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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 Writ of Certiorari to the Louisiana Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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June 4, 2009

No. 08-1358

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 Louisiana Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Louisiana Association of Criminal Defense Lawyers moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari in the above captioned matter. As grounds for this motion, the *Amicus* state as follows:

1. The Louisiana Association of Criminal Defense Lawyers ("LACDL") is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana.

LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated. The LACDL is, from time to time, invited by the Louisiana Supreme Court to submit *amicus* briefs in appropriate cases.

2. LACDL seeks leave to file this amicus brief in support of the Petitioner because the Petition before the Court raises critically important constitutional issues that implicate basic rights of those accused of capital crimes. Members of *amicus curiae* represent clients whose interests are gravely affected by these issues. LACDL, therefore, has a strong institutional interest in the resolution of the question raised by the petitioner concerning the constitutionality of Louisiana's capital punishment scheme. Accordingly, LACDL should be granted leave to file the attached amicus curiae brief, which demonstrates that Louisiana's death penalty statues violate the Eight Amendment's guarantee against arbitrary capital sentencing by not providing for proportionality review.

3. LACDL has timely informed counsel for all parties of its intent to file this *amicus* brief. Petitioner Brandy Aileen Holmes has consented to this filing, but Respondent the State of Louisiana has denied consent.

Wherefore, for the reasons above stated, LACDL request that its motion for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated. The LACDL is, from time to time, invited by the Louisiana Supreme Court to submit briefs as *amicus* in appropriate cases. The Petition before the Court raises critically important issues that implicate basic trial rights. Members of *amicus curiae* represent clients whose interests are gravely affected by these issues.

SUMMARY OF ARGUMENT

In *Furman v. Georgia*, this Court struck down the majority of the states' death penalty statutes, holding that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit

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[1] Pursuant to Rule 37.2, the counsel for *amicus* state that Petitioner has consented to the filing of this brief, but Respondent has not. Accordingly, a motion for leave to file is submitted together with this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* further state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to this brief.

this unique penalty to be so wantonly and freakishly imposed." 408 U.S. 238, 310 (1972). Four years later, in *Gregg v. Georgia*, this Court upheld Georgia's reconstituted death penalty statute on the ground that it provided for "proportionality review," a procedural mechanism that required the Georgia Supreme Court to "compare[] each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." 428 U.S. 153, 198 (1976). In response to *Furman* and *Gregg*, "roughly two-thirds of the States promptly redrafted their capital sentencing statutes in an effort to limit jury discretion and avoid arbitrary and inconsistent results[, and] . . . [m]ost, such as Georgia's, require[d] the reviewing court, to some extent at least, to determine whether, considering both the crime and the defendant, the sentence is disproportionate to that imposed in similar cases." *Pulley v. Harris*, 465 U.S. 37, 44 (1984).

In 1984, this Court held in *Pulley v. Harris* that proportionality review was not "indispensable" to the constitutionality of California's capital sentencing scheme. *Id.* at 45. In reaching this conclusion, however, this Court did *not* rule that proportionality review is *never* constitutionally required. Rather, the Court ruled that proportionality review was not required in that particular instance because the California statute provided for other important procedural safeguards, including (i) a limited number of capital-eligible crimes, and (ii) the requirement that the courts consider all mitigating circumstances. *Id.* at 51-53.

In the wake of *Harris*, several states repealed their statutory requirements for proportionality

review of capital sentences. *See* Appendix C. Indeed, as time went by, states also began removing or tempering the very safeguards that the *Harris* Court relied on in affirming the constitutionality of California's capital sentencing scheme. Contrary to *Harris's* requirement that capital sentencing statutes "limit[ ] the death sentence to *a small subclass* of capital-eligible cases," *id.* at 53 (emphasis added), states have, over the past twenty-five years, greatly expanded the universe of capital-eligible cases by adding new statutory aggravating factors, expanding existing aggravating factors, broadening their definitions of capital murder and employing vague and undefined language so as to make the death penalty applicable to most murder cases. Moreover, state capital sentencing schemes have increasingly failed to afford mitigating circumstances appropriate consideration, greatly increasing the risk of the arbitrary and discriminatory application of the death penalty.

The lesson of the past twenty-five years is that the states, left to themselves, cannot be relied on to maintain and enforce the important safeguards this Court required in *Harris*. The increasing absence and watering down of these safeguards, combined with the lack of any meaningful proportionality review, has resulted in an arbitrary and discriminating capital sentencing landscape reminiscent of that which existed before *Furman*. In order to rectify this situation, this Court should use the present case, which exemplifies the worst in what has gone wrong at the state level, to hold that proportionality review is constitutionally required in state capital sentencing statutes.

