No. 16-8255

IN THE
Supreme Court of the United States

ROBERT MCCOY,
Petitioner,

v.

LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether it is unconstitutional for defense counsel to admit an accused's guilt over the accused's express objection.

INTEREST OF AMICUS CURIAE[1]

The American Bar Association ("ABA") is the leading voluntary organization of legal professionals in the United States. The ABA's membership comprises more than 400,000 members from all fifty states and U.S. territories, and includes prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, nonprofit organizations, and government agencies. ABA members also include judges, legislators, law professors, and law students.

An important component of the ABA's mission is to advocate for the ethical and effective representation of all clients, and promote the fair and effective administration of justice. *See* ABA CONST. ART. 1, § 1.2. The ABA is a leading expert on legal ethics and the standards of practicing law, including criminal and capital defense. And while the ABA takes no position on the constitutionality of the death penalty *per se*, the ABA considers a defendant's Sixth Amendment right to defend himself and to the assistance of counsel to be of exceptional importance in capital cases.

The ABA has promulgated standards and guidelines for the effective representation of criminal defendants, including in capital cases. The ABA's role

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[1] Pursuant to Supreme Court Rule 37.3(a), the ABA certifies that all parties have consented to the filing of this brief. Pursuant to Rule 37.6, the ABA certifies that no counsel for a party authored this brief in whole or in part, and no persons other than the ABA or its counsel made a monetary contribution to its preparation or submission.

in developing such standards dates back to the 1908 Canons of Professional Ethics, and includes the 1983 publication of the Model Rules of Professional Conduct, which form the basis for rules governing the professional conduct of lawyers in almost every state. The ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("Guidelines"), first adopted as ABA policy in 1989 and revised in 2003, establish a baseline for effective representation at all stages of a capital case. The Guidelines have been widely adopted by state and local bar associations, indigent defense organizations, and by court rule in many jurisdictions.

This case addresses the core of the Sixth Amendment and of the attorney-client relationship—namely, a client's right to decide whether to concede guilt or to defend against the charges against him or her, and the proper role of an attorney once the client has expressly made that decision and conveyed it to counsel. With respect to those issues, the ABA's long history of developing, refining, and advocating for national standards governing the attorney-client relationship informs a perspective that may be of benefit to the Court.

SUMMARY OF ARGUMENT

This case involves a foundational principle of the attorney-client relationship: an attorney serves the interests of his or her client, and must respect the client's right to make fundamental decisions regarding the litigation of his or her case. There is no decision more fundamental in a criminal case than the decision whether to admit or contest guilt. And

while the deference an attorney owes to a client's strategic litigation decisions has important limits, the decision at issue in this case resides at the core, not the outer edges, of the classes of client decisions that counsel lacks discretion to overrule.

The decision of the Louisiana Supreme Court is contrary to firmly entrenched constitutional norms that undergird the policy guidance promulgated by both the ABA and the Louisiana State Bar Association. A mentally competent client has the right to decide whether to contest or admit guilt.[2] Mr. English's usurpation of Mr. McCoy's clearly-expressed decision to contest guilt at trial, however well intended, violated the principles underlying the proper role of counsel in an attorney-client relationship as laid out in the Constitution and the rules, guidelines, and standards of the ABA and the Louisiana State Bar Association.

ARGUMENT

This case presents the question whether defense counsel may unilaterally override the client's explicit direction to seek an acquittal by contesting guilt, and instead pursue the opposite strategy of admitting guilt at trial in the hope of leniency. Under the Sixth Amendment—as well as under longstanding policies of the ABA and the Louisiana State Bar Association—the answer to that question is no.

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[2] "At a hearing held on November 14, 2008[,] the trial court noted that [two] experts [had] found [Mr. McCoy] competent to stand trial." JA38.

This case arises from the 2011 trial of Petitioner Robert McCoy for the murders of his estranged wife's son, mother, and step-father. A month prior to trial, Mr. McCoy's counsel, Larry English, told him that the case could not be won and that Mr. McCoy's best strategy would be to plead guilty, but Mr. McCoy rejected that advice. Two weeks before the trial date, Mr. English informed his client that, despite Mr. McCoy's stated intentions regarding his case, and his *pro se* alibi notice, Mr. English would not offer any alibi evidence, and would be conceding Mr. McCoy's guilt in an effort to save his life. Mr. McCoy expressly opposed this strategy and informed both counsel and the trial court of his opposition. He sought new trial counsel or to represent himself, but the trial court denied his request as untimely.

