****CAPITAL CASE****

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

REPLY TO BRIEF IN OPPOSITION

Cecelia Trenticosta Kappel*
* *Counsel of Record*
Erica Navalance
Shanita Farris
The Capital Appeals Project
1024 Elysian Fields Avenue
New Orleans, LA 70116
(504) 529-5955
ctkappel@defendla.org

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Dacarius Holliday was sentenced to death after the trial court denied cause challenges to jurors who would refuse to consider the only mitigating circumstances relevant to this case: a childhood of abuse and neglect, and a history of mental illness. The jury sentenced him to death after watching the full 90-minute videotaped interrogation, in which Mr. Holliday pled with officers for a lawyer repeatedly, which was met by officers continuing to question him, giving misleading advice about his right to a lawyer, and bringing in new officers to take photographs and DNA swabs. Mr. Holliday's requests for counsel were then weaponized by the trial prosecutor in closing arguments as substantive evidence of guilt. And, he was sentenced to death even after the trial court found that the State's evidence reasonably supported a verdict of negligent homicide, which would have negated any finding of specific intent to kill or inflict great bodily harm.

Louisiana's *Brief in Opposition* (hereinafter "BIO") reveals fundamental misunderstandings of this Court's clear precedent and the purpose of review on writ of certiorari. As well, the BIO refutes none of the well-grounded reasons for granting certiorari previously asserted by Mr. Holliday. Instead, the State responds to the first question presented by falsely claiming that the issue was not presented to the Louisiana Supreme Court, when in fact it was raised. The State responds to the second question presented by mischaracterizing the circumstances in which Mr. Holliday invoked his right to counsel during questioning, while characterizing the officers' continued interrogation "good police practice." Finally, in its response to the

third question presented, the State confirms that the jurors in question would refuse to consider the mitigating circumstances in this case, and concedes that this Court has not ruled on the specific question raised by Mr. Holliday. The State's only genuine arguments in opposition to review on writ of certiorari are regarding the merits of the issue, which are not properly considered at this stage, but rather, are germane only after review has been granted.

In view of the foregoing, Mr. Holliday hereby submits this *Brief in Reply* in support of his *Petition for a Writ of Certiorari* filed on September 4, 2020.

I. The Trial Court's Finding That Petitioner Was Entitled to a Negligent Homicide Instruction Should Have Foreclosed Any Option of a Jury Finding of Specific Intent

The State's BIO is devoid of almost any substantive argument on this question, emphasizing mainly procedural arguments instead. In any event, none of the State's arguments detract from Mr. Holiday's basic premise warranting review: the State's objection to a negligent homicide instruction was overruled because the trial court found that the evidence reasonably supported a *mens rea* of negligence. The trial court's ruling inherently foreclosed the possibility that any rational factfinder could find that the State had proven specific intent beyond a reasonable doubt. This issue was properly presented by Mr. Holliday to the Louisiana Supreme Court and is ripe for this Court's review.

A. The Issue is Preserved

Although the State claims that this argument was "completely absent" from Mr. Holliday's briefing before the Louisiana Supreme Court, *see* BIO at 13, the

pleadings tell a different story. In fact, Mr. Holliday specifically argued in pro se supplemental briefing[1] that:

> Where a reasonable view of the evidence would support a finding of negligent homicide there in fact exists a reasonable doubt whether there was specific intent. And, if upon all the evidence there exists a reasonable doubt, the rule as to circumstantial evidence is clear, in order to convict the evidence must exclude every reasonable doubt, thus where a reasonable view of the evidence would in fact support a finding of negligent homicide there exists a reasonable doubt as to whether there was specific intent and the accused should be entitled to an acquittal of the specific charge.
>
> Negligent Homicide (LSA-R.S. 14:32) negates specific intent; therefore because the evidence in the instant case did not exclude Negligent Homicide but in fact arguably supported it such that a reasonable view of the evidence would support a finding of negligent homicide defendant is entitled to an acquittal of the specific crime charged, in accordance with La.R.S. 15:438 and the Due Process Clause of the Fourteenth Amendment which requires a state conviction to be based on proof sufficient to prove the essential elements of the crime charged beyond a reasonable doubt.

It was actually the State—ignoring the arguments raised in the *pro se* brief as "duplicative" of the arguments in the counseled *Original Brief on Appeal*—that failed to address this argument before the Louisiana Supreme Court. Because this claim was properly presented to the Louisiana Supreme Court, this Court does have jurisdiction over the question presented.

