No. 20-5748

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FILED ON BEHALF OF THE STATE OF LOUISIANA

CAPITAL CASE

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QUESTIONS PRESENTED FOR REVIEW

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?

CITATION OF LOWER COURT OPINION

The state court's ninety-eight-page unanimous ruling can be found in full at ***State of Louisiana v. Dacarius Holliday***, 2017-KA-01921 (La. 1/29/20), 2000 WL 500475, *reh'g denied* (4/9/20).

INTRODUCTION

Because petitioner fails to prove that any of the state court's factual rulings were clearly erroneous, or that the state courts' application of law are in conflict with this Court's precedents, his instant writ must be denied.

STATEMENT OF THE CASE

A. FACTUAL HISTORY

In late March or early April of 2007, Amanda Coon vacationed with a friend in Pensacola, Florida. While in Pensacola she met the petitioner, Dacarius Holliday. Petitioner returned to Baton Rouge with Amanda, and became her live-in boyfriend. (R. Vol. 24, pp. 5416-5418) At that time, Amanda had two children, four-year-old Daisha, and two-year-old D.C. (R. Vol. 24, p. 5417)

On May 14, 2007, Amanda left for her job at USAgencies at 6:30 a.m. She was working a twelve hour shift that day. (R. Vol. 24, pp. 5418, 5420) While Amanda normally took D.C. to daycare, she left him home that day, in the care of the petitioner, because she was out of pull-ups, which the daycare required. (R. Vol. 24, pp. 5418-5421)

Upon returning from her lunch break at a Subway in her office building, Amanda's supervisor told her that someone had been trying to reach her by phone. It was the petitioner. He told Amanda that it was important that she come home right away. When Amanda inquired about D.C., petitioner told her "he was sleeping." (R. Vol. 24, p. 5423)

Upon arriving home, the petitioner met Amanda outside, and told her he needed to talk to her. "And he was talking about how he knows he's done things in his life, and this may be a reason why he is going through things right now." (R. Vol. 24, p. 5424) The petitioner did not mention D.C. As the petitioner continued talking

about himself, Amanda got a funny feeling. She rushed into the house and found her child lying unresponsive on the sofa and cold to the touch. (R. Vol. 24, pp. 5424-5425)

Amanda became hysterical. She called 911, and attempted to follow their instructions to perform CPR but was too distraught. (R. Vol. 24, pp. 5425-5426) A neighbor who had heard the commotion arrived at the house and attempted to perform CPR. (R. Vol. 24, pp. 5462) Around this same time, Amanda's brother had arrived at her home, visiting from Houston. (R. Vol. 24, p. 5426) Petitioner's reaction to the situation was to repeatedly punch the walls inside and outside of the residence with his fists. (R. Vol. 24, pp. 5426-5427)

The fire department, EMS and police arrived. Amanda's parents also came to the home. Amanda drove to the hospital and arrived prior to the ambulance. She waited in a waiting area of the hospital until a doctor "came in and told me that they done everything they could." D.C. was gone. (R. Vol. 24, pp. 5427-5428)

It was either later that evening or the next day when petitioner telephoned Amanda and "apologized and told me that he was sorry for what happened." (R. Vol. 24, p. 5429) What had happened, which Amanda would learn from detectives the following day, was that D.C. was beaten to death. (R. Vol. 24, p. 5429)

Ms. Aida "Michelle" Williams testified. She was a registered nurse working in the emergency room at the Baton Rouge General Hospital, mid-city campus, and she arrived to work a few minutes after D.C. was brought to the hospital. (R. Vol. 23, pp. 5222, 5224) She testified that D.C.'s case was particularly memorable due to the extent of the bruising on the child's body, as well as the trauma to the child's anus

which she described as "distended…there were red streaks that appeared to be blood in the canal." She further explained that normally a baby's buttocks "are tight, but his were not. They were separated and apart. That was odd. Like we didn't have to look to find his anus, if that makes sense." (R. Vol. 23, pp. 5223-5224)

Dr. Mokiso Murrill testified. Dr. Murrill, D.C.'s pediatrician since birth, was accepted as an expert in pediatric medicine. (R. Vol. 23, pp. 5236-5237) He described D.C. as healthy. He testified that he last saw D.C. on April 23, 2007 and never saw any signs that D.C. had been abused prior to his death on May 14, 2007. (R. Vol. 23, pp. 5237-5238) Defense counsel questioned Dr. Murrill extensively regarding the victim's past medical history. (R. Vol. 23, pp. 5238-5246) In connection with that questioning, on redirect, the state presented a photograph to Dr. Murrill previously introduced as S-6. Though the state did not attempt to prove beyond a reasonable doubt that a sexual assault occurred in connection with the child victim's murder, Dr. Murrill spontaneously offered his opinion that the photograph of the victim's anus depicted "unquestionable sexual abuse to the perianal region," as well as healing impetigo lesions on the child's buttocks. (R. Vol. 23, p. 5247)

Dr. Gilbert Corrigan testified. Dr. Corrigan, accepted by the court as an expert in forensic pathology, performed the autopsy on D.C. (R. Vol. 23, pp. 5262-5263) Dr. Corrigan testified that D.C.'s body "showed external evidence of blunt force trauma. There were bruises, hemorrhagic contusions, all over his body." There were approximately seventy-five total contusions to the child's body. (R. Vol. 23, p. 5264) The official cause of death was found to be multiple traumatic injuries due to blunt

force trauma to the body. (R. Vol. 23, p. 5265) Dr. Corrigan explained that the force applied in this particular type of homicide is "usually inflicted with hands and fists and feet, and the body of another person." (R. Vol. 23, p. 5266)

Upon dissection of D.C.'s body, Dr. Corrigan discovered lacerations to the liver, kidney, renal artery, and abdominal cavity. One of the child's ribs was broken. (R. Vol. 23, pp. 5266, 5278-5279) The child was found to have five significant contusions on his scalp, as well as one on his cheek bone. (R. Vol. 23, p. 5272) The child had some hemorrhage to the end of his penis and dilation of the anus. (R. Vol. 23, pp. 5280-5281) Dr. Corrigan estimated that D.C. probably died, due to internal bleeding, within fifteen minutes of sustaining the injuries to the abdominal area. (R. Vol. 23, p. 5267) Dr. Corrigan further estimated that the force necessary to inflict such injuries would be powerful, "thirty to forty pounds per square inch." (R. Vol. 23, p. 5276)

Petitioner made two statements to police, both of which were videotaped. Petitioner admitted in these statements to having been the only person present when the child sustained the injuries which led to his death. In the first statement, petitioner admitted to "beating his ass" but then retracted that saying he only hit the child on his arms and legs during the course of disciplining two year old D.C. for urinating on himself. He admitted several times later he may have "misfired" while spanking the child, and suggested that "one of his ribs probably broke and punched through his lung." He admitted that he "roughed him up." He alleged to have put his finger in the child's mouth and anus to check the child's temperature, and

admitted to biting the child on the foot, allegedly to elicit a response once the child became unresponsive.

