**CAPITAL CASE**

NO. ___________

IN THE
# Supreme Court of the United States

___________

DACARIUS HOLLIDAY,

PETITIONER,

V.

STATE OF LOUISIANA,

RESPONDENT.

___________

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

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# PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****

## QUESTIONS PRESENTED

1. Can convictions for crimes requiring specific intent create constitutional error where the trial court has ruled that the evidence supports criminal negligence?
2. Do *Edwards v. Arizona* and *Davis v. United States* require law enforcement to stop custodial interrogation and provide a suspect with counsel if a suspect makes an unequivocal request for counsel, even after the suspect's original requests for counsel were limited or equivocal?
3. In a capital case where the jury determines sentencing, do the Eighth and Fourteenth Amendments require a juror to be willing to meaningfully consider nonstatutory mitigating circumstances?

## OPINIONS BELOW

The Louisiana Supreme Court opinion affirming Mr. Holliday's conviction and death sentence is at *State v. Holliday*, 2017-01921 (La. 1/29/20), Appendix A. ("Pet. App. A"). Summary denial of rehearing is at *State v. Holliday*, 2017-01921 (La. 04/09/20); 2020 La. LEXIS 679, Appendix B ("Pet. App. B").

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Dacarius Holliday respectfully requests that the Court grant a writ of certiorari to review the decision of the Louisiana Supreme Court affirming his capital conviction.

## JURISDICTIONAL STATEMENT

The Louisiana Supreme Court issued an opinion on January 29, 2020 and denied a timely-filed motion for rehearing on April 9, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part:

> No person shall…be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

U.S. Const. Amend. V.

The Eighth Amendment provides:

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

U.S. Const. Amend. VII.

The Fourteenth Amendment provides, in pertinent part:

> No State shall…deprive any person of life, liberty, or property, without due process of law

U.S. Const. Amend. XIV.

## STATEMENT OF FACTS

On May 14, 2007, two-year-old Darian Coon was found unresponsive on the sofa at his home, where he had been under the care of his mother's boyfriend, Petitioner Dacarius Holliday. After vigorous life-saving efforts, Darian Coon died at Baton Rouge General Hospital at 6:42 p.m.

Mr. Holliday was detained by police and initially charged with second-degree murder, but the state later indicted for capital murder. Trial began on March 11, 2010. Over the course of two days, the State presented testimony from medical and police personnel, individuals who were on the scene when Darian was found, two daycare workers, a forensic pathologist, Darian's pediatrician, and a State Police DNA analyst.

Darian's mother, Amanda Coon, testified that on the morning of May 14, 2007, she left Darian in Mr. Holliday's care, took her four-year-old daughter to daycare, and then went to work. Ms. Coon called home twice and spoke with both Mr. Holliday and Darian. At 3:59 p.m., Ms. Coon clocked back into work from her lunch break, and her supervisor told her to call home because someone had been trying to reach her. When Ms. Coon called home, Mr. Holliday told her to come home quickly but did not specify the reason. Ms. Coon clocked out for the day at 5:30 p.m. When Ms. Coon came home, she found Darian lying on the sofa unresponsive. Ms. Coon called 911 at 5:57 p.m., and the 911 dispatcher advised Mr. Coon to lay Darian on the floor while she and Ms. Godfrey, a neighbor, performed CPR. Firefighters and paramedics arrived, found no signs inconsistent with life, such as rigor mortis or lividity, and continued resuscitation efforts.

Paramedics applied EKG pads to Darian's chest, inserted an endotracheal tube directly into the lungs, and an intraosseous needle in his leg to administer medication. One of the paramedics testified that after they "got everything under control," they transferred Darian to a rigid spine board to continue chest compressions on the way to the hospital. Darian arrived at the hospital at 6:27 p.m. Monitor strips show cardiac activity between 6:34 and 6:39 p.m. until it stopped. From 5:57 p.m. until 6:42 p.m., at least a half-dozen people applied a substantial amount of force on Darian Coon's chest. Ultimately, Darian died that evening at Baton Rouge General Hospital fifteen minutes after he arrived.

EMS personnel Jessica Wright and Amie Cramer testified regarding the resuscitative measures they used on Darian. Cramer testified that when she cut Darian's shirt off, she noticed bruises on his chest. When shown photographs taken at the autopsy, Wright admitted there was a possibility that chest compressions caused injuries.

ER nurse Aida Williams testified that she noticed "strange" "little round bruises" on Darian's torso. Pathologist Gilbert Corrigan testified that the bruises were scattered and had the appearance of "the pressure imprint of a fingerprint." Dr. Corrigan determined the area of bruises to be "part of the complex of multiple traumatic injuries" that were fatal. According to Dr. Corrigan, a "generalized force on the chest" fractured the back of the tenth rib and a substantial amount of force tore the renal artery as well as a ligament located below the right rib cage, causing

an accumulation of 150 ccs of blood. Dr. Corrigan estimated that Darian died within 15 to 20 minutes after receiving the internal injuries.

Throughout his police interrogation, Mr. Holliday admitted to being negligent in caring for Darian but told detective repeatedly that he would not purposefully hurt Darian and that he did not murder Darian. When detectives suggested Darian had been beaten, Mr. Holliday admitted to using corporal punishment but he consistently denied beating Darian.

## STATEMENT OF THE CASE

As the Louisiana Supreme Court acknowledged, the prosecution's case was circumstantial. Pet. App. A at 5. From the outset, the jury was unconstitutionally skewed towards death when the trial court denied defense challenges to jurors who would refuse to consider nonstatutory mitigation. During trial, the trial court allowed the prosecution to play Mr. Holliday's videotaped custodial interrogations in full, despite the officers' refusal to honor his repeated requests for counsel. At the conclusion of trial, the trial court determined that the evidence reasonably supported jury instructions on negligent homicide and criminal negligence; in direct contradiction to this determination, the jury convicted Mr. Holliday of specific intent first degree murder.

### A. Custodial Statement

#### 1. Facts Regarding the Statement

Baton Rouge police officers brought Mr. Holliday to police headquarters from the scene and placed him in a small interview room. Detective Ross Williams testified that the interview began at "around nine o'clock," but the *Miranda* form was not

signed until 9:45 p.m. *See* R. 3442-43. The video recording of the interview begins after the interrogation had already started, with Mr. Holliday in the corner of a small interrogation room, flanked by two officers and behind a table, expressing that he did not do anything wrong and did not know anything was wrong with Darian.

