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

No. 19-8039

In the Supreme Court of the United States

JEFFREY CLARK,
***Petitioner*,**

v.

STATE OF LOUISIANA,
***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Jeffrey Clark claims that the state trial court offered him a "Hobson's choice" at his *Faretta* hearing: Accept counsel who insist on conceding his guilt in violation of *McCoy v. Louisiana* or accept no counsel at all. The Louisiana Supreme Court's close review of the record, however, demonstrates that Clark faced no such choice. Under a correct view of the record, the questions presented are the following:

(1) Whether, after a thorough *Faretta* colloquy, a trial court errs by allowing a defendant to act as lead counsel in his defense when

   a. *McCoy v. Louisiana* is inapposite because the trial judge learns of nothing more than a generalized disagreement between the defendant and his court-appointed counsel about trial strategy;

   b. court-appointed trial counsel tells the trial judge that, under the ethics rules, he cannot tell the jury the defendant's version of the crime; and

   c. the trial judge allows the court-appointed attorneys to act as co-counsel to assist the defendant in any way allowed under the ethics rules?

(2) Even assuming the trial court erred by allowing hybrid representation, did it commit structural error?

(3) Under the Sixth and Eighth Amendments, must moral determinations—in addition to factual findings—be made beyond a reasonable doubt?

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ADDITIONAL RELEVANT STATUTORY RULES

Louisiana Revised Statute 14:30 (C) provides in pertinent part:

(1) If the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefits of parole, probation, or suspension of sentence, in accordance with the determination of the jury . . . .

(2) If the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence . . . .

Louisiana Code of Criminal Procedure article 905 provides in pertinent part:

A. Following a verdict or plea of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Louisiana Code of Criminal Procedure article 905.3 provides:

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. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Louisiana Code of Criminal Procedure article 905.6 provides:

A sentence of death shall be imposed only upon a unanimous determination of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall render a determination of a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Louisiana Code of Criminal Procedure article 905.7 provides:

The form of jury determination shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury unanimously determines that the defendant should be sentenced to death.

Aggravating circumstance or circumstances found:

s/_____
Foreman"

Or

"The jury unanimously determines that the defendant should be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/_____
Foreman"

Louisiana Code of Criminal Procedure article 905.8 provides:

The court shall sentence the defendant in accordance with the determination of the jury. If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Louisiana Code of Criminal Procedure article 905.9 provides:

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Louisiana Supreme Court Rule 28 provides in part:

Section 1: Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) Whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) Whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) Whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant….

INTRODUCTION

Having received the autonomy and control he sought in the capital case against him arising from the brutal murder of a prison guard, Defendant Jeffrey Clark now has buyer's remorse.

Clark, along with several other inmates, attempted to escape from Angola prison in Louisiana. Their bid for freedom failed, and in the botched attempt they brutally murdered a corrections officer. The State charged Clark with first-degree murder for his role in the crime.

His first trial ended in a mistrial. In proceedings before his second trial, Clark invoked his right to represent himself and asked to participate in his own defense, though he did not seek to take it over entirely. He informed the judge that he and his attorneys disagreed about how to present his defense. Although the nature of the disagreement never became clear, the evidence of his participation in the planning and execution of the escape attempt was overwhelming, and so his attorneys told the trial judge that they had ethical concerns about arguments Clark might want them to make on his behalf.

In light of this disagreement, and because Clark wished to personally tell the jury the truth about the escape in his own voice, Clark asked to represent himself at the trial. After extensive *Faretta* colloquies, both in open court and in chambers, the trial judge allowed Clark to act as *lead counsel* in his defense and Clark's court-appointed attorneys to assist him as *co-counsel*. Proceeding with this "hybrid representation model," Clark himself admitted to the jury his participation in the

escape attempt. He was convicted of first-degree murder and received a death sentence.

The Louisiana Supreme Court upheld Clark's death sentence on direct appeal. While Clark's case was pending before this Court, however, this Court held in *McCoy v. Louisiana* that it is "unconstitutional to allow defense counsel to concede guilt over [a] defendant's intransigent and unambiguous objection." 138 S. Ct. 1500, 1507 (2018). This Court remanded Clark's case to the Louisiana Supreme Court for reconsideration in light of *McCoy*. On remand, the Louisiana Supreme Court reaffirmed Clark's conviction and death sentence.

Clark again seeks certiorari from this Court, contending that he was forced into a Hobson's choice in the *Faretta* hearing. According to Clark, he was forced to choose between counsel who would concede guilt against his wishes in violation of *McCoy* or he would receive no representation at all. But his argument is belied by the record.

As the Louisiana Supreme Court explained, Clark expressed uncertainty about what his trial strategy would be during the *Faretta* hearings and never articulated an intractable disagreement with counsel. The nature of Clark's disagreement with his counsel was "not clear." Clark himself ultimately made the same admissions that his attorneys suggested. And so the record shows that Clark and his counsel were aligned in their strategy. *McCoy* is inapposite.

