***** CAPITAL CASE *****

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY CLARK, *Petitioner,*

v.

STATE OF LOUISIANA, *Respondent.*

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****

QUESTIONS PRESENTED

Mr. Clark represented himself at trial because his lawyer planned to concede his guilt of second-degree murder. The Louisiana Supreme Court held the *Faretta* waiver sufficient, finding that, under *State v. McCoy*, the decision whether to concede guilt belonged to counsel.

This Court granted Mr. Clark's petition, vacated the judgment and remanded the case for reconsideration in light of *McCoy v. Louisiana*, 584 U.S. __ (2018). *Clark v. Louisiana*, 138 S. Ct. 2671 (2018).

On remand, the Louisiana Supreme Court held: "We previously approved of this extensive *Faretta* colloquy in *State v. Clark*, 12-0508, pp. 62–63 (La. 12/19/16), 220 So.3d 583, 637–639, and the United States Supreme Court's decision in *McCoy v. Louisiana*, 584 U.S. —, 138 S. Ct. 1500, — L.Ed.2d — (2018), does not render it deficient even in hindsight." This gives rise to the following question:

1. **Whether a defendant's waiver of counsel is *not* knowing, intelligent and voluntary when the defendant's only other option was to proceed to trial with counsel who insisted, over defendant's objections, on conceding guilt?**

Remaining from the initial petition, is the emerging and broadening split concerning:

2. **Whether, under the Sixth and Eighth Amendments, the determination that death is the appropriate punishment must be made by a jury beyond a reasonable doubt?**

RELATED PROCEEDINGS

Louisiana District Court

State v. Jeffrey Clark, 20th JDC Parish Of West Feliciana, No. 04-WFLN-77 (May 23, 2011) (sentence imposed).

Louisiana Supreme Court

State v. Clark, 2010-1676 (La. 07/17/10), 39 So. 3d 594; 2010 La. LEXIS 1726 (mistrial granted).

State v. Clark, 2012-0508 (La. 12/19/16), 220 So. 3d 583; 2016 La. LEXIS 2512 (conviction and death sentenced initially affirmed).

State v. Clark, 2012-0508 (La. 06/28/19), ___ So. 3d ___; 2019 La. LEXIS 1618 (opinion on remand).

State v. Clark, 278 So. 3d 364, 2019 La. LEXIS 1932 (La., Sept. 6, 2019) (rehearing denied).

United States Supreme Court

Clark v. Louisiana, 138 S. Ct. 2671 (6/25/2018) (certiorari granted; judgment vacated and case remanded).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey Clark respectfully petitions for a writ of certiorari to review the decision of the Louisiana Supreme Court affirming his conviction and death sentence. Petitioner is the defendant and defendant-appellant in the courts below. Respondent is the State of Louisiana, the appellee in the courts below.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court affirming Mr. Clark's conviction and sentence issued June 28, 2019. *See* Appendix A, at Pet. App. 1a, *State v. Clark*, 2019 La. Lexis 1618 (6/28/2019). Rehearing was denied on September 6, 2019. *See* Appendix B, at Pet. App. 8a, *State v. Clark*, 2019 La. LEXIS 1932 (La., Sept. 6, 2019). The case was on remand from this Court in *Clark v. Louisiana*, 138 S. Ct. 2671, 201 L. Ed. 2d 1066, 2018 U.S. LEXIS 3953 (U.S., June 25, 2018) seeking certiorari from *State v. Clark*, 220 So. 3d 583, 2016 La. LEXIS 2512 (La., Dec. 19, 2016). *See* Appendix C, at Pet. App. 9.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Louisiana Supreme Court on the basis of 28 U.S.C. § 1257. The Louisiana Supreme Court denied Petitioner's appeal on June 28, 2019. The Louisiana Supreme Court denied Petitioner's application for rehearing on September 6, 2019. This Court granted petitioner's extension of time to file until January 17, 2020. This petition follows timely pursuant to Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented implicate the following provisions of the United States Constitution and the Louisiana Code of Criminal Procedure:

The Fifth Amendment provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, … nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy …the Assistance of Counsel for his defense.

The Eighth Amendment provides:

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

The Fourteenth Amendment provides in pertinent part:

> …No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Code of Criminal Procedure Article 905.3 provides in pertinent part:

> **Sentence of death; jury findings**
>
> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. …

STATEMENT OF THE CASE

In *Clark v. Louisiana*,[1] this Court granted Mr. Clark's petition for writ of certiorari, vacated the judgment and remanded the case for further consideration in light of *McCoy v. Louisiana*.[2] This petition arises from the remand of that proceeding.

A. Proceedings in the Trial Court

Petitioner Jeffrey Clark and four other inmates were indicted on March 15, 2004, for the 1999 murder of Captain David Knapps. Mr. Clark's first trial ended in a mistrial after the prosecution informed the jury in opening statements in the guilt phase that Mr. Clark was already serving a life sentence. Pet. App. 3a. After a second trial, Mr. Clark was found guilty of first-degree murder and sentenced to death. *Id.*

In opening statements of the first, ultimately mistried proceeding, Mr. Clark's appointed counsel made clear that they intended to concede Mr. Clark's guilt of second-degree (felony) murder. Mr. Clark's counsel also indicated that they intended to adopt custodial statements made by Mr. Clark as true, despite Mr. Clark's insistence that his custodial statements were coerced and false:

> I'm not here to try to fool you or mislead you in any way. Evidence is going to be presented that will prove that Jeffrey Clark was involved in the aggravated -- in the attempted aggravated escape. . . .
>
> His own statements made certainly, ladies and gentlemen, suggest criminal responsibility for the escape, and therefore some legal responsibility for death. We talked about that, the felony murder but not for first degree murder.

