No.

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

PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE

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CAPITAL CASE
QUESTION PRESENTED

I. Louisiana's capital punishment scheme relies upon appellate review to ensure that death sentences are not disproportionate to the penalty imposed in similar cases. In assessing whether Petitioner's sentence was excessive, the Louisiana Supreme Court did not examine similar first-degree murder cases that resulted in a life sentence, consider Petitioner's extensive mitigating circumstances, or assess her codefendant's relative culpability. The question presented is whether the operation of Louisiana's capital punishment scheme violates the Eighth Amendment's guarantee against arbitrariness in capital sentencing.

PARTIES TO THE PROCEEDING

The petitioner is Brandy Aileen Holmes, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandy Aileen Holmes respectfully petitions for a writ of certiorari to review the Louisiana Supreme Court's judgment in this case.

OPINION BELOW

The Louisiana Supreme Court's opinion in *State v. Holmes,* authored by Justice Knoll, is reported at __ So. 2d __, 2008 La. Lexis 2758, and is reprinted in the Appendix at Pet. App. A. Chief Justice Calogero's dissent is reprinted at Pet. App. B. Justice Johnson's dissent is reprinted at Pet. App. C. The Louisiana Supreme Court's denial of rehearing is reprinted at Pet. App. D.

JURISDICTION

The Louisiana Supreme Court's opinion was entered on December 2, 2008. That court denied Ms. Holmes's timely petition for rehearing on January 30, 2009. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Article 905.3 of the Louisiana Code of Criminal Procedure provides:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggra-

> vating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Article 905.4 of the Louisiana Code of Criminal Procedure provides in pertinent part:

> A. The following shall be considered aggravating circumstances:
>
> > (1) The offender was engaged in the perpetration or attempted perpetration of . . . armed robbery, first degree robbery, second degree robbery, simple robbery . . . .
> >
> > (4) The offender knowingly created a risk of death or great bodily harm to more than one person. . . .
> >
> > (10) The victim was . . . sixty-five years of age or older.

Article 905.5 of the Louisiana Code of Criminal Procedure provides in pertinent part:

> The following shall be considered mitigating circumstances: . . .
>
> > (b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

> (c) The offense was committed while the offender was under the influence or under the domination of another person; . . .
>
> (e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
>
> (f) The youth of the offender at the time of the offense;
>
> (g) The offender was a principal whose participation was relatively minor;
>
> (h) Any other relevant mitigating circumstance.

Article 905.9 of the Louisiana Code of Criminal Procedure provides:

> The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Louisiana Supreme Court Rule 28 provides, in pertinent part:

> Rule 905.9.1 Capital sentence review (applicable to La.C.Cr.P. Art. 905.9)
>
> Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> . . .
>
> Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.
>
> (a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the

record a Uniform Capital Sentence Report . . . . The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire in to the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and other relevant matters concerning the defendant. . . .

(c) Defense counsel and the district attorney shall be furnished a copy of the complete Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds,

> the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. . . .

Section 4. Sentence Review Memoranda; Form; Time for Filing.

> (a) . . . the district attorney and defendant shall file sentence review memoranda addressed to the propriety of the sentence. . . .
>
> (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.

STATEMENT

This petition presents the Court with the question of whether Louisiana's current administration of its death penalty scheme violates the Eighth Amendment's guarantee against arbitrariness in capital sentencing. The question centers on whether Louisiana's proportionality review – an important safeguard in the state's capital sentencing regime – fails in practice to guard against disproportionate death sentences.

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court struck down (as contrary to the Eighth Amendment) the majority of states' death penalty statutes. "Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Four years later, in *Gregg*, the Court approved Georgia's reconstituted death penalty scheme. The *Gregg* Court noted with approval the

appellate review mechanism in the Georgia statute whereby the Georgia Supreme Court independently reviews "the appropriateness of imposing the sentence of death in the particular case." *Id.* at 166.

In *Pulley v. Harris*, 465 U.S. 37 (U.S. 1984), the Court held that the comparative proportionality review that Georgia provides is not "indispensable" to a constitutional death penalty scheme, while reaffirming the central holding of *Furman* that a death penalty scheme that is plagued by systemic inconsistencies is unconstitutional. 465 U.S. at 45. The Court clarified that it "take[s] statues as [it] find[s] them" and acknowledged the possibility that proportionality review might be constitutionally required if the state capital scheme failed to check against the arbitrary imposition of the death penalty. *Id.* at 51.

