ORIGINAL

NO. 19-7522

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

DEDRICK MATTHEWS, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

Respectfully submitted:

Dedrick Matthews
DOC #383290
Camp C, Bear-4
Louisiana State Prison
Angola, LA 70712

QUESTION PRESENTED FOR REVIEW

(1) Was defendant's conduct a **substantial factor** in causing the victim's death or serious bodily injury, when the accident would have occurred without it?

(2) Whether defendant maybe convicted under the vehicular homicide and first vehicular negligence injury, when the accident would have occurred irrespective of his conduct or negligence?

(3) Was the admission of the blood test results obtained without a consent or search warrant in violation of defendant's Fourth Amendment right against unreasonable searches and seizures, under **Birchfield v North Dakota**, 136 S.Ct.2160,195 L.Ed. 2D 560, 84 USLW 4493, 14 Cal. Daily Op. Serv. 6499

LIST OF PARTIES:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from federal courts:

The opinion of the United States court of appeals appear at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix "A" to the petition and is

[X] reported at *State* v. *Matthews*, #2019-K-00501 (La. 9/17/19); or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Fourth Circuit Court of Appeals appears at Appendix "B" to the petition and is

[X] reported at, *State v. Matthews, 2018-KA-1107* (La. App. 1 Cir. 2/25/19); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

No._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

DEDRICK MATTHEWS, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The Petitioner, Dedrick Matthews, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court for the State of Louisiana, which, by a six to one decision, denied Petitioner's timely Application for Writ of Certiorari in this matter on September 17, 2019, which is within ninety days of this Petition for Writ of Certiorari.

OPINION BELOW

Dedrick Matthews was convicted in East Baton Rouge Parish (19th Judicial District Court) under Docket No. 04-14-0587, Division "I" of two counts of Vehicular Homicide and two counts of First Degree Negligent Injuring. On March 5, 2018, Matthews went to trial by a six member jury. On March 7, 2018, the jury found him guilty on all counts. Matthews' convictions and sentences were affirmed on direct appeal in the Louisiana First Circuit Court of Appeal

under Docket No. 2018-KA-1107 on February 25, 2019. Writs were sought in the Louisiana Supreme Court bearing Docket No. 2018-K-00501 and denied on, September 17, 2019.

JURISDICTION

The order of the Supreme Court for the State of Louisiana denying Mr. Matthews' Application for Writ of Certiorari is filed within ninety days of that date, pursuant to Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND FEDERAL PROVISION INVOLVED

Fifth Amendment to United States Constitution: "No person shall... be deprived of life liberty, or property, except by due process of law..."

Sixth Amendment to United States Constitution: "In all criminal prosecution, the accused shall enjoy the right... to trial by an impartial jury."

Eighth Amendment to the United States Constitution: "... no person shall be sujected to cruel or unusual punishment."

Fourteenth Amendment, Section 1, to United States Constitution: "..nor shall any state deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

Matthews filed a Motion for New Trial and Motion for Post Judgment Verdict of Acquittal was denied on, April 9, 2018. On April 18, 2018, the trial court denied a subsequent Motion for New trial and Post Verdict Judgment of Acquittal and Memorandum in Support. On April 20, 2018, the trial court sentenced Mr. Matthews to twenty-five years on Count I Vehicular

Homicide, twenty-five years on Count II Vehicular Homicide, five years on Count III First Degree Negligent Injuring, five years on Count IV First Degree Negligent Injuring, all running consecutively. On May 9, 2018, the trial court denied Mr. Matthews' motion to reconsider sentence. On October 11, 2018, Matthews filed a timely appeal of his convictions and sentences imposed upon him as a result. On November 15, 2018, the State filed their response brief to Matthews' appeal. On February 25, 2019, the First Circuit Court of Appeal affirmed the Convictions and Sentences. Thereafter, timely writs were sought in the Louisiana Supreme Court under Docket No. 2019-K-00501, being denied on September 17, 2019. The instant writ application is predicated upon the holdings in the lowers and is within the ninety day prescriptive period set by this Honorable Court.