R. 6036–43. The prosecutor's opening statement in the initial trial also accurately

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[1] *Clark v. Louisiana*, 138 S. Ct. 2671, 2018 U.S. Lexis 3953 (2018).
[2] *McCoy v. Louisiana*, 584 U.S. __, 138 S. Ct. 1500 (2018).

described the defense theory:

> The shot-caller, Jeffrey Clark, minimizes his involvement. They want you to find him guilty of second-degree murder, not first-degree murder. They're going to come in and they want you to believe that Jeffrey Clark, based on his statements, was involved in a hostage situation and an attempted aggravated escape, but he had no specific intent to kill David Knapps. That's what they want. They want felony murder.

R. 5893.

Prior to the subsequent trial that serves as the foundation for this petition, it became clear that Mr. Clark's lawyers intended to again concede his guilt, just as they had in the earlier trial.

Now aware of his counsel's intention to concede his guilt, Mr. Clark objected at every opportunity. He objected in a written motion; he objected in open court; and he objected in conference in chambers. R. vol. II-sealed, p. 28 (Apr. 27, 2011) ("I brought you back here, Mr. Clark, because of what was said in your motion and also in open court in regard to the fact that you and your present counsel may have some sort of conflict in the presentation of your defense . . .").

Mr. Clark made clear that he did not want his counsel to concede guilt of second-degree murder. As Mr. Clark explained in conference on April 27, 2011:

> [T]he attorney's strategy, like I said, more or less, throwing me – I call it throwing me under the bus, you know, but give me a life sentence on the second degree. Did this, but didn't do that, convince the jury of that, that's automatic life sentence to me that I'm not willing to accept, okay, even to avoid the death penalty.

R. vol. II-sealed, p. 29. The following day, Mr. Clark reiterated in conference that "***[I]t's the admission to the jury that it's always been my problem***. Okay. To just come out and say, hey, give me life . . . ." R. vol. IB-sealed, p. 45 (emphasis added).

Mr. Clark's appointed counsel acknowledged the conflict and alerted the court that his "strategy . . . and Mr. Clark's strategy as defense in the case do not mesh very well." R. vol. IB-sealed, p. 37; see also r. 6714; r. 6716; r. vol. II–sealed, p. 29; r. vol. IB-sealed, pp. 40, 48. In response to a question from the judge, Mr. Clark characterized the conflict as irreconcilable. R. vol. II–sealed, p. 28.

At no point did the court instruct defense counsel that they were prohibited from conceding Mr. Clark's culpability over his objection. At no point did the court inform Mr. Clark that he had a right to determine the objectives of his own defense. Instead, based upon the law then in effect in Louisiana, the trial court conducted the *Faretta* colloquy and upheld counsel's refusal to accede to Mr. Clark's wishes about how his defense should proceed. *See* R. vol. IB-sealed, p. 52.

Because his appointed counsel insisted on conceding Mr. Clark's guilt, Mr. Clark chose to represent himself at the culpability phase, despite being "scared to death" and believing that "a defendant [who] represents himself[] has a fool for a client." R. vol. II-sealed, p. 31.

Mr. Clark was convicted and sentenced to death.

B. Initial Proceedings on Appeal

On direct appeal, Mr. Clark argued that his *Faretta* waiver was invalid because it was predicated upon his appointed counsel's plan to concede his guilt. *See* Assignment of Error 7 ("Mr. Clark's purported waiver of counsel under *Faretta v. California*[3] cannot stand because it was forced on him by his lawyers' plan to concede

[3] *Faretta v. California*, 422 U. S. 806, 823, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

his guilt against his will in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and La. Const. art. I, §§ 1, 2, 3, 13, 16, 17, 18, 19, and 20."). In brief to the Louisiana Supreme Court, the State responded that "appointed trial counsel did not concede that the defendant was guilty of first degree murder during the first trial which resulted in a mistrial." *State's Brief* at 52. Louisiana argued that trial counsel was allowed to make the strategic decision to concede Mr. Clark's guilt of a lesser charge. In the state's view, this was a permissible decision for trial counsel to make, and the waiver of counsel was knowing and voluntary.

The Louisiana Supreme Court upheld Mr. Clark's *Faretta* waiver. The court noted that "As a general matter, an acknowledgment of some degree of culpability may form part of sound defense strategy." Pet. App. 53a. The Court cited *State v. McCoy*, 14-1449 (La. 10/19/16), 218 So.3d 535 as support for this proposition. *Id.* In *State v. McCoy*, the Louisiana Supreme Court had explained—as the law in Louisiana and the federal Fifth Circuit had stood for years—that in a capital trial, an attorney's concession of guilt over his client's express objections was reviewed under *Strickland*'s[4] ineffectiveness analysis and accordingly could not constitute structural error. Rather, in the face of overwhelming evidence, "admitting guilt in an attempt to avoid the imposition of the death penalty appears to constitute reasonable trial strategy" and so would not even constitute counsel error under the first prong of the *Strickland* test. *State v. McCoy*, 14-1449 (La. 2016) at 50-51, 218 So.3d 535 at 572;

[4] *Strickland v. Washington*, 466 U. S. 668 (1984).

see also Haynes v. Cain, 298 F.3d 375, 381 (5th Cir. 2002) ("[T]hose courts that have confronted situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses have consistently found these partial concessions to be tactical decisions, and not a denial of the right to counsel. As such, they have analyzed them under the two-part *Strickland* test."); *State v. Tucker*, 13-1631 (La. 09/01/15), 181 So.3d 590, 621 (citing *Haynes*).

