involvement but displayed a cut on his right hand. (Vol. 26, pp. 5424-5428, 5484-5486, Vol. 27, pp. 5564, 5660) Holmes made several statements over the course of the next two days that implicated her and others as being involved in the homicide. (Vol. 26, pp. 5428-5433, 5504, 5508, 5516-5519, Vol. 27, pp. 5558-5561)

Holmes made at least six separate statements to authorities that related to the Brandon homicide. (Vol. 1, pp. 168-193, 250, Vol. 2, pp. 251-252, 363-461, 499, Vol. 3, pp. 508-522) In most of these statements, Holmes implicated herself and others to varying degrees. Of the four interviews that were taped, Holmes destroyed the one in which she unequivocally admitted her role as the shooter and active participant in all the events concerning both Reverend Brandon and Mrs. Brandon. Holmes destroyed this tape by sneaking it into the ladies' room and flushing the magnetic tape down the toilet, after substituting a blank tape in the stack of taped statements that had been left unsecured on a detective's desk. Investigators also noticed that after Holmes' bathroom visit, she was no longer wearing some of the jewelry they had observed earlier. (Vol. 26, pp. 5510-5514)

In all but her first interview with detectives, Holmes described various details of the homicide with great precision. She admitted that she had stolen her father's .380 handgun while visiting him in Mississippi. She repeatedly acknowledged her presence and involvement in the attack on the Brandons, and on

numerous occasions acknowledged her willingness to kill both Reverend and Mrs. Brandon. During her taped statements to Caddo deputies, Brandy Holmes admitted to bleaching her boots and burning her jacket stained with blood from Reverend Brandon's neck wound.

During her contact with investigators Holmes further revealed that on January 4, 2003, she took two of her nephews to view the bodies of Reverend Brandon and Mrs. Brandon. Her younger nephew later corroborated Holmes' account of this visit to the scene of the murder. The older nephew did not enter the residence, but Holmes' nine-year-old nephew went in with his aunt and saw Reverend Brandon lying in a pool of blood, and also heard Mrs. Brandon screaming from another room in the house. Holmes and her nephews were seen going to the Brandon residence together. The same witness observed the nephews hurriedly leaving the Brandon residence without their aunt. (Vol. 27, pp. 5614-5617)

The investigation revealed and the evidence showed a close link between Holmes and Coleman. Holmes and Coleman traveled from Mississippi, where they lived together as girlfriend and boyfriend, to Shreveport on Christmas Eve 2002. They were picked up by Holmes' mother and resided in her trailer while the couple was in Shreveport. They brought with them the .380 caliber handgun that belonged to Holmes' father. That handgun was determined to be the murder weapon both by Holmes' admission and by ballistics comparison of projectiles and shell

casings. (Vol. 26, pp. 5448-5459, Vol. 27, pp. 5674-5687)

The items that were known to have been stolen from the Brandon residence included jewelry, particularly a multi-colored bracelet, and bankcards. There was an attempt to use one of the Brandon's bankcards where an incorrect PIN was used at an ATM in a nearby convenience store. In addition, Holmes and Coleman were recorded minutes later and just up the street on a Hibernia bank surveillance video trying to use a bankcard, again with an incorrect PIN number. (Vol. 26, pp. 5462-5469, 5473-5476)

Many incriminating items were recovered from the Holmes' trailer where the two murderers had stayed. Among those items was a clear plastic food service glove found in the rain gutter of the trailer, containing a multi-colored bracelet and a pearl bracelet. (Vol. 26, pp. 5462-5468) Reverend Brandon's daughter identified the multi-colored bracelet as one she had given her mother some time earlier. (Vol. 26, pp. 5473-5476) A box of Subway food service gloves was recovered from the bedroom shared by Coleman and Holmes. (Vol. 26, p. 5489) The food service gloves had a diamond pattern consistent with patterns in blood transfer stains observed at the Brandon residence. (Vol. 27, pp. 5659, 5634) Additionally, a pillow was found in Holmes' bedroom with a bullet hole through it. (Vol. 26, pp. 5489-5494) That pillow was not the one used to cover Mrs. Brandon's face when she was shot, but was apparently a "practice" pillow.