B. A Reasonable View of the Evidence Necessitates a Finding of Reasonable Doubt

Although its only objection at the time the defense requested the negligent homicide instruction was that negligent homicide is not a responsive verdict to first-

[1] The Louisiana Supreme Court granted Mr. Holliday permission to file *pro se* briefing. *See* Pet. App. A at 4 n. 9.

degree murder, the State's BIO now attempts to argue—for the first time—that "[c]learly 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.'" BIO at 12. However, in order to preserve an objection for appellate review, a party must state "the grounds therefor" at the time of the ruling and cannot now, a decade later, supplement its objection with further reasons why the special instruction should not have been granted. *See* La. Code Crim. P. art. 841. In any event, these arguments are of no moment because the trial court found Mr. Holliday was entitled to a negligent homicide instruction based upon a reasonable view of the State's evidence.

The State's citation to *Mathews v. U.S.*, 485 U.S. 58 (1988) seems to confuse Mr. Holliday's argument. BIO at 13. To make abundantly clear, Mr. Holliday's argument has never been about inconsistent jury charges, but that the State has failed to prove every element of the offense—namely, Mr. Holliday's *mens rea*—where the trial court's ruling allowing a negligent homicide jury charge precludes a finding of specific intent beyond a reasonable doubt. First-degree murder requires specific intent, while negligent homicide carries a *mens rea* of criminal negligence. La. Rev. Stat. §§ 14:30, 14:32. Negligence negates specific intent under Louisiana law. *State v. Cortez*, 96-859, p. 8 (La. App. 3 Cir. 12/18/96); 687 So.2d 515, 520. The trial court's finding that a reasonable review of the evidence supports a *mens rea* of negligent homicide means that the State failed to meet its burden of proving every element of

first-degree murder beyond a reasonable doubt.[2] *In re Winship*, 397 U.S. 358, 364 (1970); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Evidence cannot both **reasonably** support criminal negligence and prove specific intent **beyond a reasonable doubt**, and it is beyond argument that the trial court found the evidence reasonably supported a *mens rea* of negligence. This Court should grant certiorari to consider this issue.

II. The BIO Underscores the Need for This Court to Resolve Disagreement Amongst the Courts Regarding When Officers Must Cease Custodial Interrogation under *Davis v. United States*

The State misapprehends both this Court's established Fifth Amendment jurisprudence and the purpose of presenting questions for certiorari. Disagreement among the state supreme courts and federal Courts of Appeal regarding interpretation of *Davis v. United States*, 512 U.S. 452 (1994) should militate in favor of, not against, a grant of certiorari to resolve the issue. Further, even with the State's distortion of the facts of Mr. Holliday's interrogation, once Mr. Holliday clearly invoked his right to counsel, law enforcement had the duty to immediately cease questioning until an attorney could be present. There should have been no further interaction, and as such the State's emphasis on Mr. Holliday's later statements only reveals how the officers violated *Edwards v. Arizona*, 451 U.S. 477 (1981) and its progeny by repeatedly questioning Mr. Holliday after his pleas for counsel. If there is any room for confusion as to an officer's duty once a suspect has followed an equivocal

[2] The State's argument that the trial court found that Petitioner was entitled to a negligent homicide charge based on a legal requirement and not a personal belief is nonsensical. BIO at 13-14. The court's finding that the charge was required under Louisiana jurisprudence inherently means that the court found the evidence reasonably supported the charge.

invocation of counsel with an unequivocal one, this Court should grant certiorari to resolve it.

A. The State's Argument Evinces a Fundamental Misunderstanding of this Court's Clear Command That a Suspect May Invoke His Right to Counsel at Any Time

The State does not dispute that, at approximately thirty-seven minutes into the interrogation in this case, Mr. Holliday clearly and unequivocally stated "I need a lawyer." *See* BIO at 19 (omitting any discussion of the interrogation between minutes eight and forty-two). Nor does the State dispute that the officers continued the interaction, asking why he needed a lawyer, and later implying that he was not entitled to a lawyer, rather than ceasing the interaction until an attorney could be present. *See id*. Instead, the State repeats the error of the Louisiana Supreme Court in ignoring unequivocal invocations of the right to counsel because of more equivocal invocations ("waffling" and "hiding") occurring both earlier in the interrogation, and later, after the officers ignored the unequivocal invocations. *Id*. at 19-21.