STATEMENT OF THE FACTS

On Sunday, March 30, 2014, Matthews was out at a casino in Baton Rouge with a friend. After leaving the casino, the two ventured out to another destination. Mr. Matthews traveled westbound on I-10 and made his way up the Horace Wilkinson Bridge, commonly known as the I-10 Mississippi River Bridge. A 1992 Honda Accord was in front of him in the right exit lane moving at a very low rate of speed, under the legal minimum speed limit on I-10. Mr. Matthews was driving a 2008 Dodge Charger, Johnny Glamon was driving the Honda Accord. Baton Rouge Police Department responded to a vehicle crash located on the super structure of the Horace Wilkinson Bridge, commonly known as the I-10 Mississippi River Bridge. Two individuals were found to be deceased at the scene, one was the driver of the Honda Accord,

Johnny Glamon. Two other individuals in the deceased's vehicle survived, but suffered serious injuries and were transported to the hospital. Mr. Matthews remained on the scene and exited the vehicle. When police arrived, officers approached him, at which time he cooperated with their investigation. After initially attempting to submit to a breath chemical test, and failing to provide a proper sample, Mr. Matthews then refused consent to further chemical testing. Officers then transported him to a hospital where blood was drawn, without a warrant signed by a judge. Mr. Matthews' blood alcohol content level was determined to be 0.11 grams. On Tuesday, April 1, 2014, Officer Reech visited Mr. Matthews in jail. Officer Reech advised Mr. Matthews of his *Miranda Rights*. Matthews did not want to make a statement. As Officer Reech was leaving, Mr. Matthews made an unsolicited statement, stating at some point, "I wish it was me", clearly referring to the fact he wished he were the victim in this accident. As memorialized in Officer Reech's own report, Mr. Matthews stated, "I'm tremendously sorry those kids lost their lives." Officer Reech noted that he was crying and holding his head down at times. There were no eyewitnesses to this accident aside from the two survivors who could not recall the accident itself. The court qualified Officer Pittman as an expert in crash and speed. Officer Pittman also testified to Mr. Matthews' alleged appearance of intoxication. The court also qualified Mr. Fox as an expert in crash reconstruction. These two individuals were the people who testified to the accident's causation. The Louisiana State Police Crime Laboratory conducted an analysis on the Johnny Glamon, the deceased victim who was determined to be the driver of the Honda Accord traveling in between 17-20 miles per hour. The LSP sent Johnny Glamon's blood sample to AIT

Laboratories and concluded that Glamon had a blood alcohol content level of .0114, which is over the legal limit and slightly higher than the amount determined to be in Mr. Matthews' blood. Additionally, Glamon's blood sample was positive for Benzodiazepines, Alprazolam (Xanax) at 4.1 ng/mL, therapeutic range 10-40.

FEDERAL ISSUES RAISED IN LOWER COURTS

1. Whether the First Circuit Court of Appeal error in affirming the conviction when there was not sufficient evidence to prove that the element of alcohol consumption while operating a motor vehicle contributed to the collision when the evidence showed that Mr. Matthews acted as any average sober person would, and the victim was intoxicated on enzodiazepines, Alprazolam (Xanax) at 4.1 ng/mL, therapeutic range 10-40 and driving below what the speed limit provide given the totality of the circumstances. Based on the evidence presented, no rational juror should have found the State proved its case beyond a reasonable doubt. *Jackson v. Virginia*, 99 S.Ct. 2781, 443 U.S. 307 (U.S. 1979) **and the reviewing court failed to exclude every reasonable hypothesis of innocence to determine the accuracy of the circumstantial evidence relied on.**

2. Whether the First Circuit Court of Appeal error when it did not review the admission into evidence the Louisiana State Police's toxicology reports when the chain of custody has been broken.

3. Whether the First Circuit Court of Appeal erred in failing to find the District Court abused its discretion in the retroactive application of LSA-R .S. 14:32.1(D), during sentencing and failure to consider any mitigating circumstances?

SPECIAL AND IMPORTANT REASONS CERTIORARI SHOULD BE GRANTED: COMPLIANCE WITH U.S. SUPREME COURT RULE 10

Mr. Matthews contends, where each of two causes is independently effective, "no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it." see **Burrage v United States**, 571 U.S. 216, 134 S.Ct.881

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO PROVE THE ELEMENTS OF VEHICULAR HOMICIDE

The trial court, Louisiana First Circuit Court of Appeal and Louisiana Supreme Court erred in denying Mr. Matthews' claim of Insufficiency of the Evidence since the jury did not consider whether the deceased victim's intoxication slow rate of speed caused the accident.

STANDARD OF REVIEW

A conviction based on insufficient evidence violates due process and cannot stand. The standard of review for sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the state proved the essential elements of the offense charged beyond a reasonable doubt. U.S. Const. Amend, XIV; La. Const. Art. 1, §2, *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State ex rel., Graffagnino v. King*, 436 So.2d 559 (La. 1983); *State v. Duncan*, 420 So.2d 1105 (La. 1982); *State v. Moody*, 393 So.2d 1212 (La. 1981).