Just two minutes into the video, the detectives began pressuring Mr. Holliday to give a DNA sample. When Mr. Holliday questioned why they needed his DNA, the detectives falsely told him that "we found some stuff on the little boy," and they needed to make sure the "stuff" was not his. The detectives also falsely told Mr. Holliday that Darian's "anus is about that [gesturing] big around and his mouth has scarring on it" and that "the little boy's mouth is split." S.E. 48, at 0:02:17. Mr. Holliday tearfully told the detectives that he did not know what happened, and that he did not kill the child. Five minutes into the video, upon pressure from the detectives to give a DNA sample, Mr. Holliday gave in-- "I'll do it man . . . but I need a lawyer . . ." Upon further questioning, Mr. Holliday explained that he needed a lawyer "just for the DNA" because "I don't know nothing about no DNA."

The interrogation continued. Thirty-seven minutes into the video, the detectives left the interrogation room and returned with another investigator to take DNA swabs. After some back and forth, Mr. Holliday stated:

Holliday: I just want a lawyer for this right here man 'cause I don't understand DNA. I don't understand what's, what y'all. Man, mother fucker that be, man I'm not playing with that DNA. That DNA you can, y'all gonna come at me

Detective: That's fine. That's fine (gathers papers and pushes back chair)

Holliday: I want to talk to someone beside y'all three to witness me giving y'all my DNA, man.

Detective: Ok, Ok. There's two other guys out there.

Holliday: No, I need a lawyer that ain't gonna, you know what I'm saying? I mean if I give y'all my DNA there ain't no telling "ah well guess." No, I need a lawyer, man.

Officer: What are you worried about with the DNA because I'm the crime scene investigator if you want me to make your mind more at ease about collect, if I take a swab of your mouth I can't change what's on that q-tip. Are you worried about manufacturing or something like that? You worried about somebody saying that that was his DNA and it's not?

At this point, the officers offered a waiver of rights form to obtain a DNA sample, until Mr. Holliday put his pen down, stating, "I don't trust that." One of the officers produces a camera and says she needs to take some photographs, to which Mr. Holliday covers his face and says: "No, where's my lawyer?" She responds, "You don't need a lawyer for me to take pictures of you, buddy." At this point, he is unequivocal: "**Get me my lawyer.**"

Instead of ceasing the interrogation until counsel could be present, the detective asks Mr. Holliday who his attorney is.

Detective: Who's your attorney? You said go get my lawyer, and I wanna get him for you.

Holliday: **Get me a lawyer.**

Detective: Well, we don't, I can't just pay for you one. I want to get you one. Whoever your attorney is.

Holliday: I just , I need – aren't y'all supposed to appoint me one if I can't afford one?

Detective: That's, that's up to the judge buddy. **We can't do that, I can't do that.** The judge has to.

The officers continued interrogation. The officer then asks, "Ok, so you want to talk without a lawyer?" and Mr. Holliday responds, "**No.**" Yet officers continue to

engage with Mr. Holliday, and the video continues for another **50 minutes**. Officers obtained a warrant for Mr. Holliday's DNA. The recording ended after midnight. At trial, the jury was shown the entire video, including a long period of time after the officers left the room, where Mr. Holliday is shown crying and covering his face with his shirt.

No attorney was appointed or made available to Mr. Holliday.

The next day, Mr. Holliday contacted the detective and indicated he wanted to talk. During this second interrogation, Mr. Holliday speculated how Darian may have died and expressed his regrets for not supervising Darian. He adamantly denied intentionally harming the child or sexually abusing him in any way.

### 2. The Louisiana Supreme Court's Ruling

The defense unsuccessfully moved to suppress Mr. Holliday's statements. Mr. Holliday raised the claim on direct appeal that the officers had violated *Edwards v. Arizona*, 451 U.S. 477 (1981), by continuing to question Mr. Holliday after his clear invocation of his right to counsel. The Louisiana Supreme Court denied relief. First, the court found that although Mr. Holliday had clearly invoked his right to counsel, the invocation was limited to the subject of DNA. Pet. App. A at 2. Further, the court found that officers respected this limited invocation by ceasing questioning regarding DNA after the request for counsel. *Id. But see* Pet. App. A at 31.

The court acknowledged that an officer comes in to swab Mr. Holliday for DNA despite his earlier "limited" invocation of his right to counsel for DNA testing only. Pet. App. A at 2; 31. As the court found, at this point Mr. Holliday invoked his right to counsel present *without* limiting it to the taking of a DNA sample. *See* Pet. App. A

at 32. The court attempted to resolve these two problems—(1) notwithstanding Mr. Holliday's earlier limited invocation, an officer comes in to swab him without a lawyer and continues questioning regarding DNA, and (2) Mr. Holliday then makes an unequivocal request for counsel to be present during questioning, which is ignored—by finding that "Defendant made no further substantive statements." Pet. App. A at 32. The court further found that Mr. Holliday's "requests for counsel were all part of a continuous exchange" and "detectives asked defendant no further questions beyond what was necessary to clarify defendant's request for counsel." Pet. App. A at 33.

Following this opinion, Mr. Holliday filed a timely application for rehearing. The court denied rehearing on April 9, 2020. Pet. App. B.

### B. Jury Selection Issues

During voir dire, the defense raised challenges for cause to jurors who would refuse to consider the specific mitigating circumstances relevant to this case. The trial court, however, found that because the jurors could consider "other" mitigating circumstances that "they deemed relevant," the jurors were fit to serve on Mr. Holliday's jury. These jurors included jurors who candidly answered "no," when asked if they could consider the mitigating circumstance of a harsh and abusive childhood or would not consider mental illness as mitigating because he viewed it as "an excuse." The trial court's rulings rested on a misunderstanding of law: that a sentencer need not be willing to consider the nonstatutory mitigating circumstances that would be presented at trial, as long as they would consider the delineated statutory mitigating circumstances not present in this case.

The Louisiana Supreme Court affirmed, finding that the jurors in question "could consider all the **statutory** mitigating factors **that he deemed relevant**" and "any **other** relevant mitigating circumstance." Pet. App. A at 22. As a whole, the court held that the trial court did not err in denying cause challenges to jurors who would refuse to consider **nonstatutory** mitigating circumstances because they would consider the **statutory** mitigating factors, and they all "indicated they would consider any other mitigating factor **they deemed relevant** . . ." Pet. App. A at 23.