Following *Harris*, a majority of a sharply divided Louisiana Supreme Court concluded that the Eighth Amendment does not require proportionality review in Louisiana. *See State v. Welcome*, 458 So. 2d at 1252; *but see* 458 So. 2d at 1256 (Calogero, J., dissenting); *id.* at 1258 (Dixon, C.J., dissenting); *id.* at 1259 (Dennis, J., dissenting).

This term, in a separate statement concerning the denial of certiorari in *Walker v. Georgia*, 129 S. Ct. 453 (2008), Justice Stevens observed that the "likely result" of an incomplete proportionality review would be "the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment." 129 S. Ct. at 457. Justice Stevens observed that the Court's decision in *Gregg* "assumed that the [Georgia Supreme Court] would consider whether there were 'similarly situated defendants' who had not been put to death because

that inquiry is an essential part of any meaningful proportionality review" and depended in "part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." *Id.*

Louisiana's current death penalty scheme is modeled after the Georgia scheme approved in *Gregg*.[1] It similarly relies on meaningful appellate review of each death sentence. *See* La. C. Cr. P. Art. 905.9 ("The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive.").[2] Though the Louisiana Supreme Court is required to review every death sentence to determine "whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," that review, in practice, does not fulfill *Furman*'s command to eliminate arbitrariness.

The Louisiana Supreme Court's proportionality review in this case did not compare Petitioner's death sentence to other first-degree murder cases where a sentence of death was not imposed. Nor did that court's review consider the extensive mitigating

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[1] *See State v. Welcome*, 458 So. 2d 1235, 1251 (1984) (noting that after the Court voided Louisiana's first post-*Furman* capital sentencing scheme in *Roberts v. Louisiana*, 428 U.S. 325 (1976), the state legislature "set forth a new capital sentencing procedure that essentially followed the Georgia procedure approved in *Gregg*.").

[2] Louisiana Supreme Court Rule 28 provides for review that closely tracks Georgia's process, except the Georgia legislature has provided for an assistant and necessary staff to monitor all capital cases -- a provision not observed in Louisiana. *See* Ga. Code Ann. §17-10-37.

circumstances that limited Ms. Holmes's moral culpability and compare them to the mitigating circumstances presented in similar cases. The court also failed to consider that Petitioner's co-defendant received a death sentence and that the prosecutor stated at the codefendant's trial that he (and not the Petitioner) was the more culpable party. In sum, the appellate review conducted in this case wholly failed to assure the proportionality of Ms. Holmes's death sentence.

Louisiana's inadequate proportionality review is not limited to this case. The Louisiana Supreme Court regularly fails to compare death sentences with other first-degree murder convictions where the jury imposed a life-sentence. Even the limited pool of cases that court does use as a basis of comparison is often incomplete or inaccurate. *See infra* Reasons for Granting the Writ II(C). In any event, the proof of the pudding is in the eating: the Louisiana Supreme Court has only ever reversed one death sentence for excessiveness. *See State v. Sonnier*, 380 So. 2d 1 (La. 1979). That court has not found a single sentence to be excessive in the last twenty-five years despite having reviewed at least 200 capital cases.

The Court last evaluated Louisiana's capital sentencing scheme over 20 years ago, and has never considered whether the federal constitution compels Louisiana's proportionality review. *Lowenfield v. Phelps*, 484 U.S. 231 (1988). Post-*Lowenfield* changes to Louisiana law increase the potential for arbitrariness. For example, Louisiana has drastically expanded the number of statutory aggravating circumstances, and simultaneously reduced restrictions on the types of State evidence that the jury may consider in making the death-determination.

These changes counter the *Furman* mandate because they expand (rather than narrow) the class of eligible offenders, and loosen the reins on (rather than channel) the sentencer's discretion. Consequently, the Louisiana Supreme Court is under more constitutional pressure to carefully conduct proportionality review to ensure the ultimate sentence is neither wantonly nor freakishly imposed.

FACTUAL BACKGROUND

A Caddo Parish Grand Jury indicted Petitioner, along with co-defendant Robert Coleman, on February 14, 2003 for the first-degree murder of Julian Brandon.[3] Petitioner conceded responsibility, but insisted that her crime constituted second –rather than first – degree murder. *See* Pet. App. A. at 2a n.2.

Significant evidence supported Ms. Holmes's diminished culpability. *See* Pet. App. C. (Johnson, J., dissenting); Pet. App. B. at 133a (Calogero, C.J., dissenting) (finding the "evidence regarding the defendant's mental retardation is sufficient, i.e., that there is a reasonable likelihood that she is mentally retarded . . . ."). Moreover, Ms. Holmes defended against the death penalty by presenting evidence that she suffered from global brain damage and Fetal Alcohol Syndrome (FAS). Further testimony established that Petitioner's structural brain damage impaired her decision-making processes and ultimately rendered her less culpable for the crime. *See infra* Reasons for Granting the Writ II(B).