LAW AND ARGUMENT

Vehicular homicide is defined in LSA-R.S. 14:32.1, in pertinent part as following:

> A. Vehicular homicide is the killing of a human being caused proximately or caused directly by an offender engaged in the operation of, or in actual

> physical control of, any motor vehicle, aircraft, watercraft, or other means of conveyance, whether or not the offender had the intent to cause death or great bodily harm, whenever any of the following conditions exist:
>
> (1) The operator is under the influence of alcoholic beverages as determined by chemical tests administered under the provisions of LSA-R.S. 32:662.
>
> (2) The operator's blood alcohol concentration is 0.08 percent or more by weight based upon grams of alcohol per one hundred cubic centimeters of blood.

It is not enough for the State to prove only that there was alcohol consumption, apparently in any amount, or a certified blood alcohol concentration, and that it was a "contributing cause" without addressing the other part of the statutes that require proof that the death under the vehicular homicide statute and the injury under the vehicular injury statute were the "direct or proximate cause" of the intoxicated operation of the vehicle. This argument contradicts the clear requirements of LSA-R.S. 14:32.1 that:

> A. Vehicular homicide is the killing of a human being caused proximately or caused directly by an offender engaged in the operation of, or in actual physical control of, any motor vehicle, aircraft, watercraft, or other means of conveyance, whether or not the offender had the intent to cause death or great bodily harm, whenever any of the following conditions exists and such condition was a contributing factor to the killing...

and LSA-R.S. 14:39.2 that,

> A. First degree vehicular negligent injuring is the inflicting of serious bodily injury upon the person of a human being when the caused proximately or caused directly by an offender engaged in the operation of, or in actual control of, any motor vehicle, aircraft, watercraft, or other means of conveyance whenever any of the following conditions exists...

Under the clear language of that statutes, the State had to prove not only that the conditions existed, but also that Mr. Matthews' operation of the vehicle, under the intoxicated condition, was a proximate cause of the death and injury. It is not enough to show that Mr. Matthews was intoxicated at the time of the alleged crime or even that he may have been traveling at a high rate of speed. The State must show that Mr. Matthews caused or proximately cause the accident. In this case, the deceased victim was driving under the influence of Xanax and alcohol, yet no expert was called to testify to his state of mind and his causation to the accident. The toxicology reports showing that the deceased victim was under the influence of Xanax and alcohol over the limit, were admitted into evidence and make clear that the deceased driver was not driving sober and thus could have cause or proximately caused the accident. As such, the evidence is insufficient to convict Mr. Matthews and the First Circuit Court of Appeal and Louisiana Supreme Courts should have reversed Mr. Matthews' conviction. Because trial counsel failed to call an expert to testify to the victim driver's state of mind and impairment effect on causation in this matter, trial counsel was ineffective and this Honorable Court should reverse Mr. Matthews' conviction.

In *Burrage v. U.S.*, 12-7515, 571 U.S. __, 2014 U.S. LEXUS 797, (Jan 27, 2014), under another negligent death statute, this Court addressed the proof of causation in a criminal case under a statute that required only that the death "resulted from" the negligence. In *Burrage,* a long-time drug user, Banka, died following an extended binge that included using heroin purchased from *Burrage*. The prosecution had to prove that *Burrage* unlawfully distributed

heroin and that "death resulted from the use of th[at] substance", thus subjecting Burrage to a 20-year mandatory minimum sentence under the Controlled Substance Act, 21, U.S.C. §841(b)(1)(C). The federal statute, like the state statutes used to convict Mr. Matthews, imposed criminal sanctions for negligent behavior, a defendant's act or omission, that killed or harmed another.

This Court found the evidence against *Burrage,* in the light most favorable to the government, showed that the distribution of heroin to Banka was a "contributing factor" to his death, but that Appellant's act or omission that was only a contributing cause did not meet the government's burden of proving that the negligence was the proximate cause of death. The conviction was reversed. In this case, the evidence in light most favorable to the State showed that Mr. Matthews' conduct was a contributing factor to the crimes for which he was convicted, but the State failed to meet its burden of proving that the negligence was the proximate or direct cause of death and injury. Here, the deceased victim driving the Honda Accord was more impaired and had Xanax in his system all the while traveling between 17-20 miles per hour on the interstate.

The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause. *H.Hart & A. Honor (C) Causation in the Law,* 104 (1959). When a crime requires "not merely conduct but also a specified result of conduct," an Appellant generally may not be convicted unless his conduct is "both (1) the actual cause, and (2) the 'legal' cause (often called the 'proximate cause') of the result." *I. W. LaFave, Substantive Criminal Law* §6.4(a), pp. 464-466 (2d ed. 2003) (hereinafter *LaFave*): see also, *ALI, Model Penal Code* §2.03.

p. 25 (1985).

This Court in *Burrage* determined that the phrase "result from" imposed a requirement of actual causality, *i.e.*, proof" 'that the harm would have occurred' in the absence of-that is, but for-the Appellant's conduct."