Even assuming allowing Clark's attorneys to represent him would have violated *McCoy*, Clark was not presented with a Hobson's choice. Requiring Clark's

attorneys to tell the jury that he was not involved in the escape attempt would have violated their ethical duties as officers of the court. *See Nix v. Whiteside*, 475 U.S. 157, 159 (1986); *McCoy*, 138 S. Ct. at 1504. Clark's attorney expressly told the trial judge that "I may not ethically be able to argue [Clark's version of events]. And, and I'm concerned about that." Moreover, Clark's "choice [was] not all or nothing." *McCoy*, 138 S. Ct. at 1508. The trial court allowed Clark to tell his own version of events, while permitting Clark's counsel to assist him in any ethical way Clark desired. Clark's court-appointed attorneys conducted the death qualification of the potential jurors, led the general *voir dire*, and questioned all the expert witnesses, among other things. Thus, even if the Court is interested in the question Clark raises in his first question presented, Clark's case makes a poor vehicle to decide that question. In any event, it appears that all courts addressing similar *McCoy* claims have handed down decisions consistent with the Louisiana Supreme Court's judgment. And so there is no need to grant review here.

Even assuming the trial court erred by allowing Clark to engage in a hybrid representation with his court-appointed attorneys as co-counsel, the mistake was merely trial error and not structural error. And so the harmless error standard applies.

In his second question presented, Clark contends that his Sixth and Eighth Amendment rights were violated because the jury was not required to make the *moral* determination that he deserved the death penalty beyond a reasonable doubt. This argument does not warrant review from this Court because only factual findings, not

moral determinations, are subject to the reasonable doubt standard. *See Apprendi v. New Jersey*, 530 U.S. 466, 476, 490 (2000); *Zant v. Stephens*, 462 U.S. 862, 879 (1983). This Court has recently explained in a similar context that "whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy . . . [and] [i]t would mean nothing, we think, to tell the jury that the defendant must deserve mercy (which simply is not a factual determination) beyond a reasonable doubt." *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016). This Court "doubt[ed] that would produce anything but confusion." *Id.* That conclusion is undoubtedly correct and nothing from the history of this country or the founding era contravenes that reasoning.

The Court should deny Clark's petition for certiorari.

STATEMENT OF THE CASE

The Murder

Defendant Jeffrey Clark was serving a life sentence at the Louisiana State Penitentiary in Angola, Louisiana, when he—along with several other inmates—devised a plan to escape. On December 28, 1999, the inmates smuggled improvised weapons into the Angola Camp "D" Education Building, where meetings and classes were taking place. In the Education Building, the inmates attacked three corrections officers. They hoped to obtain keys to a vehicle they planned to use to leave the prison and flee to Canada.

The inmates attacked Captain David Knapps in a hallway as he exited a security restroom. They dragged him back into the restroom, where he was brutally beaten and bludgeoned to death. The inmates held two more officers—Lieutenant

Douglas Chaney and Sergeant Reddia Walker—as hostages. The perpetrators took keys and radios from the officers, and they locked the doors to the Education Building. Prison officials discovered the disturbance and surrounded the building. Ultimately, Warden Burl Cain secured the surrender of Jeffrey Clark and two of the other perpetrators. A Tactical Assault and Confrontation Team entered the Education Building, rescued Lieutenant Chaney and Sergeant Walker, and captured the remaining perpetrators.[1]

On March 15, 2004, a West Feliciana Parish grand jury returned an indictment charging Jeffrey Clark and several other inmates with the first-degree murder of Captain Knapps.

The First Trial

On February 5, 2010, Clark and his co-defendants were severed for trial, and the State filed an amended indictment against Clark. Clark's first trial commenced in July 2010. But a mistrial was declared during the prosecutor's opening statement after the prosecutor informed the jury that Clark was already serving a life sentence at the time of the attempted escape.

Before that trial terminated, Clark's court-appointed counsel had conceded to the jury Clark's involvement in the escape attempt: "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 attempted aggravated escape." The defense attorney emphasized, however, that "what the evidence isn't going to show is that Jeffrey

[1] One of the perpetrators, Joel Durham, was fatally shot during the retaking of the Education Building.

Clark was involved in the death, the first-degree murder of Captain Knapps. He did not have the specific intent to kill or commit great bodily harm."

The Faretta Colloquies

Apparently Clark and his attorneys disagreed about whether to concede Clark's involvement in the escape because over nine months later, in advance of his second trial, on April 27, 2011, the trial judge heard Clark's request to represent himself in certain aspects of the trial with the assistance of his court-appointed attorneys, Thomas Damico and Joseph Lotwick. This hearing occurred one day before prospective jurors for the second trial were scheduled to report to the courthouse to complete their written questionnaires. The trial judge conducted extensive *Faretta* colloquies with the defendant in open court. The judge also engaged in an *ex parte* discussion with the defendant and court-appointed counsel in chambers. And, on April 28, 2011, the trial court held an additional *ex parte* discussion with Clark and his court-appointed attorneys about the representation issue.

During the *Faretta* colloquy of April 27, 2011, the trial judge asked, "[W]hat exactly are you asking for in regard to this self-representation, Mr. Clark?" Clark explained that he and his attorneys "simply have a divergence of philosophy on the defense." Clark acknowledged that the attorneys had "done most of the research, especially dealing with the experts, for our defense." And he asked the trial court if his attorneys could assist him with examining expert witnesses. The trial judge replied, "Well, in effect, you're asking for Mr. Lotwick and Mr. Damico to be co-counsel with you in the case." Clark said, "Just for that limited purpose, dealing with the

experts . . . ." The trial judge explained: "if they become your co-counsel, you will be granted the right to represent yourself, and you may choose which parts of the trial you want to solely represent yourself and those parts where you want assistance of your co-counsel."