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[3] Mr. Brandon's wife, Alice Brandon, survived a gunshot wound to the head. Pet. App. A. at 5a.

Petitioner's "mother testified that she drank whiskey during the first three months of her pregnancy and [] afterwards switched to beer. She told the jury she named the defendant Brandy because that was the drink she liked." Pet. App. A at 9a. As a toddler, Brandy began compulsively ingesting pebbles and gravel. This condition, known as pica, is associated with brain damage. In her case, the pica was so severe that she required oral surgery to her teeth and gums at the age of three. Appellant's Sentence Review Memorandum at 7.

When she entered school, Brandy was diagnosed with global learning disabilities in the areas of reading, math, and communication. Her problems included speech impairment and difficulties with both "visual and auditory processing and visual-motor integration." *Id.* at 5. She was placed in special education classes. Despite early intervention at school, Brandy never progressed beyond functioning at an age-equivalent of 10-12. *Id.*

Throughout her childhood, Brandy's divorced parents shipped her back-and-forth between Mississippi and Louisiana. Both family environments were characterized by alcoholism, violence, and a complete failure to provide structure, safety and security to a severely impaired young girl. *Id.* at 7.

At the age of 12, Brandy refused to eat for two days in an attempt to starve herself to death after she was raped by her sister's boyfriend.[4] She was then committed to a psychiatric hospital in Missis-

[4] The prosecution contended that Brandy's rape at age 12 by her sister's 16 year-old boyfriend was "consensual" sex. R. 6101.

sippi. *Id.* at 6. At that point, she was first diagnosed with Post Traumatic Stress Disorder and Major Depression, diagnoses that remained accurate from 1992 through a pretrial court-ordered expert evaluation performed in 2005. *Id.*

As she entered adolescence, evidence of Brandy's brain dysfunction, the trauma and neglect she endured in her parents' homes, and her borderline mentally retarded intellectual functioning manifested itself in increasingly destructive behaviors. These behaviors included truancy, running away from home and group homes, carrying knives to school for self-protection, destruction of property, theft, and unauthorized entry of an inhabited dwelling. *Id.* at 7. At the age of 13, the juvenile court removed Brandy from her mother's home because her mother was unable to respond to her needs. She was then placed in a succession of group homes. *Id.* At age 15, Brandy was sentenced to juvenile prison until the age of 21 for unauthorized entry of a dwelling. *Id.* at 8.

Several months before the commission of the instant crime, Ms. Holmes began dating Robert Coleman, her codefendant in this capital murder case.[5] Coleman was ten years older and suffered from none of Ms. Holmes's debilitating impairments. The psychiatrist who examined Petitioner and conducted pre-trial interviews with her family members testified that Ms. Holmes did whatever Coleman told

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[5] The Louisiana Supreme Court overturned Robert Coleman's conviction because the State discriminated on the basis of race in jury selection. *See State v. Coleman*, 970 So. 2d 511 (La. 2007). Coleman currently awaits re-trial.

her to do. He physically abused her and controlled her behavior. *Id.* at 9.

In both the guilt and penalty phases, the trial court precluded Ms. Holmes from introducing evidence "revealing that Coleman had been convicted of first-degree murder and sentenced to death." Pet. App. A at 32a. Ms. Holmes presented other evidence that suggested her codefendant was the major participant in the homicide, and that she acted under his domination. Appellant's Sentence Review Memorandum at 9-10.

The State submitted three aggravating circumstances. The jury found: (1) the offender was engaged in the perpetration or attempted perpetration of an armed robbery, first-degree robbery or simple robbery; (2) the offender knowingly created a risk of death or great bodily harm to more than one person; and (3) the victim was 65 years of age or older. *See* La. C. Cr. Proc. art. 905.4(A) (1), (4), (10).

At the penalty phase, the defense offered evidence that Petitioner's case implicated at least six of Louisiana's statutory mitigating circumstances. In addition to the "any other relevant mitigating circumstance" catch-all, La. C. Cr. P. art. 905.5 (h), evidence indicated that: the offense was committed while under emotional and mental disturbance; the offense was committed while under the domination of another person; at the time of the offense the offender's ability to appreciate the criminality of her conduct or conform it to the law was impaired as a result of mental defect; the offender was young at the time the crime was committed; and the offender's participation was relatively minor. La. C. Cr. P. art. 905.5 (b), (c), (e), (f), (g).