In the same rain gutter that contained the multi-colored bracelet, three fired .380 cartridge casings were found. (Vol. 26, pp. 5462-5468) Investigators went to Holmes' father's residence in Mississippi. There her father took detectives to a location where he had fired the .380 handgun that was discovered missing at the time of Coleman and Holmes' departure from Mississippi. (Vol. 26, p. 5455) One of the cartridge casings found in the gutter was matched to a .380 cartridge casing recovered from that location in Mississippi. (Vol. 27, pp. 5684-5687) During analysis at the crime lab, Reverend Brandon's DNA was found on a swab taken from one of the fired cartridge casings found in the gutter. (Vol. 27, p. 5706) The portions of the .380 projectile that were recovered from Reverend Brandon's brain and dining room ceiling were matched to a projectile recovered from a tree pointed out by Holmes' father at the same location in Mississippi where investigators had recovered the cartridge casing. (Vol. 27, pp. 5674-5687)

Victim impact testimony from family members was introduced at the penalty phase. That testimony consisted of the two daughters testifying about the impact of this crime upon the Brandon family, and specifically upon Alice Brandon, as well as an edited video of Mrs. Brandon's existence in her daughter's care. (Vol. 29, pp. 6039-6058)

Evidence of the unadjudicated attempted burglary and potential murder of Mrs. Patricia Camp and the unadjudicated homicide of Terrance Blaze

were also admitted. On December 27, 2002, Holmes made a 911 call from her mother's house in reference to a gated community located very close to her mother's trailer known as "Nob Hill." The call was an attempt to gain an access code for the gate at the front of that community. (Vol. 29, pp. 5911-5917) No access code was given to Holmes during that call; however, Holmes was able to get into the neighborhood. Later that same day, Holmes, wearing a wig, attempted to get into the residence of Mrs. Patricia Camp by ringing the doorbell and asking to use the phone. Mrs. Camp spoke with Holmes, but denied her entry to her house. Mrs. Camp saw Holmes again two days later, again while Holmes was trying to gain entry to her residence. Mrs. Camp did not let Holmes in on this subsequent attempt either, and noticed a man was standing at the street waiting. (Vol. 29, pp. 5920-5924) Holmes admitted in a statement to authorities "If she would have opened that door, she would have been like Mr. Brandon" and "My plan was to get somebody on the hill that night." (Vol. 29, pp. 5928-5929)

Evidence of the Terrance Blaze homicide came into play when, as part of the Brandon investigation, Holmes directed authorities to Blaze's body. (Vol. 29, pp. 5933-5934, 5941-5944) High velocity blood spatter and other bloodstains matched to Blaze were found in Holmes' mother's vehicle and on Robert Coleman's right boot and right pants leg. (Vol. 29, pp. 5948-5955, 5985-5991) The stains indicate that Terrance Blaze was shot in Holmes' mother's vehicle, that Robert

Coleman was likely the driver at the time the shot was fired, and that the shot most likely came from the back seat. (Vol. 29, pp. 6029-6037) Holmes confessed in a letter to a prosecutor that she killed Terrance Blaze. (Vol. 29, p. 6011) Blaze was shot in the back of the head with a .380 caliber weapon and the bullet was recovered from his skull. The bullet had the same class characteristics as the bullet recovered from the tree in Mississippi. A cartridge casing found near where Blaze's body was dumped was matched to the cartridge case found in Mississippi. (Vol. 29, pp. 6001-6004)

Brandy Holmes and Robert Coleman were indicted for the first degree murder of Reverend Julian Brandon and the attempted first degree murder of his wife, Alice Brandon, as well as the first degree murder of Terrance Blaze. Holmes went to trial on the first degree murder of Reverend Brandon on February 6, 2006, in Caddo District Court and was convicted and sentenced to death. On direct appeal, the Louisiana Supreme Court affirmed petitioner's conviction and sentence, and rehearing was denied. *State v. Holmes,* 2006-2988 (La. 12/2/08), 5 So.3d 42, *rehearing denied,* 1/30/09. Petitioner's application for writs of certiorari followed.

SUMMARY OF ARGUMENT

As proportionality review is not required by the Eighth Amendment, there is no basis for federal review of a purely state court procedure.

Petitioner failed to raise many of her current complaints and supporting arguments in the state courts below.