### C. Insufficiency of Evidence

Following the presentation of the prosecution's circumstantial case, the defense moved to instruct the jury on negligent homicide. Pet. App. A at 35. The defense pointed to Mr. Holliday's custodial statement where he referred to "misfiring" and denying any intention to hurt or kill Darian. *Id*. The trial court granted the instruction under state law requiring a special instruction when the charge or defense is one which "a jury could reasonably infer from the evidence." *Id.*; *see also State v. Telford*, 384 So. 2d 347, 350 (La. 1980).

On appeal, Mr. Holliday raised several claims related to the insufficiency of evidence of first-degree murder. The state had no clear theory at trial as to how the child died; indeed, the prosecutor admitted to the jury in closing that "I can't prove exactly what he did." R. 5670. The medical evidence was that blunt force trauma resulted in the internal injuries that led to Darian's death, but the State's pathologist would testify only that the injuries were of a type that is "usually" inflicted by another human. R. 5266. At least six trained and untrained individuals had subjected Darian to forty-five minutes of vigorous CPR on a hard surface. Further, the State gave no

explanation for the diagnosis of sepsis given as cause of death in Darian's hospital records. Ultimately, the State's case was predicated on the fact that Mr. Holliday was with Darian at the time he became unconscious, Mr. Holliday's statements admitting to using physical discipline but denying intent to harm or injure the child, and DNA analysis which could not "include or exclude" Mr. Holliday as the source of DNA found on the child's penis.

Aside from insufficiency of evidence and innocence, Mr. Holliday argued on appeal that the trial court's finding that the evidence "reasonably supported" negligent homicide established that there was necessarily a reasonable doubt as to whether Mr. Holliday had specific intent to kill or cause great bodily harm.[1] Mr. Holliday also argued that to instruct the jury on the lesser offense of negligent homicide without providing an actual verdict form that allowed the jury to find him guilty of negligent homicide violated *Beck v. Alabama*, 477 U.S. 625 (1980). Relatedly, Mr. Holliday argued that the death penalty was a disproportionate punishment for a defendant who has no specific intent to kill.

The Louisiana Supreme Court denied the insufficient evidence claim, noting that, as trial counsel presented a negligent homicide theory of the defense, any other theories of innocence were "arguably precluded." Pet. App. A at 5. In upholding the conviction, the court relied heavily on Mr. Holliday's custodial statements regarding actions he claimed to have taken after the child was found unconscious, and his

[1] Additionally, under Louisiana law, when circumstantial evidence forms the basis for a conviction, the prosecution has the higher burden of excluding "every reasonable hypothesis of innocence." La. Rev. Stat. § 15:438.

overall "animus" towards the decedent shown by his indelicate language. Pet. App. A at 9. Conspicuously, the court did not find that Mr. Holliday had specific intent to kill, but only intent to cause great bodily harm, marking the only time the Louisiana Supreme Court has found the death penalty is permissible absent a finding of specific intent to kill. *Id.*; *see also* Pet. App. A at 39. This Petition follows.

**REASONS FOR GRANTING THE WRIT**

Mr. Holliday presents several clear questions for this Court to resolve, each invoking a different constitutional provision that was violated in his case. Louisiana's interpretation of this Court's mandates run afoul of firmly established precedent.

First, the jury in Mr. Holliday's case reached an unreasonable verdict for first degree murder, which requires a *mens rea* of specific intent, when the trial court evaluated the evidence and determined he was entitled to a jury instruction on negligent homicide. His conviction—despite the court's determination that it would be reasonable to find that his *mens rea* was negligence—violated Mr. Holliday's fundamental right not to be convicted unless every element of the crime is proven beyond a reasonable doubt.

Second, there is a disjointed split between federal circuits and states alike regarding when officers must cease questioning of a suspect. Despite this Court's insistence that officers must discontinue an interrogation once a suspect clearly asks to speak to an attorney, circuits and states have applied the standards in *Edwards v. Arizona* and *Davis v. United States* incongruously or disregarded the standard in *Davis* entirely. This Court should resolve this disagreement amongst states in this egregious case.

Finally, Louisiana's misapplication of this Court's mandates that every juror in a capital case must meaningfully consider mitigating circumstances is a result of the conflicting positions of several states. Though this Court has established that a capital juror must give meaningful consideration to mitigation presented and be able to consider returning a life sentence,[2] the trial court in the instant case denied cause challenges to several jurors who patently refused to consider the defense's mitigation.

## I. This Court Should Consider Whether a Rational Juror Could Find Specific Intent where the Trial Court has Found that the Evidence Reasonably Supports a *Mens Rea* of Negligence

### A. A Defendant has a Right Not to be Convicted Except When Every Element of the Offense is Proven Beyond a Reasonable Doubt

The Fourteenth Amendment's right to due process commands that a defendant may not be convicted without a jury's determination that the State has proven every element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Thus, it is a well-established tenant of our criminal justice system that a state seeking a conviction must prove every element of the offense charged beyond a reasonable doubt. *Id.*

Due to the high stakes of a criminal trial—loss of liberty, or even life—this Court has found that "due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *see also Clark v. Arizona*, 548 U.S. 735 (2006) (finding that, where the jury finds that there is enough

[2] *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

evidence to show insanity such to negate the *mens rea* of a crime, "once reasonable doubt was found, acquittal would be required"). Thus, it is clear from this Court's repeated explicit reliance on this rule that anytime a defendant is charged with a crime, a jury must decide that he is guilty beyond a reasonable doubt of each fact before he may be convicted. It then follows that the opposite is true; where there is reasonable doubt as to one of the elements of the charged crime, the defendant must be acquitted of that crime. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) ("no person shall be made to suffer the onus of a criminal conviction except upon… evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense").

This elevated standard underscores and respects our bedrock principle that all those accused are deemed innocent until proven guilty. *Coffin v. United States*, 156 U.S. 432, 453 (1895); *see also Ross v. Moffitt*, 417 U.S. 600, 610 (1974) ("The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt").

Taken together, this Court's unambiguous requirements regarding proof beyond a reasonable doubt and the presumption of innocence establish that a defendant is entitled to be acquitted where a rational factfinder would find reasonable doubt that he is guilty of one element of the charge. This is no more important than in a case where a conviction means the difference between life and death.