While Mr. Clark's petition for certiorari was pending, this Court decided *McCoy v. Louisiana*. *McCoy* unambiguously held that a criminal defendant has a right under the Sixth Amendment to determine the objectives of his own defense, and invalidated Louisiana's rule allowing counsel to concede guilt over the defendant's objections:

> [A] defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right "to have the Assistance of Counsel for his defence," the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

McCoy v. Louisiana, 138 S. Ct. 1500, 1505 (2018).

Under *McCoy*, violations of a defendant's Sixth Amendment right to determine the objective of his own defense are structural error, and may not be reviewed—as the Louisiana Supreme Court reviewed Mr. Clark's claim—under *Strickland*'s ineffective-assistance-of-counsel standard:

> [b]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington*, 466 U. S. 668 (1984), or *United States v. Cronic*, 466 U. S. 648 (1984), to McCoy's claim . . . Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review.

McCoy, 138 S. Ct. at 1510–11; compare with Pet. App. at 53a ("As a general matter, an acknowledgment of some degree of culpability may form part of sound defense strategy. *See, e.g.*, *State v. Brooks*, 505 So.2d 714, 724 (La. 1987) (trial counsel's strategy in acknowledging the defendant bore some culpability, in being in the company of the murderer at the scene of the crime, did not constitute ineffective assistance).

Recognizing the incompatibility of the *State v. McCoy* rule and Mr. Clark's waiver of rights, this Court granted, vacated and remanded the decision in *State v. Clark*. *Clark v. Louisiana*, 138 S. Ct. 2671, 201 L. Ed. 2d 1066, 2018 U.S. LEXIS 3953 (U.S., June 25, 2018).

C. Proceedings on Remand from this Court

On remand, the Louisiana Supreme Court did not recognize McCoy's sea-change in law in Louisiana, finding that "even in hindsight," *McCoy* did not render Mr. Clark's *Faretta* waiver deficient. Pet. App. 7a ("We previously approved of this extensive *Faretta* colloquy in *State v. Clark*, 12-0508, pp. 62-63 (La. 12/19/16), 220 So.3d 583, 637-639, and the United States Supreme Court's decision in *McCoy v. Louisiana*, 584 U.S. , 138 S. Ct. 1500, 200 L.Ed.2d 821 (2018), does not render it deficient even in hindsight.").

REASONS FOR GRANTING THE PETITION

I. THE LOUISIANA SUPREME COURT IGNORED THE SEA-CHANGE IN THE LAW (INSIDE LOUISIANA) GENERATED BY *MCCOY v. LOUISIANA*

For Louisiana, this Court's opinion in *McCoy v. Louisiana* represented a sea-change in jurisprudence which had previously ceded to counsel the strategic decision to determine whether to concede guilt regardless of a defendant's objection. *Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002) ("[T]hose courts that have confronted situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses have consistently found these partial concessions to be tactical decisions, and not a denial of the right to counsel. As such, they have analyzed them under the two-part *Strickland* test."). In Louisiana, this was not 'a rare plant that blooms every decade' but rather an invidious weed in the tangle in which the state courts operated. *See*, *e.g.*, *McCoy*, *supra; Clark*, *supra*; *State v. Tucker*, 13-1631, p. 41 (La. 09/01/15), 181 So. 3d 590, 621; *State v. Horn*, 16-0559, p. 9 (La. 09/07/18), 251 So.3d 1069, 1075.

This Court, in response to Mr. Clark's initial petition, granted certiorari, vacated the judgment below and remanded for reconsideration in light of *McCoy v. Louisiana*. But the Louisiana Supreme Court did not reconsider the case in light of *McCoy v. Louisiana*, deciding instead that in hindsight, it would have changed nothing.

The Louisiana Supreme Court held that the *Faretta* waiver was valid, even though the law in Louisiana at the time that the waiver was first taken and first

reviewed gave trial counsel the authority to make strategic decisions over whether to concede guilt—and the law had now changed 180 degrees. This finding was flawed in two fundamental respects: first the trial court—unaware of the holding of *McCoy v. Louisiana*—did not inform Mr. Clark that as a result of his right to autonomy his lawyers would not concede his guilt over his objection (so the waiver was not knowing or intelligent); and second, Mr. Clark waived his right to counsel believing that the only way to prevent his lawyers from making that admission was to invoke his right to self-representation (so the waiver was not voluntary).

The Louisiana Supreme Court thus revealed a complete lack of understanding of how *McCoy v. Louisiana* altered the nature of the *Faretta* colloquy, holding, ultimately, that there was no violation of *McCoy v. Louisiana* because: "Counsel did not concede appellant participated in a murder of any degree…" Pet. App. at 6a.