Petitioner suggested that the child may have been injured during petitioner's alleged attempts at CPR, and further suggested that D.C. may have fallen off of the toilet or getting out of the bathtub while unsupervised. He maintained throughout the interview that he did not intend to hurt or kill D.C. and that he was only guilty of negligence. (S-48, S-51)

After considering all of the evidence and testimony, the jury unanimously rejected the defense theory of negligent homicide and convicted the petitioner of first degree murder. Following the death penalty phase of trial, the jury likewise unanimously found that the petitioner should be sentenced to death.

B. PROCEDURAL HISTORY

On June 27, 2007, a grand jury for the parish of East Baton Rouge indicted petitioner, Dacarius Holliday, with one count of first degree murder for the May 14, 2007 murder of D.C. (R. Vol. 1, p. 120) On October 31, 2007, petitioner, while represented by counsel, was formally arraigned and entered a plea of not guilty as charged. (R. Vol. 13, pp. 2899-2900) The state filed a formal notice of intent to seek the death penalty and designation of the following aggravating circumstances: (1) The offender was engaged in the perpetration or the attempted perpetration of second-degree cruelty to juveniles; and (2) The victim was under the age of twelve. (R. Vol. 8, p. 1635)

Both petitioner and the state filed various pretrial motions, including petitioner's motions to suppress two statements made by petitioner to police, and motions relating to jury selection. The trial court presided over numerous pretrial hearings and ruled upon the numerous motions filed. Both the state and petitioner sought writs of review of some of those rulings.

Petitioner's trial began on March 1, 2010 with voir dire, which took place on March 1, 2, 3, 4, 5, 8, 9, and 10. The jury was sworn as a panel on March 11, 2010, after which time the trial court gave preliminary instructions, and read the indictment and plea of the accused to the jury. (R. Vol. 22, pp. 5117-5122) Both parties gave opening statements that day. (R. Vol. 22, pp. 5122-5142) Presentation of evidence and testimony lasted until March 13, 2010. (R. Vol. 22, p. 5147 through Vol. 24, p. 5651) On that day the state rested its case in chief and the defense presented one witness. (R. Vol. 24, pp. 5639-5651) On March 14, 2010, petitioner rested and the parties presented closing arguments to the jury. (R. Vol. 25, pp. 5661-5701) The trial court instructed the jury, and deliberations on the guilt phase followed. (R. Vol. 25, pp. 5702-5717) The jury deliberated for approximately one hour and forty minutes before returning with a unanimous verdict of guilty as charged of first degree murder. (R. Vol. 1, p. 97, Vol. 25, p. 5720)

The penalty phase of trial began on March 16, 2010 and lasted until March 17, 2010. The state presented the testimony of two surviving family members who testified about the impact of petitioner's crime on their lives. (R. Vol. 25, pp. 5743-5764) The petitioner presented the testimony of one family member, one forensic

psychologist, and one clinical and forensic psychologist. (R. Vol. 25, pp. 5769-5866) The state then called Dr. Donald Hoppe, forensic psychologist, in rebuttal. (R. Vol. 25, pp. 5874-5887) Following closing arguments, and approximately two hours and fifteen minutes of deliberations, the jury returned a verdict of death. (R. Vol. 1, p. 103, Vol. 25, p. 5897) The aggravating circumstances the jury unanimously found beyond a reasonable doubt were: (1) The offender was engaged in the perpetration or attempted perpetration of second degree cruelty to juveniles; and (2) The victim was under the age of twelve (12) years. (R. Vol. 25, p. 5897)

Following the disposition of post-trial motions at a July 7, 2010 hearing, and the waiver of the three day statutory delay by the petitioner, the trial court sentenced petitioner, in accordance with the jury's verdict, to death by lethal injection. (R. Vol. 26, pp. 5964-5965) The trial court denied a subsequent, untimely "Supplemental Motion for New Trial" October 18, 2011.

Following direct appeal to the state's highest court, the Supreme Court of Louisiana, in a unanimous ruling, affirmed petitioner's conviction and sentence. ***State of Louisiana v. Dacarius Holliday***, 2017-KA-01921 (La. 1/29/20), 2000 WL 500475, *reh'g denied* (4/9/20).

REASONS FOR DENYING CERTIORARI

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."

On March 13, 2010, during a recess after the state's presentation of evidence but prior to the state resting its case-in-chief, the parties made objections on the

record with regard to proposed jury instructions. (R. Vol. 24, pp. 5622-5633) Those record objections were apparently a continuation of a discussion in chambers regarding the parties' respective positions. (R. Vol. 24, p. 5631) The defense requested the jury be charged on the definition of negligent homicide, which definition was not included in the trial court's original jury charges. The state objected because pursuant to Louisiana law, negligent homicide is not a responsive verdict to the charge of first degree murder, and reiterated that "we don't believe that negligent homicide should be included at all, your honor." (R. Vol. 24, pp. 5628-5629)

Petitioner alleges in brief that "The State did not argue that the evidence did not reasonably support a special jury instruction for negligent homicide," but only argued that negligent homicide is not responsive to the crime of first degree murder. (Petitioner's brief, p. 14) Clearly implicit in the state's prosecution of the petitioner for first degree murder, to verdict and sentence, is the state's position that the horrific facts of this case do not present a scenario in which the victim's death resulted from "negligence." Nonetheless, and over the state's objection, the trial court allowed the requested definition, stating as follows: "After reading *State v. Marse*, the court is inclined to agree with the defense and give instruction on negligent homicide."[1] (R. Vol. 24, p. 5629)

Petitioner now seemingly argues in brief to this Honorable Court, that once the trial court found that petitioner was entitled to an instruction on the definition of

[1] In *State v. Marse*, 365 So.2d 1319 (La. 1978), the Supreme Court of Louisiana held that it was error for the trial court not to include requested instructions related to negligent homicide in defendant's murder trial, but further held that error harmless and affirmed the defendant's conviction for manslaughter.

negligent homicide, the court should have immediately acquitted the defendant on the crime charged, sent the jury home, and called it a day. While certainly an interesting assertion, this Court lacks jurisdiction over the question presented according to its jurisprudence. Absent "very rare exceptions," when reviewing state court judgments under 28 U.S.C.A. section 1257, this Court has adhered to the rule that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to the state court that rendered the decision now sought to be reviewed. *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1996). While petitioner alleged in the state supreme court that the evidence was insufficient to support the verdict, his argument in state court focused on an alleged lack of intent. Petitioner also asserted a new hypothesis of innocence on direct appeal in state court, i.e., that petitioner's actions did not cause the victim's death at all. Completely absent from his state petition is the current argument, which, carried to its illogical conclusion, is that the trial court's inclusion of an instruction on negligent homicide was tantamount to an acquittal on the charge of first degree murder. Petitioner cites no authority for this proposition. In fact, in *Mathews v. U.S.*, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988), this Court recognized that a defendant in a criminal case is entitled to assert inconsistent defenses, and thus, is entitled to inconsistent jury charges. Furthermore, the trial court's decision to include a jury charge on negligent homicide was not based upon any expressed belief that the

petitioner was only guilty of negligent homicide, but upon his belief that the charge was required by Louisiana jurisprudence.