At this point in the proceeding, the trial judge retired to the jury room to hold an *ex parte* discussion with Clark and his appointed counsel in order to discuss whether there was "some sort of conflict in the presentation of your defense[.]" Clark replied, "Yeah. I wouldn't say - - use the word 'conflict,' but, yes, just a divergence, difference of opinion, yeah." The trial court asked whether he felt it could be reconciled at this time, and the defendant replied that he did not know. Clark stated that Damico's opinion was "the only way to save me from the death penalty, should I be convicted, is to convince the jury to trust him." Clark described appointed counsels' strategy as follows: "[G]ive me a life sentence on the second degree. Did this, but didn't do that, convince the jury of that, that's a[n] automatic life sentence to me that I'm not willing to accept . . . even to avoid the death penalty."

According to Clark, if it came down to life and death, he would prefer the death sentence because he would continue to have representation after his direct appeal. He noted that he was already serving a life sentence. Clark further stated: "I want the truth to come out. I want them to know. There's too much that's not going to be said." Clark felt that "it's just in my best interest to take this step now."

Clark acknowledged that he needed the attorneys to help him "as far as how to properly present an exhibit or the cross-examination, give any records to the Clerk,

. . . any of that kind of stuff." The trial court asked counsel whether they were prepared, should Clark be permitted to represent himself, to help him in the manner that he had described. Damico stated that he believed that he could handle the expert witnesses without prejudicing either the defense he had prepared or "the defense [Clark] is talking about" because his job with the State's experts "is pretty much to nullify them." However, Damico opined that, "if the defendant pollutes the jury with his defense as opposed to what I have prepared for, I think I would have a problem with . . . that hybrid representation" with respect to the presentation of the fact witnesses. Lotwick added that he and Damico could certainly consult with and advise the defendant with regard to the handling exhibits and witnesses, and that they could do so "at various steps throughout the trial."

The trial judge told Clark that while Damico and Lotwick would be his co-counsel, he (Clark) was going to be "lead counsel" and would make the determinations as to how his defense would be presented. The trial judge asked Clark whether he understood that if his presentation of his defense "is divergent with what Mr. Damico has in mind . . . you could very well cause yourself to suffer dire consequences?" Clark responded, "I do." The trial judge warned that Clark did not want to get himself into a situation where he was presenting one defense and Lotwick and Damico were presenting another. Clark stated that he would not let that happen and understood it would also affect his credibility with the jury.

The *Faretta* colloquy resumed when the trial judge, Clark, Lotwick, and Damico returned to open court. The trial judge found that Clark's motion to represent

himself was made "knowingly and intentionally and voluntarily." The Court granted the motion and "also continue[d] the appointment of Mr. Lotwick and Mr. Damico as co-counsel to the defendant in this case."

On the following day, April 28, 2011, the trial judge held another *ex parte* conference in chambers with the defendant and court-appointed counsel. Damico advised the trial court that his strategy as previous lead counsel and Clark's strategy did not mesh very well with regard to the guilt phase of the trial. Damico explained that he "could be put into the position to maybe do an opening or closing on a defense that, No. 1, is a different strategy than I believe is necessary in this case, and, No. 2, *one that I may not ethically be able to argue. And, and I'm concerned about that*." (emphasis added). Damico added that he and Lotwick had talked to Clark about their concerns.

Clark told the trial court that he was "not set 100 percent on what my defense is right now. I mean, pretty much, but not set." Still trying to determine how the defendant wanted the court-appointed attorneys to participate, the trial judge asked Clark whether, for example, he wanted them to handle parts of *voir dire*. Clark replied, "Right. We had discussed earlier - - I'm very comfortable - - I also realize the potential for putting them in the position for possible - - I mean - -[.]" The trial judge interrupted Clark to tell him that the attorneys would not be expected to assert a defense that was illegal or unethical, and that Damico and Lotwick were trying to see that they were not put in a position where they could be compromised in any way. Clark said he was uncomfortable with his attorneys' decision "[t]o just come out and

say, hey, give me life, you know, throwing me like that." But he understood that *"there's a lack of foundation - - the defense I want to present, I don't have the foundation for. Whether it's the truth or not, I don't have the foundation to present it. Okay. And that causes counsel a lot of problems if I stand up[,] add those stories and I can't support [them]."* (emphasis added).

The trial judge ultimately permitted Clark to be lead counsel, and the judge allowed Clark to use the court-appointed attorneys to support him as co-counsel.

The Second Trial

During the guilt phase of his trial, Clark gave the defense opening and closing statements and questioned numerous fact witnesses. *See State v. Clark*, 12-508 (La. 12/19/16), 220 So. 3d 583, 600. Clark's appointed counsel assisted with these tasks. Under Clark's direction as lead counsel, the court-appointed attorneys conducted the death qualification of the potential jurors, led *voir dire*, and questioned all the expert witnesses.

In his opening statement, Clark told the jurors that he invoked his right to self-representation "because I think it's important that you understand from the very start that I, Jeffrey Clark, am not guilty of the crime for which they have charged me." Clark continued by emphasizing that "I'm innocent of this murder. And I believe that once you hear all the evidence and likewise have consideration of the lack of evidence in this case - - that's just as important - - that you will come to the same conclusion."