ARGUMENT

I. Since *Harris*, the Critical Safeguards Against the Arbitrary and Discriminatory Application of the Death Penalty have Deteriorated to Such an Extent That Current State Capital Sentencing Schemes Mirror Those in Effect at the Time This Court Decided *Furman*.

A. States Have Greatly Expanded the Universe of Capital-Eligible Crimes.

This Court has consistently held that capital punishment must "'be limited to those offenders who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008) (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). Because "death as a punishment is unique in its severity and irrevocability," *Gregg*, 428 U.S. at 187, it must be reserved only for those crimes that are "so grievous an affront to humanity that the only adequate response may be the penalty of death," *id.* at 184. Despite the extreme nature of the death penalty, and despite the fact that this Court has "insist[ed] upon confining the instances in which capital punishment may be imposed, *Kennedy*, 128 S. Ct. at 2659, state legislatures have greatly expanded the universe of capital-eligible crimes over the twenty-five years that have transpired since *Harris* was decided.

1. Application of the Death Penalty to Defendants Who Did Not Kill Has Broadened the Class of Capital-Eligible Cases.

Under this Court's precedent, states are permitted to use the felony murder rule to impose the death penalty on individuals who did not kill, so long as the defendant in question sufficiently participated in the underlying felony and displayed a reckless indifference to human life. *See Enmund v. Florida*, 458 U.S. 782, 797 (1982) (concluding that the Eighth Amendment prohibits the "imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed"); *but see Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement"). Accordingly, twenty-nine states now include felony murder as an aggravating factor in capital sentencing, which necessarily expands the universe of capital-eligible cases. *See* Appendix A.

The *Enmund* and *Tison* rules alone, however, do not provide clear standards to assist jurors and courts in reliably determining which defendants are the "worst of the worst." *See* David McCord, *State Death Sentencing for Felony Murder Accomplices under the* Enmund *and* Tison *Standards*, 32 Ariz. St. L.J. 843, 844 (2000) (calling *Enmund*, *Cabana v. Bullock*, and *Tison* "ambiguous and even contradictory in important aspects"); Constitution Project, *Mandatory Justice: The Death Penalty*

Revisited, 20 (Feb. 2006), *available at* http://www.constitutionproject.org/manage/file/30.pdf (The *Tison* rule "permits execution based on vague, highly subjective judgments about culpability"). Accordingly, absent the important safeguard of proportionality review, the application of the death penalty in the felony murder context significantly increases the probability of arbitrary and disproportionate results.

Arbitrary results in the felony murder context occur in a variety of scenarios. In some instances, the defendant is sentenced to death despite the fact that the co-defendant – the actual killer – was sentenced to life imprisonment. *See e.g., People v. Moss,* 792 N.E.2d 1217 (Ill. 2001); *Bishop v. State*, 882 So. 2d 135 (Miss. 2004). In other instances, the defendant is sentenced to death despite inconsistent arguments concerning whether the defendant or the co-defendant committed the murder. *See e.g., Stein v. State*, 995 So. 2d 329 (Fla. 2008); *State v. Scott*, 921 So. 2d 904 (La. 2006); *State v. Tate*, 851 So. 2d 921 (La. 2003); *State v. Parker*, 901 So. 2d 513 (La. Ct. App. 2005); *Romano v. State*, 909 P.2d 92 (Okla. Crim. App. 1995). Other examples include sentencing a defendant to death despite his or her lack of participation in the murder or limited participation in the underlying felony, *see e.g., Foster v. Quarterman*, 466 F.3d 359 (5th Cir. 2006); *Wood v. State*, 18 S.W.3d 642 (Tex. Crim. App. 2000), and despite the fact that the defendant's equally culpable co-defendant only received life imprisonment, *see e.g., Ex Parte Barbour*, 673 So. 2d 473 (Ala. 1995); *State v. Gerlaugh*, 698 P.2d 694 (Ariz. 1985); *Marquard v. State*, 850 So. 2d 417 (Fla. 2002); *Bassett v. State*, 449 So. 2d 803 (Fla. 1984); *State v. Lavalais*, 685 So. 2d 1048 (La. 1996); *State v. Roache*,

595 S.E.2d 381 (N.C. 2004).[2] A constitutional requirement exacting proportionality review would help prevent the arbitrary executions of defendants in felony murder cases, or at least limit such executions to those instances where it is clear that each specific defendant is morally culpable.