The jury returned a death verdict. On appeal, Petitioner challenged under the Eighth Amendment the sufficiency of Louisiana's proportionality review. She argued that "[a]n adequate capital sentence review cannot be performed without consideration of both mitigating and aggravating circumstances" and that the Louisiana Supreme Court must review "cases where the death penalty was returned, but also those in which it was not." Appellant's Capital Sentence Review Memorandum at 2, 17.

The Louisiana Supreme Court affirmed Petitioner's conviction and death sentence, specifically finding that "it cannot be said the death penalty in this case is disproportionate." Pet. App. A at 113a. The Louisiana Supreme Court's proportionality review was limited to references to other cases in which death sentences were returned for the same or similar aggravating circumstances that the jury found in Ms. Holmes's case. The court listed a series of cases in which juries imposed the death penalty for crimes committed in the home,[6] for crimes in

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[6] The court observed that "juries appear especially prone to impose capital punishment for crimes committed in the home." Pet. App. A at 110a. This observation demonstrates the problem with failing to compare death sentences to life sentences: without knowing the universe of cases of crimes committed in the home, it is impossible to know whether juries are "especially prone to impose capital punishment for crimes." If there were only 20 death-eligible crimes committed within the home and all of them resulted in death sentences, the court would reach a very different conclusion than if there were 500 death-eligible crimes committed within the home and only 20 resulted in death sentences. *See, e.g., Enmund v. Florida,* 458 U.S. 782, 818-19 (1982) (O'Connor, J., dissenting) (explaining the problem in the felony murder context with statistics that "do not reveal the number or fraction of homicides that were charged" or "the number or fraction of cases in which the State

which the defendant created a risk of death or great harm to more than one person, and for crimes in which the victims were over the age of 65. Based on this observation alone – that the Louisiana juries have previously imposed the death penalty for the same aggravating factors which were found to be present in Ms. Holmes's case – the court concluded that her death sentence was proportionate.

The Louisiana Supreme Court did not compare Petitioner's death sentence to other first-degree murder cases where death sentences were not imposed. That court also did not compare mitigating evidence across cases when it determined that Petitioner's death sentence is proportionate. Nor did the court do as it had promised and assess Petitioner's diminished culpability compared to her older, larger, and more domineering co-defendant. *See* Pet. App. A. at 44a ("[T]he Legislature did not intend to require a detailed comparative analysis of other first degree murder cases and sentences by the jury in a capital sentence hearing," because "the function of comparative analysis falls to this Court as part of its Rule 28 [proportionality] review of capital sentences." (internal quotation and citations omitted)).

In her application for rehearing, Petitioner, noting Justice Stevens's statement concerning the denial of certiorari in *Walker*, argued that the Louisiana Supreme Court's "minimal review cannot detect excessive sentences of death and ensure against the arbitrary or discriminatory imposition of death . . . . [T]his Court erroneously affirm[ed] Ms.

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sought the death penalty" because "[c]onsequently, we cannot know the fraction of cases in which juries rejected the death penalty.").

Holmes' unconstitutionally excessive sentence of death." Appellant's Application for Rehearing at 3. The Louisiana Supreme Court denied Petitioner's timely application for a rehearing on January 30, 2009. This petition ensues.

REASONS FOR GRANTING THE WRIT

The Eighth Amendment limits imposition of the death penalty to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (internal citations omitted). State sentencing statutes must meaningfully sort the many murderers who do not receive a death sentence from the very few who do. *See Gregg*, 428 U.S. at 188 ("*Furman* held that [capital punishment] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

The quality of Louisiana's proportionality review is central to the constitutionality of its death penalty scheme. Inadequate proportionality review fails to ensure that death sentences in Louisiana comply with the Eighth Amendment's guarantee against arbitrary death sentences. The Louisiana Supreme Court's proportionality review of Petitioner's death sentence could not plausibly measure whether her sentence is excessive: that court did not consider cases where a person convicted of first degree murder received a life sentence, or even compare mitigating factors in its excessiveness analysis.

This Court should grant review to consider whether the United States Constitution requires Louisiana's proportionality review. The Court should also address whether the review conducted in this case was so inadequate as to unconstitutionally increase the risk of an arbitrary death sentence. This issue is well-preserved, and there are no vehicle impediments to this Court's review of the case.