#### 1. A Defendant is Entitled to a Special Jury Charge Only If the Evidence Reasonably Supports the Charge

After the trial court heard all of the state's evidence, which included a pathologist's testimony on the types of injuries and cause of death, and the custodial statement, Mr. Holliday argued that he was entitled to a special jury instruction on negligent homicide. The State did not argue that the evidence did not reasonably support a special jury instruction for negligent homicide. Instead, the State argued only that negligent homicide was not a responsive verdict under Louisiana's statutory scheme. The trial court granted the defense request, finding that a reasonable view of the evidence supported a finding of criminal negligence.

A defendant is not entitled to any jury charge he may request; however, a trial court must charge the jury regarding offenses that are reasonably supported by the evidence adduced at trial upon request. Under Louisiana law, a trial court must give a requested charge only if the evidence reasonably supports the charge. La. C.Cr.P. art. 807; *State v. Marse*, 365 So. 2d 1319, 1323 (La.1978). Moreover, under federal law, this Court has held that "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Mathews v. United States*, 485 U.S. 58, 63 (1988) (citing *Stevenson v. United States*, 162 U.S. 313 (1896); 4 C. Torcia, Wharton's Criminal Procedure § 538, p. 11 (12th ed. 1976)). Federal courts have deemed special jury instructions about lesser offenses instrumental in "prevent[ing] juries from improperly resolving their doubts in favor of conviction when one or more of the elements of the charged offense remain unproven, but the defendant seems plainly guilty of some offense." *United States v. Harrison*, 55 F.3d 163, 166 (5th Cir.1995)

(citing *United States v. Browner*, 889 F.2d 549, 551 (5th Cir. 1989) (emphasis in original). Both Louisiana and federal law deem jury instructions crucial to the jury's fact-finding ability, and command a trial court to give forth any requested instructions supported by the evidence adduced at trial. Certainly, an instruction on a charge that requires a significantly lower *mens rea* requirement would be critical to a defense emphasizing the defendant's lack of specific intent to commit the charged crime. A trial judge's ability to ensure that the jury has all of the appropriate knowledge to make a decision about the life or death of another human being is authoritative; a judge has "an affirmative constitutional obligation" to use its power of the jury instruction when a defendant seeks it to protect his constitutional privileges. *See id.* at 303 (holding that a trial court must instruct a jury on the defendant's privilege against compulsory self-incrimination of the Fifth Amendment when requested).

It therefore follows that *if* a requested charge is given to the jury, a Louisiana trial court has determined that the instruction is both wholly correct and reasonably supported by the evidence adduced at trial. It is clear in the instant case that the trial court at the conclusion of the evidence found that a reasonable view of the evidence supported a finding of negligent homicide. *Marse*, 365 So. 2d at 1323.

### 2. The Evidence Presented Could Not Reasonably Support Both a Finding of First-Degree Murder and a Finding of Negligent Homicide

In order to sustain a conviction for first-degree murder, the State must prove specific intent beyond a reasonable doubt. La. Rev. Stat. § 14:30(A)(1);. Specific intent exists where "circumstances indicate that the offender actively desired the prescribed

criminal consequences to follow his act or failure to act." La. Rev. Stat. § 14:10; *see*, *e.g. State v. Williams*, 480 So. 2d 721, 725 (La. 1985) (specific intent required for first-degree murder exists where the defendant "actively intended to kill").

In contrast, negligent homicide is the killing of a human being with criminal negligence, which exists where "although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances." La. Rev. Stat. § 14:32; La. Rev. Stat. § 14:12; *see also State v. Small*, 100 So. 3d 797 (La. 2012) (reversing conviction for second degree murder where a mother's negligence in leaving her two small children unsupervised resulted in the death of the youngest in an apartment fire); *see also State v. Tensley*, 955 So. 2d 227, 15-16 (La. Ct. App. 2007) (defendant's failure to seek medical attention for a child's chronic injuries exhibited "such a disregard for the interest of the child to amount to gross criminal negligence").

Under Louisiana law, "specific intent cannot coexist with criminal negligence." *State v. Cortez*, 96-859, p. 8 (La. App. 3 Cir. 12/18/96); 687 So. 2d 515, 520 (reversing conviction for attempted cruelty to juveniles where defendant was not criminally negligent in procuring medical attention for her child's injuries and defendant did not know the origin or severity of her child's injuries); *see also State v. Martin*, 539 So. 2d 1235, 1238 (La.1989) ("Unlike general or specific criminal intent, criminal negligence is essentially negative. Rather than requiring the accused to intend some

consequence of his actions, criminal negligence is found from the accused's gross disregard for the consequences of his action.”).

Because the trial court found that the evidence presented reasonably supported a charge of negligent homicide, the court had a reasonable view that Petitioner’s mental state was that of criminal negligence—and not specific intent. The two types of *mens rea* are fundamentally incompatible under Louisiana law, and a finding of one negates the other. *Cortez*, 687 So. 2d at 520. Accordingly, the trial court’s finding that the evidence reasonably supported negligence was essentially a finding that at least a reasonable doubt existed as to specific intent, and where there is reasonable doubt as to one of the elements of the crime charged, the accused must be acquitted of the crime. A conviction on a crime requiring proof of specific intent is unsustainable where a reasonable view of the evidence necessarily includes the possibility of a *mens rea* of criminal negligence.

This Court should grant certiorari to decide whether, where the crime charged requires proof of specific intent beyond a reasonable doubt, and the presiding court has held that a reasonable view of the evidence supports a finding of criminal negligence, a jury’s verdict finding the defendant guilty as charged violates the *In re Winship* standard. Specifically, where a conviction on a crime requiring specific intent is unsustainable because specific intent cannot co-exist with criminal negligence.

The definition of criminal negligence itself negates a theory of specific intent, by establishing that specific intent is not present, deeming the two *mentes reae* fundamentally incompatible. Thus, the evidence cannot reasonably support a finding

of criminal negligence and prove specific intent beyond a reasonable doubt. Once the evidence establishes criminal negligence, a theory of specific intent has already failed; therefore, if a judge allows a person to be sentenced to death where he found that the evidence reasonably supported negligent homicide, he has failed to act to prevent a grave miscarriage of justice. This Court should grant certiorari to decide whether, where the crime charged requires proof of specific intent beyond a reasonable doubt, and the presiding court has held that a reasonable view of the evidence supports a finding of criminal negligence, a jury's verdict finding the defendant guilty as charged violates the *In re Winship* standard. A failure to do so will produce irreversible consequences.