2. Increasing the Number of Aggravating Factors and Employing Vague and Undefined Language Has Also Expanded the Scope of Capital Sentencing Statutes.

Since *Harris*, state legislatures have dramatically broadened capital sentencing statutes in two ways: (i) most statutes contain a long list of aggravating factors that cover nearly all murder cases; and (ii) the statutes' aggravating factors are vague and undefined, thus, subject to arbitrary application.

Between 1995 and 2000, twenty states added new aggravating factors, expanded existing aggravating factors or broadened their definitions of capital murder. Jeffrey Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L.

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[2] As a result of such arbitrary results, a consensus is emerging that felony murder should be eliminated or greatly restricted as an aggravating factor for capital punishment. *See* Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103 (1990); Thomas P. Sullivan, *Proposed Reforms to Illinois Capital Punishment System: A Status Report*, 96 ILL. B.J. 38 (2008); Cal. Comm'n on the Fair Admin. of Justice, *Report and Recommendations on the Administration of the Death Penalty in California*, 60-71 (June 30, 2008), *available at* http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf; Constitution Project, *supra*, at XXV, 18-23.

REV. 1, 11-12 (2006). The trend in legislatures toward expanding death penalty eligibility continued into the present decade with twenty states, including Louisiana, broadening their capital sentencing statutes during the period between 2000 and 2006. *Id.* at 12. The new eligibility and aggravating factors added to capital sentencing statutes in the last two decades fall into four categories: (i) facts surrounding the murder, including burglary, robbery and multiple killings; (ii) defendant's motivation for the murder, including a hate crime, premeditation or terrorism; (iii) defendant's status as, for example, a gang member, convicted felon or sexual predator; and (iv) protected classes or victim's status as, for example, a child, elderly or disabled person, or judge or witness. *Id.* at 17-25.

This pattern of expansion has led to long lists of aggravating factors that necessarily preclude limiting the death penalty to a narrow group of defendants. *See* Appendix A. In California, for instance, there are now *twenty-two* statutory aggravating factors, up from only seven when this Court first approved California's capital sentencing scheme in *Harris*. *Compare Harris*, 465 U.S. at 53, n.13 *with* CAL. PENAL CODE § 190.2(a) (2009).[3] Similarly, Illinois currently has *twenty-one* aggravating factors, up from the seven aggravating factors when the state reenacted the death penalty in 1974. *Compare* Leigh Bienen, *The Quality of Justice in Capital Cases: Illinois as a Case Study*, 61 LAW &

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[3] Even then, the *Harris* Court acknowledged that California had already "greatly expanded" the number of aggravating factors. *See Harris*, U.S. 465 at 53, n.13 (evaluating the seven factors in the 1977 statute and acknowledging the aggravating factors "[we]re greatly expanded in the current [1983] statute").

CONTEMP. PROBS. 193, 197 (1998) *with* 720 ILL. COMP. STAT. § 5/9-1(b) (2009). Moreover, Arizona has fourteen aggravating factors, ARIZ. REV. STAT. § 13-751(F) (2009); Delaware has twenty-two, 11 DEL. CODE ANN. § 4209(e) (2009); Florida has sixteen, FLA. STAT. 921.141(5) (2009); Louisiana has twelve, LA. CODE CRIM. PROC. ANN. art. 905.4 (2008); Nevada has fifteen, NEV. REV. STAT. § 200.033 (2009); and Pennsylvania has eighteen, 42 PA. CONS. STAT. § 9711(d) (2008). The sheer number of aggravating factors now present in capital sentencing statutes provides more discretion to prosecutors and juries, thereby increasing the risk of the arbitrary and discriminatory application of the death penalty.

Contrary to this Court's precedent, *see Gregg*, 428 U.S. at 197-98 (stating jury discretion should be "'controlled by clear and objective standards so as to produce non-discriminatory application'") (quoting *Coley v. State*, 204 S.E. 2d 612, 615 (Ga. 1974)); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (requiring narrow and precise definitions of aggravating factors), state legislatures have also increasingly employed vague and undefined language in the statutory descriptions of these aggravating factors. For example, twenty-six state death penalty statutes include, as an aggravating factor, crimes that are "especially heinous, atrocious or cruel," "outrageously or wantonly vile, horrible or inhuman" or similar such language. *See* Appendix A. The inclusion of such subjective and vague language in state statutes has broadened the class of cases that are death-eligible. Indeed, a prosecutor can describe almost any killing as "heinous" or "vile" if he or she wishes to seek the death penalty. *See* Jeffrey Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's*

Arbitrary and Mandatory Capital Punishment Scheme, 6 WM. & MARY BILL RTS. J. 345, 364-68 (1998).