I. The Eighth Amendment Requires Louisiana to Engage in Proportionality Review.

This Court's decision in *Harris* is not a reason to deny *certiorari* here.[7] "[T]he Eighth Amendment

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[7] Indeed, *Harris* reiterated the *Gregg* Court's maxim that "each distinct system must be examined on an individual basis." 465 U.S. at 45. Moreover, since *Harris*, numerous commentators have called for proportionality review as a means to achieve the consistency and fairness that continues to elude capital punishment schemes. *See, e.g.*, David Baldus et al., *Race and Proportionality Since* McCleskey v. Kemp (1987): *Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143, 176 (2007) (praising New Jersey's extensive proportionality review for helping to reduce arbitrariness and discrimination in its administration of the death penalty); Evan J. Mandery, *In Defense of Specific Proportionality Review*, 65 ALB. L. REV. 883, 887-88 (2002) (explaining the need for proportionality review that considers as evidence of the violation of evolving standards of decency the better treatment of similar defendants); THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY (2001), *available at* http://www.constitutionproject.org/detail.asp?id=2 (last visited March 23, 2009) at 27 ("Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, non-arbitrary, and even-handed fashion, to provide a check on broad prosecutorial discretion, and

cannot tolerate the infliction of a death sentence under a legal system that permits this unique penalty to be wantonly and freakishly imposed." *Walker*, 129 S. Ct. at 454 (Statement of Stevens, J., respecting the denial of the petition for writ of certiorari) (citing *Furman v. Georgia,* 408 U.S. 238, 310 (1972) (Stewart, J., concurring)). Louisiana, unlike California, employs a "capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." *Harris*, 465 U.S. at 51.

The sheer number of individuals who may receive a death sentence directly relates to the risk of arbitrariness. When the Court decided *Lowenfield*, the Louisiana statute contained five aggravating factors at the guilt phase and nine aggravating factors at the penalty phase. *See* 484 U.S. at 241-42 & 243 n.6. Subsequently, the state legislature added four aggravating factors at the guilt stage and three additional aggravating circums-

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to prevent discrimination from playing a role in the capital decision-making process"); Ken Driggs, *The Most Aggravated and Least Mitigated Murders: Capital Proportionality Review in Florida*, 11 ST. THOMAS L. REV. 207, 272 (1999) (describing proportionality review as a successful tool in Florida for reducing the arbitrary and discriminatory nature of the death penalty); Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After* Pulley v. Harris, 70 U.COLO. L. REV. 813, 819 (1999) (arguing that state courts must use meaningful proportionality review to ensure constitutionally required fairness in capital sentencing); Lawrence Lustberg & Lenora Lapidus, *The Importance of Saving the Universe: Keeping Proportionality Review Meaningful*, 26 SETON HALL L. REV. 1423, 1428 (1996) (demonstrating that "meaningful proportionality review is necessary to ensure the very fairness, even-handedness and egalitarian application of the most severe sanction available in this or any other society").

tances at the penalty phase. *See* La. R.S. § 14:30; La. C. Cr. P. art. 905.4 (A). The upshot is that far more individuals are eligible for a possible death sentence today than when this Court last validated the Louisiana capital sentencing scheme.

In addition to the post-*Lowenfield* widening of the net of offenders eligible for a possible death sentence, the Louisiana sentencing scheme further increases the risk of arbitrariness because it contains few internal controls to guide jury discretion. For example, while many state statutes harness the jury's discretion by requiring jurors to weigh mitigating evidence against aggravating evidence, the Louisiana sentencing scheme "does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard." *State v. Anderson*, 996 So. 2d 973, 1015 (La. 2008). Nor does the Louisiana scheme impose a standard of proof upon the jury's determination that death should be imposed. *See id.*

The Louisiana Supreme Court has also vastly expanded the type of evidence the State can introduce for the jury's consideration at the penalty phase. *See State v. Jackson*, 608 So. 2d 949 (La. 1992) (permitting evidence of un-adjudicated other offense evidence); *State v. Bernard*, 608 So. 2d 966 (La. 1992) (permitting victim impact evidence); *State v. Sepulvado*, 672 So. 2d 158 (La. 1996) (holding that admissible bad character evidence includes verbal and non-criminal information).[8] In-

[8] Procedural bars may also increase the amount of prejudicial evidence heard by a capital jury. *See State v. Taylor*, 669 So. 2d 364 (La. 1996) (applying procedural bar to unob-

creased access to such aggravating information has expanded – rather than channeled – jury discretion. This amplified discretion heightens the risk of arbitrary sentencing.

In light of Louisiana's current capital punishment scheme, proportionality review necessarily plays a vital role in stamping out the risk of arbitrariness and discrimination in capital sentencing. *See Gregg*, 428 U.S. at 205 ("In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury."); *id.* at 207 ("the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.").

In a State where the death penalty's imposition looks more and more like what this Court saw in *Furman*, the need for meaningful proportionality review is clear. Despite this heightened need to ensure that death sentences are not arbitrary or excessive, the Louisiana Supreme Court's proportionality review remains deficient.