Clark also told the jury, however, that he was involved in the escape attempt.

But he stressed that "the plan was simply to overcome the guards one by one, handcuff them without anybody getting hurt."

In his closing argument Clark conceded that (1) he knew of the escape plan days before December 28, 1999, and he agreed to participate; (2) he was in the hallway with other involved inmates when Captain Knapps entered the building; (3) he was in the restroom where Captain Knapps was killed; and (4) he discarded his denim jacket and sweatshirt in the inmates' restroom when his efforts to remove Captain Knapps' blood proved unsuccessful. 220 So. 3d at 619–20.

On May 15, 2011, Clark was found guilty of first-degree murder. Clark then waived his right to self-representation. His court-appointed attorneys represented him in the penalty phase of the trial. The jury returned a verdict of death, finding beyond a reasonable doubt, as required by Louisiana law, the following aggravating circumstances: (1) Clark was engaged in the perpetration or attempted perpetration of the aggravated kidnaping of Officer Chaney and Officer Walker; (2) Clark was engaged in the perpetration or attempted perpetration of an aggravated escape; (3) Captain Knapps, was a peace officer engaged in the lawful performance of his duties at the time of the murder; (4) Clark was previously convicted of an unrelated murder; and (5) Clark knowingly created a risk of death or great bodily harm to more than one person. In accordance with the jury's determination, the trial judge sentenced Clark to death May 23, 2011.

The Appeal

The Louisiana Supreme Court upheld Clark's conviction and death sentence. 220 So. 3d at 598. Clark petitioned this Court for certiorari. While Clark's appeal was pending, this Court explained in *McCoy v. Louisiana* that it is "unconstitutional to allow defense counsel to concede guilt over [a] defendant's intransigent and unambiguous objection." 138 S. Ct. at 1507. This Court vacated the Louisiana Supreme Court's judgment and remanded the case "for further consideration in light of *McCoy*." *Clark v. Louisiana*, 138 S. Ct. 2671, 2671 (2018).

On remand, the Louisiana Supreme Court explained that it had previously approved the *Faretta* colloquy and *McCoy* "does not render it deficient even in hindsight." Pet. App. 8a. The court observed that the record "does not establish that appellant was forced to make a choice between representation that would compromise his autonomy or no representation at all." *Id.* at 7a.

The court reasoned: (1) the factual basis for his *McCoy* argument was lacking; (2) Clark's counsel did not concede he participated in a murder and the record does not show that his counsel had determined to do so; (3) Clark had not completely decided what his strategy would be at the *Faretta* hearing and that, in his second trial, Clark echoed the very same arguments his counsel employed in the opening statements at his first trial; (4) the trial court allowed Clark to decide the contours of his co-counsel's role in every aspect of the trial; (5) Clark offered several reasons for his choice to take the role of lead counsel that did not implicate disagreement with court-appointed counsel at all, such as his desire to better engage with the jury; and

(6) "appellant and counsel were aligned in their strategy to deny involvement in the murder while admitting participation in the attempt to escape." *Id.* at 8a.

At bottom, the court held "that there was no violation of appellant's Sixth Amendment-secured autonomy here comparable to that in *McCoy* . . . nor was one implicated in his decision to represent himself with the assistance of qualified co-counsel." *Id.*

Clark again appeals to this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. THIS CASE MAKES A POOR VEHICLE TO ANSWER CLARK'S FIRST QUESTION

Clark contends that at his *Faretta* hearing the state trial court offered him a Hobson's choice: He could pick between (1) counsel conceding guilt on his behalf in violation of *McCoy* or (2) no assistance of counsel. Clark paints a grim picture, but the record in his case renders a wholly different depiction of the *Faretta* hearing. Because the record does not support Clark's contentions, this case makes a poor vehicle to decide his first question.

A. *McCoy* Is Distinguishable from Clark's Case

The record does not support Clark's position that he and his attorneys had an intractable disagreement over trial strategy, much less that his attorneys' proposed trial strategy would have amounted to a *McCoy* violation. The Louisiana Supreme Court was correct when concluding that the factual basis for his *McCoy* argument is lacking. The distinctions between this case and *McCoy* are legion.

The Louisiana Supreme Court observed that, at the *Faretta* hearings, Clark

"described what he characterized as a 'difference of opinion' with counsel." Pet. App. 6a. Clark expressed uncertainty about what his trial strategy would be during the *Faretta* hearings. *Id.* The nature of Clark's disagreement with his counsel was "not clear." *Id.* at 8a. Clark "expressed his belief that it was in his best interest to be the one 'to present the truth' to the jury." *Id.* at 7a. And Clark himself ultimately ended up making the same admissions his attorney suggested. *Id.* (Clark "drew heavily on counsel's opening statement from his first trial, in many parts almost verbatim."). Thus, the Louisiana Supreme Court concluded that "[t]he record shows that [Clark] and counsel were aligned in their strategy to deny involvement in the murder while admitting participation in the attempt to escape." *Id.* at 8a. At the very least, "this record does not reflect an intractable disagreement about the fundamental objective of the representation." *Id.*

These facts stand in stark contrast to those of *McCoy*. Robert McCoy was charged with first-degree murder for killing his family. McCoy "opposed [his attorney's] assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." *Id.* at 1509. Clark, however, ambivalently contested his participation in the escape during the *Faretta* hearing and later *conceded* his participation during the trial. Clark did not "wish to avoid, above all else, the opprobrium that comes with admitting he" participated in the escape. *Id.* at 1508.