Other less common but equally subjective aggravating factors in today's death penalty statutes include defendants who "constitute a continuing threat to society," or "display an egregious lack of remorse." *See* Appendix A; *see also* Kirchmeier, *Aggravating and Mitigating Factors*, *supra*, at 368-74. Such language is particular troubling in the context of mentally ill or impaired defendants. As this Court has recognized, such defendants "are typically poor witnesses, and their demeanor may create an *unwarranted impression* of lack of remorse for their crimes." *Atkins*, 536 U.S. at 312 (emphasis added). Indeed, "capital sentencing juries often treat mental disorders not as a mitigating circumstance . . . but as an aggravating circumstance supporting imposition of the death penalty." Christopher Slobogin, *Is* Atkins *the Antithesis or Apotheosis of Anti-Discrimination Principles?: Sorting Out the Group-wide Effects of Exempting People with Mental Retardation from the Death Penalty*, 55 ALA. L. REV. 1101, 1107 (2004).

B. State Capital Sentencing Schemes Fail to Give Appropriate Consideration to Mitigating Circumstances.

While the number of aggravating factors is on the rise, state legislatures have failed to expand the number of statutory mitigating factors, and state trial and appellate courts are increasingly failing to consider mitigating circumstances or are reviewing mitigating circumstances in a perfunctory and meaningless manner. Consequently, the safeguards *Harris* required are now being chipped away at both

ends of the spectrum. *See Harris*, 465 U.S. at 45 (recognizing that "the consideration of mitigating circumstances minimize[s] the risk of wholly arbitrary, capricious or freakish [death] sentences").

1. State Capital Sentencing Statutes Fail to Enumerate Mitigating Circumstances.

This Court has long held that, in order for state capital sentencing schemes to pass constitutional muster, such schemes must not vest unguided sentencing discretion in juries and trial judges. *Gregg*, 428 U.S. at 189 (holding that the jury's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). As a result, *Harris* held that statutory mitigating factors "'[provide] jury guidance and [lessen] the chance of arbitrary application of the death penalty.'" *Harris*, 465 U.S. at 53 (quoting *Harris v. Pulley*, 692 F.2d 1189, 1194 (1982)). Notwithstanding *Harris*'s mandate, six states still fail to enumerate *any* mitigating circumstances in their capital sentencing statutes. *See* Appendix B. Of the states that do enumerate mitigating factors, most fail to sufficiently enumerate the most fundamental circumstances that one must consider to avoid the arbitrary application of the death penalty.

This Court has held, for example, that a defendant's level of culpability plays a crucial role in the application of capital punishment. *See Roper*, 543 U.S. at 569, 571 (stating that penological justifications for the death penalty are diminished by a "lack of maturity and underdeveloped sense of responsibility," "vulnerability to negative influences and outside pressures," and "reduced control . . . over [ones] environment"); *Atkins*, 536 U.S. at 319

(holding that in order "to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate"); *Godfrey*, 446 U.S. at 433 (setting aside death sentence where defendant lacked "a consciousness materially more 'depraved' than that of any person guilty of murder"). Yet, only two states enumerate the defendant's history of childhood abuse as a mitigating factor. *See* CAL. RULES OF COURT, Rule 4.423(a)(9) (2009) (permitting consideration of abuse only when the victim was the abuser); 720 ILL. COMP. STAT. § 5/9-1(c)(6) (2009); *see also* Kirchmeier, *Aggravating and Mitigating Factors*, *supra*, at 398-99; Ill. Comm'n on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 154 (2002), http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf. And of the twenty-nine states that include felony murder as an aggravating factor, *only four* states include "lack of intent" as a mitigating factor. *See* Appendix B. Moreover, seven states fail to enumerate "mental capacity" as a mitigating factor. *See* Appendix B. And of the twenty-eight states that do enumerate "mental capacity," seventeen do not clearly identify mental illness as falling within this category of mitigation. *See* Appendix B. Consequently, sentencing authorities often equate mental illness with dangerousness – thus, perversely treating it as a *reason* to execute. *See* American Psychiatric Association, *Position Statement, Diminished Responsibility in Capital Sentencing* (2004) , http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200406.aspx; Slobogin, *supra*, at 1107; Christopher Slobogin, *Minding Justice: Laws that Deprive People With Mental Disability of Life and Liberty,* 90

(Harvard University Press 2006). When one considers that jurors may not necessarily give nonstatutory factors proper weight, *see* Kirchmeier, *Aggravating and Mitigating Factors*, *supra*, at 398-99, it becomes clear that the failure to enumerate mitigating factors undermines the Eighth Amendment's requirement of robust consideration and weighing of mitigating evidence.