When a defendant seeks to represent himself because he objects to his counsel's plan to concede guilt ("appellant reiterated that he did not want an admission to be made that could result in a life sentence." Pet. App. at 6a), he must be informed of and have use of his Sixth Amendment right to counsel and to determine the objectives of his own defense in order for his *Faretta* waiver to be valid.

A. Louisiana's Rule—That A Defendant May Be Forced To Choose Between Conceding Guilt And Representing Himself—Impermissibly Forces Defendants To Sacrifice One Constitutional Right In Order To Exercise Another

The Louisiana Supreme Court held that it was not unconstitutional to force Mr. Clark to choose between allowing counsel to present the case as they saw fit or representing himself.

1. *McCoy* made clear that a defendant has a Sixth Amendment right of autonomy to decide the objective of the defense.

In *McCoy v. Louisiana*, this Court held that the Sixth Amendment provides defendants with "the right to insist that counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." 138 S. Ct. at 1505. *McCoy* made explicitly clear that the rationale of the Louisiana Supreme Court in both *State v. McCoy* and *State v. Clark* was wrong:

> The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel.

138 S. Ct. at 1508. As this Court explained in *McCoy*, the Sixth Amendment's guarantee of assistance of counsel is grounded in respect for the defendant's autonomy. 138 S. Ct. at 1507 ("the right to defend is personal, and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law") (internal quotations omitted).

Neither Mr. Clark nor the Louisiana trial court were aware of this right at the time of Mr. Clark's *Faretta* waiver, four days before the start of *voir dire*. Accordingly, Mr. Clark understood, and the trial court did not instruct him otherwise, that the

only way he could avoid conceding guilt at trial would be to waive his right to assistance of counsel and represent himself.

2. Because Mr. Clark was forced to choose between the assistance of counsel and controlling the objectives of his defense, his *Faretta* waiver was invalid.

This Court has consistently struck down waivers of rights where the waiving party was forced to surrender one constitutional right in order to assert another. For example, in *Simmons v. United States*, 390 U.S. 377, 394 (1968) this Court held that a defendant's testimony at a suppression hearing could not be later used against him at trial, noting that the defendant was forced "to give up what he believed . . . to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination," and finding it "intolerable that one constitutional right should have to be surrendered in order to assert another." *See also Lefkowitz v. Cunningham*, 431 U.S. 801, 807–08 (1977) (citing *Simmons* to invalidate a state law that required an officer of a political party to testify in response to a subpoena or else lose his party office, finding the law unconstitutionally coercive because it forced the party officer to "forfeit one constitutionally protected right"—his Fifth Amendment privilege against self-incrimination—"as the price for exercising another"—his First Amendment right to participate in private, voluntary political associations). *Cf. Currier v. Virginia*, 585 U.S. __, 138 S. Ct. 2144, 2151 (2018) (holding that by consenting to sever charges against him into separate trials, a defendant waived his Fifth Amendment Double Jeopardy protection, and noting that the decision to sever was not a choice between one constitutional right and another

because it would have been entirely constitutional to try all the charges in a single trial). Mr. Clark, like the defendant in *Simmons* and the party officer in *Lefkowitz*, was forced to waive one right—his Sixth Amendment right to insist that his counsel refrain from admitting guilt—in order to assert another—his Sixth Amendment right to assistance of counsel. Because Mr. Clark was forced to sacrifice one constitutional right in order to assert another, the Louisiana Supreme Court should have followed this Court in *Simmons* and *Lefkowitz* and held Mr. Clark's *Faretta* waiver invalid.

This Court has even struck down waivers of rights where the waiving party was forced to choose between surrendering a constitutional right and facing serious hardship. *See Garrity v. New Jersey*, 385 U.S. 493, 498 (1967) (striking down a requirement that public employees respond to questions by criminal investigators or else lose their jobs, finding that "[w]here the choice is between the rock and the whirlpool, duress is inherent in deciding to waive one or the other."); *Gardner v. Broderick*, 392 U.S. 273, 277–78 (1968) (holding that a police officer appearing before a grand jury could not be put to the "Hobson's choice" of waiving immunity or losing his job); *United States v. Jackson*, 390 U.S. 570, 583 (1968) (holding that to require a criminal defendant to choose between either contesting guilt at trial or avoiding a death penalty charge would be to "impose an impermissible burden upon the exercise of a constitutional right"). Mr. Clark, like the employees in *Garrity*, the police officer in *Gardner*, and the defendant in *Jackson*, was forced to choose between surrendering a constitutional right—his Sixth Amendment right to insist that his counsel refrain from admitting guilt, announced in *McCoy*—and facing a serious hardship—the

prospect of representing himself, despite the fact that he was "scared to death" of doing so and "kn[ew] nothing about [trial procedure]." R. vol. II-sealed, p. 31. The Louisiana Supreme Court should have followed this Court in *Garrity*, *Gardner*, and *Jackson* and held Mr. Clark's *Faretta* waiver invalid.