## II. Louisiana's Rule Ignoring Unequivocal Requests for Counsel During Custodial Interrogation When Preceded by a Limited Invocation of Counsel would Gut the Protections of *Edwards v. Arizona* and Contravene the Holding of *Davis v. United States*

The Louisiana Supreme Court held that, although Mr. Holliday had made a "limited" request for counsel under *Connecticut v. Barrett*, 479 U.S. 523 (1987) for the subject matter of DNA testing only, the police were free to continue questioning Mr. Holliday on "non-DNA" matters. Pet. App. A at 32. However, approximately 30 minutes into the interview, the police (a) resume questioning about DNA, and (b) ignore Mr. Holliday's general requests for counsel (i.e., "I need a lawyer"). *Id*. The court held that this was permissible because all further questioning was part of a "continuous exchange" during which Mr. Holliday made "repetitive and ambiguous statements" regarding his request for counsel. *Id*. The jury was shown the full 90-minute videotaped interrogation at trial, with 50 of those minutes occurring after Mr.

Holliday's general request for counsel, in violation of Mr. Holliday's Fifth and Fourteenth Amendment rights.

### A. The Louisiana Supreme Court's Decision Violates the *Edwards* Rule

This Court has enacted three layers of protection for an accused's Fifth Amendment rights during custodial interrogation. First, law enforcement must inform the accused "not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him." *Miranda v. Arizona*, 384 U.S. 436, 473 (1966). If the accused indicates that he would like to talk to a lawyer, "interrogation must cease until an attorney is present." *Id*. at 474. Second, under *Edwards*, once the suspect "has invoked his right to have counsel present" at any point, interrogation must stop and officers may not reinitiate questioning "until counsel has been made available." 451 U.S. at 484-85. Third, when counsel is requested, even where the accused has actually consulted with an attorney, officers may not resume interrogation without counsel present. *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990).

The only question under *Edwards* is whether the suspect "has invoked his right to have counsel present;" if he has, the "interrogation must stop." *Edwards*, 451 U.S. at 484. There is no exception for "continu[ing]" the "exchange" where the suspect has made "repetitive" requests for counsel. Pet. App. A at 32. There is no exception for interrogations where the suspect "made no further substantive statements." *Id*. At the point where Mr. Holliday stated: "Get me a lawyer," it was incumbent on the police officers to immediately cease questioning.

The Louisiana Supreme Court uses a few early invocations of counsel that the court found to be "limited" or "equivocal" to invalidate Mr. Holliday's later many general demands for counsel. *See id*. However, this Court has addressed "limited" and "ambiguous" requests for counsel. In *Connecticut v. Barrett*, where a suspect made a clear but limited invocation of counsel, this Court held that a limited request for counsel does not require officers to provide counsel outside of the limitation. 479 U.S. 523, 529-30 (1987) (addressing invocation for purposes of making a written statement). Here, assuming Mr. Holliday's initial request for counsel was limited to questioning about DNA, or during the DNA swabbing itself, officers ran afoul of this Court's Fifth Amendment protections by returning to the subject later in the interrogation.

The Louisiana Supreme Court also found that Mr. Holliday's request for counsel was "ambiguous" and that the officers "asked defendant no further questions beyond what was necessary to clarify defendant's request for counsel." Pet. App. A at 33. If the officers were confused, Mr. Holliday's later, blatant invocation should have eliminated any confusion: "Get me my lawyer." In *Davis v. United States*, this Court held that officers do not need to immediately cease questioning when the officers "reasonably do not know whether or not the suspect wants a lawyer." 512 U.S. 452, 460 (1994). The facts in *Davis* are similar to this case. Initially, the suspect made an ambiguous request for an attorney ("Maybe I should talk to a lawyer"), which was later followed by an unequivocal request ("I think I want a lawyer before I say

anything else”). *Id.* at 455. The officers stopped questioning immediately when the latter request was made. *Id.*

Unfortunately, the Louisiana Supreme Court’s disregard for the Fifth Amendment is not unique to the case at hand. In the now-infamous *State v. Demesme*, a suspect repeatedly asserted his innocence and told officers to “give [him] . . . a lawyer, dog.” *State v. Demesme*, 228 So. 3d 1206 (La. 2017). The Louisiana Supreme Court upheld the denial of the motion to suppress, and in a concurrence, one of the justices explained that “the defendant’s ambiguous and equivocal reference to a ‘lawyer dog’” did not constitute an invocation of counsel. *Id* (Crichton, J. concurring). Much like the instant case, in *State v. Leger*, the Louisiana Supreme Court held the assertion “I need to see [a lawyer],” was insufficient to trigger *Edwards*’ protections. *State v. Leger*, 936 So. 2d 108, 135 (La. 2006); *see also State v. Payne*, 833 So. 2d 927, 938-39 (La. 2002).

Here, any ambiguity in the initial request should have been resolved by the later unequivocal request (“I need a lawyer.”). Pet. App. A at 32-33. Unlike the officers in *Davis*, the officers in Mr. Holliday’s case did not cease questioning. Instead, they gave misleading statements about whether he was entitled to an appointed lawyer (“I can’t just pay for you one”), and told him he would not go home tonight “since you’ve asked for an attorney.” Questioning continued for another fifty minutes. The jury saw the entire interaction. This ran afoul of this Court’s clear statement in *Davis*, that even where the initial request for counsel is ambiguous, “if a suspect *subsequently* requests an attorney, questioning must cease.” *Davis*, 512 U.S. at 461

(emphasis added). The Louisiana Supreme Court's rule which allows officers to ignore subsequent requests for an attorney, where an initial request was ambiguous or limited, cannot be squared with this Court's jurisprudence in *Edwards*, *Barrett*, and *Davis*.

### B. Federal Circuit Courts of Appeal and State Supreme Courts are divided with regard to *Davis*' scope and applicability, resulting in regular misapplication of the *Davis* rule and vastly different outcomes in near-identical scenarios

Louisiana is not the only jurisdiction that struggles with implementation of the *Davis* rule. For instance, the Second and Fourth Circuits have reached different results under *Davis* where a suspect refused to sign a *Miranda* waiver form. *See United States v. Plugh,* 648 F.3d 118 (2nd Cir. 2011); *see contra United States v. Johnson*, 400 F.3d 187 (4th Cir. 2007).