CORRECTION OF PETITIONER'S MISSTATEMENTS

1. Prosecutorial "misconduct"

Petitioner asserts that the Louisiana Supreme Court failed to consider that the prosecutor stated at the codefendant's trial that he was the more culpable party, rather than petitioner. (p. 11, petitioner's writ application) This is a reworking of petitioner's claim on appeal that the State pursued inconsistent theories of prosecution, a claim that the Louisiana Supreme Court specifically found to be misleading:

> "As borne out in the record and her brief to this Court, defendant's focus on selective portions of the evidence presented and the State's closing arguments at both trials is misleading. As an initial matter, defendant concedes in her brief that at 'Coleman's trial, the prosecution argued that Coleman and Holmes both played an active role in the murder of Mr. Brandon [and] . . . charged Coleman as a principal in the alternative.'

Brief for the Appellant, p. 14. It is abundantly clear that the State was free to speculate which of the defendant's statements was the most truthful concerning her actual participation in the shooting of Julian Brandon. More importantly, during closing argument at the guilt phase, the State argued that even if the defendant was merely 'policing up the crime scene making sure nobody gets caught,' she was concerned in the commission of the offense and thus guilty as a principal. Trial Tr., vol. XXVIII, p. 5777 (Feb. 14, 2006).

During rebuttal closing at the guilt phase, the State further argued:

> We can't say which slice she inflicted, which stab she inflicted, which one of the times the trigger was pulled her finger was on it. But we can tell you that she was there helping, participating. It was too much for one person and that she wanted them dead because she didn't wear a mask and all the other things we've told you. When you realize that she had the specific intent to kill, she was involved in the killing and as the defense has conceded the victims were over 65, it was during an armed robbery, a burglary, and there was more than one person, the only appropriate verdict is guilty as charged of first degree murder. Trial Tr., vol. XXVIII, pp. 5812-13 (Feb. 14, 2006).

Similarly at the penalty phase, rather than arguing that defendant was the shooter, as

> she claimed in one of her statements, counsel for the State argued:
>
> > . . . I don't think we're ever going to have an answer to whose hand the gun was in as it relates to the Brandons and whose particular hand the knife was in as it relates to the Brandons, you have seen what the evidence does show. And that's simply coming back to this concept that they participated part and parcel together from start to finish. Trial Tr., vol. XXX, p. 6236 (Feb. 16, 2006)."

(Pp. 37a-38a of petitioner's appendix, or *see State v. Holmes, supra*, 5 So.3d at 64-65)

The duty to represent a client zealously does not excuse a lack of candor with the Court. *Nix v. Whiteside,* 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

2. No clear diagnosis of FAS was agreed upon by petitioner's expert witnesses

Petitioner also makes some telling omissions from her claims that her mitigating evidence was "compelling." At a pretrial hearing where petitioner attempted to prove she was mentally retarded, one of petitioner's expert witnesses, psychiatrist Dr. Richard Williams diagnosed her with Fetal Alcohol Syndrome (FAS). Dr. Williams confidently predicted that petitioner would be found to have frontal lobe damage. (Vol. 19, pp. 4153, 4162) His testimony was deflated

during the penalty phase when Dr. James Patterson's analysis of the MRI and PET scan test results did not support this prediction. (Vol. 30, pp. 6199-6206)

The State addresses this matter in more depth later in this opposition brief.

3. Louisiana Supreme Court DID review potential racial factors

As for petitioner's complaints that "Louisiana's review also fails to consider the introduction of invidious factors such as the race of the defendant and victim," petitioner did not raise this complaint in the state court. Indeed, she could hardly do so when the Louisiana Supreme Court specifically addressed the question of potential racial discrimination in its opinion, noting that petitioner and her victims were of the same race. *Holmes,* at 95-96.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE LOUISIANA SUPREME COURT CONDUCT PROPORTIONALITY REVIEW OF CAPITAL CASES

Petitioner advances a number of arguments to support her claim that the Louisiana Supreme Court failed to make a sufficient review of similar capital cases. None of them are convincing, and some are inaccurate.

Petitioner relies heavily on Justice Stevens' statement issued in relation to the writ denial of *Walker v. Georgia*, 129 S.Ct. 453 (2008). Although acknowledging that Walker did not present his claims in the state court, thereby precluding review, Justice Stevens expressed his views regarding state proportionality review in what can only be regarded as *dicta*, prompting Justice Thomas's concurrence.