B. Louisiana's Rule Is In Tension With The Law In the Majority of the Circuits

Louisiana's rule—that a defendant may be forced to choose between representing himself and accepting representation by counsel that insists, over his objections, on conceding his guilt—allows defendants to be forced to choose, in effect, between constitutionally inadequate counsel and self-representation. *McCoy* made clear that the Sixth Amendment's guarantee of effective assistance of counsel does not come at the cost of the defendant's autonomy, and that counsel who concedes a defendant's guilt over the defendant's objections violates the defendant's Sixth Amendment-secured autonomy. 138 S. Ct. at 1511. Because counsel who concedes a defendant's guilt over the defendant's objections violates the defendant's Sixth Amendment-secured autonomy, such counsel does not offer effective assistance of counsel under the Sixth Amendment. A defendant's choice between forfeiting his autonomy and representing himself is therefore a choice between inadequate counsel and self-representation.

The Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have all held that a *Faretta* waiver is involuntary where the defendant is faced with a choice between inadequate counsel and self- representation. *See Arrendondo v. Neven*, 763

F.3d 1122, 1136 (9th Cir. 2014) ("Our cases do indicate that a *Faretta* waiver is involuntary if the alternative is inadequate counsel") (emphasis omitted); *James v. Brigano*, 470 F.3d 636, 644 (6th Cir. 2006) ("the choice between unprepared counsel and self-representation is no choice at all"); *Pazden v. Maurer*, 424 F.3d 303, 315, 319 (3d Cir. 2005) (holding petitioner's *Faretta* waiver involuntary because he was forced to choose between representing himself and being represented by counsel who, among other deficiencies, had not been able to review the evidence fully nor interview all the witnesses); *Gilbert v. Lockhart*, 930 F.2d 1356, 1360 (8th Cir. 1991) (finding that petitioner's constitutional right to counsel was violated when he was "offered the 'Hobson's choice' of proceeding to trial with unprepared counsel or no counsel at all"); *Sanchez v. Mondragon*, 858 F.2d 1462, 1465 (10th Cir. 1988) (finding that "a choice between incompetent or unprepared counsel and appearing pro se is a dilemma of constitutional magnitude," and that "[t]he choice to proceed pro se cannot be voluntary in the constitutional sense when such a dilemma exists") (internal quotations omitted); *Wilks v. Israel*, 627 F.2d 32, 36 (7th Cir. 1980) ("a choice between proceeding with incompetent counsel or no counsel is in essence no choice at all").

Two of those circuits—the Sixth and the Third—have held that this Court's precedents clearly establish that a *Faretta* waiver is involuntary where the defendant is faced with a choice between inadequate counsel and self- representation. *See James v. Brigano*, 470 F.3d 636, 644 (6th Cir. 2006) and *Pazden v. Maurer*, 424 F.3d 303, 315 (3d Cir. 2005) (reversing state court rulings upholding *Faretta* waivers under 28 U.S.C. §2254(d)).

In order to ensure uniformity, this Court should reverse the Louisiana Supreme Court and hold that a defendant may not be forced to choose between representing himself and accepting representation by counsel that insists, over his objections, on conceding his guilt.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MORAL DETERMINATION THAT DEATH IS THE APPROPRIATE PUNISHMENT MUST BE MADE BEYOND A REASONABLE DOUBT

Still pending from Mr. Clark's initial petition remains the Louisiana Supreme Court's rejection of his argument that the Sixth Amendment requires the jury to determine beyond a reasonable doubt that the death penalty is the appropriate punishment. The Louisiana Supreme Court held:

> to the extent the defendant suggests the rule of *Apprendi v. New Jersey*, 530 U.S. at 490, 120 S. Ct. at 2363 ("Other than the fact of a prior conviction, any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt") also applies to the jury's unanimous determination that death is the appropriate punishment, such that it too must be beyond a reasonable doubt, citing *Ring v. Arizona*, supra, he is mistaken.
>
> *Ring* requires only that jurors find beyond a reasonable doubt all of the predicate facts that render a defendant eligible for the death sentence, after consideration of the mitigating evidence. *Id.*, 536 U.S. at 609, 122 S. Ct. at 2443. Neither *Ring*, nor Louisiana jurisprudence, requires jurors to reach their ultimate sentencing determination beyond a reasonable doubt.

Pet. App. at 90a.

A. Louisiana's Capital Sentencing Scheme Requires Two Findings Prior To The Imposition Of A Death Sentence

In Louisiana, before a defendant is sentenced to death, the Louisiana death penalty statute mandates that the jury must make two findings. The law is very clear that these are "jury *findings*" (plural).

> Art. 905.3. Sentence of death; ***jury findings***
>
> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt *that at least one statutory aggravating circumstance exists* ***and,*** *after consideration of any mitigating circumstances,* ***determines*** *that the sentence of death should be imposed. ...*

La. Code Crim. Proc. Ann. § art. 905.3 (emphasis added).

Significantly, the Louisiana statute provides that before a sentence of death may be imposed the jury must make two findings: the first involves a beyond a reasonable doubt determination; the second statutory determination carries with it no burden of proof. The Louisiana courts declined petitioner's request to require the jury make this second finding beyond a reasonable doubt. Pet. App. at 90a.

The Louisiana Supreme Court has consistently concluded that "neither *Ring*, nor Louisiana jurisprudence, require[d] jurors to reach their ultimate sentencing determination beyond a reasonable doubt." Pet. App. at 90a, citing *State v. Koon*, 96-1208, p. 27 (La. 05/20/97), 704 So. 2d 756, 772-73; *see also State v. Anderson*, 06-2987, p. 61 (La. 09/9/08), 996 So.2d 973, 1015.