Similarly, there is significant disagreement regarding other common requests for counsel. For example, it is disputed whether or not the words "I think" undercut a suspect's invocation of the right to counsel, dependent upon the jurisdiction. *See United States v. McClaren*, 34 M.J. 926 (A.F.C.M.R. 1992), aff'd, 38 M.J. 112 (C.M.A. 1993) (holding that "I think I want a lawyer," does not constitute a definite request for counsel); *but see State v. Jackson* 497 S.E.2d 409 (N.C. 1998) (finding an unequivocal request where a suspect said "I think I need a lawyer present"). Likewise, there is disagreement among lower courts concerning the words "could" and "should." *See Thomas v. Crow*, Case No. 16-CV-308-JED-JFJ, 2019 U.S. Dist. LEXIS 157976, at *17 (N.D. Okla. Sept. 17, 2019) ( "Could I have a lawyer. . ." was not an unequivocal request for counsel); *see also Downey v. State*, 144 So. 3d 146 (Miss. 2014) (a suspect

saying she "could use" her attorney was unequivocal); *see also Dalton v. State*, 248 S.W.3d 866 (Tex. App. 2008) ("I guess I should get a lawyer" was not unequivocal).

Even more, state courts disagree as to whether or not the phrase "[c]an I get a lawyer" constitutes an unequivocal request for counsel. *See Wimbish v. State*, 29 A.3d 635, 644, 646-47 (Md. App. 2011) ( "[c]an I get a lawyer?" is not unequivocal); *see also Lewis v. State*, 966 N.E.2d 1283 (Ind. Ct. App. 2012) ("[c]an I get a lawyer?" is unequivocal); *see also Martin v. Commonwealth*, Record No. 0035-07-4, 2008 Va. App. LEXIS 195, at *11 (Va. Ct. App. 2008) (finding a valid invocation once he directly asked "can I get a lawyer"). If every conceivable request for counsel can be interpreted as equivocal, suspects have little recourse when officers ignore an invocation of the Fifth Amendment right to counsel.

### C. The Second, Sixth, and Eleventh Circuit Courts of Appeal have adopted the approach espoused in Justice Souter's concurring opinion in *Davis v. United States*

Several jurisdictions have come to rely mainly on Justice Souter's concurrence. This Court granted certiorari in *Davis* to resolve a disagreement amongst the Circuits with regard to police questioning following a suspect's ambiguous request for counsel, but was divided with respect to the protections afforded a criminal defendant in a custodial interrogation. *Davis*, 512 U.S. at 456, 462, 466.

While the majority in *Davis* held that officers have no obligation to cease questioning after an ambiguous request for counsel, Justice Souter wrote separately to express his concern with this opinion. *Id.* at 466 (Souter, J., concurring). Justice Souter emphasized the danger of requiring "heightened linguistic care" of criminal defendants, advocating for a rule requiring law enforcement to ask clarifying

questions following an ambiguous request for counsel. *Id.* at 469. Lower courts continue to echo this concern.

The Second Circuit has adopted Justice Souter's concurrence, refusing to "require criminal defendants to 'speak with the discrimination of an Oxford don.'" *See Wood v. Ercole*, 644 F.3d 83, 91 (2nd Cir. 2011) (quoting *Davis,* 512 U.S. at 476 (Souter, J., concurring)); *see also Cannady v. Dugger*, F.2d 752, 755 (11th Cir. 1991).[3] The Sixth Circuit has held that the word "maybe," when coupled with a request for counsel, is not dispositive of a suspect's intent. *See Abela v. Martin*, 380 F.3d 915, 926 (6th Cir. 2004). Additionally, the *Abela* court found that "a court's use of surrounding circumstances to evaluate the clarity of a suspect's request for counsel neither is precluded by nor alters the Supreme Court's decision [in *Davis*]." *Id.*

### D. The Seventh and Ninth Circuit Courts of Appeal, the Colorado Supreme Court, and the New York Court of Appeals disregard the standard articulated in *Davis* in favor of their own unique tests in determining whether or not a custodial request for counsel was unambiguous

Finally, several jurisdictions disregard *Davis* entirely in assessing the ambiguity of a request for counsel in favor of crafting their own unique tests. The Seventh Circuit has regularly espoused its own standard in determining whether a suspect's request for counsel in a custodial interrogation was equivocal. *See United States v. Lee*, 413 F.3d 622 (7th Cir. 2005); *see also United States v. Wysinger*, 683

[3] In *Wood*, the Second Circuit found the defendant's "statement 'I think I should get a lawyer' evidence[d] no internal debate whatsoever." *Wood*, 644 F.3d at 91. The Second Circuit relied on the Eleventh Circuit's opinion in *Cannady v. Dugger* in holding the words "think" and "should" fail to undermine a suspect's request for counsel. *Id*. (citing *Cannady*, 931 F.2d at 755). This directly conflicts with the majority in *Davis*, which held that a suspect's use of the words "maybe" and "should" evinced a lack of seriousness or urgency. *Davis*, 512 U.S. at 462.

F.3d 784 (7th Cir. 2012); *see also United States v. Hunter*, 708 F.3d 938 (7th Cir. 2013); *see also United States v. Hampton*, 885 F.3d 1016 (7th Cir. 2018). In *Lord v. Duckworth*, the court suggested only those statements which evince a "clear implication of a present desire to consult with counsel" are sufficient to trigger the protections of *Edwards*. *Lord v. Duckworth*, 29 F.3d 1216, 1221 (7th Cir. 1994). In *United States v. Lee*, the Seventh Circuit found the simple request, "[c]an I have a lawyer?" triggered *Edwards*'s protections; however, the court maintained there are no "magic words" necessary. *Lee*, 413 F.3d at 625-26. Rather, the Seventh Circuit looks to the circumstances, timing, and urgency of a particular request for counsel to determine ambiguity.

Likewise, the Ninth Circuit has relied on *Lee* and *Hunter* in developing its own test. *See Sessoms v. Grounds*, 776 F.3d 615 (9th Cir. 2015) (en banc) (citing *Lee*, 413 F.3d at 625; *Hunter*, 708 F.3d at 948). The Ninth Circuit departed from the flexible rule of *Davis* in 2015, finding a suspect's two, albeit meek, requests for counsel were unequivocal when taken together. *Id. Sessoms* indicated a marked departure from *Davis*, with the Ninth Circuit instructing lower courts to consider a suspect's repeated requests for counsel "together and in context." *Id.* at 892.