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jected to guilt phase error); *State v. Wessinger*, 736 So. 2d 162 (La. 1999) (applying procedural bar to unobjected to penalty phase error).

II. The Louisiana Supreme Court Conducted a Constitutionally Insufficient Proportionality Review in this Case.

A. The Louisiana Supreme Court did not compare Petitioner's death sentence with other first-degree murder cases where a life sentence was imposed.

In *Zant v. Stephens*, the Court upheld the current iteration of Georgia's capital sentencing scheme after relying (in part) on the Georgia Supreme Court's representation that its proportionality review "uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed." 462 U.S. 862, 880 n.19 (1983); *see also Gregg*, 428 U.S. at 205 n.56. As Justice Stevens recently observed, "[t]hat approach seemed judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court." *Walker*, 129 S. Ct. at 454-55.

Simply comparing cases in which the death penalty has been imposed does not constitute meaningful proportionality review "because without knowledge of the life-sentenced cases, a court would be unable to determine whether there is a 'meaningful basis' for distinguishing the death sentences it reviews from the 'many cases' in which lesser sentences are imposed." *In re Proportionality Review Project*, 161 N.J. 71, 84 (N.J. 1999) (internal citations omitted). "The [court's] failure to acknowledge . . . any other cases outside the limited universe of cases in which the defendant was sentenced to death

creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations." *Walker*, 129 S. Ct. at 456.

Many Louisiana first-degree murder cases with aggravating circumstances similar to those the jury found here resulted in life sentences. Juries have imposed life sentences in a plethora of cases involving crimes committed in the home.[9] Juries have also frequently sentenced to life individuals convicted of creating the risk of death or great bodily harm to more than one person.[10] And, several cases

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[9] *See, e.g.*, *State v. Odom*, 760 So. 2d 576 (La. App. 2 Cir. 2000); *State v. Donaldson*, 391 So. 2d 1182 (La. 1980); *State v. Wiley*, 513 So. 2d 849 (La. App. 2 Cir. 1987); *State v. Edwards*, 406 So. 2d 1331 (La. 1981); *State v. Medford*, 489 So. 2d 957 (La. App. 5 Cir. 1986); *State v. McCullough*, 774 So. 2d 1105 (La. App. 3 Cir. 2000); *State v. Kevin Manieri*, 378 So. 2d 931 (La. 1979); *State v. Sheldon Manieri*, 378 So. 2d 931 (La. 1979); *State v. Deboue*, 496 So. 2d 394 (La. App. 4 Cir. 1986); *State v. Thibodeaux*, 728 So. 2d 416 (La. App. 3 Cir. 1998); *State v. Robinson*, 421 So. 2d 229 (La. 1982) (life sentence after new sentencing hearing); *State v. Ledet*, 792 So. 2d 160 (La.App. 5 Cir. 2001); *State v. Vasquez*, 729 So. 2d 65 (La. App. 5 Cir, 1999); *State v. Cedrington*, 725 So. 2d 565 (La. App. 5 Cir. 1998); *State v. Johnson*, 725 So. 2d 565 (La. App. 5 Cir. 1998); *State v. Bibb*, 626 So. 2d 913 (La. App. 5 Cir. 1993).

[10] *See State v. Gilliam*, 827 So. 2d 508 (La. App. 2 Cir. 2002); *State v. Smith*, 740 So. 2d 675 (La. App. 2 Cir 1999), writ denied, 785 So. 2d 840 (La. 2001); *State v. Williamson*, 671 So. 2d 1208 (La. App. 2 Cir. 1996), writ denied, 679 So. 2d 1380 (La. 1996); *State v. Johnson*, 665 So. 2d 1237 (La. App. 2 Cir. 1995); *State v. Foy*, 439 So. 2d 433 (La. 1983); *State v. Forbes*, 362 So. 2d 1385 (La. 1978); *State v. Stanfield*, 562 So. 2d 969 (La. App 3 Cir. 1990); *State v. Lormand*, 771 So. 2d 734 (La. App. 3 Cir. 2000); *State v. Brown*, 715 So. 2d 566 (La. App. 3 Cir. 1998); *State v. Boudoin*, St. Martin Parish District Court Docket No. 97-181960 (1997); *State v. Wilson*, 631 So. 2d 1213 (La.App. 5 Cir. 1994); *State v. Williams*, 871 So. 2d 599 (La.

involving elderly victims have resulted in a life sentence.[11] The Louisiana Supreme Court's cursory proportionality review is silent on the import and relevance of all these life-sentence cases.