The Louisiana statutes in this case are even stronger in their requirement of causation. The legislature has determined that the State had to prove that intoxicated condition existed and must also show that Mr. Matthews' intoxicated operation of the vehicle caused the proximately or caused directly the injury or death.

In this case, the victim was traveling at a slow rate of speed unbefitting of an interstate highway. The victim was intoxicated and had a blood alcohol level of .0114 and had Xanax in his system. An expert did not testify to the effects of this seemingly deadly cocktail. While this may not a defense to the actual charge, it is evidence that the victim contributed to the accident. Since the State has the burden of proving, Mr. Matthews proximately or directly caused the accident, Mr. Matthew ought to receive the benefit of every reasonable hypothesis, including that the intoxicated victim, with Xanax in his system, traveling under 20 mph on the interstate, could have caused the accident.

In *State v. Taylor*, 463 So.2d 1274, 1275 (La. 1985), the Louisiana Supreme Court concluded that, under the vehicular homicide statute, "the [S]tate... must prove that an offender's unlawful blood alcohol concentration combined with his operation of a vehicle to cause the death of a human being." See also: *State v. Ritchie*, 590 So.2d 1139, 1149 (La. 1991) (on rehearing). It

is insufficient for the State to prove merely that the alcohol consumption "coincides" with the accident. *Taylor*, 463 So.2d at 1275. The vehicular homicide statutes does not impose criminal liability based solely on the coincidental fact that the fatal accident occurred (without fault on the part of the accused) while the accused was operating a vehicle under the influence of alcohol. *Ritchie*, 590 So.2d at 1149. *Compare State v. Archer*, 619 So.2d 1071, 1074 (La. App. 1 Cir.) *writ denied*, 626 So.2d 1178 (La. 1993). Causation is a question of fact that should be considered in light of the totality of circumstances surrounding the ultimate harm and its relation to the actor's conduct. *State v. Kalathakis*, 563 So.2d 228, 231 (La. 1990); *State v. Trahan*, 93-1116, p. 11 (La. App. 1 Cir. 5/20/94), 637 So.2d 694, 701.

In this case, the deceased victim was clearly intoxicated, had Xanax in his system, and was traveling at a slow rate of speed unbefitting of an interstate highway. Clearly, the jury failed to consider the totality of the circumstances surrounding the ultimate harm and its relation to Mr. Matthews' conduct. Moreover, the State failed to put on the Coroner, the only qualified individual who could determine the cause of death. There was no coroner's report to establish the cause of death for either victim. La.C.Cr.P. Article 102 "Autopsy" states in pertinent part: "The coroner may perform an autopsy in any death case or cause one to be performed by a competent physician. ***He shall do so***: (1) when there is a reasonable probability that violation of a criminal statute has contributed to the death..."

In the this case, there was no coroner's reports were admitted into evidence, no testimony was elicited that excluded Glamon's level of intoxication and the amount of Xanax in his system

as causation to the accident.[1] Given that the victim was illegally under the influence of alcohol and Xanax, trial counsel should have called an expert witness who could have testified to the victim's level of impairment and its effects on his driving. None of this information was elicited at trial. As such, the jury was deprived of evidence showing the totality of circumstances surrounding the ultimate harm. This Honorable Court should reverse the conviction so that the trier of fact can have the benefit of considering the totality of the circumstances surrounding the ultimate harm, specifically whether Glamon's BAC level and Xanax level effected his ability to drive, which may have caused the accident.

This Court and the Louisiana jurisprudence agree that where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witness, the matter is one of weight of the evidence, not its sufficiency. *State v. Richardson*, 459 So.2d 31, 38 (La. App. 1 Cir. 1984). Accordingly, the courts role is not to access credibility or reweigh evidence. *State v. Smith*, 94-3116, p. 2 (La. 10/16/95), 661 So.2d 442, 443. In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. *State v. Higgins*, 2003-1980, p. 6 (La. 4/1/05) 898 So.2d 1219, 1226, *cert. denied*, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). In this case, trial counsel failed to put on an expert witness who could have testified to the effects of Xanax and alcohol simultaneously in the deceased victim's system, thus depriving the jury of even hearing conflicting testimony, much less considering or believing such testimony.

[1]See Exhibit "F" which is a copy of the Chronological Index of the Evidence introduced at trial.

An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases, that determination rests solely on the sound discretion of the trier of fact. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. *State v. Azema*, 633 So.2d 723, 727 (La. App. 1 Cir. 1993), *writ denied*, 90141 (La. 4/29/94), 637 So.2d 460. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the Appellant is guilty unless there is another hypothesis which raises a reasonable doubt. *State v. Moten*, 510 So.2d 55, 61 (La. App. 1 Cir.) *writ denied*, 514 So.2d 126 (La. 1987). In this case, the jury was not even given the chance to reject the hypothesis of innocence because not a single witness was called to testify to the deceased victim's ability to drive while under the influence of alcohol, Benzodiazepines, and Alprazolam, commonly known as Xanax.