The State goes even further afield than the Louisiana Supreme Court, however. While the Louisiana Supreme Court found that law enforcement is allowed to "clarify" requests for counsel under *Edwards* and *Davis*, Pet. App. A at 33 ("detectives asked defendant no further questions beyond what was necessary to clarify defendant's request for counsel"), the State asserts that any invocation of the right to counsel must be made at the time of the *Miranda* warnings, that is, "prior to" any interrogation. BIO at 27-28 & n. 4 (arguing that Mr. Holliday made no request for counsel "prior to" interrogation and dismissing the case law cited in the *Petition* as "filler" because "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 is simply not the law. No reading of this Court's Fifth Amendment jurisprudence can be interpreted to require someone to invoke a right to counsel **before** interrogation. If there was any question that the *Miranda* decision required cessation of questioning whether counsel is invoked prior to or during interrogation, this Court in *Edwards* clarified that 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." *Edwards*, 451 U.S. at 484-85; *see Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966) ("[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease"); *see also Berghuis v. Thompkins,* 560 U.S. 370, 387-88 (2010) ("[a]ny waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease"). The State's insistence that a suspect invoke his right to counsel before the first question is asked, or lose his right to counsel forever, runs contrary to this Court's precedent. The State's wholesale dismissal of Mr. Holliday's arguments on this ground is misguided, as his mid-interrogation invocations were valid invocations and should have ended the questioning immediately.

Similarly, the State attempts to bolster the Louisiana Supreme Court's decision by changing the issue from whether Mr. Holliday's Fifth Amendment rights under *Edwards* were violated by the continued questioning after his invocation of his

right to counsel, to whether Mr. Holliday's invocation of his right to *remain silent* was respected by officers. BIO at 16. This case has never been about the right to remain silent; *Connecticut v. Barrett*, 479 U.S. 523 (1987) itself is a case about the invocation of the right to counsel limited to precence during a written statement. If the officers in *Barrett* had continued to repeatedly bring up the prospect of obtaining a written statement, including bringing in a separate officer to take the statement, and ultimately obtained and introduced the statement at trial, the result would have been different. *See id.* at 525-26. Here, despite Mr. Holliday's early statement that he needed a lawyer for "the DNA part," officers repeatedly brought up the subject of DNA, repeatedly attempted to persuade Mr. Holliday to give a sample, and ultimately obtained the sample. The State introduced not only the results of the DNA testing but also the entire recorded interchange, and argued that his reluctance to give a voluntary sample—and his requests for counsel—were evidence of guilt.

To clear up the State's confusion about the basis of Mr. Holliday's claim, *see* BIO at 17, Mr. Holliday's invocation of his right to counsel should have been followed by complete cessation of questioning until counsel could be present. *See Minnick v. Mississippi*, 498 U.S. 146, 153 (1990). Simply put, there should have only been one invocation of counsel, because the interrogation should have ended at the point the invocation was made. *Edwards*, 451 U.S. at 484-85. Instead, Mr. Holliday's clear statements—"I need a lawyer, man;" "No, where's my lawyer?" "Get me my lawyer;" "Get me a lawyer"—were followed by officers continuing the interrogation and implying that counsel could not be present ("Who's your attorney?" "I can't just pay

for you one."). The Fifth Amendment was violated the first time officers continued questioning after Mr. Holliday asked for a lawyer; the remainder of the recorded interrogation should have been suppressed. *See Davis*, 512 U.S. at 461. The question for this Court is whether limited or equivocal assertions of the right to counsel allowed officers to continue questioning in an attempt to "clarify" his request under *Davis*.

B. The Brief in Opposition Downplays Mr. Holliday's Repeated Requests for Counsel and Highlights the Error of the Louisiana Supreme Court in Justifying Continued Questioning as "Clarification"

Though the BIO attempts to paint a picture of a suspect who is begging to be interrogated, a plain review of Mr. Holliday's statements show that this is not the case. Mr. Holliday requested the presence of counsel **at least fourteen times** throughout his questioning, and demonstrated fear and confusion about the interrogation process and his rights, which officers deliberately did not clarify. The BIO characterizes the continued interrogation as "good police practice," yet *Edwards* makes no such exception for continued questioning in the face of a request for counsel.