B. The Louisiana Supreme Court's proportionality review failed to consider mitigating circumstances to determine whether Petitioner's death sentence is appropriate.

Despite the extensive mitigating circumstances presented in this case, the Louisiana Supreme Court made *no* effort to compare the mitigation presented by Ms. Holmes to that offered in other capital cases.

App. 5 Cir. 2004); *State v. Harris*, 871 So. 2d 599 (La. App. 5 Cir. 2004); *State v. Medford*, 489 So. 2d 957 (La. App. 5 Cir. 1986); *State v. Deboue*, 496 So. 2d 394 (La. App. 4 Cir. 1986); *State v. Butler*, 462 So. 2d 1280 (La. App. 5 Cir. 1985); *State v. Thibodeaux*, 728 So. 2d 416 (La. App. 3 Cir. 1998); *State v. Dean*, 487 So. 2d 709 (La. App. 5 Cir. 1986), writ denied, 495 So.2d 300 (La. 1986); *State v. Coleman*, 756 So. 2d 1218 (La. App. 2 Cir. 2000); *State v. Vince*, 739 So. 2d 308 (La. App. 1 Cir. 1999) (jury deadlock resulted in life sentence); *State v. Shawn Smith*, 717 So. 2d 1209 (La. App. 4 Cir. 1998); *State v. Kendrick Howard*, 717 So. 2d 1209 (La. App. 4 Cir. 1998); *State v. Guillory*, 715 So. 2d 400 (La. App. 3 Cir. 1998); *State v. Rodriguez*, 822 So. 2d 121 (La. App. 1 Cir. 2002); *State v. Odom*, 760 So. 2d 576 (La. App. 2 Cir. 2000); *State v. Moore*, 412 So.2d 108 (La. 1982); *State v. Bibb*, 626 So. 2d 913 (La. App. 5 Cir. 1993); *State v. Pascual*, 735 So. 2d 98 (La. App. 5 Cir, 1999).

[11] *See State v. Donaldson*, 391 So. 2d 1182 (La. 1980); *State v . Edwards*, 406 So.2d 1331 (La. 1981); *State v. Odom*, 760 So. 2d 576 (La. App. 2 Cir. 2000); *State v. Riggins*, 388 So. 2d 1164 (La. 1980); *State v. Ledet*, 792 So. 2d 160 (La. App. 5 Cir. 2001); *State v. Ross*, 572 So. 2d 238 (La. App. 1 Cir. 1990).

Petitioner's case presents compelling mitigating evidence. Prior to trial and at trial, a psychiatrist testified that Ms. Holmes suffers from Fetal Alcohol Syndrome (FAS), a condition created by her mother's alcohol consumption during pregnancy. A psychologist testified that neuropsychological testing revealed Ms. Holmes has long-suffered from a moderate degree of organic brain dysfunction, primarily to the left side of her brain. The expert testified – uncontested by the state – that the specific impairment to Brandy's brain negatively impacts her ability to reason, foresee consequences, communicate, abstract and learn from experiences, control impulses, read verbal cues, and accurately interpret the reactions of others. Appellant's Sentence Review Memorandum at 4.

Further uncontested testimony established that pre-trial MRI and PET scans revealed significant abnormalities in several areas of Brandy's brain, including: the amygdala, bilateral inferior temporal regions, superior temporal areas along the sylvian fissure, bilateral parietal regions, left medial temporal area, right putamen/globus pallidus, bilateral cerebellum frontal regions. *Id.* at 4-5.

The record further establishes – particularly in light of codefendant Coleman's physical and emotional domination – real questions about the level of Petitioner's participation in the crime. The only evidence placing Ms. Holmes at the scene of the murder is her contradictory and unreliable statements to police. The physical evidence placed Coleman, not Ms. Holmes, at the scene of the crime. Even the Assistant District Attorney who prosecuted this capital case expressed concern as to the level of Ms. Holmes's involvement in the murder for which she

has been convicted and sentenced to death.[12] Appellant's Sentence Review Memorandum at 9.

C. The Louisiana Supreme Court Regularly Conducts Inadequate Proportionality Review.

The Louisiana Supreme Court's proportionality review routinely fails to compare the death sentence at issue with similar first-degree murder convictions where the jury imposed a life sentence. *See, e.g.*, *Anderson*, 996 So. 2d 973, 1018-20; *State v. Legrand*, 864 So. 2d 89, 104-07 (La. 2003); *cf. Walker*, 129 S. Ct. at 455-56 ("Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment."). Nor does that court consider the factors that determine which defendants are the most culpable for their crimes. *See, e.g.*, *State v. Lacaze*, 824 So. 2d 1063, 1085 (La. 2002).[13] The latter is especially important where, in

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[12] Mr. Holland related that he believes Holmes's personality is one that would exhibit tendencies to cover for and/or make excuses for an individual that she cared for, namely Robert Coleman. While speaking with a female detective in one interview, Holmes asked the detective if she had ever loved someone so much that she would do anything in the world for him. The detective then asked if the subject was referring to Robert Coleman, and Holmes replied that she was. Appellant's Sentence Review Memorandum at 9.