McCoy's purpose (maintaining his innocence at all costs) was directly at odds with his lawyer's purpose (saving McCoy's life). By contrast, Clark shared a purpose

with his lawyers. Clark believed that he was best suited to "present[ing] the truth" to the jury. Pet. App at 7a. His lawyers believed they were better suited to the task, but the point is that Clark and his lawyers eventually agreed that acknowledging Clark's participation in the escape plan was the best course.

It is not surprising that Clark's case is distinguishable from *McCoy*. When the dissenting opinion in *McCoy* objected that *McCoy*'s facts were "'rare' and 'unlikely to recur,'" the majority opinion could point to only three state supreme court opinions that had "addressed this conflict." *Id.* at 1510 (citing *People v. Bergerud*, 223 P.3d 686, 691 (Colo. 2010); *Cooke v. State*, 977 A.2d 803 (Del. 2009); *State v. Carter*, 270 Kan. 426, 429, 14 P.3d 1138, 1141 (2000)). The dissenting opinion in *McCoy* accurately described the facts of that case as "a rare plant that blooms every decade or so." 138 S. Ct. at 1514 (Alito, J., dissenting). Clark's case is not one of those rare plants.

In light of Clark's uncertainty about his strategy at the *Faretta* hearing and Clark's ultimate confession to participating in the escape during the second trial, there was no looming *McCoy* error. Clark did not "vociferously" insist that he did not engage in the charged acts. *Id.* at 1505. Because Clark expressed *ambivalence* about whether to confess, the trial court could have allowed Clark's attorneys to represent him as they saw fit without violating Clark's *McCoy* autonomy right.

B. Clark Was Not Presented with a Hobson's Choice

Even if this Court determines that—on this record—allowing Clark's attorneys to concede his participation in the escape plan would have violated his *McCoy* autonomy right, Clark's contention that he was presented with a Hobson's choice is

wrong for two reasons.

First, requiring Clark's attorneys to represent to the jury that he was not involved in the escape attempt would have violated their ethical duties as officers of the court. This Court has expressly held that the Sixth Amendment right of a criminal defendant to assistance of counsel is *not* violated "when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial." *Nix v. Whiteside*, 475 U.S. 157, 159 (1986). This holding, of course, accords with the Rules of Professional Conduct, which mandate that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ." Rule1.2(d); *see also id.* at 3.3(b) ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage . . . in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."); *id.* at 3.4 ("A lawyer shall not . . . counsel or assist a witness to testify falsely.").

In *McCoy*, this Court expressly acknowledged that "Louisiana's ethical rules might have stopped [McCoy's attorney] from presenting McCoy's alibi evidence if [the attorney] knew perjury was involved." *McCoy*, 138 S. Ct. at 1504. The problem for the State in *McCoy* was that it could identify "no ethical rule requiring [the attorney] to admit McCoy's guilt over McCoy's objection." *Id.* Here, however, Clark's attorney expressly told the trial judge that "I may not ethically be able to argue [Clark's version of events]. And, and I'm concerned about that." Clark's "Hobson's choice" argument is illusory because Clark never had the option to obtain unethical

representation.

Second, the record reflects that Clark's "choice [was] not all or nothing." *McCoy*, 138 S. Ct. at 1508. Indeed, the trial court allowed Clark to tell his own version of events, while permitting Clark's counsel to assist him in any ethical way Clark desired. The record reflects that the court-appointed attorneys conducted the death qualification of the potential jurors, led *voir dire*, and questioned all the expert witnesses. After Clark was found guilty of first-degree murder, his attorneys represented him in the penalty phase of the trial.

By allowing Clark to engage in a hybrid representation with his court-appointed attorneys, the trial judge made the best of a bad situation. On the one hand, the court could not require the attorneys to provide assistance to Clark that they believed was unethical. But, on the other hand, requiring Clark to forego assistance altogether may have deprived him of his Sixth Amendment right to counsel. The trial judge forged a pragmatic middle path, granting Clark the autonomy he sought by giving him control over the division of labor with his attorneys. This approach allowed Clark to tell his version of events while still permitting the attorneys to assist him in any way he desired. It is hard to conceive of a solution that better accounts for the dignity and autonomy of a criminal defendant who, after all, faces the consequences at the end of the trial. Clark was in a position at all times to have his attorneys perform any function he wanted them to. In short, the trial court *ensured* Clark was in control of his own defense.

The existence of this third option—hybrid representation—dispels Clark's

argument that he was offered a Hobson's choice during the *Faretta* hearing. Clark's *Faretta* waiver was valid and voluntary.

C. The Lower Court's Decision Is Consistent with Those of Other Courts in Similar Cases

Clark contends his case is worthy of this Court's review because the Louisiana Supreme Court's opinion "is in tension with the law in the majority of the circuits." Pet. at 14. That is incorrect.