2. State Trial and Appellate Courts Fail to Provide Meaningful Review of Mitigating Circumstances.

This Court has explicitly acknowledged the importance of meaningful consideration and appellate review of mitigating circumstances. *See Harris*, 465 U.S. at 51-53; *see also Parker v. Dugger*, 498 U.S. 308, 321-22 (1991) (reversing death sentence because appellate court failed to consider mitigating evidence); *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) (vacating death sentence because both trial and appellate court failed to consider mitigating evidence).

Most state capital sentencing statutes, however, do not require a trial judge, upon reviewing a jury's recommendation of death, to make specific findings as to mitigating factors. *See* Appendix B. Compounding this problem is the widespread failure of state appellate courts, when presented with an inadequate trial record, to remand cases for the full consideration of mitigating circumstances. *See e.g., State v. Boggs*, 185 P.3d 111 (Ariz. 2008) (failing to remand for inquiry into defendant's horrendous childhood and mental illness); *Commonwealth v. Rompilla,* 653 A.2d 626 (Pa. 1995) (same), *rev'd*, 545 U.S. 374, 379 (2005); *Walker v. State*, 653 S.E.2d 439 (Ga. 2007) (failing to admonish the trial court for its

failure to prepare a detailed report describing defendant's history and circumstances of the case),; *State v. Tate*, 851 So. 2d 921 (La. 2003) (refusing to remand for inquiry into defendant's mental illness and mental retardation); *Bishop v. State*, 882 So. 2d 135 (Miss. 2004) (same); *State v. Shafer*, 969 S.W.2d 719 (Mo. 1998) (same); *State v. Stout*, 46 S.W.3d 689, 704 (Tenn. 2001) (failing to remand for consideration of defendant's minor role in the offense); *Wood v. State*, 18 S.W.3d 642 (Tex. Crim. App. 2000) (failing to remand for consideration of duress). As this Court recognized in *Gregg*, however, "[w]here the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." 428 U.S. at 195; *see also Harris*, 465 U.S. at 53 (quoting *People v. Frierson*, 599 P.2d 587, 609 (Cal. 1979)) ("'[S]tatutory requirements . . . that the trial judge specify his reasons for denying modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case.'").

Equally troubling is the failure of state appellate courts to adequately review and consider *both* aggravating and mitigating circumstances in a particular case even when the trial record is sufficient. Instead, state appellate courts refuse to reweigh evidence of mitigation, leaving such considerations completely within the jury's discretion. *See e.g., Reams v. State,* 909 S.W.2d 324, 326 (Ark.1995); *Manley v. State*, 918 A.2d 321, 330 (Del. 2007); *Epperson v. Commonwealth*, 197 S.W.3d 46, 63 (Ky. 2006); *Wackerly v. State*, 12 P.3d 1, 19 (Okla. Crim. App. 2000); *Morris v. State*, 940 S.W.2d

610, 614 (Tex. Crim. App. 1997); *State v. Lafferty,* 20 P.3d 342, 359 (Utah 2001). Because state capital sentencing schemes permit jurors to assign little or almost no weight to mitigating circumstances, *see* John Holdrige, *Selecting Capital Jurors Uncommonly Willing to Condemn a Man to Die: Lower Courts' Contradictory Readings of Wainwright v. Witt and Morgan v. Illinois,* 19 MISS. C. L. Rev. 283, 285 (1999), meaningful appellate review is necessary to cabin jury discretion. Simply rubber stamping the jury's imposition of death violates the Eighth Amendment's prohibition against the arbitrary and capricious application of the death penalty.

II. This Court Should Grant the Petition in Order to Reaffirm that Proportionality Review is Constitutionally Required Where, As Exists Today, Other Checks on Arbitrariness are Inadequate or Defunct.