Under Article 905.3 of the Louisiana Code of Criminal Procedure, the jury in Petitioner's case was required to find first the existence of at least one statutory aggravating circumstance. As the statute clearly says by its use of "and," in addition to the statutory aggravating circumstance, the jury also was required to determine—

after considering mitigating circumstances—that death was the appropriate sentence. Louisiana statutory law specifically dictates that this determination is a "jury finding." However, the jury was not instructed that that determination needed to be made beyond a reasonable doubt.

B. This Court's Jurisprudence Has Left Open the Question of Whether the Determination that Death is the Appropriate Punishment Must be Found Beyond a Reasonable Doubt

Apprendi v. New Jersey provided that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). This Court found attempts to distinguish between factual findings that were "elements" and those that were "sentencing factors" misplaced. "The relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494.

Ring v. Arizona, 536 U.S. 584, , 122 S. Ct. 2428, (2002), the next of the Court's cases in this line of jurisprudence, did not address the Sixth Amendment's requirements as to the sentencing determination. *Ring,* 536 U.S. at 597 n.4, 122 S. Ct. at 2437 ("Ring's claim is tightly delineated: . . . Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty."). *Ring* left open the question presented by Mr. Clark: whether the Sixth Amendment requires the finding that death is warranted to be made beyond a reasonable doubt.

Then, in *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016), this Court clarified the meaning of *Ring* and explicitly stated that any and all "findings" that the jury was required to make, under state law, had to comply with the federal constitution. Indeed, the Court "expressly overrule[d] *Spaziano*[5] and *Hildwin*[6] in relevant part":

> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Their conclusion was wrong, and irreconcilable with *Apprendi*.

136 S. Ct. at 623 (internal citations omitted).

Even so, *Hurst* did not resolve the question, still percolating in the courts, whether the jury should make the moral determination of culpability; nor did it resolve the question Mr. Clark presents today.

C. There Is A Significant Split of Authority Among The States Concerning Whether *Hurst* Imposes Sixth Amendment Requirements On All Findings Necessary for the Imposition of a Death Sentence

In the absence of direction from this Court, the States have employed various means of determining who deserves the death penalty; this in turn has produced arbitrariness in our administration of capital punishment. Twenty-one States and the District of Columbia have determined that no level of proof is sufficient to warrant imposition of the death penalty.[7] Of the twenty-nine (29) states that retain

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[5] *Spaziano v. Florida*, 468 U.S. 447 (1984).

[6] *Hildwin v. Florida*, 490 U.S. 638 (1989).

[7] The twenty-one states without the death penalty are: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. The District of Columbia and Puerto Rico are also without the death penalty.

the death penalty, six have statutorily imposed a requirement that death-worthiness be proven beyond a reasonable doubt.[8] Two more have imposed that standard judicially.[9] The remaining death penalty jurisdictions[10] make up a patchwork with no discernible commonality.[11] Some States, such as Louisiana, Mississippi, and Oklahoma, simply reject the beyond-a-reasonable-doubt standard without providing further guidance as to the actual standard of proof.[12]

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[8] *See* Ark. Code Ann § 5-4-603(a); Ohio Rev. Code Ann. § 2929.03(D)(2); Or. Rev. Stat. § 163.150(1)(d); Tenn. Code Ann. § 39-13-204(g); Utah Code Aim. § 76-3-207(5)(b); Va. Code Ann. § 19.2-264.4(C).

[9] *See People v. Tenneson,* 788 P.2d 786, 792 (Colo. 1990); *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016); *Rauf v. Delaware*, 145 A.3d 430 (Del. 2016). Delaware has not adopted a new death penalty scheme since the Court held its old scheme violated the Sixth Amendment.

[10] The highest relevant courts in eleven states in addition to Louisiana have determined that the finding that death is warranted need not be made beyond a reasonable doubt . *See People v. Case*, 418 P.3d 360, 396 (Cal. 2018); *State v. Sivak*, 674 P.2d 396, 401 (Idaho 1983); *Kubsch v. State*, 866 N.E. 2d 726, 739 (Ind. 2007); *Windsor v. Commonwealth*, 413 S.W.3d 568, 573 (Ky. 2010); *State v. Clark*, 220 So. 3d 583, 689–690 (La. 2019); *Brown v. State*, 890 So. 2d 901, 921 (Miss. 2004); *State v. Johnson*, 207 S.W.3d 24, 47 (Mo. 2006); *Nunnery v. State*, 263 P.3d 235, 251–253 (Nev. 2011); *State v. Holden*, 362 S.E.2d 513, 535 (N.C. 1987); *Rojem v. State*, 753 P.2d 359, 369 (Okla. Crim. App. 1988); *Commonwealth v. Le*, 208 A.3d 960, 981 (Pa. 2019). Meanwhile, seven federal circuits have reached the same result. *See United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013); *United States v. Fields*, 516 F.3d 923, 950 (10th Cir. 2008); *United States v. Mitchell*, 502 F.3d 931, 993-94 (9th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 31 (1st Cir. 2007); *United States v. Fields*, 483 F.3d 313, 345-46 (5th Cir. 2007); *United States v. Purkey*, 428 F.3d 738, 749 (8th Cir. 2005); *United States v. Gabrion*, 719 F.3d 511, 531–533 (6th Cir. 2013).