Justice Thomas's concurrence with the denial of the writ makes clear, however, that "Proportionality review is not constitutionally required in any form." *Walker v. Georgia*, 129 S.Ct. 481, 483 (2008). Louisiana, like Georgia, "simply has elected, as a matter of state law, to provide an additional protection for capital defendants." *Ibid.* As there is no constitutional mandate, there is no basis for this Court to review the Louisiana Supreme Court's proportionality review process. Nor does *Walker*, or petitioner's claim, raise a new issue. This Court determined twenty-five years ago that certiorari review of such state procedures is not federally mandated:

> "Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Pulley v. Harris,* 465 U.S. 37, 50, 104 S.Ct. 871, 879, 79 L.Ed.2d 29 (1984).

Petitioner attempts to turn back the clock by claiming that amendments to Louisiana's capital punishment plan look "more and more" like the

mandatory death penalty plan condemned in *Furman v. Georgia,* 408 U.S. 238 (1972). This argument was not raised in the Louisiana Supreme Court, and cannot serve as the basis for review in the instant case. *Walker,* 129 S.Ct., at 454.

Moreover, petitioner's argument is disingenuous. Pre-*Furman*, a mandatory death sentence was the norm in Louisiana as well as Georgia. There can be no rational argument that more recent changes to the first degree murder statute have returned capital cases to a mandatory footing. While some elements of first degree murder may have been added, petitioner ignores the erosion of the death penalty that has occurred through the prohibition of the execution of the mentally retarded and the juvenile murderer. *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

Petitioner claims that "far more individuals are eligible for a possible death sentence today than when this Court last validated the Louisiana capital sentencing scheme." Petitioner, however, is not one of those individuals: in the instant case, two of the three aggravating circumstances found in petitioner's case have been part of the statute since 1979. La. R.S. 14:30 has since that time defined first degree murder as an intentional killing committed during the course of an armed robbery, and/or an intentional killing committed when the offender has the intent to kill or inflict great bodily harm upon more than one person, among other elements. Louisiana Acts 1979, No. 74.

The remaining aggravating circumstance returned by the jury in petitioner's case, the intentional killing of a victim over the age of sixty-five, was added by a 1992 amendment. La. Acts 1992, No. 296. In light of the fact that even an invalid aggravating circumstance will not undermine a death sentence where there are valid aggravating circumstances remaining, any unrelated additions to Louisiana's first degree murder statute are irrelevant to petitioner's case. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *State v. Anderson,* 2006-2987 (La. 9/9/08), 996 So.2d 973, *rehearing denied, cert. denied,* 129 S.Ct. 1906; *Watson v. Blackburn*, 756 F.2d 1055 (5th Cir. 1985), *cert. denied,* 476 U.S. 1153, 106 S.Ct. 2259, 90 L.Ed.2d 703, *rehearing denied,* 478 U.S. 1028, 106 S.Ct. 3341, 92 L.Ed.2d 749.

The State presented evidence of petitioner's murder of another person within a few days of the murder of Julian Brandon, and of her efforts to gain entry at another home a few days before, including her admission that if that homeowner had opened the door, she would have been dead. Louisiana Code of Criminal Procedure Article 905.2.A provides that "The sentencing hearing shall focus on the . . . character and propensities of the offender." Nothing could be more relevant for a jury considering whether to impose the death sentence.

Also raised for the first time in petitioner's application for certiorari is the claim that Louisiana's sentencing plan fails to "harness" jurors' discretion because it does not require jurors to "weigh" aggravating versus mitigating circumstances, and does not

impose a standard of proof on the jury's determination of sentence. Petitioner has not only failed to allege this claim in the state court, she has also failed, and failed utterly, to show that uniformity of state sentencing schemes is required by the Constitution.

Petitioner is also far from the mark when she complains that the Louisiana Supreme Court acted unconstitutionally by allowing more information be given to jurors during the penalty phase. As early as *Gregg v. Georgia,* 428 U.S. 153, 203-204, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976), this Court rejected an attack on the Georgia statute because of the "wide scope of evidence and argument allowed at presentence hearings." The joint opinion stated:

> "We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."

In *Payne v. Tennessee,* 501 U.S. 808, 821, 111 S.Ct. 2597, 2606, 115 L.Ed.2d 720 (1991), the Court specifically reversed *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South*

Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), which had imposed limits on evidence and argument the prosecution could present during the penalty phase:

> "Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests *with the States.*" *Payne, supra,* emphasis added.