A. Proportionality Review is No Longer "Constitutionally Superfluous."

Because, as set forth above, state capital sentencing schemes have become "so lacking" in two critical checks on arbitrariness – *i.e.*, (i) limiting the universe of capital-eligible cases through a narrow list of aggravating factors and (ii) providing meaningful consideration of mitigating circumstances – proportionality review can no longer be considered "constitutionally superfluous." *Harris,* 465 U.S. at 49. Simply put: the states have proven that they cannot be relied on to scrupulously adhere to the important safeguards required by *Harris.* Accordingly and consistent with the spirit and reasoning of the holding in *Harris*, this Court should now hold that the Eighth Amendment requires

proportionality review in state capital sentencing schemes.

The unconstitutionality of state capital sentencing schemes cannot be cured by attempting to limit the number or narrow the language of statutory aggravating factors. Although the dramatic expansion of the universe of capital-eligible cases over the last twenty-five years is disconcerting, it is self-evident that the number and scope of statutory aggravating factors will naturally increase or decrease over time based on the changing moral compass of society. *See Coker v. Georgia*, 433 U.S. 584, 597 (1977) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."). A salient example is the fact that ten states in the last decade have added "acts of terrorism" as a new aggravating factor in their death penalty statutes. *See* Kierchmeier, *Casting a Wider Net*, *supra*, at 27-30.

It is therefore neither wise nor practical for this Court to try to reign in the states by limiting the number of statutory aggravating factors.[4] Because the determination of whether a particular crime is capital-eligible is necessarily a qualitative exercise, not a quantitative one, this Court should explicitly require proportionality review in state capital sentencing schemes to ensure that only the worst of

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[4] *But see* Ill. Comm'n on Capital Punishment, *supra* at 72-73 (proposing a reduction in the number of statutory aggravating factors); Mass. Governors Council on Capital Punishment, *Governor's Council on Capital Punishment: Final Report* 10-12 (2004), *available at* http://www.lawlib.state.ma.us/docs/5-3-04Governorsreportcapitalpunishment.pdf (same).

the worst are given the ultimate punishment of death.

Moreover, although "judging the 'character and record of the individual offender and the circumstances of the particular offense [i]s a constitutionally indispensable part of the process of inflicting the penalty of death,'" *Kennedy*, 128 S. Ct. at 2659 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)), this requirement alone cannot cure an unconstitutional state capital sentencing scheme that arbitrarily metes out the punishment of death. Without proportionality review, sentencing authorities have no context to assess whether a particular defendant's mitigating circumstances are being given the same weight as those of similarly-situated defendants who were sentenced (or not sentenced) to death in the past. Nor do they have any means of assessing whether the "'evolving standards of decency that mark the progress of a maturing society'" dictate that capital punishment is warranted for this particular defendant. *Id.* at 2649 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). As such, this Court should explicitly require that state capital sentencing schemes include a robust consideration of mitigating circumstances and that state appellate courts also conduct a meaningful proportionality review to lessen the arbitrary application of the death penalty.

To be clear, proportionality review necessarily requires the comparison of "each death sentence with the sentences imposed on similarly situated defendants." *Gregg*, 428 U.S. at 198. Accordingly, state appellate courts must compare "not only similar cases in which death was imposed, but similar cases in which death was not imposed." *Zant*

v. Stephens, 462 U.S. 862, 880, n.19 (1983); *see also Walker v. Georgia*, 129 S. Ct. 453, 454-57 (2008). Moreover, state appellate courts must not only evaluate the aggravating factors in those "similar cases," but also the mitigating circumstances leading to the imposition of a death or life sentence in those "similar cases." *See Walker*, 129 S. Ct. at 455 (admonishing the Georgia Supreme Court for its perfunctory review of twenty-one death cases).

Of the thirty-five states that authorize the death penalty today, approximately one-half do not require – whether through statute or case law – that state appellate courts conduct proportionality review of capital sentences. *See* Appendix C. And even with those states that do ostensibly require proportionality review, most state appellate courts are now treating proportionality review as such a perfunctory exercise as to make the review meaningless. Indeed, state appellate courts often mechanically pronounce in their opinions that proportionality review is no longer required under the federal Constitution. *See e.g., State v. Salazar*, 844 P.2d 566, 583 (Ariz. 1992); *State v. Rhoades*, 820 P.2d 665, 682 (Idaho 1991); *People v. King*, 488 N.E.2d 949, 967 (Ill. 1986); *Burris v. State,* 465 N.E.2d 171, 192 (Ind. 1984); *State v. Welcome*, 458 So. 2d 1235, 1252 (La. 1984), *superseded by statute on other grounds,* 1993 IND. ACTS. P.L. 250 § 2, *as recognized in Wrinkles v. State*, 690 N.E.2d 1156, 1171 (Ind. 1997); *Walker v. State,* 863 So. 2d 1, 24 (Miss. 2003); *Battenfield v. State*, 816 P.2d 555, 564 (Okla. Crim. App. 1991). Following such a pronouncement, state appellate courts then typically dedicate no more than one rote paragraph to their so-called "proportionality review." Such paragraph often uses terse and conclusory language to