[11] The discord among the States affects weighing and non-weighing jurisdictions equally, with States imposing various burdens of proof regardless of the process by which a jury reaches its sentencing decision. For this reason, the Court should impose a uniform standard binding across all jurisdictions, irrespective of whether it is a weighing or non-weighing state. *See Brown v. Sanders*, 546 U.S. 212, 219 (2006) ("This weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations.").

[12] *See State v. Anderson*, 996 So.2d 973, 1015 (La. 2008); *Keller v. State*, 138 So. 3d 817, 868-69 (Miss. 2014); *Rojem v. State*, 753 P.2d 359, 369 (Okla. Crim. App. 1988).

Pennsylvania forbids review of this decision entirely.[13] And still other States, such as North Carolina, merely direct that the aggravating circumstances "sufficiently outweigh" mitigating circumstances in order to return the death penalty.[14]

D. This Court Should Hold That The Moral Determination That Death Is The Appropriate Punishment Must Be Made By A Jury Beyond A Reasonable Doubt

This Court should hold that the moral determination that death is the appropriate punishment must be made by a jury beyond a reasonable doubt.

1. The Sixth Amendment requires that the determination that death is the appropriate punishment must be made beyond a reasonable doubt.

"Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019). *A fortiori*, that promise must stand when what is at stake is not merely a person's liberty, but his life.

The reasonable doubt standard forms part of the bedrock of our constitutional system, and goes hand in hand with the Sixth Amendment's jury trial right. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (holding that a constitutionally deficient instruction on the meaning of reasonable doubt can never be harmless and

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[13] *See Commonwealth v. Reyes*, 963 A.2d 436, 441–442 (Pa. 2009) (explaining that court is not allowed to review weighing determination, which a jury makes without adherence to any specific standard of proof).

[14] *See* N.C. Gen. Stat. § 15A-2000(b).

requires automatic reversal, and finding it "self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. . . . the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"); *Apprendi v. New Jersey*, 530 U.S. 466, 477–78 (2000) ("trial by jury has been understood to require that *the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of the [the defendant's] equals and neighbors . . . equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt") (emphasis in original) (internal quotations omitted).

Apprendi's holding that eligibility factors must be found beyond a reasonable doubt should apply also to the determination that death is the appropriate punishment. This Court has repeatedly demonstrated that "the relevant inquiry [under *Apprendi*] is one not of form, but of effect." 530 U.S., 494 (2000). *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (findings "essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt"). The finding that death is the appropriate sentence is essential to the imposition of capital punishment. It should therefore be determined beyond a reasonable doubt.

2. At the Founding, the jury's moral determination that death was the appropriate punishment was made beyond a reasonable doubt.

The reasonable doubt standard was created specifically for the moral determination in capital trials. It emerged in the eighteenth century as a means of combatting increasing resistance, both in Britain and America, to the application of capital punishment. Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 Am. Crim. L. Rev. 45, 51 (2005). Indeed, "the early life of the reasonable doubt instruction appears to have been limited solely to capital trials," Steve Sheppard, *The Metamorphoses of Reasonable Doubt*, 78 Notre Dame L. Rev. 1165, 1195 (2003), where it served as an explicit reminder to Christian juries, fearful of the moral consequences of condemning defendants to death, that they need not find guilt beyond *all* doubt in order to convict. Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 Ark. L. Rev. 267, 277–278 (2017).

In capital trials, the reasonable doubt standard was meant to apply specifically to the sentencing determination. The eighteenth-century capital trials for which the reasonable doubt standard was designed were not primarily concerned with guilt. Rather, capital trials "were essentially sentencing hearings, where the issue of guilt went largely uncontested and the real question was whether the defendant should die for his crime." John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 1974 (2005); *see also* Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 Tex L. Rev. 105, 111 (1999) ("[In the late eighteenth and early

nineteenth centuries,] [p]roof beyond a reasonable doubt was equated with *moral* certainty") (emphasis added). Thus, at the time of the founding, the reasonable doubt standard was not applied primarily to questions of fact, but to the moral determination of whether the guilty defendant should live or die.

The history of the reasonable doubt standard shows that by *not* requiring the jury to determine that death is warranted beyond a reasonable doubt, Louisiana renders the Sixth Amendment's guarantees less meaningful than they were at the time of their adoption. The reasonable doubt standard provides protection for defendants, and also for juries; it was designed to protect jurors' moral consciences by providing guidance as they executed "the 'perilous' task of condemning others." James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* 204 (2008); *see also In re Winship*, 397 U.S. 358, 364 (1970) (recognizing the import of the standard to the community that condemns, not just to the defendant who is condemned: "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"). Jurors today need no less protection. *See* Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 Ind. L.J. 1333, 1338 n.21 (1993) (finding that jurors who sit in capital cases and return death verdicts often suffer great anxiety long after the verdict is returned).

To hold now that the reasonable doubt standard applies only to findings of fact would not only be unfamiliar to the framers; it would seem to them flatly wrong.

"Because the Constitution's guarantees cannot mean less today than they did the day they were adopted," *Haymond*, 139 S. Ct. at 2376, it should remain the case today that a jury must find beyond a reasonable doubt that death is deserved.

3. The Eighth Amendment requires that the determination that death is the appropriate punishment must be made beyond a reasonable doubt.