[13] *Cf. State v. Thompson*, No. E2005-01790-CCA-R3-DD (Tenn. Crim. App. April 25, 2007) (reversing death sentence of defendant with "long and documented history of mental illness" under proportionality review after comparative review of all

cases such as this one, the defendant's diminished culpability could have been overlooked by – or poorly presented to – the jury. A jury may see maladaptive behaviors as aggravating – rather than mitigating – circumstances. *Cf. Atkins v. Virginia*, 536 U.S. 304, 320 (2004) ("The risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty,' is enhanced . . . by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." (internal citations omitted)).[14]

The Louisiana Supreme Court's proportionality review also regularly relies on cases that have required sentencing relief, been overturned or reversed, or where the defendant has been exonerated. *See* Pet. App. A at 110a-113a (citing to *State v. Bridgewater*, 823 So. 2d 877 (La. 2002) (defendant under age 18 at time crime was committed); *State v.*

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cases involving similar defendants and similar crimes); *State v. Kemmerlin*, 573 S.E. 2d 870 (N.C. 2002) (setting aside death sentence as disproportionate under totality of circumstances, including weak evidence in aggravation and presence of six mitigating factors); *State v. Papavvasas*, 170 N.J. 462 (N.J.2002) (setting aside defendant's death sentence under comparative proportionality review based comparison of mitigating and aggravating factors of defendant and those defendants in the appropriate comparison group).

[14] *See id.* ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* [*v. Lynaugh*, 492 U.S. 302 (1989)] demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." (internal citations omitted)).

Jacobs, 789 So. 2d 1280 (La. 2001) (reversed); *State v. Burrell*, 561 So. 2d 692 (La. 1990) (charges dismissed); *State v. Sanders*, 648 So. 2d 1272 (La. 1994) (death sentence vacated and remanded for new sentencing hearing); *State v. Deboue*, 552 So. 2d 355 (La. 1989) (cannot be executed under *Atkins*); *State v. Scott*, 921 So. 2d 904 (La. 2006) (sentence not yet affirmed)); *Anderson*, 996 So. 2d 973 (citing to *Burrell*, 561 So.2d 692 (above); *State v. Thompson*, 516 So. 2d 349 (La. 1987) (exonerated); *Bridgewater*, 823 So. 2d 877 (above); *Jacobs*, 789 So. 2d 1280 (above); *State v. Howard*, 751 So. 2d 783 (La. 1999) (defendant under age 18 at time crime was committed); *State v. Summit*, 454 So. 2d 1100 (La. 1984)).

Furthermore, the Louisiana Supreme Court's proportionality review is arbitrary in its geographic scope. That court employs an inter-district review in only some cases, without a consistently-articulated justification for the inconsistency. *See, e.g.*, Pet. App. A at 110a; *State v. Robinson*, 874 So. 2d 66, 89 (La. 2004); *State v. Weary*, 931 So. 2d 297, 325-26 (La. 2006); *State v. Davis*, 637 So. 2d 1012. 1031 (La. 1994). Louisiana's review also fails to consider the introduction of invidious factors such as the race of the defendant and victim or other arbitrary factors such as the judicial district in which the case arose.

Importantly, the Louisiana Supreme Court does not enforce the rules necessary to enable it to conduct meaningful proportionality review. *See* La. S. Ct. R. 28. Here, for example, the State did not come close to providing a complete list of first-degree murder cases where a sentence was imposed. *See* La. S. Ct. R. 28(4)(b)(i) (requiring the State to produce "a list of each first degree murder case in the district in which sentence was imposed after January 1,

1976.").[15] Nor did the State provide a complete accounting of mitigating circumstances in the first-degree murder cases that it did list. *See* La. S. Ct. R. 28(4)(b)(ii) (requiring the district attorney to file a memorandum that includes "a synopsis of the facts in the record concerning the crime and the defendant in the instant case."). Without this critical information, the Louisiana Supreme Court simply cannot provide any capital defendant the check against arbitrariness required by the Constitution.

CONCLUSION

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

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[15] "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." *Id.*

Respectfully submitted,

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