In the event that counsel has misconstrued petitioner's argument, and he is simply asserting insufficiency of the evidence pursuant to this court's decision in *Jackson v. Virginia*, 443 U.S. 307, 323, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

Lastly, the state supreme court properly applied *Jackson v. Virginia*, and properly found the evidence constitutionally sufficient to support the conviction. In a unanimous opinion, the Supreme Court of the State of Louisiana painstakingly reviewed all of the evidence and testimony presented at trial, concluding,

> We find that the State presented sufficient evidence to show that the two-year-old victim died because of the severe beating the 29-year-old defendant inflicted upon him. Moreover, we conclude there is sufficient evidence to show that defendant had the specific intent to inflict great bodily harm on the victim when he repeatedly punched him with enough force to lacerate the toddler's internal organs and cause internal bleeding, ordered him to sit for hours on the toilet as punishment for a toilet-training accident, and bit the victim on the foot with enough force to leave clearly visible dental impressions. Even after the toddler had died of the injuries caused by defendant's beating, defendant spoke of "beating his ass" and mocked the dying child's cries as "whimpery-ass bullshit," and referred to him as a "little bitch." Particularly in conjunction with defendant's animus toward the toddler, evident in his videotaped statement, the fatal internal injuries defendant inflicted while punching and beating the two-year-old victim are sufficient to show defendant's specific intent to kill or inflict great bodily harm. *Cf. State v. Fuller*, 414 So.2d 306, 310 (La. 1982) (Specific intent to cause serious bodily harm inferred because "[w]hen a much stronger man hits a younger, smaller man, the fact finder could rationally conclude that the offender intended to cause, at a minimum,

> unconsciousness and/or extreme physical pain."); *State v. Hager*, 13-0546 (La. App. 5 Cir. 12/27/13), 131 So.3d 1090, 1092–93 (Specific intent to cause serious bodily injury can be inferred where male defendant punched female victim with sufficient force to fracture her orbital bone.); *State v. Accardo*, 466 So.2d 549, 551–52 (La. App. 5 Cir. 1985), *writ denied*, 468 So.2d 1204 (La. 1985) (specific intent to cause serious bodily injury where male defendant struck female victim in the head, causing her face to swell).
>
> The State also showed that by punching a toddler with closed fists, biting his foot with enough force to leave a clear impression of his teeth, inserting his finger into the child's anus, and failing to seek medical attention when the child was unresponsive and not breathing, defendant mistreated or neglected the victim intentionally, or with criminal negligence, and thereby caused serious bodily injury. These elements establish the aggravating factor of second-degree cruelty to a juvenile. We reiterate that: the court does *not* determine whether another *possible* hypothesis has been suggested by defendant which *could* explain the events in an exculpatory fashion. Rather, the reviewing court evaluates the evidence in the light most favorable to the prosecution and determines whether the alternative hypothesis is sufficiently reasonable that a rational juror could not 'have found proof of guilt beyond a reasonable doubt.' *State v. Captville*, 448 So.2d 676, 680 (La. 1984) (internal citation omitted) (emphasis added). Based upon the aforementioned analysis, under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), we find the State has proven beyond a reasonable doubt each of the essential elements of the crime charged. As a result, this assignment of error is without merit, and we therefore turn to defendant's remaining assignments of error.

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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.*"

In his claim before the state supreme court, petitioner first argued that he made a general, unequivocal and unlimited invocation of his right to remain silent. In "Part B" of his argument in the state supreme court, petitioner stated that the court *could* find, pursuant to *MI v. Mosely*, 423 U.S. 96, 96 S.Ct.321, 46 L.Ed.2d 313

(1975) that Mr. Holliday's alleged "multiple requests for a lawyer only established limited invocations," but maintained that his rights were nonetheless violated.

The state supreme court rejected both arguments, finding instead that the petitioner's "request for counsel was clearly a limited invocation per *Barrett* and not a general invocation of his right to counsel that would require termination of the interview."[2] In contrast to *Mosley,* who had requested a lawyer prior to **interrogation about a specific topic**, *Barrett* had only requested counsel be present prior to the **act of making a written statement**. In *Connecticut v. Barrett,* this Honorable Court noted that "Barrett made clear to police ***his willingness to talk about the crime for which he was a suspect***," and further noted that "The fundamental purpose of the Court's decision in *Miranda* was 'to assure that the individual's right to choose between ***speech and silence*** remains unfettered throughout the interrogation process." (Emphasis added) As did the petitioner in *Barrett*, petitioner Dacarius Holliday made clear to police his willingness to talk about the crime for which he was a suspect and his invocation of his right to counsel was limited to the ***act of a voluntary submission of a DNA sample***. However, petitioner never voluntarily submitted a DNA sample and petitioner's right was honored when detectives, ***over the petitioner's objections,*** ceased questioning and obtained a warrant for his DNA.

[2] *Holliday*, citing *Connecticut v. Barrett*, 479 U.S. 523, 527-30, 107 S.Ct. 828-832, 93 L.Ed.2d 920 (1987).

Though the argument is not entirely clear, petitioner now seemingly argues anew he invoked his right to counsel for interrogation purposes; he did not. Furthermore, just as he failed in the state supreme court, petitioner has failed before this Honorable Court to accurately portray the proceedings, facts and circumstances surrounding the taking of his statement.