At trial, Mr. McCoy attempted to advance his innocence claim, but was ignored and contradicted by his lawyer from the outset of the trial to its end. Even after Mr. McCoy testified that he was innocent, and explained that he was out of state and therefore could not have committed the crimes, Mr. English told the jury that Mr. McCoy had committed the murders, that the prosecution had been relieved of its burden of proof, and that there was no alibi defense. A unanimous jury convicted Mr. McCoy of all three counts of first degree murder. The Louisiana Supreme Court denied the appeal and affirmed the three convictions and death sentences.

Amicus respectfully urges this Court to hold, consistent with longstanding Sixth Amendment

principles and with rules and guidelines of the ABA, that a lawyer may not confess his client's guilt to the jury over the client's express objection. ABA rules, standards, and guidelines as well as state law counterparts[3] provide guidance on the appropriate role of attorneys in assisting their clients. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Here, Mr. English's unilateral decision to overrule his client's stated objective of contesting guilt violated rules of the ABA and the Louisiana State Bar Association governing attorney-client relationships, as well as the constitutional rights that inform those rules.

I. THE SIXTH AMENDMENT GRANTS THE CLIENT THE RIGHT TO CONTROL THE FUNDAMENTAL OBJECTIVES OF HIS OR HER DEFENSE

ABA policies governing the allocation of authority in an attorney-client relationship are based on and implement the constitutional guarantees of the accused. One such principle is the notion that the attorney is an assistant to the client. *Faretta v. California*, 422 U.S. 806, 820 (1975) (noting that the Sixth Amendment "speaks of the 'assistance' of

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[3] The Louisiana Rules of Professional Conduct are largely modeled after the ABA Model Rules of Professional Conduct. *See* AMERICAN BAR ASSOCIATION, *State Adoption of the ABA Model Rules of Professional Conduct*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited November 20, 2017) (Louisiana first adopted the ABA's Model Rules of Professional Conduct in 1986).

counsel, and an assistant, however expert, is still an assistant"). The attorney, as an assistant, is obliged to respect the client's autonomy to make fundamental decisions about his or her case. As this Court has explained, the Sixth Amendment "grants to the accused personally the right to make his defense," because it is the defendant "who suffers the consequences if the defense fails." *Id.* at 819-20. "Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." *Id.* at 821.

The principle that fundamental decisions are committed to the client—such as the decisions whether to plead guilty, to testify, or to appeal—appropriately respects the client's ultimate right to control the core objectives of his or her defense. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979) ("As part of th[e] right to make a defense, the [Sixth] Amendment speaks of the 'assistance' of counsel, thus contemplating a norm in which the accused, and not a lawyer, is master of his own defense.") (citing *Faretta*, 422 U.S. at 819-20).

As this Court explained in *Strickland v. Washington*, 466 U.S. 668 (1984), an attorney's role as "assistant to the defendant" creates "the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Ibid.* at 688. Prior to *Strickland*, this Court explained that "fundamental" decisions in a case include "whether to plead

guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citing ABA STANDARDS FOR CRIMINAL JUSTICE §§ 4-5.2, 21-2.2 (2d ed. 1980)). For such decisions, this Court has "recognized that the accused has the ultimate authority." *Id.*; *see also Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, J., concurring) ("[S]uch basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make.") (citing ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 5.2 (App. Draft 1971)).

The decision whether to confess guilt at trial—like the decision whether to plead guilty at the outset of a case and the decision to testify—is a fundamental decision that implicates a defendant's Fifth Amendment privilege against self-incrimination. *See State v. Carter*, 14 P.3d 1138, 1148 (Kan. 2000) (holding that a refusal to present defendant's innocence defense, and conceding the defendant's involvement, betrayed "the defendant by deliberately overriding his plea of not guilty"). Indeed, a defendant's right to contest guilt at the pleading stage means little if counsel is permitted to undermine the defendant's wishes with repeated public statements about the defendant's guilt during trial. Timing should not determine whether a client who has exercised the fundamental right to refuse to admit guilt in a criminal case may be overruled by his or her counsel.