Based upon Richard Fox's expert testimony, the victim's vehicle was traveling at 17-18 miles per hour. He further stated that in his expert opinion, even if Mr. Matthews was traveling at the posted rate of speed, he would not have been able to stop and avoid the accident. Fox further explained his expert opinion by stating, "believe it or not closing speed doesn't have a whole lot to do with things, because most of the research deals with following vehicles that are going very slow or actually stopped in the road, which is an unexpected circumstance on an interstate

highway." The Court improperly precluded the expert from answering whether he thought that Mr. Matthews could have avoided or caused the accident if he were sober. Nonetheless, the State on cross-examination opened the very door they sought close by stating, "but the numbers I want to make sure that we all understand are the average person in sober condition," to which Mr. Fox responded by stating, "what I testified to was the evidence of his (Mr. Matthews') reaction is slightly better than the expected reaction in that scenario... for a sober person." The expert made very clear that an "average person" traveling at 60 mph and coming upon a "looming risk" vehicle traveling at 17.5 mph would not be able to avoid the accident.

Mr. Matthews had a quicker time than average, undermining the State's theory that Mr. Matthews' intoxication caused the crash. The victim's rate of speed was so low that it constituted a crime, which should have been considered as causation by the jury and certainly by the sentencing judge. LSA-R.S. 32:64(B) "No person shall operate a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic." Because the victim's vehicle was characterized as a looming risk and hazard, the sentencing judge erred when he did not consider it as a mitigating factor at sentencing.

On cross-examination, the State sought to exploit the defense's expert by proposing that under his logic if a car is traveling at 100 miles per hour, then all cars are "looming risks" and present a hazard. However, the flaw in the State's analogy is that the victim's vehicle was traveling at 17.7 miles per hour, making the victim's vehicle a "looming risk" even if Mr. Matthews was driving within the posted speed limit. Driving on the interstate at a rate of speed

of less than 20 miles per hour cannot be perceived as reasonable, especially so since the driver was intoxicated. While the State's expert concluded, Mr. Matthews was traveling at 91 miles per hour, he conveniently did not testify to the victim's speed, while passingly admitting it was slow. In this case, there is insufficient evidence to convict Mr. Matthews. The record is clear that the victim was intoxicated traveling at 17.7 miles per hour on an interstate system where the posted speed limit is 60 miles per hour. The record does not support that causation of the accident can be attributed to Mr. Matthews beyond a reasonable doubt.

Moreover, Glamon tested positive for alcohol with a BAC level of 0.0114. Had the victim survived the crash, he most likely would have been charged with the very same offenses for which Mr. Matthews has now been convicted. For the jury and sentencing judge to place zero emphasis on the victim's criminal causation is beyond the realm of conscientious belies the record in this matter. Had the jury considered the victim's criminal culpability, it would have changed the verdict in this matter. The entire State's case in chief underscored Mr. Matthews' speed and intoxication as causation to the accident. Had the jury considered the testimony and argument pertaining to the deceased victim's level of intoxication and abnormally low rate of speed, they would have attributed causation to Mr. Matthews, or at a minimum, found reasonable doubt and returned a verdict of not guilty.

The First Circuit Court of Appeal and the Louisiana Supreme Court found that even though Mr. Matthews' reaction was faster than the average sober person, "was well within the fact finder's ambit to find credible State evidence indicating Matthews' intoxication was a

contributing factor to his reacting to the victim's car only .0.06 second before impact." The consumption of alcohol in the present case was not a contributing factor because the expert testimony showed than any average sober person would have been in the same collision as Matthews if they were faced with the same circumstances. According to expert testimony, Mr. Matthews would have reacted as any average sober person under the same circumstances would have reacted. Therefore as a matter of law, the BAC level was merely coincidental and not a contributing factor to the collision and the trial judge in the least should have instructed the jury of the aforementioned.

This Honorable Court should remand for resentencing even it this Honorable Court affirms Mr. Matthews' conviction because the sentencing judge did not consider whether the deceased victim's criminal conduct of driving while intoxicated caused or contributed to the accident.

ISSUE NUMBER TWO

The Louisiana Supreme Court and First Circuit Court of Appeal error when it did not review the admission into evidence the Louisiana State Police's toxicology reports when the chain of custody has been broken.