Petitioner gave two statements to police, on May 14 and 15, 2007, respectively. On June 1, 2009, the state filed a "Motion in Limine to Determine the Admissibility of the Defendant's Statements." (R. Vol. 5, p. 962) On June 30, 2009, the defendant filed a "Motion to Suppress I" (R. Vol. 5, p. 1133) with respect to the statement given on May 14, 2007, wherein he alleged he did not knowingly and intelligently waive his Miranda rights due to a "history of mental problems" and "low intelligence." He further alleged that he "continuously asked for an attorney," and that statements and DNA were taken in violation of his rights. Also on June 30, 2009, defendant filed a "Motion to Suppress II," seeking to suppress the statement given on May 15, 2007, for essentially the same reasons. (R. Vol. 5, p. 1136) Finally, on August 11, 2009, defendant filed a "Supplemental Motion to Suppress I" alleging that he was "psychologically interrogated," "coerced," "under Duress," and that "Police officer took advantaged of his low intelligent and low-educational level." [sic] (R. Vol. 6, p. 1228)

Thereafter, on August 12, 2009, the state's Motion in Limine and the defendant's motions to suppress I and II came on for a hearing. The defendant's "Supplemental Motion to Suppress I" was not heard as it was filed beyond the court's cut-off date. (R. Vol. 16, pp. 3528-3532) At that hearing, Detective Ross Williams

testified that he advised the defendant of his Miranda rights by reading them to the defendant off of a standardized form. (R. Vol. 16, pp. 3535-3536) The defendant indicated he understood his rights as read to him, both verbally and by his signature on the rights form. (R. Vol. 16, pp. 3536, 3538; S-47) Thereafter he gave a statement that was videotaped. (R. Vol. 16, pp. 3537-3538; S-48) Detective Williams testified that the defendant did not appear to be under the influence of alcohol or drugs, and no threats or promises were made to obtain a statement from the defendant. (R. Vol. 16, p. 3538) The detective testified that Holliday was "calm," "forthcoming," and "just freely sat down and began to talk with us." (R. Vol. 16, p. 3539) Holliday never indicated he wanted an attorney present in order to speak with detectives and never stated he did not wish to speak to detectives. (R. Vol. 16, p. 3539) Holliday did ask for an attorney "for the DNA part only." (R Vol. 16, pp. 3539-3540) However, defendant's DNA was later seized pursuant to a search warrant. (R. Vol. 16, p. 3540)

Following state's questioning to lay a proper foundation, video of the statements given by the defendant on May 14, 2007 and May 15, 2007[3] were allowed to be played in open court. The first statement was played in open court, after which, due to the lateness of the hour, the matter was continued until the next day. (R. Vol. 16, pp. 3540-3558) The following afternoon, August 13, 2009, the second statement was played in open court. (R. Vol. 16, p. 3566) On defendant's cross-examination, the detective admitted that the defendant had asked for a lawyer more than once, but clarified that "He asked for a lawyer ***for the DNA only."*** (R. Vol. 16, pp. 3575-3576)

[3] The statement on May 15th was given at the defendant's request. Detectives nevertheless obtained a second waiver of rights. (See Vol. 16, pp. 3547-3548)

Detective Williams further clarified that a warrant was obtained prior to the taking of DNA. (R. Vol. 16, p. 3575) Following argument of counsel, the trial court ruled that statements given by the defendant on May 14 and 15, 2007 would be admissible at trial. (R. Vol. 16, p. 3589) The court agreed that defendant clearly asked for an attorney for the taking of DNA only and that the defendant continuously engaged with officers even after they sought to, out of an abundance of caution, end the questioning. (R. Vol. 16, p. 3588)

The videotaped statements themselves support the trial court's finding as to the free and voluntary nature of the statements. In neither statement did defendant ever ask for an attorney prior to questioning, nor did defendant even hint at exercising his right to remain silent.

At approximately six minutes into the videotaped statement of May 14, 2007, the defendant stated he wanted ***an attorney present for the taking of DNA***. When asked whether he wanted an attorney ***for the interview***, defendant was adamant that, "***I don't want an attorney man***, cause I ain't did nothing." (S-48)

At eight minutes into the interview, the defendant, apparently under the belief he could convince detectives they did not need a DNA sample, invited detectives to "***Ask me. I'll tell ya straight up"*** apparently regarding any suspicions they had.

At forty-two minutes into the interview, detectives again asked if the defendant would consent to a DNA sample. Dacarius again states he wants a lawyer "for DNA," apparently under the mistaken assumption that detectives would have to disclose more information about what they had found on the victim's body to an attorney.

Detectives explained that they did not and would not. For several minutes Dacarius is *questioning the detectives* relative to DNA. For several more minutes Dacarius is waffling, mumbling, staring at the wall, or hiding underneath his t-shirt. After once again saying he would consent, but "I will need a lawyer to be present for that," the detective asks "So you want an attorney is what you're saying?" Response: "I DON'T WANT A LAWYER CAUSE I DON'T HAVE NOTHING TO DEFEND."

At fifty-five minutes, the detective says, "he says he wants a lawyer, let's stop." Response: "DON'T STOP MAN!" Defendant keeps engaging with the officers, asking questions.

At 57:29 the detective explains to Dacarius, "You've asked for an attorney – I have to stop. By law, that's what I need to do." Dacarius continues to waffle, and to engage detectives, at the one hour mark instructing the crime scene investigation officer who was present to "Go get your swab." However, a minute later, while detectives are going through the voluntary consent form, Dacarius renews his request for an attorney for the taking of DNA. Detectives leave. About two minutes later, Dacarius opens the door to the interview room to re-engage with detectives who tell him there is "nothing else to talk about."

At 1:12:35, defendant exclaims, "I DON'T WANT NO LAWYER, I DON'T WANT NOTHING MAN…LET'S JUST CONTINUE WITHOUT AN ATTORNEY…LET'S DO IT…LET'S DO THIS SH--!" Officers, understandably exasperated, told him it was too late to consent, they were getting a warrant.

Not once did petitioner assert his Fifth Amendment right to remain silent. In fact, he simply would not ***stop*** talking, even after detectives sought to end the interview.

The videotaped statement of May 14, 2007 speaks for itself. The evidence of the voluntary nature of defendant's statement is crystal clear. The Supreme Court of Louisiana, painstakingly applying this Honorable Court's principles, agreed:

> Defendant states the trial court erred by denying his motions to suppress his waiver of rights forms and the two statements he made to police, arguing that the police continued to interrogate defendant after he repeatedly requested a lawyer in violation of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). He further contends the police failed to honor his limited request for counsel, in accordance with *Connecticut v. Barrett*, 479 U.S. 523, 527-30, 107 S. Ct. 828-832, 93 L.Ed. 2d 920 (1987) (a defendant's request for counsel in the event that he had to give a written statement was limited to that situation and did not serve as a general invocation of the right to counsel prohibiting subsequent police-initiated questioning). Specifically, in his first motion to suppress, defendant argued that his statements were involuntary because police did not honor his requests for an attorney, and in his second motion to suppress, defendant asserted that he did not knowingly waive his rights before giving his statement.
>
> When an accused has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484–485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981). A defendant may invoke his right to counsel for limited purposes, however, without triggering the rule of *Edwards. See also*, *Barrett, supra.*
>
> As a general matter, before inculpatory statements may be admitted into evidence, the State has the burden of affirmatively showing that they were made freely and voluntarily and not under the influence of fear, duress, intimidation, menace, threats, inducements, or promises. *See* La. R.S. 15:451; *State v. West*, 408 So.2d 1302, 1307 (La. 1982); *State v. Dewey*, 408 So.2d 1255, 1258 (La. 1982). If the statement was made during custodial interrogation, the State must show that the defendant was advised of his constitutional rights. *Miranda v. Arizona*,

384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Petterway*, 403 So.2d 1157, 1159 (La. 1981); *State v. Sonnier*, 379 So.2d 1336, 1355 (La. 1979). The admissibility of such statements is a question for the trial judge, whose conclusions on the credibility and weight of testimony relating to the voluntariness of a confession for the purpose of admissibility should not be overturned on appeal unless they are not supported by the evidence. *State v. Jackson*, 381 So.2d 485, 487 (La. 1980). Improper admission of a coerced statement is subject to harmless-error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991).