pronounce that the death sentence is not disproportionate to other similar cases in which death *was* imposed. And, such "similar cases" are typically presented as a string citation without any comparative analysis of the aggravating or mitigating circumstances in those cases.[5] Moreover, state appellate courts also fail to evaluate "similar cases" in which death was *not* imposed. *See* Appendix C. As Justice Stevens noted in *Walker*, cases resulting in life sentences "are eminently relevant to the question whether a death sentence in a given case is proportionate to the offense," and the failure of state appellate courts "to acknowledge

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[5] *Manley*, 918 A.2d at 330 (merely stating, without analysis, that the "case fits the pattern of cases deserving of the death penalty as reflected in the applicable universe of cases"); *Walker*, 653 S.E.2d at 447-48 (concluding in a single paragraph that the death sentence was not disproportionate and string citing, without analysis, twenty-one death cases); *Wrinkles v. State*, 690 N.E.2d 1156, 1173 (Ind. 1997) (merely pronouncing "that the mitigating circumstances that exist are outweighed by the aggravating circumstance" and string citing, without analysis, to other death cases); *Epperson*, 197 S.W.3d at 63 (merely concluding that the death sentence was not disproportionate because similar aggravating factors existed in many death cases decided since 1970 and citing the same cases as it had in numerous decisions); *State v. Draughn,* 950 So. 2d 583, 635 (La. 2007) (concluding in a single paragraph that because Louisiana juries have sentenced defendants to death for murder cases involving robbery, the death sentence was proportionate); *Manning v. State*, 765 So. 2d 516, 522, 523-528 (Miss. 2000) (comparing only death cases involving robbery); *State v. Roache*, 595 S.E.2d 381, 435 (N.C. 2004) (merely string citing, without analysis, death cases for each aggravating factor, despite the jury finding three statutory and forty-four non-statutory factors of mitigation); *Wackerly*, 12 P.3d at 19 (merely concluding in a single paragraph that the death sentence was appropriate without evaluating aggravating or mitigating circumstances or comparing any other cases).

these or any other cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that [they] will overlook a sentence infected by impermissible considerations." *Walker*, 129 S. Ct. at 456; *see also State v. Marshall*, 613 A.2d 1059, 1070-71 (N.J. 1992) (proclaiming that any review of a death sentence "would be inadequate if limited to the review of only cases where death sentences were imposed").

B. The Deterioration of Louisiana's Capital Sentencing Review Process Exemplifies Why Proportionality Review Is So Necessary.

Under Louisiana's capital sentencing scheme, the Louisiana Supreme Court is required to determine, *inter alia*, whether the death sentence was arbitrarily imposed and whether it is "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." LA. CODE CRIM. PROC. art. 905.9 (2009); La. S. Ct. Rule 28. However, in the entire history of its capital sentencing scheme, the Louisiana Supreme Court has reversed *only one* death sentence for excessiveness.[6] *See State v. Sonnier*, 380 So. 2d 1 (La. 1979). In *Sonnier*, a pre-*Harris* decision, the court set aside the death sentence after considering the extensive mitigating evidence in the defendant's case and after comparing it to four other similar

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[6] Although, in *State v. Weiland*, the Louisiana Supreme Court concluded that, because of the defendant's numerous mitigating circumstances, his death sentence was disproportionate to other sentences, the court reversed exclusively due to the erroneous exclusion of mitigating evidence. 505 So. 2d 702, 710 (La. 1987).

first-degree murder cases, in which three of four defendant's received life imprisonment. *Id.* at 8. Since this Court's ruling in *Harris*, however, Louisiana has greatly diminished the procedural safeguards in its capital sentence scheme. As a result, despite having reviewed at least 200 capital cases since *Harris*, the Louisiana Supreme Court has not reversed a single death sentence for excessiveness.