There are some limitations, of course, but "[b]eyond these limitations . . . the Court has deferred to the State's choice of substantive factors relevant to the penalty determination." *California v. Ramos,* 463 U.S. 992, 1001, 103 S.Ct. 3446, 3453, 77 L.Ed.2d 1171 (1983), *Payne, supra.*

Payne cut petitioner's claims out from under her feet in another respect: the complained-of expansion of aggravating factors and crimes which serve as the basis for first degree murder:

> "'Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.' *Blystone v. Pennsylvania*, 494 U.S. 299, 309, 110 S.Ct. 1078, 1084, 108 L.Ed.2d 255 (1990). The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt

> needs . . . victim impact evidence serves entirely legitimate purposes."

Payne, 501 U.S. at 824-825.

Besides these complaints about the victim impact testimony and the addition of aggravating factors, petitioner also complains about the evidence of other crimes which were presented as part of the "character and propensities" evidence required during the penalty phase.

> "A wide range of evidence is admissible on literally countless subjects: 'We have Long recognized that [f]or the determination of sentences, justice generally requires . . . that there be taken into account the *circumstances of the offense* together with the *character and propensities of the offender.*' *Gregg*, *supra*, 428 U.S. at 189, 96 S.Ct. at 2932 (emphasis added)."

Zant v. Stephens, *supra*, 462 U.S. at 900, 103 S.Ct. at 2755.

Petitioner's claims are without merit. There is no constitutional basis for review of the Louisiana Supreme Court's proportionality review of petitioner's death sentence.

II. THE LOUISIANA SUPREME COURT CONDUCTED A THOROUGH PROPORTIONALITY REVIEW

A fact which has no Eighth Amendment implications whatsoever

A. The Louisiana Supreme Court conducted a state-wide review of home invasion capital verdicts

Petitioner complains that the Louisiana Supreme Court erred in considering only first degree murder cases where the death penalty was actually returned in performing its proportionality analysis. As noted above, the Eighth Amendment does not require proportionality review, and the States are free to omit or include such a review of death penalty cases. The fact that one state may include the consideration of cases where the death penalty was not returned does not mean that every state must employ the same methodology. As *Harris* demonstrates, California has no proportionality review at all.

The Louisiana Supreme Court conducted a statewide analysis of home invasion first degree murder cases, not being content to rely on only those in Caddo Parish. *Holmes, supra,* 5 So.3d at 96. On her direct appeal, petitioner attempted to draw a comparison between eleven robbery first degree murder cases in Caddo Parish where the death penalty was returned and ten robbery first degree murder cases where a life sentence was imposed (either by agreement of the jury or their inability to reach a sentence

verdict, which triggers an automatic life sentence under La. C.Cr.P. Articles 905.6, 905.8). Petitioner's complaints are inconsistent, to say the least. On the one hand she complains that the Louisiana Supreme Court did not consider enough of one kind of case, while on the other she complains that they considered cases state-wide.

The comparisons actually made by the Louisiana Supreme Court are more relevant than those advanced by petitioner, as the cases the court used are so much closer to the facts of the instant case: "This Court has observed that Louisiana juries appear especially prone to impose capital punishment for crimes *committed in the home.*" *Holmes,* 5 So.3d at 97, emphasis added. Undertaking the type of district-specific analysis used by petitioner in the state court, of the now 43 first degree murder cases tried in Caddo Parish since 1976, there were eight which involved home invasion robberies. Of those, seven defendants received the death penalty, the most recent being Felton Dorsey, whose death penalty was returned by the jury May 28, 2009.[1] (*See* State's

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[1] Listing of capital cases in Caddo Parish:

1. *State v. Nathaniel Code*, 627 So.2d 1373 (La. 1993), *cert. denied,* 511 U.S. 1100, 114 S.Ct. 1873, 128 L.Ed.2d 490, *rehearing denied,* 512 U.S. 1248, 114 S.Ct. 2775, 129 L.Ed.2d 887

2. *State v. Robert Coleman, reversed and remanded,* 2006-518 (La. 11/02/07), 970 So.2d 511, *rehearing denied*, 01/07/08

(Continued on following page)

Appendix 1.) The sole case involving a home invasion robbery where the death penalty was not returned was in 1976.[2] (*See* State's Appendix 1, p. 12.) Under the very type of analysis which petitioner urges, that being the inclusion of similar cases where the death penalty was not returned, it can be clearly seen that petitioner's death sentence was neither freakish nor arbitrary.