At the motions hearing, Detective Ross Williams testified that on May 14, 2007, the night the victim died, he and Detective Brian Watson transported defendant to the police station from the scene. Before questioning defendant, they informed him of his *Miranda* rights, defendant acknowledged and appeared to understand them and thereafter signed a waiver of rights form. Det. Williams further testified that defendant's entire statement was video recorded, defendant did not appear to be under the influence of alcohol or drugs, and the detectives did not threaten him or promise him anything in return for the statement. Det. Williams indicated that defendant was generally "forthcoming," but during the interview when the police requested a DNA sample, defendant requested an attorney to advise him regarding his consent to providing the DNA. Because defendant was vacillating on whether to consent to providing a DNA sample, later that evening police obtained a warrant authorizing them to obtain the DNA sample and then retrieved the sample by swabbing defendant's cheek with the help of Crime Scene Investigator Mindy Stewart. After defendant gave his statement and police obtained the DNA sample, the police brought him home.

Det. Williams testified that the next morning, defendant spontaneously called him and asked to attend the autopsy to discuss his theories about the victim's cause of death. Det. Williams told defendant that he could not attend the autopsy but agreed to send an officer to give defendant a ride to the police station so he could offer his theories. When defendant arrived, Det. Williams again advised him of his rights, and defendant signed another waiver of rights form, prior to giving a second video-recorded statement. At the conclusion of his second statement, defendant was placed under arrest.

After Det. Williams testified at the hearing, the defense objected to the admission of defendant's statements and waiver forms, arguing the State failed to prove defendant had knowingly and voluntarily

waived his rights before giving his statements. Specifically, defendant argued that the State failed to clearly establish which officer had signed defendant's waiver of rights forms. The State countered that Det. Williams testified at both hearings that he was present when defendant was advised of his rights, that he saw defendant sign the form, and that Det. Williams, Det. Watson, and defendant all signed each waiver of rights form before defendant began his statements. The trial court ultimately concluded that defendant's signed waiver-of-rights forms were admissible based upon Det. Williams' testimony.

Similarly, the defense argued that defendant's recorded statements were inadmissible because he requested an attorney multiple times, that the beginning of the interviews are not shown in the video, and that "it is clear from the tapes that he didn't understand what his rights were," such that defendant did not knowingly, intelligently, or voluntarily waive his rights. In contrast, the State argued that the videos showed defendant's statements were entirely voluntary, emphasizing that defendant himself had requested the second interview. The video showed the detectives did not use any coercive tactics, defendant called the detectives back multiple times when they tried to leave the room, and each time defendant mentioned an attorney, the detectives paused the interview to clarify his request. When it was not entirely clear whether defendant was requesting an attorney, the detectives stopped the interview and stepped out of the room until defendant called them back in to resume the interview. Importantly, because it was not clear whether defendant was consenting to providing a DNA sample, the detectives obtained a warrant before collecting defendant's DNA.

After reviewing Det. Williams' testimony and watching the recordings of defendant's statements, which the court found clearly showed that defendant freely and voluntarily spoke with the detectives, the court ruled that both of defendant's statements were admissible. As to the first statement, the court also noted that, while defendant did request counsel several times, he was clear that the request only related to his consent to providing a DNA sample. The trial court found that defendant otherwise wanted to continue speaking with the detectives. Moreover, each time defendant requested an attorney the detectives stopped the interview until defendant actively re-engaged them.

We find defendant's second recorded interview reveals no violation of defendant's rights, during which, notably, defendant never requested an attorney. Moreover, he initiated this second interview by calling the detectives in an effort to advance his own theories regarding

the victim's death. Based upon our review of the record, we specifically find the defendant's second interview is clearly voluntary, free of coercion, and admissible per *Edwards*.

Regarding defendant's first statement, a review of the video shows that statement was also voluntary and free of coercion. Although defendant requested an attorney initially for the limited purposes of his consent to providing a DNA sample, we find the detectives properly stopped the interview to clarify defendant's request, before resuming non-DNA questioning after he clearly stated his intent. Defendant's first mention of an attorney occurs at approximately 0:06:07 in the first recorded interview, after the detectives first requested that defendant voluntarily provide a DNA sample. Defendant responded:

Defendant: I'll do it, man, but my—I need a lawyer though, cause I don't, I don't, y'all got me somewhere I don't want to be at.

Officer: So you want a lawyer now?

Defendant: I—for the DNA part, everything else, I don't need a lawyer for, cause I don't know nothing about that, I don't know nothing about no DNA.

Officer: Ok, I'm just asking you, do you want an attorney here?

Defendant: Just for the DNA. Everything else—

Officer: So when we swab you for DNA?

Defendant: So I could ask him, so he could know, don't y'all gotta tell him? What y'all swabbing for? I mean, I know y'all telling—

Officer: I tell him the same thing I told you.

Defendant: But, I mean, if he was my lawyer don't y'all gotta tell him like, well, "Look, we found something, the babysitter penetrated, so we want to check DNA on him for that."

Officer: No. Not necessarily.

Officer 2: We never said we found anybody penetrated or nothing, nobody said that.

Defendant: Well that's good.

Officer: There's some fluids on the outside of the boy's body that we need to find out where they came from. That's all we got, and that's all we wanna know right now. But if you want an attorney here, I'll—

Defendant: I don't want no attorney, man, 'cause I ain't did nothing.

Officer 2: Ok, there you go. So we do your DNA and we finish all that we're doing, and we do whatever that, we move on, and we get this finished with.

Defendant: I don't trust that. I swear man.

Officer: Ok, well that's cool, that's totally up to you. I can't make you do anything you don't want to do.

In this instance, defendant's request for counsel was clearly a limited invocation per *Barrett* and not a general invocation of his right to counsel that would require termination of the interview. Importantly, after defendant asked more questions of the detectives, he distinctly stated that, "I don't want no attorney man, cause I ain't did nothing." He then voluntarily continued the interview by inviting the detectives to ask him more questions.

Defendant's voluntary statement continued until roughly 00:36:00, when the detectives walked out into the hallway for roughly five minutes, and returned with Crime Scene Investigator Mindy Stewart. As Ms. Stewart prepared to take defendant's DNA sample, defendant told them, "I don't care about no DNA, man, but y'all got ta, I need a lawyer so if you say you've got something you gotta tell that lawyer what is y'all checking on me for, I mean you checking my clothes."