The Ninth Circuit laid equivocality to rest, declaring "the only reasonable interpretation of 'give me a lawyer'" is that a suspect is invoking his Fifth Amendment right to counsel. *Id.* at 893. By requiring investigators and judges to consider multiple equivocal requests in context of one another, law enforcement is no longer able to hide behind *Davis* after ignoring a suspect's repeated pleas for an attorney. However, this

approach conflicts with well-established Supreme Court precedent. *Davis* 512 U.S. 452.[4]

The supreme courts of Colorado and New York have departed as well. While the Colorado Supreme Court has formally adopted *Davis* in full, it still relies upon its own set of discrete factors in evaluating the ambiguity of a custodial request for counsel. *See People v. Kutlak*, 364 P.3d 199, 206 (Colo. 2016).

Alternatively, New York has strayed from *Davis* to the extent that it conflicts with the New York State Constitution. *See People v. Harris*, 93 A.D.3d 58, 67 (N.Y. 2012). New York courts are to consider the "circumstances surrounding the request, including the defendant's demeanor, manner of expression, and the particular words found to have been uttered by the defendant," when determining whether an invocation of the right to counsel was unequivocal. *Id.* at 67. *See also People v. Porter*, 878 N.E.2d 998, 999 (N.Y. 2007); *People v. Carrino*, 134 A.D.3d 946 (N.Y. 2015).

Because there is such evident disagreement as to the proper inquiry following an equivocal request for counsel, Petitioner requests this court reconsider its opinion in *Davis* and resolve the incongruence in lower authority.

### III. This Court Should Apply the Well-Established Rule that a Sentencer Must Not Refuse to Consider Any Non-Statutory Mitigating Circumstance to Jury Selection in Capital Cases

This Court has made clear: "in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence."

[4] *See also United States v. Alamilla-Hernandez*, 654 F. Supp. 2d 1004 (D. Neb. 2009) (relying on the context of the suspect's statement compared to the officer's remarks); *see contra United States v. Eastman*, 256 F. Supp. 2d 1012 (D. S.D. 2003) (applying the *Davis* standard).

*Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)) (quotations omitted). In this case, the trial court denied defense cause challenges to jurors who would refuse to consider the only mitigating circumstances that would be presented in this case.

The legal error in this case occurred when the trial court denied the defense cause challenges to these jurors, who made clear that they would **refuse** to consider the mitigating circumstances presented in this case, namely, a childhood of abuse and neglect, and mental illness. The Louisiana Supreme Court found that the trial court did not err in denying cause challenges to these jurors because they would consider the **statutory** mitigating factors, and they all "indicated they would consider any other mitigating factor **they deemed relevant** . . ." Pet. App. A at 23. Yet, a harsh and abusive childhood is precisely the kind of mitigating circumstance that the fact-finder *must* be able to meaningfully consider. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264-65 (2007).[5]

The Louisiana Supreme Court accordingly holds that a juror need not be willing to consider the mitigating circumstances relevant to the case before them, so long as they can consider other hypothetical mitigation. Defense counsel did not argue or present evidence of any of the statutory mitigating circumstances listed in La. C.Cr.P. art. 905.5; therefore, a juror's ability to consider the delineated statutory mitigating circumstances did Mr. Holliday no good. This Court should decide

[5] "[U]nder today's decision a juror who thinks a 'bad childhood' is never mitigating must also be excluded." *Morgan v. Illinois,* 504 U.S. 719, 744 n. 3 (1992) (Scalia, J., dissenting).

whether, where a juror deems mitigating circumstances "irrelevant," the proceeding violates the Eighth Amendment's guarantee that the jury be able to "consider and give effect to a capital defendant's mitigating evidence." *See Tennard v. Dretke*, 542 U.S. 274 (2004).

### A. This Court has Long Held that the Sentencer Cannot be Precluded—whether by Refusal or by Law—from Considering Any Relevant Mitigating Circumstance

A trial court commits constitutional error if it instructs the jurors to consider only statutory mitigating circumstances. *Hitchcock*, 481 U.S. at 394. A law is unconstitutional if it precludes the sentencer from considering non-statutory mitigating circumstances. *Eddings*, 455 U.S. at 114. This Court's decisions in this area stem from the principle that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269 (1998). In *Eddings*, this Court explained that, "The sentencer . . . may determine the weight to be given relevant mitigating evidence, but they may not give it no weight by excluding such evidence from their consideration." 455 U.S. at 114–15. This Court also noted that the Oklahoma statute, like the Louisiana code, permits the defendant to present evidence as to any other mitigating circumstance, and that "*Lockett* requires the sentencer to listen." *Id*. at 115 n. 10.

If a juror were free to make its own determination of relevancy for mitigation, it would have unjust and absurd consequences. Here, the defense presented no statutory mitigation evidence under La. C.Cr.P. art. 905.5 (a)-(g); its case was centered around Mr. Holliday's bad childhood, his history of abuse and neglect by

caretakers, and the impact of this trauma on his own mental health starting from early childhood. For jurors who would find the mitigating circumstances of a bad childhood and mental illness "irrelevant," however, there was no mitigation at all. This cannot be the result instructed by *Eddings*, *Lockett,* and *Hitchcock*.

### B. This Court Should Resolve the Question of Whether Capital Jurors are Required to Consider Non-Statutory Mitigating Circumstances as a Matter of Law

There is disagreement among the lower courts as to whether a juror in a capital case must be willing to consider the nonstatutory mitigating circumstances relevant to the case at hand. The disagreement has caused disparate results as to whether the defense may ask about a juror's willingness to consider nonstatutory mitigating circumstances. In this case, the defense was allowed to voir dire on nonstatutory mitigating circumstances and so the jurors' refusal to consider them was clear. In other cases, the courts have refused to even let defense attorneys question jurors regarding nonstatutory mitigating circumstances. Both scenarios share a common legal error: that a juror may refuse to consider evidence relating to nonstatutory mitigating circumstances.