Before imposing the death penalty, a jury, under the Eighth Amendment, must determine both that the defendant belongs to a class of convicted persons eligible to receive the death penalty (the eligibility determination), and that the defendant is deserving of the death penalty in light of his "character and record . . . [and] the circumstances of the particular defense" (the selection determination). *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The first determination ensures that "a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* [cannot] occur." *Gregg v. Georgia*, 428 U.S. 153, n. 46 (1976). The second determination ensures that the penalty accords with "the dignity of man, which is the basic concept underlying the Eighth Amendment," *id.* at 173, by mandating that the defendant be treated as a "uniquely individual human being[]" *Woodson*, 428 U.S. at 304.

The Eighth Amendment thus demands that the entire sentencing determination—including the selection determination—be made with the most exacting scrutiny. This Court has held that "under the Eighth Amendment the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *Caldwell v.*

Mississippi, 472 U.S. 320, 329 (1985) (internal quotation omitted). The scrutiny required of the sentencing determination by the Eighth Amendment is no less than that required of the guilt determination: a capital sentencing "decision, given the severity and finality of the sanction, is no less important than the decision about guilt," and "neither is accuracy in making that decision any less critical." *Deck v. Missouri*, 544 U.S. 622, 632 (2005) (internal quotations omitted). *See also Caldwell*, 472 U.S. at 331–33 (finding that the Eighth Amendment's requirement of heightened reliability forbids jury instructions that might encourage the jury to return a verdict of death despite being uncertain as to its appropriateness). This Court has made clear that the scrutiny demanded of the sentencing determination applies not just to the eligibility determination, but to the selection determination. *See Woodson*, 428 U.S. at 305 (holding that because "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two . . . there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment *in a specific case*") (emphasis added). Accordingly, both aspects of the sentencing determination—the eligibility *and* selection determinations—must be made beyond a reasonable doubt.

The jury must make both aspects of its sentencing determination beyond a reasonable doubt so as to ensure consistency in the penalty's application. This Court has recognized an inherent tension between the Eighth Amendment's requirement of guided discretion—which, in turn, mandates the eligibility inquiry—and its requirement of individualized sentencing—which, in turn, mandates the selection

inquiry. *See, e.g.*, *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) ("the objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time"); *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008) ("[t]he tension between general rules and case-specific circumstances has produced results not altogether satisfactory"). And this Court has acknowledged that the tension between the two inquiries has resulted in "imprecision," and, potentially, "some inconsistency of application." *Kennedy*, 554 U.S. at 440. Failing to require that the selection determination be made beyond a reasonable doubt would only exacerbate the problem, for it would increase the range of circumstances in which the jury could impose death, and thereby increase the ability of the jury to impose death—or not—on similarly situated defendants. This risk is particularly high given the proliferation, in many states, of aggravating circumstances. *See, e.g.*, *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018) (Breyer, J., statement respecting denial of certiorari). Where aggravators do not effectively narrow the class of defendants, the sentencing determination serves as the primary means of "justify[ing] the imposition of a more severe sentence on the defendant compared to others found guilty of murder," *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), and thereby ensuring that the penalty is not imposed arbitrarily or inconsistently. In such circumstances, it is imperative that the sentencing determination be made beyond a reasonable doubt.[15]

[15] Neither *Kansas v. Marsh*, 548 U.S. 163 (2006) nor *Kansas v. Carr*, 136 S. Ct. 633 (2016) undermine Mr. Clark's claim, for the statute approved in both opinions "ma[de] clear that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt." 136 S. Ct. at 643. Nor does *Walton v. Arizona*, 497 U.S. 639 (1990), undermine Mr. Clark's claim, for there this Court held only that the defendant can bear the burden of proving that death is not

E. This Case Provides An Ideal Vehicle For This Court To Resolve This Question.

This case provides an ideal vehicle for this Court to resolve this question. As this case is on direct appeal, no question regarding whether the relief would be available retroactively arises. The issue is not constrained by *Teague*[16] or AEDPA. *Cf. Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005) ("[N]o Supreme Court or Fifth Circuit authority requires the State to prove the absence of mitigating circumstances beyond a reasonable doubt. The district court also noted . . . that it could not rule otherwise except by creating a new rule of constitutional law in violation of *Teague*.").

The issue has percolated in the courts with *certiorari* petitions arising from both state-petitioners and defendants, and the conflicting lines of jurisprudence are fully entrenched. Seven federal circuits and the highest courts of thirteen states have addressed the question and come to different results. *See* notes 8-10, *supra*. In light of this split in authority, the State of Florida asked this Court to review *Hurst* anew and address the question, noting that there are significant "splits of authority among the lower courts concerning the scope of the sixth amendment right to trial by jury." *Florida v. Hurst*, 16-998 (Petition for Certiorari filed 2/13/2017). This Court denied certiorari in *Florida v. Hurst*, 16-998, but the instant case presents a far better vehicle for addressing that split in authority identified by the State of Florida. That case presents considerable questions regarding whether the state court issued an advisory

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warranted in the specific circumstances of the case; the holding did not address the standard of proof by which the defendant must establish that death is not warranted.

[16] *Teague v. Lane*, 489 U.S. 288, 311, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989).

opinion; whether the adoption of a new statute in Florida rendered the legal question moot; and whether the state court had ruled on state grounds. None of those problematic considerations arise here.

Resolving the issue now will ensure heightened respect for the criminal justice system, and increase confidence that the death penalty is being reserved for those instances where a jury has determined beyond a reasonable doubt that the punishment is appropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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