Since this Court's decision in *Harris*, the Louisiana legislature has vastly expanded the universe of capital-eligible crimes. It has added eight new felonies as aggravating circumstances in which the state may apply the death penalty to defendants who did not kill. *Compare Lowenfield v. Phelps*, 484 U.S. 231, 243, n.6 (1988) *with* LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1), 905.5 (2008) (adding the commission of murder during the course of a forcible rape, second-degree kidnapping, assault by drive by shooting, first-degree robbery, second-degree robbery, cruelty to juveniles, second-degree cruelty to juveniles or terrorism, and failing to enumerate "lack of intent" as a mitigating circumstance). It has also added two separate groups of individuals to protected classes, *see* La. R.S. 14:30-(A)(2) (2008) (civilian employees of the state police or forensic laboratories); La. R.S. 14:30-(A)(5) (2008) (victims sixty-five years of age or older), and added four whole new aggravating factors, *see* La. R.S. 14:30-(A)(6-9) (2008). Moreover, Louisiana's capital sentencing statute includes, as an aggravating factor, crimes "committed in an especially heinous, atrocious or cruel manner," LA. CODE CRIM. PROC. ANN. art. 905.4(A)(7) (2008), which is nothing more than a "catch-all" phrase applicable to almost every murder. Louisiana's capital

sentencing scheme also does not require its juries to weigh aggravating factors against mitigating factors and does not impose a burden of proof on its juries' final determination that death is the appropriate punishment. *See State v. Anderson*, 996 So. 2d 973, 1015 (La. 2008); *State v. Scott*, 921 So. 2d 904, 928-929 (La. 2006); *State v. Williams,* 831 So. 2d 835, 846 (La. 2002), *superseded by statute on other grounds*, LA. CODE CRIM. PROC. ANN. art. 905.5.1, *as recognized in State v. Dunn*, 974 So. 2d 658, 660-61 (La. 2008).

As the instant case and other recent Louisiana capital cases demonstrate, the meaningful appellate review of capital sentences conducted by the Louisiana Supreme Court has diminished since *Sonnier* to such an extent that it is now essentially non-existent. *See, e.g., Draughn*, 950 So. 2d at 635; *Tate*, 851 So. 2d at 943. In the instant matter, the trial record and sentencing memorandum outlined extensive mitigating evidence, including Ms. Holmes' mental diagnoses of fetal alcohol syndrome and post-traumatic stress disorder, low intelligence, susceptibility to her co-defendant's physical and emotion domination and the likelihood of her minimal role in the underlying crime. Appellant's Capital Sentence Review Memorandum at 4-5, 9. The Louisiana Supreme Court, however, glossed over and ignored this evidence in its review. *See Holmes*, *State v. Holmes*, 5 So. 3d 42, 94-98 (La. 2008). In fact, in the mere two paragraphs where the court discussed Ms. Holmes' childhood and background, it is unclear whether the court considered these facts as mitigating or aggravating. *Id.* at 95.

Moreover, the proportionality review conducted by the Louisiana Supreme Court in the petitioner's

case was a perfunctory exercise at best. It limited its analysis to the consideration only of the aggravating factors of the petitioner's crime compared to the aggravating factors of other death-sentence cases. *Id.* at 96-98. In doing so, it made merely three conclusory statements: (i) "Louisiana juries appear especially prone to impose capital punishment for crimes committed in the home," *id.* at 97; (ii) "Louisiana juries have not hesitated in imposing the death penalty in a variety of cases involving multiple deaths or when a defendant creates the risk of death or great harm to more than one person," *id.* at 97-98; and (iii) "juries in Louisiana have readily returned the death sentence when the elderly are preyed upon as victims," *id.* at 98. Following each statement, the court included string citations without analysis of any additional aggravating circumstances or any mitigating circumstances in those cases, and without any discussion of Ms. Holmes' numerous mitigating circumstances. *Id.* at 96-98. In addition, the court failed to compare Ms. Holmes' case to any cases where death was *not* imposed. *Id.* Had the Louisiana Supreme Court looked outside the universe of death-sentence cases, it would have found numerous first-degree murder cases with aggravating circumstances similar to the petitioner's where the jury imposed life sentences.

Louisiana's capital punishment scheme exemplifies the trend among states to eviscerate the procedural safeguards this Court affirmed in *Harris*. Indeed, Louisiana's chillingly casual death sentencing review illustrates the necessity of proportionality review as a constitutional requirement.

CONCLUSION

For the foregoing reasons, *Amicus* requests that this Court grant petitioner's writ for certiorari.

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