Florida v. Nixon, 543 U.S. 175 (2004), is fully consistent with the proposition that counsel may

not override a client's express decision to contest guilt. Defense counsel in *Nixon* "attempted to explain . . . [his proposed concession] strategy to Nixon at least three times," but, unlike Mr. McCoy in this case, "Nixon was generally unresponsive during their discussions. He never verbally approved or *protested* [his counsel's] proposed strategy." *Nixon*, 543 U.S. at 181 (emphasis added) (citations omitted). The Court held that "when a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course." *Id.* at 178.

Here, in contrast to *Nixon*, Mr. McCoy was fully engaged with his defense, and unequivocally expressed his opposition to Mr. English's strategy of conceding guilt. Mr. McCoy's testimony on his own behalf at trial makes clear that his consistent objective was to maintain his innocence and seek an acquittal. The trial court nonetheless required Mr. McCoy to proceed to trial with an attorney intent on admitting his guilt. Mr. English's conduct—including undermining Mr. McCoy's alibi both before and after he testified—overrode Mr. McCoy's objective, violating his right to control the basic goals of his own defense.

Mr. McCoy expressly objected to the implementation of a concession strategy, and the lower courts have recognized that *Nixon* is inapposite under such circumstances. *See People v. Bergerud*, 223 P.3d 686, 693, 699 n.11 (Colo. 2010) (en banc) (distinguishing *Nixon* where "attorneys had effectively

conceded [the client's] guilt to lesser homicide offenses despite [the client's] desire to defend against the charges and seek acquittal" on grounds that "the defendant *explicitly* objected to counsel's actions on his behalf") (emphasis in original); *Cooke v. State*, 977 A.2d 803, 847 (Del. 2009) ("[W]here, as here, the defendant *adamantly objects* to counsel's proposed objective to concede guilt and pursue a verdict of guilty but mentally ill, and counsel proceeds with that objective anyway, the defendant is effectively deprived of his constitutional right to decide personally whether to plead guilty to the prosecution's case, to testify in his own defense, and to have a trial by an impartial jury. The right to make these decisions is nullified if counsel can override them against the defendant's wishes.") (emphasis in original).

The ABA guidelines on which the *Nixon* Court relied offer no support for the decision below. The *Nixon* Court, for example, cited commentary to ABA Guideline for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, which explains that in capital cases where "the evidence is overwhelming and the crime heinous . . . 'avoiding execution [may be] the best and only realistic result possible.'" *Nixon*, 543 U.S. at 191 (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.9.1 CMT (rev. ed. 2003) [hereinafter GUIDELINES]). While it may be true that conceding guilt in the hope of avoiding death is a reasonable strategic decision in some cases, the decision remains the client's to make. Neither the Sixth Amendment nor the ABA's Guidelines au-

thorize counsel to force an admission of guilt upon an objecting client simply because counsel believes it is good litigation strategy. *See* GUIDELINES § 10.9.1(f) ("Counsel should not accept any agreed-upon disposition without the client's express authorization."). Because Mr. McCoy expressly exercised his right to reject Mr. English's proposed concession strategy, *Nixon* is not controlling.

II. ABA AND LOUISIANA STATE BAR ASSOCIATION GUIDELINES PROTECT THE CLIENT'S SIXTH AMENDMENT RIGHT TO DECIDE WHETHER TO ADMIT OR CONTEST GUILT

A. ABA and Louisiana State Bar Association Ethical Rules Confirm the Constitutional Guarantee That Clients Control the Fundamental Objectives of Their Representation

The ABA rules, standards, and guidelines relevant to this case closely track the constitutional principle that the client has the ultimate say over the objectives of his or her defense, and accordingly, advise that the decision whether to concede or contest guilt belongs to the client. Specifically, ABA Model Rule of Professional Conduct 1.2 ("Rule 1.2") and its Louisiana counterpart, Louisiana Rule of Professional Conduct 1.2, govern the scope of representation and the allocation of authority between a client and his or her counsel. Rule 1.2 clearly establishes that a lawyer's role is to execute the client's objectives and dictates that a lawyer "abide by a client's decisions concerning the objectives of representation"—in the case of Mr. McCoy, to seek an

acquittal—and "consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2014); *see* LA. RULES OF PROF'L CONDUCT r. 1.2(a) (2017). Rule 1.2 and its accompanying commentary are well established and embody longstanding policies that have been universally embraced by the legal community.