As detectives attempted to take photographs of him, Mr. Holliday tries to refuse and says, "No, where's my lawyer?" More officers enter the room and continue to question Mr. Holliday; he then unequivocally stated, "**Get me my lawyer.**" Instead of ceasing the interrogation, the detective misled Mr. Holliday by stating that he cannot pay for an attorney and that it is "up to the judge" whether he is entitled to one. Later, an officer asks, "Ok, so you want to talk without a lawyer?" and Mr.

Holliday responds, plainly, "**No.**" At different points in the interrogation, Petitioner states "I need a lawyer" and "I need a lawyer to be present."

The State claims the officers "sought to, out of an abundance of caution, end the questioning." BIO at 19. This is a disingenuous portrayal which ignores the reality that officers had complete control and power in the interrogation room, and could have ended the communication at any time. Though couching the admission in qualifiers, the State also acknowledges that at trial, the interrogating officer admitted on cross-examination that Mr. Holliday asked for a lawyer more than once. BIO at 18. The State justifies the continuation of questioning by categorizing the officers' re-engagement with Mr. Holliday as "good police practice" and "asking clarifying questions," when in fact, this was when officers were telling Mr. Holliday they could not get him a lawyer, that he would not be going home that night because he asked for a lawyer, and asking him ***why*** he wanted a lawyer and what he was so worried about. *See Miranda*, 384 U.S. at 467 ("the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely").

The Louisiana Supreme Court's holding in this case validates the officers' continuation of questioning as "necessary to clarify defendant's request for counsel." Pet. App. A at 33. The State's position in the BIO actively encourages officers to disregard requests for counsel where it can be later claimed that earlier requests were "unclear." If this ruling is allowed to stand, it will result in the continued erosion of

Edwards's Fifth Amendment protections and confusion as to the proper interpretation of *Davis*. This Court should grant certiorari to explain the implications of an earlier equivocal or limited request for counsel under *Davis* on a later unequivocal request for counsel under *Edwards*.

C. The State Does Not Contest that a Circuit Split Exists Regarding the Interpretation of *Davis*

Finally, the State expresses bafflement about the *Petition*'s "comparative summary of various state and federal case law" regarding the limitations of *Edwards*, arguing that the "lengthy discussion of random case law" was not relevant to the issue at hand. BIO at 28, 27 at n. 4. Rule 10 of this Court states that: "A petition for a writ of certiorari will be granted only for compelling reasons," including where "(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Thus, one of this Court's primary purposes is to resolve conflicts amongst the states and the circuits regarding matters of federal law or interpretations of this Court's precedent. The *Petition* properly demonstrates that there is significant disagreement amongst the state courts of last resort and Circuit Courts of Appeals regarding when officers must cease questioning of a suspect under *Davis v. United States*, 512 U.S. 452, 460 (1994).

The State does not contest the Circuit split that Mr. Holliday identified. And, in fact, there is significant disagreement among lower courts regarding the implications and interpretation of "equivocal," "ambiguous" or "limited" requests for counsel. Courts do not agree whether words such as "could," "maybe," or "should"

triggers the Fifth Amendment protections. Pet. for Cert. at 22-24. Moving beyond a particular word or phrase, some courts look to circumstances, timing, and urgency, while other courts look to someone's demeanor or manner of expression to determine equivocacy.[3] Pet. for Cert. at 24-26. The divergent interpretation of *Davis* in the lower courts results in inconsistent application of federal law across jurisdictions, and resolution of these differing standards can be fashioned by this Court alone. Accordingly, Mr. Holliday requests that this Court resolve the incongruence in lower authority.

III. This Case Presents the Ideal Vehicle for this Court to Decide Whether a Capital Juror May Refuse to Consider Nonstatutory Mitigating Circumstances

The BIO makes two key concessions in this case. First, the State goes beyond the Louisiana Supreme Court's euphemizing of the jurors' responses as not "promis[ing] to accord specific weight" to the nonstatutory mitigating circumstances in this case, and candidly admits that the jurors "could not consider" the mitigating circumstances. *See* BIO at 31-32, Pet. App. A at 23. Second, the State admits that, although this Court has handed down a wealth of opinions regarding whether the sentencer may be precluded from considering, or refuse to consider, the defense mitigating circumstances, this Court has not yet clarified whether a capital juror may be struck for cause for refusing to consider the mitigating circumstances. *See* BIO at 32-35. The parties are thus in agreement that this case squarely presents the

[3] The State argues that even if there is a circuit split to be resolved, this case is not the proper vehicle to address it because Mr. Holliday did not make an equivocal request for counsel "prior to" questioning. BIO at 27. This is, again, a misunderstanding of this Court's commands in *Miranda* and *Edwards*, as explained in section II(A) *supra.*

question raised in the *Petition*, and that the question is ripe for this Court's consideration. The only disagreement is over the answer to the question, which this Court should grant certiorari to decide.