B. The weight to be given mitigating circumstances is for the trier of fact

Petitioner complains that the Louisiana Supreme Court did not consider mitigating circumstances in its proportionality review. There is no Eighth Amendment requirement that it do so. That task is for the

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3. *State v. Michael Cooks*, 97-0999 (La. 9/9/98), 720 So.2d 637, *cert. denied,* 526 U.S. 1042, 119 S.Ct. 1342, 143 L.Ed.2d 505, *rehearing denied,* 526 U.S. 1128, 119 S.Ct. 1789, 143 L.Ed.2d 816

4. *State v. Felton Dorsey*, 1st J.D.C., Docket No. 251,406

5. *State v. Darrell Dewayne Draughn*, 05-1825 (La. 01/17/07), 950 So.2d 583, *rehearing denied,* 3/30/07, *cert. denied,* ___ U.S. ___, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007)

6. *State v. Cedric Edwards*, 97-1797 (La. 7/2/99), 750 So.2d 893, *cert. denied,* 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421

7. *State v. Brandy Aileen Holmes*, 2006-2988 (La. 12/2/08), 5 So.3d 42, *rehearing denied,* 1/30/09

[2] *State v. John L. Donaldson*, 391 So.2d 1182 (La. 1980)

jury to do, and their determination was a reasonable one. The mitigating evidence was not nearly as clear-cut or "compelling" as petitioner presents it to the Court in her application, as noted above.

According to Dr. James Patterson, there is as yet not much objective statistical image analysis data on people with FAS, and he was unable to say that any physical brain defect caused petitioner to commit criminal acts. (Vol. 30, pp. 6201-6205) Moreover, it was not proven by a preponderance of the evidence that petitioner was either mentally retarded or has FAS. Dr. Patterson testified at the penalty phase about his analysis of the MRI and PET scans of petitioner's brain, and found that, although some brain abnormalities were found which were consistent with what was expected in "published results" on FAS, petitioner did not have other expected brain abnormalities. (Vol. 30, pp. 6200, 6202-6206) Dr. Patterson was unable to "reach a conclusion either way." (Vol. 30, p. 6205)

As for petitioner's claims of mental retardation, petitioner never filed the required notice of a claim of mental retardation, and her plea of "not guilty and not guilty by reason of insanity" was withdrawn after the report of the sanity commission was received. La. C.Cr.P. Article 905.5.1.B (Vol. 11, pp. 2350-2352, 2356-2365, Vol. 18, pp. 4046-4049) Her expert witnesses were similarly equivocal on the retardation issue presented at a motion to quash.

Psychologist Dr. Mark Vigen's opinion apparently morphed between his original report to defense counsel and the motion to quash. In his first report to defense counsel, Dr. Vigen had found that appellant was not mentally retarded. (Vol. 11, pp. 2393-2395) By the time of the hearing, Vigen testified that appellant was mentally retarded by the standards set out by La. C.Cr.P. Article 905.5.1, but not under the DSM-IV, and that he therefore could not diagnose her as mentally retarded. (Vol. 19, pp. 4194, 4203, 4206) Although Dr. Vigen testified at the motion to quash that petitioner was limited in two or more adaptive skills (Vol. 19, p. 4194), at the penalty phase he found that petitioner was "street smart," could drive, buy groceries, and was "responsible for her actions," competent and sane. (Vol. 30, pp. 6111, 6115, 6128)

Petitioner has been subjected to much psychological testing throughout her life. Those tests diagnosed petitioner as having depression, developmental disorders, oppositional defiant disorder, post-traumatic stress disorder and various learning disabilities and personality disorders. (*See* chart at Vol. 12, pp. 2609-2630.) None of them found her to be mentally retarded. This is not surprising, as her full scale IQ scores ranged from 74 to 78. An IQ of 70 or below is generally regarded as an indicator of mental retardation. (DSM-IV, p. 49)

Petitioner's other expert was also less than conclusive about whether she is mentally retarded. Dr. Richard Williams opined that appellant is mentally retarded under the definition of La. C.Cr.P. Article

905.5.1, but testified that he could not diagnose her as mentally retarded because she did not fit the criteria set out in the DSM-IV, rather she has a learning disorder. (Vol. 19, pp. 4154-4155, 4171) At the penalty phase, Williams testified that petitioner has "borderline intellectual functioning." (Vol. 30, p. 6141)

Conflicting testimony of expert witnesses who are unable to reach conclusions or make diagnoses about claimed mental defects hardly constitute "compelling" mitigating evidence.