Certain basic decisions are left to clients and may not be overruled by defense counsel, including the fundamental decision whether to plead guilty. "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." MODEL RULES OF PROF'L CONDUCT r. 1.2(a); *see* ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTIONS § 4-5.2(b)(ii) (4th ed. 20015) [hereinafter STANDARDS] ("The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include[s]: what pleas to enter . . . ."); GUIDELINES § 10.5(c) CMT. ("Some decisions require the client's knowledge and agreement."). "A lawyer's duty under Rule 1.2(a) to defer to certain client decisions in a criminal matter is a necessary corollary of a criminal defendant's constitutional right to make decisions regarding matters that are 'fundamental' or 'substantive' because they derive from constitutional guarantees." ELLEN J. BENNETT ET AL., ANN. MODEL RULES OF PROF'L CONDUCT § 1.2 (8th ed. 2015) (collecting cases).

Although a decision to admit guilt at trial—unlike the decision to plead guilty, *see Nixon*, 543

U.S. at 188—may not always require the client's express prior consent, a lawyer cannot force the client to adopt such a strategy over his or her objection. Where a client expressly objects to conceding guilt, the decision to admit guilt is akin to pleading guilty in its "material impact on the case." GUIDELINES § 10.5(c); *see Carter*, 14 P.3d at 1148. Such an admission takes away the client's constitutional right to decide for himself whether to defend against the charges. It compromises both the client's right to testify and the corresponding right to remain silent. Admitting guilt at trial over the client's express objection is no different from forcing the client to plead guilty at the case's outset under the Constitution and ABA policies.

The contrary rule adopted by the Louisiana Supreme Court undermines the attorney-client relationship. As the ABA guidance recognizes, an attorney has a practical need to maintain the client's trust, as well as an obligation to advance the client's lawful objectives. "In the initial meeting with a client, defense counsel should begin the process of establishing an effective attorney-client relationship. This includes assuring the client of confidentiality, establishing trust, explaining the posture of the matter, discussing fees if applicable, *and inquiring about the client's objectives for the representation*." STANDARDS § 4-3.3(a) (emphasis added); *see also id.* § 4-3.1(b) ("At an early stage, counsel should discuss with the client objectives of the representation . . . ."); GUIDELINES § 10.5(a) ("Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client . . . ."). In capital cases, the

ABA advises that "[c]ounsel at all stages . . . engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as . . . the development of a defense theory; . . . presentation of the defense case; [and] . . . potential agreed-upon dispositions of the case." GUIDELINES § 10.5(c). While "[c]ertain decisions relating to the conduct of the case are for the accused[, and] others are for defense counsel, . . . counsel should give great weight to strongly held views of a competent client . . . ." STANDARDS § 4-5.2(a).

Here, two weeks before trial, well past "an early stage" in the case as prescribed by ABA Criminal Justice Standard for the Defense Functions § 4-3.1(b), Mr. English announced to his client his intention to "concede that [Mr. McCoy] had killed the three victims." JA286. Not only did Mr. English fail to "give great weight to [Mr. McCoy's] strongly held views," STANDARDS § 4-5.2(a), he disregarded Mr. McCoy's ultimate choice to maintain his innocence. Instead, Mr. English pursued his own personal strategy for "sav[ing Mr. McCoy's] life." JA286. And the day two weeks before trial that Mr. McCoy learned about Mr. English's concession strategy was, as Mr. English himself admitted, "essentially the end of [the] professional relationship." *Id.*

The Constitution, Rule 1.2 and its Louisiana counterpart clearly required Mr. English to "abide by [Mr. McCoy's] decisions concerning the objectives of representation," and "consult with [Mr. McCoy] as to the means by which they [we]re to be

pursued." MODEL RULES OF PROF'L CONDUCT r. 1.2(a); *see* LA. RULES OF PROF'L CONDUCT r. 1.2(a). "A lawyer who fails to carry out the objectives of a representation chosen by the client violates Rule 1.2." BENNETT ET AL., ANN. MODEL RULES OF PROF'L CONDUCT § 1.2 (collecting cases); *see, e.g., Taylor v. State*, 28 A.3d 399, 408 (Del. 2011) ("[A]n irreconcilable conflict existed between [the defendant's] desired result, a not guilty verdict, and his counsel's proposed strategy of raising the defense of guilty but mentally ill [("GBMI")] at trial. . . . [T]he trial judge denied . . . [defense counsel] the opportunity to present GBMI to the jury . . . . This ruling protected [the defendant's] individual right to determine whether or not to present a defense of GBMI to the jury . . . .") (internal quotation marks and alteration omitted).