Defense counsel stipulated that the Louisiana State Police Crime Lab will evaluate both Mr. Matthews' and the victim's driver toxicology. The evidence was sent to the AIG Lab in Indiana. However, when the evidence was returned from AIT to LSP, the original bag signed by

Officer Reech was missing, which the State conceded, "which is a critical link in the chain of custody." When referring to his confidence level on proving the chain of custody, the Sta5te conveniently conceded, "it may not be one hundred percent, but we certainly believe it is above 51 percent." The Louisiana Crime Lab analyst confirmed there was a difference between the condition it was sent out and the condition it was received from AIT. She stated, "the kie was returned without the envelope it was enclosed in." Moreover, the defense counsel failed to cal the LSP analyst to testify as to the BAC level of the deceased victim. When tendered for cross examination, the defense counsel stated, "nothing for this witness, your honor," leaving the trial judge in such disbelief causing him to utter curiously, "I am sorry." (Tr. p.1311) Rather than cross examine the witness, defense counsel stipulated with the state that the deceased victim John Glamon's blood was positive for alcohol at .0114, a level higher that Mr. Matthews now serving a 60 year prison sentence. (Tr.p. 1313). Additionally, defense counsel stipulated with the State that Mr. Matthews' blood sample was tested by AIT Laboratories and that it in fact confirmed the blood alcohol content reading conducted by the LSP Crime Lab at .011. Such a stipulation was made in spite of the State admitting their chain of custody, "may not be one hundred percent," describing their missing piece, "a critical link in the chain of custody." (pp. 1313-14). A such, this Honorable Court should reverse Mr. Matthews' conviction and remand to the trial court to ascertain if there was a proper chain of custody established.

Moreover, the State admitted into evidence S6, S7 and S8. The defense counsel objected stating, "I've been asking for all of these reports for quite some time and the fact that it has not

been produced until today, when then utterly undermines the foundation for all of my expert's work, I believe and I am not accusing Mr. Russell of any ill intent, but this is the epitome of trial by ambush as far as my not having the information." (Tr.p. 1209). The speed believed to be accurate is 80 miles per hour. The speed believed to be inaccurate was 100 miles per hour. (Tr. p. 1221). By the State's witnesses' own admission, the Honda was going very slow on the interstate. (Tr. p. 1223). Based upon the foregoing, the defense's expert scrambled to get up to speed and had to work with what was given to him at the 11th hour. In the interest of justice, the conviction should be reversed and remanded to give Mr. Matthews adequate time to prepare for the State's case.

In the instant case, Mr. Matthews' blood was drawn without his consent and without a warrant issued by the Court. A warrantless search or seizure is presumed to be unreasonable. In order to justify a warrantless search, the State must show that it falls within one of the narrowly drawn exceptions to the warrant requirement. See: *State v. Barrett*, 408 So.2d 903 (La. 1981). In this case, the police officers made no such showing, but the results were admitted into evidence nonetheless. As such, the trial court abused its discretion by admitting into evidence Mr. Matthews' blood results, which were obtained without a warrant. This Honorable Court should reverse Mr. Matthews' conviction finding that such abuse of discretion was not harmless error because it substantively prejudiced him.

ISSUE NUMBER THREE

The sentence imposed is constitutionally defective and excessive.

The trial court improperly applied the newly amended R.S. 14:32.1 at sentencing. Specifically, the trial court applied Acts 2014, No. 372, § 1, eff. May 30, 2014, which is currently Section D of R.S. 14:32.1 and states:

> Notwithstanding the provisions of Code of Criminal Procedure Article 883, if the offense for which the offender was convicted pursuant to the provisions of this Section proximately or directly causes the death of two or more human beings, the offender shall be sentenced separately for each victim, and such sentences shall run consecutively. In calculating the number of deaths for purposes of this subsection, a human being includes an unborn child.

In this case, the alleged crime took place on March 30, 2014. As such, the current statute that had the force of law at the time of the alleged crime did not contain the mandatory consecutive sentence provision added in May 2014. As a substantive change in sentencing law, Section D of the vehicular homicide statute as mandatory consecutive sentence is not retroactive and should only apply prospectively. See: LSA-R.S. 1:2 ("No section of the Revised Statute is retroactive unless it is expressly so stated."); La. Civ. Code, Art. 6 ("In the absence of contrary legislative expression, substantive laws apply prospectively only.") See: Church Mut. Ins. Co., v. Dardar, 2013-2351 (La. 5/7/14), 145 So.3d 271, 279 (same). Hence, the trial court clearly abused its discretion by applying LSA-R.S. 14:32.1(D) retroactively. By not even considering mitigating factors, it is clear the trial judge erroneously felt compelled to run Mr. Matthews' sentence consecutively, by applying Section "D" retroactively.

B. The trial court did not comply with La.C.Cr.P. art. 894 by failing to consider mitigating factors.

Even if this Honorable Court finds that the trial court did not apply Section "D" of LSA-

R.S. 14:32.1 retroactively, the sentence imposed is constitutionally excessive. The trial court improperly considered elements of the crime as aggravating factors and failed to consider the victim's conduct in contributing to the accident as a mitigating factor at sentencing.