A. The State Agrees that the Jurors at Issue "Could Not Consider" the Mitigating Circumstances in this Case

The State does not dispute that the jurors at issue here would refuse to consider the relevant mitigating circumstances in this case. Instead, the State admits that Juror Carlock "**could not**" consider nonstatutory mitigating circumstances of a "fatherless home, substance abusing parent, difficult home life;" Juror Lambert "**could not** consider a fatherless, alcoholic, abusive home;" and Juror Mitchen "**did not believe he could** consider an abusive childhood." BIO at 31-32.[4] This case thus squarely presents the issue of whether a juror may refuse to consider nonstatutory mitigating circumstances and nevertheless be qualified to serve on a capital jury. Moreover, this case does not involve statutory mitigating circumstances. With jurors who would not consider the only relevant mitigating circumstances in the case, Mr. Holliday's case for life was stripped of any force it may have had.

B. The Louisiana Supreme Court's Decision Violated this Court's Principle that the Sentencer Must Not Refuse to Consider Nonstatutory Mitigating Circumstances

1. The Louisiana Supreme Court's Decision Runs Contrary to This Court's Eighth Amendment Jurisprudence

[4] Additionally, the State omits the fact that Juror Mitchen considered mental illness "an excuse" for bad behavior and stated "I more likely would not consider" mental illness as a mitigating circumstance. *See* Pet. App. A at 22.

The Louisiana Supreme Court held that a juror may refuse to consider mitigating circumstances, as long as they are not statutory. The Louisiana Supreme Court's ultimate holding, quoted in the BIO, is as follows:

> 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).

Pet. App. A at 23. In light of the State's "disagreement" with the meaning of this holding, it is worth a closer examination. First, the court finds that the jurors at issue "did not promise to accord a specific weight" to the nonstatutory mitigating circumstances in this case. This is an understatement to say the least. As the State concedes, the jurors at issue **could not consider** the nonstatutory mitigating circumstances. *See* BIO at 31-32. No one asked the jurors what weight they would assign to a particular mitigating circumstance; what was asked during voir dire was whether the jurors could consider the circumstances **at all**. The jurors candidly admitted they could not.

The Louisiana Supreme Court found that although the jurors could not consider the nonstaututory mitigating circumstances, they could consider the *statutory* enumerated mitigating circumstances. If the court's holding is that jurors need not be willing to consider nonstatutory mitigating circumstances if they are willing to consider statutory mitigating circumstances, the holding is contrary to the basic, indisputable principle that a sentencer must consider nonstatutory mitigating circumstances. *See Skipper v. South Carolina*, 476 U.S. 1, 4 (1986).

However, the court does not stop there. The court concludes its holding by finding that the jurors "each appropriately indicated they would consider any other mitigating factor they deemed relevant" under the catch-all provision, La. C.Cr.P. 905.5(h). The consequence of this finding is that individual jurors would be free to determine that a bad childhood, mental illness, and child abuse were not relevant to the determination of whether the defendant should be sentenced to death. On the contrary, this Court has held that nonstatutory mitigating circumstances like an unhappy childhood are *constitutionally* relevant to a defendant's moral culpability. *See*, *e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 236 (2007); *Penry v. Johnson*, 532 U.S. 782, 798 (2001).

The State adopts the Louisiana Supreme Court's position that, because of the existence of the statutory catch-all, the jurors' refusal to consider the mitigating circumstances in this case may be excused. However, that a juror would consider other circumstances not present in this case does Mr. Holliday no good. A capital defendant is entitled to individualized sentencing. *See Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978). And "the fundamental respect for humanity underlying the Eighth Amendment" required the jurors in this case to consider Mr. Holliday's character and background, his history of mental illness, and his childhood of neglect and abuse. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The Louisiana Supreme Court's decision violated the constitutional requirement of individualized sentencing.