#### 1. State Supreme Courts and Federal Circuits Holding that the Sentencer Must Consider Nonstatutory Mitigation

The Ninth Circuit has interpreted the *Lockett/Eddings* rule as requiring the sentencer to consider nonstatutory mitigation as mitigating. *See*, *e.g.*, *McKinney v. Ryan*, 813 F.3d 798, 820-21 (9th Cir. 2015) (en banc); *Spreitz v. Ryan*, 916 F.3d 1262, 1276 (9th Cir. 2019). The court has thus struck down death sentences in cases where the lower court found that mitigating evidence did not have "substantial mitigating

weight absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions." *McKinney*, 813 F.3d at 821 (quoting *State v. McKinney*, 917 P.2d 1214, 1234 (1996)). Several federal district courts have found that a juror in a capital case may not make its own determination that a mitigating factor is not mitigating.[6]

The Supreme Court of California has considered the issue in the alternative: whether the prosecution is entitled to strike a juror for cause *because of* an apparent inclination to consider specific nonstatutory mitigation. *People v. Heard*, 75 P.3d 53, 63-64 (Cal. 2003). In *Heard*¸ a prospective juror who indicated he would be sympathetic to a defendant's history of psychiatric illness as mitigating evidence was excused for cause; on appeal, the Supreme Court of California found "the validity of the penalty judgment ultimately rendered against defendant was doomed even before the jury was empaneled." *Id.* at 968. The same is true where a juror who cannot adequately consider nonstatutory mitigating evidence is permitted to sit on a capital jury.

**2. State Supreme Courts and Federal Circuits that allow Sentencers to Ignore Nonstatutory Mitigation**

[6] *See*, *e.g.*, *United States v. Sampson*, 335 F. Supp. 2d 166, 228-29 (D. Mass. 2004) (it would be improper "for a juror to refuse to even consider a particular factor because he or she disagrees with the court's determination that the factor is aggravating or mitigating"); *United States v. Fell*, 372 F. Supp. 2d 766, 771 (D. Vt. 2005) (jurors who are unable to consider mitigating evidence relating to the defendant's background or upbringing "must be excused for cause"); *United States v. Wilson*, 04-CR-1016, 2013 U.S. Dist. LEXIS 79177, *6-8 (E.D. N.Y. June 5, 2013) (juror's refusal to consider evidence of a bad childhood as mitigating amounted to a "substantial reservation" and a belief that "childhood experiences are entirely irrelevant to a sentencing determination."); *Harlow v. Murphy*, Case No. 05-CV-039-B, 2008 U.S. Dist. LEXIS 124288, *231 (D. Wy. Feb. 5, 2008) ("Any juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial").

However, Mississippi and Texas have essentially held that capital jurors are under no obligation to consider mitigating factors as mitigating, in cases holding that the defense has no right to voir dire potential jurors on their willingness to consider non-statutory mitigation factors. *See*, *e.g.*, *Evans v. State*, 226 So. 3d 1, 20 (Miss. 2017) (*but see* dissenting opinion of Kitchens, J., at 51); *Garcia v. State*, 919 S.W.2d 370, 400 (Tex. Crim. App. 1994) (en banc). Texas, in particular, has taken the position that jurors are to be given free rein to decide whether evidence is mitigating or aggravating: "Neither an attorney nor a judge can tell jurors what evidence is mitigating. . . . Rather, the facts of the case as interpreted solely by jurors [to] determine if such a factor is a mitigating or aggravating factor, or neither." *Moore v. State*, 999 S.W.2d 385, 406 (Tex. Crim. App. 1999).

The Second, Fifth, and Tenth Circuits have affirmed trial court rulings preventing the defense from asking jurors whether they would view certain evidence as mitigating. *See, e.g.*, *United States v. Whitten*, 610 F.3d 168, 186 (2nd Cir. 2010) (rejecting Eighth Amendment claim where trial court rejected defense's proposed voir dire questions regarding ability to consider defendant's childhood as mitigating); *Soria v. Johnson*, 207 F.3d 232, 243–44 (5th Cir. 2000) (not error to preclude defendant from asking juror whether he would view certain evidence as mitigating); *Sellers v. Ward*, 135 F.3d 1333, 1341–42 (10th Cir. 1998) (Constitution only guarantees jury that will not automatically impose death penalty).

The Fifth and Eighth Circuits have found that the defense does not have the right to a jury finding that mitigating circumstances have been proven even if they

are uncontested. *United States v. Bernard*, 299 F.3d 467, 485 (5th Cir. 2002); *United States v. Paul*, 217 F.3d 989, 999-1000 (8th Cir. 2000). In both cases, jurors refused to find the defendant's youth to be mitigating even though the evidence was uncontested that the defendant was eighteen at the time of the offense. *See Paul*, 217 F.2d at 1000.These decisions reflect the erroneous position that a juror, and not the court, makes the legal determination that the defense's evidence in mitigation is relevant to show that the defendant is worthy of life.

Although Louisiana has not taken the extreme position that the defense cannot voir dire regarding jurors' ability to consider nonstatutory mitigating circumstances, its decision below essentially renders such questioning meaningless if the answers cannot form the basis for a challenge for cause.[7] The court's decision solidifies Louisiana's position: a capital juror makes its own legal determination of relevancy as to nonstatutory mitigating circumstances. Because this position conflicts with this Court's established principle that "the sentencer may not refuse to consider . . . any relevant mitigating evidence," *see Hitchcock*, 481 U.S. at 394, this Court should grant certiorari to resolve the split.

## CONCLUSION

Petitioner respectfully requests that this Court grant the petition to review the Louisiana Supreme Court's decision, or grant the petition and summarily reverse.

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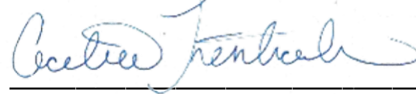
[7] The Supreme Court of North Carolina has also held that while a defendant may ask specific questions of prospective jurors concerning non-statutory mitigating evidence, questionable responses cannot form the basis for a cause challenge. *See State v. Cummings*, 648 S.E.2d 788, 794 (N.C. 2007) (*but see* concurring opinion of Parker, C.J. at 489: "The prospective juror's statements suggest that he was perhaps the precise juror described in *Morgan v. Illinois*, the one who 'by definition . . . cannot perform [his] duties in accordance with the law, [his] protestations to the contrary notwithstanding.'" quoting *Morgan*, 504 U.S. at 735).

Respectfully Submitted,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