From that point forward, the remainder of this first interview primarily consisted of discussion between defendant and the detectives as they attempted to clarify defendant's request for counsel, interspersed with defendant's questions to detectives about the victim's injuries, the evidence they were seeking to test, and the ramifications of the DNA testing. Defendant made no further substantive statements. Despite defendant's claims that he issued numerous individual requests for counsel that the detectives ignored, we find the exchange between the detectives and defendant dictates otherwise. Specifically, the video shows that defendant's requests for counsel were all part of a continuous exchange in which defendant alternated between making repetitive and ambiguous statements regarding his limited request for counsel, asking

> the detectives about the DNA testing and evidence, and asking detectives about the victim's injuries. It is clear from the recording that detectives asked defendant no further questions beyond what was necessary to clarify defendant's request for counsel and whether defendant would consent to providing a DNA sample. The detectives never coerced or pressured him to speak and rigorously respected his invocation of his right to counsel, as demonstrated by the following excerpt:
>
> Defendant: I will take [the DNA test], but I need a lawyer to be present for that. I don't want a lawyer because I have nothing to defend, but if you're coming with this whole DNA, I just want a lawyer because I don't understand this.
>
> Detective: He says he wants a lawyer, let's stop.
>
> Defendant: Don't stop!
>
> Detectives: If you say you want a lawyer, I have to stop until the lawyer gets down here.
>
> We find the video shows that defendant's first statement was also entirely knowing and voluntary. Detectives immediately ceased questioning when defendant asked for counsel, and further, neither defendant's statement nor his DNA were obtained via coercive interview techniques. In sum, defendant's statements here were not under the influence of fear, duress, or intimidation, and we find no reversible error in their admission. As a result, we find these assignments of error to be without merit.
>
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The state supreme court properly applied the law and jurisprudence to the facts in finding that petitioner's constitutional rights were scrupulously honored.

Lastly on pages 20 through 26 of his application, petitioner cites, for the first time anywhere in these proceedings, more than two dozen state and federal cases

which, if they have any relevance at all, simply bolster the state supreme court's finding that petitioner's rights were safeguarded. [4]

In *Davis v. United States,* 114 S.Ct. 2350, 512 U.S. 452, 129 L.Ed.2d 362 (1994), one of the cases cited, the *Davis* Court simply held that a petitioner's remark, that "Maybe I should talk to a lawyer," prior to continuing to answer NIS agents' questions, did ***not*** require questioning to cease. Furthermore, while noting that "it will often be good police practice" to submit clarifying questions subsequent to an ambiguous reference to counsel during questioning, this Court did not require it.

As stated herein, early in the interview process, petitioner stated that he wanted an attorney present for the taking of DNA. As properly found by the state supreme court, this was a limited request for counsel pursuant to *Barrett.* Nevertheless, out of an abundance of caution, and in accordance with suggestions by the *Davis* court, detectives demonstrated "good police practice" in asking clarifying questions regarding petitioner's request. Petitioner's actions in subsequently

[4] Petitioner's rambling discussion of cited case law, demonstrates, if not a misunderstanding of the content and holdings thereof, an ambivalence to that content and the applicability herein. For instance, petitioner makes reference to the "now infamous" case of *State v. Demesme*, but the Louisiana Supreme Court's writ denial appears to have gone undisturbed. In *State v. Leger*, the question was whether detectives' violation of defendant's right against self-incrimination in an initial interview, in which he repeatedly stated that he did not want to talk to detectives, had a coercive effect on subsequent statements. The court found a second statement not to be the product of custodial interrogation at all, and a third and fourth statement not the product of coercion. Petitioner apparently casts dispersions on the *Payne* court though the facts show that defendant was not being interrogated at all when she asked the question, "may I call a lawyer?" In *United States v. Johnson*, the defendant stated unequivocally, and *in writing* that he did "not want to make a statement at this time without a lawyer." In *U.S. v. McLaren*, defendant made an unequivocal statement, "I think I want a lawyer." In *Plugh,* the defendant simply refused to sign a waiver of rights form. These string citations continue for several more pages describing various scenarios wherein courts determine whether various requests ("I think I need a lawyer present," "Could I have a lawyer," defendant "could use" an attorney, "I guess I should get a lawyer," "can I get a lawyer?") are equivocal or unequivocal. Given that petitioner in ***this*** case never once stated, equivocally or unequivocally, that he was interested in a lawyer prior to discussing the case with detectives and answering their questions, this lengthy discussion of random case law serves no purpose save to confuse the issue, or simply as "filler."

imploring detectives to ask him questions about the crime, and proudly proclaiming that he would answer those questions "straight up," dispelled any notion whatsoever that he wished to have a lawyer present **for questioning**.

The remainder of petitioner's argument consists of a comparative summary of various state and federal case law, culminating in the assertion that, "Because there is such evident disagreement as to the proper inquiry following an equivocal request for counsel, Petitioner requests this court to reconsider its opinion in *Davis* and resolve the incongruence in lower authority." Even if such were true and/or any reconsideration prudent, the petitioner's implication that the case at hand is the proper vehicle to do so is simply mystifying. To reiterate, petitioner herein made ***no*** request for counsel prior to, or for purposes of, interrogation, much less an "equivocal" one. The state supreme court's language in its opinion regarding the defendant "making repetitive and ambiguous statements regarding his limited request for counsel," upon which petitioner appears laser focused in attempting to improperly pigeonhole this case into a *Davis*-type analysis, clearly refers to the petitioner having reversed his limited invocation pursuant to *Barrett,* more than once. Practically speaking, the only way officers could have violated petitioner's limited invocation of his right to an attorney would have been to hold him down and extract a DNA sample without his consent; this never happened.

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

Louisiana law and the state court disposition:

Louisiana's statutory mitigation law is codified in La. C.Cr.P. art. 905.5.[5] La. C.Cr.P. art. 905.5(h) lists "any other relevant mitigating circumstances." The phrase "any other relevant mitigating circumstances" is not further defined in the statute.

Petitioner assigned as error in the state Supreme Court, rulings denying defendant's cause challenges to jurors defendant claimed were unwilling to consider non-statutory mitigating circumstances.