The Louisiana Supreme Court's opinion was entirely consistent with the decisions of other courts around the country that have considered similar *McCoy* claims. *See, e.g.*, *United States v. Felicianosoto*, 934 F.3d 783, 787 (8th Cir. 2019) (concluding that no *McCoy* violation occurred even though attorney told the jury that defendant was guilty of possession with intent to distribute because defendant "admitted on the stand to holding nearly four ounces of methamphetamine"); *United States v. Audette*, 923 F.3d 1227, 1236 (9th Cir. 2019) (concluding that the record did not support the defendant's argument that his "request for self-representation was based on his desire to assert his innocence and his attorney's refusal to honor that objective"); *United States v. Holloway*, 939 F.3d 1088, 1101 n.8 (10th Cir. 2019) (observing that a defendant's right to autonomy was not violated when attorney and defendant had "strategic disputes" about how to achieve same goal); *United States v. Khan*, 769 F. App'x 620, 624 (10th Cir. 2019) (explaining that there was no *McCoy* violation when "counsel worked toward [defendant's] objective[s]" and the only disagreement between the parties "involved the timing of the guilty plea"); *Thompson v. United States*, 791 F. App'x 20, 26–27 (11th Cir. 2019) (observing that a defendant's

right to autonomy is not violated because attorney conceded some, but not all, elements of a charged crime); *United States v. Hashimi*, 768 F. App'x 159, 163 (4th Cir. 2019) (denying defendant's *McCoy* claim after remand from this Court because "the record in this case includes no definitive evidence regarding whether [defendant] consented or objected to his counsel's concession of guilt").

Because courts have universally denied defendants' *McCoy* claims in cases presenting facts similar to those of Clark's case, he has not demonstrated any "tension" exists and review of Clark's first question is unwarranted.

II. ASSUMING THE DISTRICT COURT ERRED BY ALLOWING HYBRID REPRESENTATION, THE COURT COMMITTED ONLY TRIAL ERROR, NOT STRUCTURAL ERROR

This Court found in *McCoy* that, under the facts of that case, the court committed structural error. 138 S. Ct. at 1510–12. But the Court did not say that all errors that implicate a defendant's autonomy and control over his defense are structural. If this Court is determined to consider Clark's first question—even though the record does not support his claims—then this Court should also consider the question of the nature of the error alleged.

The State contends that, assuming the state district court erred, it committed only trial error. Pet. App. 7a n.7. Clark claims it was unfair to force him to choose between counsel intent on conceding his guilt or no counsel at all. For all the reasons described above, he never faced that choice. But, in any event, because he ultimately conceded his participation in the escape plan, the error was harmless. Because Clark's claim is "amenable to harmless error" review, the trial court's alleged error could not amount to structural error. *See McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8

(1984) (internal quotation marks omitted).

III. THE REASONABLE DOUBT STANDARD APPLIES TO FACTUAL FINDINGS, NOT MORAL DETERMINATIONS

Clark asks the Court to hold that the final decision made by a jury to sentence a defendant to death must be made under the "beyond a reasonable doubt" standard. This Court has refused to do so in the past.[2] *Zant*, 462 U.S. at 879 (The sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty."). The Court should deny certiorari on Clark's second question for the following reasons.

A. Under This Court's Jurisprudence, the Reasonable Doubt Standard Applies Only to Factual Findings

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). This standard of proof applies to findings of *fact* that are required to determine whether the state has proved the *elements of the crime* with which a defendant is charged. It reduces the risk of *convictions* resting on *factual* error. *Id*. at 363.

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[2] *See Woodson v. North Carolina,* 428 U.S. 280, 303–04 (1976) (plurality opinion); *Blystone v. Pennsylvania,* 494 U.S. 299, 307 (1990) (recognizing that the "requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"); *California v. Ramos,* 463 U.S. 992, 1008 (1983) ("Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."); *Tuilaepa v. California*, 512 U.S. 967 (1994); *Proffitt v. Florida,* 428 U.S. 242, 255–258 (1976); *McCleskey v. Kemp,* 481 U.S. 279, 315, n. 37 (1987) ("Discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed" is not impermissible in the capital sentencing process.).

In *Apprendi v. New Jersey*, 530 U.S. 466, 476, 490 (2000), this Court combined the reasonable doubt requirement with the Sixth Amendment right to a jury trial and, for the first time, applied them to the sentencing stage of a criminal proceeding.[3] Under *Apprendi*, "any *fact* (other than prior conviction) that increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt." Thus, because a defendant is entitled to a jury determination that he is "guilty of every *element of the crime* with which he is charged, beyond a reasonable doubt," that includes any fact which increases the sentence to more than that prescribed by the legislature for the crime charged. 530 U.S. at 477. However, the Court expressly distinguished that factual determination from the *discretion to select* a penalty within a legislatively prescribed range—which does not require a jury or the use of the reasonable doubt burden of proof. *Id*. at 486.

Two years later, in *Ring v. Arizona*, 536 U.S. 584 (2002), this Court extended the rule of *Apprendi* to sentencing in a capital case. Because Arizona's aggravating factors increased the maximum penalty for murder, they operated as the "functional equivalent of an element of the greater offense." *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19.) Thus, the Sixth Amendment required that they be found by the jury. The same is true in *Hurst v. Florida*, 136 S. Ct. 616 (2016), upon which Clark relies. *Hurst* is little more than the application of *Ring* to a similar statute in Florida. Neither case held that the moral determination that death is the appropriate punishment had to be determined beyond a reasonable doubt, as Clark

[3] *See also Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

suggests.

