

No. 17-8174

IN THE
SUPREME COURT OF THE UNITED STATES

◇

RANDY PARKER,
Petitioner

v.

STATE OF LOUISIANA,
Respondent

◇

**On Petition for Writ of Certiorari to the
Louisiana Supreme Court**

◇

BRIEF IN OPPOSITION

◇

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
ARGUMENT	3-11
I. <i>Petitioner has failed to show that the issue was presented to, or decided by, the state court</i>	3-4
II. <i>In the alternative, if this Honorable Court finds jurisdiction, compelling reasons, and that the issue is in need of resolution by this Honorable Court, this case is not, as suggested by petitioner herein, “a good vehicle to decide the question presented”</i>	5-11
CONCLUSION	12
RULE 29 CERTIFICATE OF SERVICE	13
APPENDIX:	
<i>A - Copy of Petitioner’s Brief on Appeal to Court of Appeal, First Circuit</i>	
<i>B - Copy of Petitioner’s Application for Supervisory Writs to the Louisiana Supreme Court</i>	

TABLE OF AUTHORITIES

CASES:

<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	5
<i>Board of Directors of Rotary Int’l v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987)	3
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986)	5
<i>State v. Small</i> , 2011-K-2796 (La. 10/16/12), 100 So.3d 797	11
<i>Tison v. Arizona</i> , 481 U.S. 137 (1987)	9
<i>Webb v. Webb</i> , 451 U.S. 493 (1981)	3

OTHER:

La.C.Cr.P. art. 905.5.1	6
LSA-R.S. 14:93(A)(1)	9

ARGUMENT

Petitioner herein calls upon this Honorable Court to find that the imposition of life imprisonment without parole is constitutionally excessive when applied to an intellectually disabled defendant, regardless of age, convicted of felony murder, when the underlying felony involves “criminal negligence.” For the following reasons, the petition for writ of certiorari should be denied.

I. *Petitioner has failed to show that the issue was presented to, or decided by the state court:*

Absent very rare exceptions, when reviewing state court judgments under 28 U.S.C.A. 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 (1996). When the highest state court is silent on a federal question, this Court assumes that the issue was not properly presented. *Board of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). The aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had “a fair opportunity to address the federal question that is sought to be presented here.” *Webb v. Webb*, 451 U.S. 493 (1981).

The state has attached, as Appendix A and B respectively, petitioner’s briefs to the state’s intermediate court and the state’s highest court. An examination of petitioner’s argument in the courts below shows that his

argument with regard to sentencing was part and parcel of his argument in assignment of error number three¹ that the trial court, in finding the petitioner acted with “ordinary negligence” as opposed to “criminal negligence,” erred in finding the petitioner guilty of second degree murder.² (See Appendix A, pp. 18-23; Appendix B, pp.13-18)

In his petition before this court, petitioner avers that “This case involves the application of the Eighth and Fourteenth Amendments to three Louisiana statutes...” namely, those defining second degree murder, cruelty to juveniles, and *criminal negligence*,” and acknowledged the trial court’s finding that the petitioner was guilty of felony murder “for the unintentional killing of a child in the course of *criminally negligent* maltreatment.” (Petition, p. 7) (Emphasis added) As the state courts were not presented with, nor did they address, the question of whether a life-without-parole sentence on an intellectually disabled, *criminally negligent* defendant is unconstitutional, this Honorable Court should decline consideration of petitioner’s claim.

¹ This argument appears as assignment of error number two before the Louisiana Supreme Court.

²The state court rejected petitioner’s argument that he acted with “ordinary negligence” as opposed to “criminal negligence.” (Petitioner’s Appendix A, p. 10)

II. *In the alternative, if this Honorable Court finds jurisdiction, compelling reasons, and that the issue is in need of resolution by this Honorable Court, this case is not, as suggested by petitioner herein, “a good vehicle to decide the question presented.”*

A. Absence of evidence of intellectual disability:

First, there is no evidence of intellectual disability in the record. As noted by this Court in *Atkins v. Virginia*, 536 U.S. 304 (2002),

Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, 477 U.S. 399 (1986), with regard to insanity, we leave to the states the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.