The Louisiana Supreme Court, applying state jurisprudence to interpret state law, found that the trial court did not commit reversible error in denying petitioner's cause challenges:

> In this instance, we find the defendant fails to show the trial court abused its discretion in denying these cause challenges. *See State v. Blank*, 04-0204, p. 25 (La. 4/11/07), 955 So.2d 90, 113, citing *State v.*

[5] La. C.Cr.P. Art. 905.5 is the pertinent law:

> The following shall be considered mitigating circumstances:
>
> (a) The offender has no significant prior history of criminal activity;
> (b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;
> (c) The offense was committed while the offender was under the influence or under the domination of another person;
> (d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;
> (e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
> (f) The youth of the offender at the time of the offense;
> (g) The offender was a principal whose participation was relatively minor;
> (h) ***Any other relevant mitigating circumstance***. (Emphasis added)

> *Cross*, 93-1189 (La. 6/30/95), 658 So.2d 683, 686–687 ("A trial court is vested with broad discretion in ruling on challenges for cause, and these rulings will only be reversed when a review of the voir dire record as a whole reveals an abuse of discretion."). Although the challenged individuals did not promise to accord a specific weight to the particular unenumerated factors defendant proposed, each stated that they could consider, or contemplate, all of the enumerated mitigating factors of La.C.Cr.P. art. 905.5, and further, they each appropriately indicated they would consider any other mitigating factor they deemed relevant for purposes of La.C.Cr.P. art. 905.5(h).
>
> We note that there is a distinction between considering a factor and determining what weight, if any, to give that particular listed factor. In other words, for purposes of La. C.Cr.P. art. 905.5, to "consider" something requires a juror to focus or reflect upon a mitigating factor but does not dictate their arriving at a particular conclusion. Here, rather recognizing that jurors would "think carefully" about the mitigating factors, defendant appears to be seeking a commitment from these jurors to grant special consideration to the mitigating factors he would be presenting. Such an interpretation of La. C.Cr.P. art. 905.5 is prohibited. *Cf. Williams*, 96-1023, pp. 8-10, 708 So.2d at 712-14 (citing *State v. Bourque*, 622 So.2d 198, 227 (La.1993), *rev'd on other grounds by*, *State v. Comeaux*, 93-2729 (La. 7/1/97), 699 So.2d 16, the Court finding that when determining whether or not a juror should be dismissed for cause, the trial judge should consider the potential juror's answers as a whole and not merely consider "correct" answers in isolation.) Upon our review of the entire voir dire process in this case, we do not find any reversible error in the trial court's rulings in this regard.
>
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Petitioner characterizes the Louisiana Supreme Court's ruling as holding 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." The state does not agree with this characterization. The state supreme court concluded that the jurors' answers as a whole indicated a willingness to follow the law, as that law has been interpreted by that court's prior decisions.

Voir dire of challenged jurors:

Juror Joseph Carlock testified that he could keep an open mind throughout the penalty phase, consider each statutory mitigating factor, and anything else that "came up during the course of either guilt or penalty" that he felt was relevant and mitigating. He testified that he would have to hear the case before he made any kind of judgment.

During defense voir dire, Mr. Carlock was asked specifically if he could consider a fatherless home, substance abusing parent, difficult home life or abusive home, as factors in determining what sentence would be appropriate. Mr. Carlock responded regarding each that he could not, with the exception of an abusive home, which he related, "It would have to be proven to me that it was very abusive." (R. Vol. 21, pp. 4814-4845)

Juror Robert Lambert testified that he could keep an open mind all the way through the penalty phase and base his decision on all of the facts and circumstances submitted throughout the case. He confirmed he could consider all of the factors listed in La. C.Cr.P. 905.5. Similar to Carlock, in response to pointed questions by defense counsel, he stated that he could not consider a fatherless, alcoholic, abusive home in mitigation. (R. Vol. 21, pp. 4811-4849)

Juror Eric Mitchen testified that he could consider each of the mandatory statutory mitigating circumstances, keep an open mind throughout the penalty phase, and give consideration to any circumstance he felt was mitigating. However, he did not believe he could consider an abusive childhood to be a mitigating circumstance during the penalty phase for the reason that family members had been abused as children and did not commit murders. With regard to "having mental

disorders," he explained that he himself had been diagnosed as bipolar, as had other family members, but that he was proactive in treating the condition. (R. Vol. 14, pp. 3137-3172)

A fourth juror, Ms. Keri Jackson-Parker, was initially equivocal regarding mitigation but ultimately, in response to defense questioning, stated she could "meaningfully consider" factors "such as brutal childhood, abusive parents, alcoholic parent, either the person or the parent having a mental disorder such as bipolor." (R. Vol. 17, pp. 3879-3934; Vol. 18, pp. 3966-3970)

United States Supreme Court cases cited by petitioner:

None of the cases cited by the petitioner hold that prospective jurors are subject to being challenged for cause absent an ***express commitment to the defense***, to consider, in the abstract, as mitigating, every non-statutory mitigating circumstance posited by the defense, prior to the juror hearing any of the evidence and testimony in the state and defendant's case-in-chief, rebuttal, or any of the evidence and testimony presented during the penalty phase.

In *Hitchcock v. Duggar*, 107 S.Ct. 1821, 481 U.S. 393, 95 L.Ed.2d 347 (1987), petitioner was sentenced to death pursuant to a Florida scheme that tasked the trial jury with rendering an "advisory verdict" on the existence of aggravating and mitigating circumstances, but left the ultimate decision as to sentence of life or death to the trial judge. Petitioner's trial counsel introduced evidence to the jury regarding a childhood habit of petitioner of sniffing gasoline fumes and its possible neurological effects, regarding petitioner being one of seven children in a poor family that earned

a living by picking cotton, death of his father by cancer, his being an affectionate uncle, youth, potential for rehabilitation, difficult upbringing and his voluntary surrender to authorities. However, the jury was instructed to consider *only the enumerated statutory mitigating circumstances,* and the trial court expressed that in making the final determination as to sentence, it was "mandated" to apply only those enumerated circumstances. Petitioner Holliday's jury was ***specifically instructed*** to consider "any other relevant mitigating circumstances," quite the opposite of the instructions to the Florida jury in *Hitchcock.*

In *Skipper v. South Carolina*, 106 S.Ct. 1669, 476 U.S. 1, 90 L.Ed.2d 1 (1986), this court did not address jury challenges at all. The "only question" before this court was "whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment." This Honorable Court held that it did. Petitioner Holliday's penalty phase evidence was extensive, and not similarly proscribed by the trial court.

In *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Oklahoma death penalty statute stated that "In the sentencing proceeding, evidence may be presented as to *any mitigating circumstances…"* This Honorable Court reversed the defendant's death penalty, and remanded, due to the sentencer's, in this case the trial judge's, belief that the law of Oklahoma *precluded* him from considering any mitigating factor outside of the defendant's youth.

In *Lockett v. Ohio*, 438 U.S. 586, 8 S.Ct. 2954, 57 L.Ed.2d 973 (1978), this Honorable Court found Ohio's death penalty statute unconstitutional because it ***did not permit consideration*** of character, prior record, lack of specific intent to cause death, and relator's minor part in the crime, as mitigating evidence. Under the Louisiana statutory scheme these factors ***shall be considered***.