After Clark filed his petition, this Court clarified that "in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range."[4] *McKinney v. Arizona*, 140 S. Ct. 702, 707–08 (2020). If the Sixth Amendment does not require a jury to weigh the circumstances or make the ultimate sentencing decision, there is no reason the Sixth Amendment should require either decision to be made beyond a reasonable doubt.

Neither the weighing of aggravating factors against mitigating factors nor the final decision to sentence a person to death involves the finding of any facts—a conclusion that every federal circuit court to consider the issue agrees with. *See United States v. Sampson,* 486 F.3d 13, 32 (1st Cir. 2007) ("[T]he requisite weighing constitutes a process, not a fact to be found."); *United States v. Runyon,* 707 F.3d 475, 516 (4th Cir. 2013) ("The weighing of aggravating and mitigating factors is a process that is not a factual determination but a complex values-based judgment. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, the relative *weight* is not."); *United States v. Fields,* 483 F.3d 313, 345, 346 (5th Cir. 2007) ("We hold that the Sixth Amendment does not require a jury to be instructed that it must find that

[4] Justice Scalia predicted this result in *dicta* in *Ring*, 536 U.S. at 612 (The "States that leave the ultimate life-or-death decision to the judge may continue to do so."); *see also Clemons v. Mississippi*, 494 U.S. 738, 745 (1990).

the aggravating factors outweigh the mitigating factors beyond a reasonable doubt."); *United States v. Gabrion*, 719 F.3d 511, 532 (6th Cir. 2013) (*en banc*) ("*Apprendi* does not apply to every 'determination' that increases a defendant's maximum sentence. Instead it applies only to findings of fact that have that effect."); *United States v. Purkey,* 428 F.3d 738, 751 (8th Cir. 2006) ("[I]t makes no sense to speak of the weighing process . . . as an elemental fact . . . ."); *United States v. Mitchell,* 502 F.3d 931, 993–94 (9th Cir. 2007); *United States v. Fields,* 516 F.3d 923, 950 (10th Cir. 2008); *Ford v. Strickland*, 696 F.2d 804, 818–19 (11th Cir. 1983).

It would not make much sense to extend the reasonable doubt standard to moral determinations. As this Court recently recognized in the Eighth Amendment context:

> The ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendant must deserve mercy (which simply is not a factual determination) beyond a reasonable doubt . . . . We doubt that would produce anything but confusion.

Carr, 136 S. Ct. at 643. Clark suggests that *Kansas v. Carr* is inapposite because the statute at issue there required a reasonable doubt standard in the weighing process. Pet. at 27 n.15. That fact, however, does not change the Court's observation that such a requirement is not only unnecessary but confusing.

It should not trouble the Court that some States require moral determinations about the death penalty to be made beyond a reasonable doubt. This Court has long held that "States are free to determine the manner in which a jury may consider mitigating evidence" "including the manner in which aggravating and mitigating

circumstances are to be weighed." *Kansas v. Marsh*, 548 U.S. 163, 171, 174 (2006); *see also Walton v. Arizona*, 497 U.S. 639, 652 (1990), overruled on other grounds, *Ring v. Arizona*, 536 U.S. 584 (2002); *Boyde v. California*, 494 U.S. 370, 374 (1990). Thus, it is not unusual, much less unconstitutional, that state statutes regarding the standard of proof for mitigating facts, the weighing of factors, and the ultimate conclusion process will vary. There is no split of authority that warrants this Court's attention.

B. Under Louisiana Law, Only Factual Determinations Must Be Made Beyond a Reasonable Doubt

Louisiana law provides that the sentence of death shall not be imposed unless, "after consideration of any mitigating circumstances, [the jury] determines that the sentence of death should be imposed." LA. C.CR. P. art. 905.3. Clark asserts that because one of Louisiana's death penalty statutes is entitled "Sentence of death; jury findings," it "dictates that the determination [that death is the appropriate sentence] is a 'jury finding.'" Pet. at 18. Then, pulling the word "finding"—completely out of context—from the Court's opinion in *Hurst*, he argues that 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." Pet. at 19. Both assertions miss the mark by a wide margin.

Louisiana distinguishes between "findings" and "determinations." Louisiana Code of Criminal Procedure article 905.3 requires a jury to "find"—beyond a reasonable doubt—that at least one statutory aggravating circumstance exists, as this Court demands. It then requires the jury, after considering the mitigating

circumstances, to "determine" that the sentence of death should be imposed. Thus, Louisiana does not require the jury to make a "finding" that the sentence of death should be imposed. Other statutory provisions echo these distinctions[5] and nothing in the Louisiana statutory scheme requires a jury to make a "finding" that death is the appropriate sentence. The title of an act is not part of a statute and can only be used to interpret legislative intent when the language of the statute leaves doubt as to its meaning. LA. R.S. 1:13(A); *State v. Williams*, 2010-1514 (La. 3/15/11, 6); 60 So. 3d 1189, 1192; *see also Sibley v. Bd. of Sup'rs of La. State University,* 447 So. 2d 1094 (La. 1985); *Swift v. State,* 342 So. 2d 191 (La. 1977). This Court has recognized this plain rule of statutory interpretation. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he title of a statute . . . cannot limit the plain meaning of the text."). Thus, Louisiana's sentencing scheme does not require juries to make moral determinations beyond a reasonable doubt. And so it is entirely consistent with this Court's jurisprudence.