2. The State's Attempt to Cabin the Louisiana Supreme Court's Decision as Solely Based on State Law is Unavailing

The State's characterization of the Louisiana Supreme Court's decision in this case as "applying state jurisprudence to interpret state law" is a cavalier attempt to inoculate the decision from federal review and should not be credited. *See* BIO at 29. In fact, the court's decision relied upon this Court's precedent. In his briefing before the Louisiana Supreme Court, Mr. Holliday based his claim on this Court's Eighth Amendment jurisprudence in cases such as *Abdul-Kabir*, 550 U.S. at 246-47 (2007), *Tennard v. Dretke*, 542 U.S. 274, 278 (2004), and *Lockett*, 438 U.S. 586, 586 (1978). Mr. Holliday also discussed Louisiana decisions applying this Court's jurisprudence, for example, *State v. Williams*, 01-1650 (La. 11/1/02); 831 So.2d 835, 847, which stated that "[a]t the bedrock of the United States Supreme Court's evolving capital punishment jurisprudence over the past quarter century is the principle that 'the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the offense.'" (quoting *Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989)). The Louisiana Supreme Court in *Williams* held that "a juror must commit himself or herself to keeping an open mind with respect to not only the statutory mitigating circumstances, but also any non-statutory circumstance the defendant proffers as the basis for returning a sentence less than death." 831 So.2d at 847.[5] And in its decision in this case, the Louisiana Supreme Court referred to this Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and also quoted Justice Brenann's opinion dissenting from the denial of

[5] The court in *Williams* ultimately denied relief due to the defense counsel's "vague questioning" (there was no definitive answer on the question of whether the juror would consider a bad childhood) and a sustained State objection to which the defense did not object. *Id*. at 847-48.

certiorari in *Heiney v. Florida*, 469 U.S. 920 (1984) (discussing the Florida court's holding that "lingering doubt" is an invalid mitigating factor). Pet. App. A at 23. Of course, even if the Louisiana Supreme Court cited to no federal authority, the issue of whether a sentencer must give meaningful consideration to the evidence in mitigation proffered by the defense is clearly one of federal constitutional law. *See Smith v. Texas*, 550 U.S. 297, 315 (2007). As such, the State's attempt to thread a nonexistent needle should be rejected.

C. This Court's Jurisprudence Requiring the Consideration of Nonstatutory Mitigating Circumstances Should Apply to Jurors as Sentencers and Fact-Finders

As discussed in the *Petition*, the principle that runs throughout this Court's Eighth Amendment jurisprudence is that the sentencer, whether that is a judge or a jury, must be able to consider and give independent mitigating effect to the evidence the defendant presents in mitigation. *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings*, 455 U.S. at 114; *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This is true whether it is a statute, jury instruction, or simply the personal opinion of the sentencer. *See Hitchcock*, 481 U.S. at 394.

The State's observation that this Court has never squarely held that a juror is subject to removal for cause if he or she cannot consider the nonstatutory mitigating circumstances in the case, s*ee* BIO at 32, 36, is precisely the reason why Mr. Holliday seeks a writ of certiorari. That the Louisiana Supreme Court's decision conflicts with the decisions of other state supreme courts or federal courts of appeal, and that this issue has not been settled by this Court, does not diminish the need for this Court to

rule. Indeed, it is a consideration weighing in favor of review. *See* Supreme Court Rule 10.

Although the State warns that Mr. Holliday's position would allow the defense "to determine what factors are relevant to mitigation," BIO at 37, this Court has already established the principle that the jury must be able to "give meaningful effect to a **defendant's** mitigating evidence." *Abdul-Kabir*, 550 U.S. at 264 (emphasis added). Like this case, the defendant in *Abdul-Kabir* presented two categories of mitigation evidence: evidence of an unhappy childhood, and mental illness stemming from the neglect and abandonment he suffered as a child. *Id*. at 239-42. This Court conducted an individualized inquiry into the defendant's evidence in mitigation before holding that the Texas special jury issues violated the Eighth Amendment by failing to allow the jury to adequately consider the mitigation presented. *Id.* Had the defense presented other mitigation that could be adequately considered given the Texas special issue scheme, the result would have been different. *See Johnson v. Texas*, 509 U.S. 350, 368 (1993) (holding that the Texas special issues allowed adequate consideration of the defendant's youth as a mitigating circumstance). Likewise, if the jurors here had agreed to meaningfully consider the defense mitigation evidence, but would have refused to consider other evidence not present in this case (*e.g.*, defendant believed there was a moral justification for his conduct, La. Code Crim. P. art. 905.5(d)), there would be no basis for a cause challenge.