While a victim's negligence may not be a defense to vehicular homicide, the victim's conduct in contributing to the accident has been considered to be a mitigating factor in sentencing. See: e.g., *State v. Copes*, 566 So.2d 652, 655, 656 (La. App. 2 cir. 1990) (Appellant, who was driving without headlights at night, hit bicyclist who was driving on the wrong side of the road with neither a headlight nor front reflector on his bicycle.).

It is within a trial court's discretion to order sentences to run consecutively rather than concurrently. *State v. Berry*, 95-1610 (La. App. 1 Cir. 11/8/96), 684 So.2d 439, 460, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603. The imposition of consecutive sentences requires particular justification when the crimes arise from a single course of conduct. *State v. Johnson*, 99-0385 (La. App 1 Cir. 11/5/99), 745 So.2d 217, 221, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. However, even it the convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive if the trial court considers appropriate factors when imposing sentences. Some of those factors include Appellant's criminal history, the dangerousness of the offense, the viciousness of the crime, the harm done to the victim, the potential for Appellant's rehabilitation, and the danger posed by the appellant to the public safety. Additional factors may serve as justification for consecutive sentences include multiplicity of acts and lack of remorse.

Mr. Matthews has provided the lower courts with numerous cases where sentences less than twenty years, usually ten to fifteen years, were upheld, despite far more contemptible appellants and/or egregious circumstances.

A fifteen year sentence was upheld in *State v. Rodrigue*, 00-1369 (La. App. 4 Cir. 6/13/01) 789 So.2d 729, *writ denied*, 01-2039 (La. 6/7/02), 817 So.2d 1144.

The Court upheld a sentence of thirteen years, ten to be served without benefit of parole, in *State v. Gumto*, 10-876 (La. App. 4 Cir. 4/13/11) 66 So.3d 882.

In *State v. Parker*, 720 So2d. 767, a first offender's fifteen year sentence at hard labor on each of three counts of vehicular homicide was affirmed on appeal.

In this case, the deceased victim's father stated, "I know you ain't (sic) mean to do what you didn't, but you did it." Mr. Matthews stated, "first of all, I would like to give condolences to the family that lost their loved ones in this tragic accident." He went on to state, "I've been praying since this unfortunate accident occurred that God will comfort the family that lost their loved ones." (Tr. p. 1410). Clearly, Mr. Matthews expressed sorrow and remorse for the victims in this matter. While the trial judge found Mr Matthews lacked remorse, Mr. Matthews' own words both in jail and in court, belie the trial judge's finding. Seemingly so, the judge considered Mr. Matthews' *pro se* motion as aggravating factors by stating, "the Appellant maintains that he should not be prosecuted for his actions on the night of the wreck and has filed many motions seeking to have the charges against him dismissed on the basis that the wreck was not caused by his intoxication and reckless driving at an extraordinary rate of speed resulting in the deaths of

two people and seriously bodily injuries to two other people was merely an accident." While the judge may not have agreed with his legal argument, Mr. Matthews' motion should not be considered aggravating factors at sentencing. Mr. Matthews is untrained in the law and simply applied *State v. Taylor*, which he believed applied to him. The judge abused his discretion when he considered Mr. Matthews' motions based on *State v. Taylor* as aggravating factors that warrant a consecutive sentence. Presenting an adversarial argument on causation cannot reasonably be construed as lacking remorse. As such, the trial judge erred when it considered Mr. Matthews' *pro se* motions as aggravating factors, especially that he lacked remorse.

The judge acknowledged that Mr. Matthews did try to slow down, but placed more emphasis on his level of deceleration. (Tr. p. 1413). In considering Mr. Matthews' sentence, the judge stated that Mr. Matthews' BAC level was 0.11 and that he admitted to consuming alcohol before the accident. However these are essential elements of the crime for which was convicted, not aggravating factors. Moreover, the judge failed to consider the victim's level of impairment caused by alcohol and Xanax, and his slow rate of speed on the interstate. La.C.Cr.P. Art. 894.1 requires that the trial judge consider and articulate both aggravating and mitigating factors in support of the sentence imposed. Art. 894.1{C) requires the sentencing judge to state for the record a factual basis and the factors considered in imposing the sentence.

The purpose of the art. 894.1 guidelines and the requirement that the sentencing judge set forth a factual basis and articulate sentencing considerations is to create a complete record for reviewing the sentence. The trial court in this matter did not comply with the statutory sentencing

guidelines in that it did not articulate mitigating factors. As such, this Honorable Court should vacate Mr. Matthews' sentence and remand to the trial court so that court can consider mitigating factors, specifically, the deceased driver's level of impairment consisting of alcohol and Xanax.