The capital punishment exemption for intellectually disabled offenders is codified in La.C.Cr.P. art. 905.5.1, which provides a procedure to be used in the event that a capital defendant raises a claim of intellectual disability. Under the article, such a defendant has the burden of proving intellectual disability by a preponderance of the evidence. The article defines intellectual disability as: a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years. The article concludes with an advisory list of several medical conditions that do not necessarily constitute an intellectual disability, which includes behavioral disorders, difficulty in adjusting to school, emotional disturbance, emotional stress in home or school, lack of educational

opportunities, learning disabilities, mental illness, and temporary crisis situation.

The trial court made no explicit findings with regard to intellectual disability pursuant to applicable Louisiana authority, either in ruling on petitioner's motion to suppress, or in oral reasons for verdict rendered June 11, 2015. Nor could the trial court make such a finding absent evidence upon which to base such an opinion. Evidence in the record *does* indicate that petitioner may have suffered from a learning disability. Petitioner testified at a motion to suppress hearing that he was in special education classes from the third through the eighth grade and that he "couldn't read too good." (R. p. 327) Petitioner further told a detective in a videotaped interview that he had reached the tenth grade on his GED but "didn't get a chance to finish." Petitioner's aunt testified at trial that petitioner "had special needs" as a child, "was in special ed," and "was on...medicine to keep him calm and stuff like that." (R. p. 493)

The Court of Appeal, First Circuit correctly noted in footnote one of its opinion that the state declined to seek the death penalty because of the possibility that petitioner was intellectually disabled. The state, however, did not test the petitioner. The petitioner thereafter requested, and was granted, funds for employment "of a clinical psychologist/psychiatrist to assess his intellectual disability." (R. p. 210) If that assessment was done,

petitioner did not seek to present the results, if any, at the motion to suppress hearing, trial, or at sentencing.

The Court of Appeal, First Circuit noted trial court references to the defendant having a “limited education,” (p. 16) and being “an intellectually challenged individual.” (p. 22) The state submits that the intermediate state court’s references, in footnote five of its opinion, that “there was sufficient evidence in the record to establish the defendant’s disability,” and that “in its ruling, the district court found that the defendant had an intellectually disability,” are unfounded. In fact, subsequent language in the opinion, that “*Even if the defendant was intellectually disabled*, the Louisiana Supreme Court has upheld a sentence of life imprisonment...” (p. 24) indicates merely an *assumption* of intellectual disability for purposes of disposing of petitioner’s assignments of error related to sentencing and ineffective assistance of trial counsel.

Finally, petitioner, in his brief to the state supreme court, in the context of arguing the matter should have been remanded to the trial court for a *Strickland* hearing, acknowledged that “although there is unquestionably evidence in the record establishing at the very least cognitive limitations, and sufficient to raise the issue of intellectual disability, *proof of intellectual disability itself is not present in the record.*” (Appendix B, p. 21) (Emphasis added)

B. High level of culpability of the petitioner herein under the facts and established legal authority:

1. *Defendant's conduct amounted to intentional, rather than "criminally negligent" maltreatment:*

The trial court found the petitioner did not have specific intent to kill or inflict great bodily harm. The trial court further characterized petitioner's actions as an "attempt to discipline 23-month-old Demarcus for not being potty trained." (R. p. 615) However, upon review of the sufficiency of the evidence, the state intermediate court noted that under Louisiana law,

Second degree murder is the killing of a human being:...(2) When the offender is engaged in the perpetration or attempted perpetration of...cruelty to juveniles...even though he has no intent to kill or to inflict great bodily harm. Cruelty to juveniles is defined in LSA-R.S. 14:93(A)(1) as the "*intentional* or criminally negligent mistreatment or neglect by anyone seventeen years of age or older of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said child." *The term "intentional" as used in LSA-R.S. 14:93 refers to general criminal intent to mistreat or neglect and does not require a specific intent to cause the child unjustifiable pain and suffering. "Mistreatment" as used in this statute is equated with "abuse."* Criminally negligent mistreatment or neglect of the juvenile exists when, although neither specific nor general intent is present, there is such disregard of the interest of the juvenile that the defendant's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful person under like circumstances. (Appendix A pp. 3-4, emphasis added, citations omitted)

In rejecting petitioner's claim of insufficient evidence the Court of Appeal, First Circuit, found as follows:

The evidence clearly established that the victim was severely abused. By the defendant's own admission, he whipped the victim with a belt multiple times on the date of his death and

punched him until he “accidentally” hit the victim in his mouth. Medical testimony at trial clearly established that the victim’s death was caused by the trauma to his head, trunk, and extremities. The medical testimony also indicated that there had been rapid movements taking place in the victim’s head and brain. (Appendix A, p. 10)

The court of appeal noted evidence in the record that the petitioner had abrasions on the knuckles of his right hand. (Appendix A, p. 4) The court further noted petitioner’s admissions to police that he punched twenty-three-month-old Demarcus out of anger because the child had lost control of his bladder:

During Detective Dotson’s testimony at trial, he noted that the defendant admitted that he punched the victim multiple times, demonstrated how he did so, and gave a reason for doing so – that he was mad at the victim. (Appendix A, p. 7)

Also factoring prominently into the court’s decision was petitioner’s efforts to evade culpability during police questioning, and the fact that the petitioner delayed calling 911 after realizing the child was in distress. (Appendix A, p. 10)

The State of Louisiana avers that this is not a case of a negligent or misguided attempt at disciplining a child. This is a case of intentional child abuse.

2. *Alternatively, this petitioner was highly culpable in the victim’s murder:*

In *Tison v. Arizona*, 481 U.S. 137 (1987), this Court addressed the issue of whether the Eighth Amendment prohibits the death penalty in the case of the defendant whose participation in a felony that results in murder is

major and whose mental state is “one of reckless indifference to the value of human life.” This Court concluded that it did not.³ In reaching this conclusion, the Court noted that reckless disregard for human life “represents a highly culpable mental state that may support a capital sentencing judgment in combination with major participation in the felony resulting in death.” The court noted that “...reckless indifference to the value of human life may be every bit as shocking to the moral sense as an ‘intent to kill.’” The court concluded, holding that “the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.”

Petitioner herein was a major participant in the felony of cruelty to juveniles, having beaten the victim to death with his own two fists. Though petitioner argued in state court that the court found him to have acted with “ordinary negligence,” this is inaccurate, the trial court specifically finding that “the brutality of the injuries inflicted upon Demarcus was reckless.” (R. p. 615) The trial court also remarked that “this is one of the toughest bench trials...I’ve presided over in my sixteen years as a member of the

³In *Tison*, petitioner brothers, aged nineteen and twenty, and others, planned and participated in a jail break of their father from prison. A subsequent crime spree ensued as a result of the party’s efforts to evade apprehension, resulting ultimately in the gruesome, execution-style shooting deaths of a family of four, (from whom the party commandeered a vehicle) including a two-year-old boy. The brothers’ death sentences were upheld despite neither having pulled the trigger, or possessing intent to kill. Neither had a felony record.

judiciary...because of the senselessness of what happened to a defenseless baby.” (R. pp. 613-614)

This is clearly a case in which the reckless indifference to the value of human life is “every bit as shocking to the moral sense as an ‘intent to kill.’” Petitioner’s reckless disregard for human life implicit in knowingly engaging in severe abuse of a defenseless baby “represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.” *Tison*.

If in fact there is a case appropriate for resolution of the issue presented, this is not that case.⁴

⁴ The courts of the State of Louisiana have limited the application of the felony murder doctrine to those cases in which “the defendant or an accomplice performed the direct act of killing.” As such, in State v. Small, 2011-K-2796 (La. 10/16/12), 100 So.3d 797, the Court reversed a second degree murder conviction based upon a mother’s criminally negligent lack of supervision. In that case, the defendant had left her two small children at home in the middle of the night to go out drinking. A fire broke out in the apartment. One child made it to safety by jumping out of a window but the other child died from smoke inhalation. The Court found that the evidence *was* sufficient to prove negligent homicide.

CONCLUSION

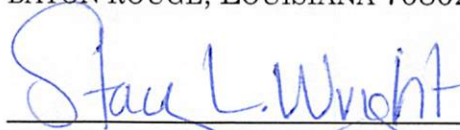
The petition for writ of certiorari should be denied, and the Louisiana Supreme Court affirmed.

RESPECTFULLY SUBMITTED,

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