C. The Louisiana Supreme Court conducted a state-wide review of similar cases

Petitioner complains that the Louisiana Supreme Court proportionality review "employs an inter-district review in only some cases, without a consistently-articulated justification for the inconsistency." In petitioner's case, however, the court employed a state-wide review of capital cases involving home invasion robberies, attacks on more than one victim, and attacks on elderly victims. *Holmes,* at 97-98.

As noted above, if the court had chosen to conduct a Caddo-Parish-only review of home invasion cases, it would have been revealed that of the seven capital trials for home invasion robberies that had been tried in Caddo Parish at the time of the appeal, six defendants received the death penalty.

In her direct appeal, petitioner limited her own comparison of first degree murder cases to those tried in Caddo Parish. Despite this, the Louisiana Supreme Court reviewed cases from other districts throughout the state. On rehearing, petitioner then complained that the court conducted a state-wide proportionality review. (Petitioner's Application for Rehearing, p. 10) Petitioner has not stated a constitutional basis for micro-managing whether state supreme courts may conduct district-only or must conduct state-wide review of similar cases, for those states which have proportionality review.

As for petitioner's claims that the Louisiana Supreme Court did not conduct a review for arbitrary factors, the State has previously addressed the inaccuracies in a portion of this claim, regarding potential impact from racial discrimination. There remains petitioner's new claim that the judicial district in which the case arose was an "arbitrary factor" that should have been considered in the court's proportionality review. The State cannot but note that the district in which the case arose was not due to any arbitrary action by the State, judge or jury, but falls upon the murderer herself. She chose the location as well as the victims. Petitioner has failed, moreover, to enlighten the reader as to just what this has to do with proportionality.

Petitioner even goes so far as to complain about the content of the Sentencing Memorandum filed by the State. Such complaints about whether the State included details of her mental illness claims are

absurd. Federal courts are not "super" state courts acting to correct interpretations of state law. Claims that the trial court improperly applied state law do not constitute an independent basis for federal review. *Narvaiz v. Johnson*, 134 F.3d 688, 695 (5th Cir. 1998), *cert. denied*, 524 U.S. 947, 118 S.Ct. 2364, 141 L.Ed.2d 731.

Under Louisiana Supreme Court Rule 28,[3] every capital defendant is required to file her own sentence

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[3] Also titled as La. C.Cr.P. Article 905.9.1, Section 4.

Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.

iii. any other matter relating to the guidelines in Section 1.

(Continued on following page)

review memorandum, and may include whatever facts she deems relevant in that document. In fact petitioner did file such a memorandum, included as State's Appendix B. The even-handedness of Rule 28 renders petitioner's complaints about the content of the State's Capital Sentencing Memorandum beside the point: Rule 28 permits petitioner to correct any perceived flaws or omissions in her own memorandum. This ensures that information petitioner deems relevant will be seen by the reviewing court, satisfying any due process concerns. It does not, however, permit petitioner, under the guise of a constitutional claim, to require this Court dictate to the State what to include in the State's memorandum. Once again, federal courts do not operate as "super" state courts, and petitioner's complaints were properly rejected by the Louisiana Supreme Court, based on state law. Petitioner's complaints are without merit.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

CONCLUSION

Respondent State of Louisiana shows that the writ should not be granted in the instant case:

I. The Louisiana Supreme Court did not err in affirming petitioner's sentence on appeal. Their thorough review of capital convictions throughout the state supported the finding that the sentence was not disproportionate.

II. More importantly, there is no Eighth Amendment basis for federal review of proportionality analysis when such analysis is not required by the Constitution.

WHEREFORE, the State of Louisiana prays that Brandy Holmes's application for writ of certiorari be denied.

Respectfully submitted,

CHARLES REX SCOTT
Counsel of Record
Caddo Parish District Attorney

CATHERINE M. ESTOPINAL
Assistant District Attorney
501 Texas Street
Shreveport, LA 71101
Telephone: (318) 429-7618
Fax: (318) 841-4020