Furthermore, the judge stated Mr. Matthews' actions constituted a crime and not accident. (Tr. p. 1416) The judge characterized Mr. Matthews' actions as a crime and not an accident and used it as an aggravating factor at sentence. Every criminal appellant appearing before a court for sentencing either pled or was found guilty of a crime. Considering conduct as a crime at sentencing and using it as an aggravating factor is a clear abuse of discretion and must be reversed.

Mr. Matthews avers, the Courts of Appeal in the State of Louisiana are conflict when it comes to holdings in excessive sentencing claims and the State's Supreme Court refuse to speak on the issue. Which ultimately leaves the circuits split and without guidance.

The Louisiana Supreme Court was aware of, *State v. Marilyn Leblanc*, 12 So.3d 1125 (La. App. 3 Cir. 2009) a case where the appellant was sentenced to thirty years and the sentence was reversed by the Third Circuit Court of Appeal. The decision was then reversed by the Louisiana Supreme Court on the State's request for supervisory writs. Leblanc's case was clearly distinguishable from the instant case in several areas. Ms. Leblanc's actions were clearly more aggravated than those of Mr. Matthews.

The facts in the Leblanc case indicate that after colliding with the victim's vehicle, Ms. Leblanc's car straightened out and she continued northbound, still speeding and driving

erratically. She then drove through the parking lot striking another car. Subsequently she led the Lafayette Parish Sheriff's Office on a chase and informed them, upon being stopped, that she had been kidnapped, beat up and forced to drive while the person who kidnapped her grasped the steering wheel and caused her to crash several times.

In the present case, Mr. Matthews did not leave the scene or cause any other further collisions, or become involved in a high speed chase. Furthermore, he did not lie about the facts of the case. As such, Mr. Matthews is not the worse type of offender deserving of a consecutive sentence.

An addition case worth noting is *State v. Trahan*, 93-1116 (La. App. 1 Cir. 5/20/94) 637 So.2d 694, in which a first-time felony offender, without a criminal record, was convicted of three counts of vehicular homicide and received three, ten-year sentences to be served concurrently. That appellant had a blood alcohol content of 10% or greater at the time of the accident, showed little remorse for his conduct, and while awaiting trial was observed driving after having several drinks at a bar.

Finally, in *State v. Adair*, 875 So.2d 972 (La. App. 5 cir. 5/26/04), the appellate court held that a ten-year sentence for vehicular homicide was not excessive for an appellant whose blood alcohol content was over twice the legal limit, had a previous criminal record, including DWI and aggravated assault, had been warned by family members that he should not drink and drive, and did not accept responsibility for the accident until after he was taken to the hospital. The ten-year sentence was half of the maximum that could have been imposed.

Given the unique circumstances and aggravating factors by the deceased victim, Mr. Matthews' consecutive sentences totaling 60 years in prison is grossly excessive and should be vacated.

In *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), this Honorable Court announced the standard for determining sufficiency of the evidence as – *viewing the evidence in light most favorable to the prosecution* – that Appeals Court is tasked to determine whether any rational trier of fact could have found that the proved the essential elements of the crime beyond a reasonable doubt.

In reviewing the sufficiency of the evidence to support a criminal conviction, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the court to determine whether the evidence is minimally sufficient.

When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the fact-finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. *State v. Patorno*, 2001-2585 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Ultimately, all evidence both direct and circumstantial must be sufficient to support the conclusion that the defendant is guilty beyond a reasonable doubt. *State v. Porretto*, 468 So.2d 1142 (La. 1985), *dissenting opinion*, 475 So.2d 314 (La. 1985).

A reviewing court, however, may impinge on the fact finder's discretion to the extent necessary to guarantee the fundamental due process of law. *State v. Casey*, 99-0023, p 9, (La. 1/26/00), 775 So.2d 1022, *cert denied*, 531 U.S. 840, 121 S.Ct. 104, 148 (citing: *State v. Mussall*,

523 So.2d 1305, 1310 (La. 1988)).

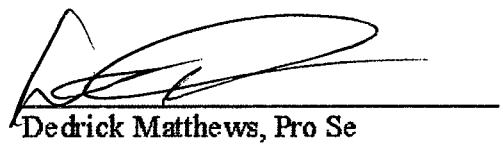
CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana in its decision denying Dedrick Matthews' Application for Writ of Certiorari. Mr. Matthews, convicted of two counts of Vehicular Homicide and two counts of First Degree Negligent Injuring violates the Due Process Clause and the right to jury trial where the prosecution failed to meet a mandatory burden of

proof. This Honorable Court should exercise its discretion and grant a writ of certiorari to correct the substantial injustice caused Dedrick Matthews.

November 19, 2019

Respectfully submitted:



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