The principle that the client must be permitted to make fundamental decisions relating to whether to admit or contest guilt is consistent with the substantial discretion that attorneys have to determine trial tactics and strategy. The ABA has long maintained that "[d]ecisions that involve tactics and trial strategy may constitutionally be made by the lawyer after consultation with the client." BENNETT ET AL., ANN. MODEL RULES OF PROF'L CONDUCT § 1.2; *see* STANDARDS § 4-5.2(d) ("Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what

motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced."). Consultation, while not mandatory for every decision relating to investigation or trial strategy, ensures that the attorney's assistance remains in line with the client's objectives for his or her defense. What counsel may not do, under the Sixth Amendment or ethical rules, is overrule the client's express decision to maintain innocence or admit guilt.

Finally, the trial court compounded Mr. English's failure to pursue Mr. McCoy's ultimate goal with decisions that increased the likelihood that Mr. McCoy's objectives would be bypassed. Specifically, the trial court denied Mr. McCoy's request for new counsel as untimely and allowed Mr. English to advance a concession strategy, despite having notice of Mr. McCoy's repeated and strenuous objections. *See* JA460-JA461; JA505-JA506.

B. Respecting Client Control Over Fundamental Decisions Is Consistent With the Ethical Duty of Candor to the Tribunal

The Louisiana Supreme Court erred in its conclusion that Mr. English's conduct was necessary to avoid violating the duty of candor toward the tribunal by eliciting false or perjured testimony. *See* JA208. That duty, which is enshrined in ABA Model Rule of Professional Conduct 3.3 and its Louisiana counterpart, Louisiana Rule of Professional Conduct 3.3, is not at issue here. "The prohibition against offering false evidence only applies if the lawyer *knows* that the evidence is false. A lawyer's

reasonable belief that evidence is false does not preclude its presentation to the trier of fact." MODEL RULES OF PROF'L CONDUCT r. 3.3 CMT. 8 (emphasis added); *see id.* CMT. 9 ("Because of the special protections historically provided criminal defendants . . . Rule [3.3] does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.").

Although his post-trial declaration claimed that he was "convinced that the evidence against Robert McCoy was overwhelming," JA286, there is no evidence that Mr. English *knew* Mr. McCoy's testimony (or the other evidence he sought to offer) was false. In fact, Mr. English noted that "[t]hroughout the entire period of [his] representation, Mr. McCoy adamantly maintained his innocence and claimed that he was out of state at the time of the killings." JA284-JA285. Even a good faith disagreement with such an innocence strategy does not implicate the duty of candor to the tribunal. Respecting a client's stated refusal to admit guilt is not akin to *knowingly* offering false testimony to a court, and only the latter is prohibited.

To be sure, "the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *United States* v. *Cronic*, 466 U.S. 648, 656 n.19 (1984). That said, where a criminal defendant

wishes to maintain his or her innocence during trial, defense counsel is obliged, at minimum, to hold the prosecution to the burden of proving guilt beyond a reasonable doubt. *See id.* ("[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt."). Defense counsel may hold the prosecution to its burden by undermining the prosecution's case through various means, including rigorous cross-examination. Such a strategy effectuates the client's stated goal of contesting guilt but does not entail violating the duty of candor to the tribunal.

Had Mr. English been presented with proposed testimony that he knew to be false, which did not happen here, he would have had other means with which to address that concern short of conceding his client's guilt. For example, an attorney has the option to seek withdrawal from the case. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 CMT. 15. Further, an attorney can refuse to participate in the presentation of affirmative evidence that the attorney knows to be false during the defense case. *See id.* CMT. 5 (Rule 3.3(a)(3) "requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes"). Under no circumstances is a lawyer ethically required, or allowed, to overrule the client's decision to defend the charges and tell the jury the client is guilty.

* * *

Longstanding ABA guidance rooted in the Sixth Amendment clearly provides that the client, not

counsel, must be permitted to decide the core objectives of a case. Accordingly, fundamental decisions such as whether to contest or concede guilt must be left for the client to make. To require a client to concede guilt, notwithstanding his or her clear objection, is at odds both with the Constitution as well as the relevant ABA rules, standards, and guidelines that implement basic constitutional principles governing the right to defend oneself and to the assistance of counsel.

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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