In *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007), this Honorable Court reversed the Fifth Circuit Court of Appeals denial of collateral relief, noting that "when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence- because it is forbidden from doing so by statute or a judicial interpretation of a statute-the sentencing process is fatally flawed." Nothing in the law or jurisprudence of the State of Louisiana "forbids" consideration of mitigating evidence.

In *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), this Honorable Court reversed the Fifth Circuit Court of Appeal's denial of a COA. This Court found that a rule, applied uniformly in the Fifth Circuit, to *Penry* claims, "has no foundation in the decisions of this Court."[6] That rule stated,

> In reviewing a *Penry* claim, we must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury…To be constitutionally relevant, the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,…and (2) that the criminal act was attributable to this severe permanent condition.

[6] In *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) this Honorable Court found that, although the jury received a supplemental instruction that made mention of mitigating evidence (in this case, mental retardation and severe child abuse), there was no vehicle for expressing the view that *Penry* did not deserve to be sentenced to death based upon his mitigating evidence.

This Court found the Fifth Circuit's "uniquely severe permanent handicap" and "nexus" tests to be incorrect, and held that "reasonable jurists would find debatable" or wrong the District Court's disposition of Tennard's low-IQ –based *Penry* claim.

In *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), this Honorable Court found that a Virginia court's instruction that the jury base its sentencing decision on "all the evidence" afforded jurors an opportunity to consider mitigating evidence. The death sentence was affirmed, the Court finding, "The absence of an instruction on the concept of mitigation and of instructions on particular statutorily defined mitigating factors" did not violate defendant's constitutional rights.

The Louisiana statutory scheme, far from *precluding* consideration of mitigating circumstances, requires it. Furthermore, none of the aforementioned cases even broach the subject of the appropriateness of cause challenges to jurors who express reservations as to the relevance of particular mitigating factors offered by the defense.

Petitioner's invitation to this Honorable Court to "require capital jurors to consider non-statutory mitigating circumstances as a matter of law:"

Petitioner invites this Honorable Court to move beyond ensuring capital juries a framework within which to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence, and ***require*** capital juries to consider as relevant and mitigating, and as a matter of law, any non-statutory mitigating circumstance proffered by the defense.

Petitioner simultaneously cites recent case law from various state and federal courts that demonstrate the lack of authority and support for such a rule.[7] In *Evans v. State*, 226 So.3d 1, 18-20 (Miss. 2017) the Mississippi Supreme Court noted that "The venire cannot be asked whether it will accept or reject the evidence before it is presented to it." The Second Circuit in *United States v. Whitten*, 610 F.3d 168, 183-87 (2d Cir. 2010) cited with approval the Tenth Circuit Court of Appeal in noting, "The district court was not required…to allow inquiry into each juror's views as to specific mitigating factors as long as the voir dire was adequate to detect those in the venire who would *automatically* vote for the death penalty." (See *United States v. McCullah*, 76 F.3d 1087, 1114 (10th Cir. 1996) The Eighth Circuit Court of Appeal in *United States v. Paul*, 217 F.3d 989, 999-1000 (8th Cir. 2000) notes, contrary to petitioner's assertions in brief, that neither *Lockett* nor *Eddings* require a capital jury to give mitigating effect or weight to any particular evidence. See also, *United States v. Bernard*, 299 F.3d 467, 485-87 (5th Cir. 2002) wherein the Fifth Circuit Court of Appeal found that neither *Lockett* nor *Eddings* expressed a "well-established rule" requiring a capital jury to give mitigating effect or weight to any particular evidence…"There is only a constitutional violation if there exists a reasonable

[7] Petitioner states in brief that "The Ninth Circuit has interpreted the *Lockett/Eddings* rule as requiring the sentencer to consider nonstatutory mitigation as mitigating." In fact, at issue in *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) and *Spreitz v Ryan*, 916 F.3d 1262 (9th Cir. 2019) was the unconstitutionality of a "causal nexus" test for nonstatutory mitigation that forbade as a matter of law giving weight to mitigating evidence, such as family background or mental condition, ***unless the background or mental condition was causally connected to the crime.*** This "causal nexus" test was a creature of Arizona law and peculiar to capital defendants in Arizona. The cases have no applicability herein.

likelihood that jurors believed themselves precluded from considering mitigating evidence."

It is apparently petitioner's position that it is defense counsel that determines what factors are relevant to mitigation. It is also petitioner's position that the defense is entitled to a commitment from every juror that they too believe those factors are mitigating, prior to hearing any evidence or testimony in the guilt phase, and more importantly, prior to hearing any evidence or testimony in mitigation.[8] Petitioner has cited no authority from this Honorable Court which supports his position. Though petitioner has identified a few outliers, most of the jurisdiction from which petitioner cites case law do not subscribe to defendant's position. In fact, as pointed out by petitioner herein, some jurisdictions go so far as to ***preclude questioning*** on specific mitigating circumstances.

Louisiana neither precludes questioning as to specific mitigating circumstances, nor does it circumscribe in any way a defendant's presentation of mitigation evidence during the penalty phase of trial. Indeed, the defense presented

[8] During voir dire, prospective jurors were only aware that the defendant was charged with first degree murder, and that the victim was a child. This Honorable Court should also take judicial notice of the fact that single parent households, substance abuse, physical abuse, emotional abuse, and mental health issues are ubiquitous in our society as demonstrated by those jurors who had been affected directly, or had family members who had been affected by these issues. Similarly, in *State v Taylor*, 1999-1311 (La. 1/17/01), 781 So.2d 1205, two prospective jurors struggled with the abstract notion of a "violent upbringing" as mitigating, one of them indicating that she had "been there." The Louisiana Supreme Court noted correctly that "There is no statutory or legal presumption in favor of any penalty or any mitigating circumstances, and individual jurors often, if not always, have their own inchoate or unarticulated predispositions. Such personal predispositions do no offend the law, provided they do not "substantially impair" the juror's duty to follow the law. Not every predisposition or leaning in any direction rises to the level of substantial impairment…Significantly, it is the determination of substantial impairment that the trial judge's broad discretion plays the critical role. A juror may assign little weight or importance to any mitigating circumstance he does not consider significant in light of the fact that a defendant has been convicted of first degree murder.

extensive evidence in mitigation and the prosecutor acknowledged in penalty phase closing arguments that the petitioner had a "horrible childhood." However, despite this, evidence was also presented during the penalty phase that the petitioner had family members who loved and supported him and tried everything in their power to right the wrongs that the petitioner had suffered. Evidence showed that he abused their trust and squandered the second chances provided not only by family, but by the criminal justice system.

The rulings of the trial court during voir dire do not conflict in any way with relevant decisions of this Court and petitioner has failed to state compelling reasons for grant of certiorari.

CONCLUSION

For the foregoing reasons, the State of Louisiana respectfully requests that this Honorable Court deny petitioner's application for writ of certiorari.

RESPECTFULLY SUBMITTED,

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