C. Nothing from the Founding Era Supports Clark's Argument

In over two hundred years of this Court's extensive jurisprudence on both the death penalty and the reasonable doubt standard, it has never suggested that history requires the final decision to sentence a person to death to be determined beyond a reasonable doubt.[6]

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[5] Article 905.6 also requires a unanimous "determination" that a sentence of death should be imposed. The verdict form also requires the jury to "find" the statutory aggravating circumstance but to "determine" that the defendant should be sentenced to death. *See* LA. C.CR. P. art. 905.6. Finally, article 905.8 requires the court to "sentence the defendant in accordance with the 'determination' of the jury. *Id.* art. 905.8.

[6] In fact, as noted above, it has suggested the opposite. *See Carr*, 136 S. Ct. at 642.

Clark now claims, however, that applying the reasonable doubt standard to findings of fact, as this Court has repeatedly done, "would not only be unfamiliar to the framers; it would seem to them flatly wrong." Pet. at 24. His argument is basically that, because the term "reasonable doubt" appears to have originated in a capital trial and because the death penalty was mandatory for most capital crimes, a founding era jury was actually determining the sentence. Therefore, he posits, the reasonable doubt standard should apply to the final sentencing decision in a capital case. History does not support the adoption of Clark's proposed rule.

Although most commentators agree that the term "reasonable doubt" was first uttered in 1770 at the trial of the English soldiers involved in the "Boston Massacre,"[7] it was hardly an accepted standard of proof at the time.[8] In fact, Clark's own scholar, in his next breath, admits that "few trials for such offenses employed it." STEVE SHEPPARD, *The Metamorphoses of Reasonable Doubt*, 78 NOTRE DAME L. REV. 1165, 1195 (2003).

And, although the death penalty may have been mandatory upon conviction, the jury was still instructed only to find *facts* beyond a doubt, or sometimes beyond a reasonable doubt.[9] It was the *factual* determination of guilt that was governed by the standard, not the sentence—which was the province of the judge. *Id.* Even if the

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[7] Ironically, the standard was first suggested by the prosecutor, it is believed, to make it easier to obtain a conviction. John Adams, one of the defense attorneys, had suggested the "beyond a doubt" standard. *See* RANDOLPH N. JONAKAIT, *Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development*, 10 U.N.H.L. Rev. 97, 102, 124–27 (2012).

[8] The term did not receive widespread use until the mid-to-late 1800s. ANTHONY A. MORANO, *A Reexamination of the Development of the Reasonable Doubt Rule,* 55 B. U. L. REV. 507, 516–19 (1975).

[9] *See United States v. Haymond*, 139 S.Ct. 2369, 2376 (2019) citing *Alleyne v. United States*, 570 U.S. 99, 108 (2013) (plurality opinion). *See also* 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872).

sentence was mandatory then, today this Court has held mandatory death sentences are unconstitutional—and so a jury has discretion to reject the penalty and recommend life at the sentencing phase. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). Thus, one of the major premises of Clark's argument is no longer valid under today's jurisprudence.

Although moral concerns at the Founding may explain the concept of "jury nullification," there is really no evidence it led to the creation of the "reasonable doubt" standard of proof. As this Court has recognized, the States "responded to this expression of public dissatisfaction" in numerous ways, including "limiting the classes of capital offenses"[10] and, beginning in 1838, granting juries sentencing discretion in capital cases.[11] Perhaps most telling is that in two extensive treatises on the history of the criminal trials and the death penalty by noted legal historians John H. Langbein[12] and Stuart Banner,[13] absolutely no mention is made of the reasonable doubt standard, much less that it was a device "created specifically for the moral determination in capital trials," as Clark claims. Pet. at 23.

Finally, Clark's suggestion that this historic moral judgment standard should be injected into the death penalty decision runs counter to the concerns of this and

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[10] *Woodson*, 428 U.S. 280, 290 (1976) (citing R. BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 5 (1919)).

[11] *Woodson*, 428 U.S. 280, 289–91 (1976) (citing W. BOWERS, EXECUTIONS IN AMERICA 7 (1974)). Tennessee was first, followed by Alabama in 1841 and Louisiana in 1846. *Id*. at 291.

[12] JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 334–38 (2003).

[13] STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002).

other courts, and those of many commentators,[14] about the use of the term "moral certainty" in reasonable doubt instructions. That concern is based on the "real possibility that such language would lead jurors reasonably to believe that they could base their decision to convict upon moral standards or emotion in addition to or instead of evidentiary standards." *Victor v. Nebraska*, 511 U.S. 1, 37 (1994) (Blackmun, concurring).

At bottom, nothing in the history of this country or the jurisprudence of this Court militates in favor of requiring moral determinations be made beyond a reasonable doubt. Because authorities are in agreement on that point, granting certiorari on Clark's second question is unwarranted.

CONCLUSION

Louisiana submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[14] ROBERT C. POWER, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 TENN. L. REV. 45, 63 (1999) (citing BARBARA J. SHAPIRO, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850,* 38 HASTINGS L.J. 153, 174–75 (1986)).