In *Hitchcock v. Dugger*, although Florida law allowed consideration of nonstatutory mitigating circumstances, the sentencing judge "refused to consider"

the evidence of nonstatutory mitigating circumstances such as a troubled childhood, his potential for rehabilitation, and his voluntary surrender to authorities. 481 U.S. at 398-99. This Court reversed, holding that the sentencing judge's refusal to consider the nonstatutory mitigating circumstances violated the petitioner's right to a sentencing proceeding where the sentence considers all relevant mitigating evidence. *Id*. *See Skipper*, 476 U.S. at 4.

The Constitution guarantees a capital defendant the right not only to determine the evidence in mitigation to present, but also the right to require the sentencer to give "*independent mitigating weight* to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." *Lockett*, 438 U.S. at 605 (emphasis added). The Louisiana Supreme Court's holding that a defendant is not entitled to "special consideration to the mitigating factors he would be presenting" runs contrary to *Lockett*'s guarantee. *See* Pet. App. A at 23. The State, however, seems to be arguing the inverse: that nonstatutory mitigating circumstances should be viewed as optional or lesser than the enumerated statutory mitigating circumstances. *See* BIO at 37 n. 8. Inviting this Court to discount certain "ubiquitous" mitigating circumstances—difficult upbringing, child abuse, and mental illness—would allow jurors to unilaterally close the door to the defense's proffered evidence. Under the State's concept of mitigation, if the sentencer, in this case the jury, is allowed to deem mitigating circumstances "irrelevant," the proceeding would violate the Eighth Amendment right that the jury "consider and give effect to a capital defendant's mitigating evidence." *See Tennard*, 542 U.S. at 285.

D. The State's Interpretation of Louisiana's Death Penalty Scheme Would Violate the Eighth Amendment

In *Roberts v. Louisiana*, this Court struck down Louisiana's capital sentencing statute that made the death penalty mandatory for the killing of a police officer, holding that "it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant." 431 U.S. 633, 637 (1977). Enacted after *Roberts*, the current Louisiana capital sentencing scheme contains a list of specific mitigating circumstances, as well as a catch-all that allows the jury to consider "any other circumstance" in mitigation. La. Code Crim. P. art. 905.5. The scheme thus attempts to satisfy the duel constitutional requirements of channeling the jury's discretion to avoid arbitrary results, *see Furman v. Georgia*, 408 U.S. 238, 253 (1972) (Douglas, J., concurring), and requiring the consideration of the defendant's mitigating evidence even if it falls outside the specific enumerated mitigating circumstances, *see Eddings*, 455 U.S. at 114.

The State's concept of Louisiana's capital sentencing scheme would allow individual jurors to discount and disregard the defendant's mitigating circumstances if the circumstances are "ubiquitous in our society," or unilaterally decide that the circumstances are "irrelevant" in light of the conviction for first-degree murder. *See* BIO at 35-37. Such a reading of the law would allow for unbridled discretion of the jurors to determine relevancy of mitigating circumstances. As this Court has held, it is the law that determines relevancy, not the jurors. *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (noting that "relevance exists even if the fact-finder fails to be persuaded by that evidence") (quoting dissenting opinion below); *see also Payne v.*

Tennessee, 501 U.S. 808, 822 (1991) ("[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances" (quoting *Eddings*, at 114)). This Court should grant certiorari to resolve the question presented and avoid this unconstitutional interpretation of Louisiana's capital sentencing scheme.

CONCLUSION

For the reasons set out in the original *Petition* and those contained herein, Mr. Holliday respectfully requests that this Court grant the petition to review the Louisiana Supreme Court's decision, or grant the petition and summarily reverse.

Respectfully Submitted,

/s Cecelia Trenticosta Kappel

Cecelia Trenticosta Kappel*
* Counsel of Record
Erica Navalance
Shanita Farris
The Capital Appeals Project
1024 Elysian Fields Avenue
New Orleans, LA 70116
(504) 529-5955
ctkappel@defendla.org