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

No. 19-8039

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

PETITONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF

Pursuant to Rule 15.6, Petitioner files this Reply Brief to the State of Louisiana's *Brief in Opposition*.

The *Brief in Opposition* makes clear that the issues presented are preserved and ripe for review.[1]

This Court should grant certiorari to clarify that where a court conducts a *Faretta* waiver with a defendant seeking to represent himself, the defendant should be informed of his right to control the objectives of the representation under *McCoy v. Louisiana*. In the alternative the Court should summarily reverse the Louisiana Supreme Court decision which failed entirely to consider the *Faretta* colloquy as directed to by this Court, in light of *McCoy v. Louisiana*, 584 U.S. __ (2018). *See Clark v. Louisiana*, 138 S. Ct. 2671 (2018).

Separately, this Court should grant certiorari to address the legal issue percolating through the courts: whether the jury's determination of moral culpability is excluded from the findings that should be made by a jury beyond a reasonable doubt. The BIO frankly acknowledges that under Louisiana law, moral determinations need not be made by a jury beyond a reasonable doubt – which renders the issue plain before this Court.

[1] The BIO also suggests that "assuming the district court erred by allowing hybrid representation, the Court committed only trial error not structural error." BIO at 19. However, this Court's decisions in *Faretta* and *McCoy* makes clear that this is structural. Even the Louisiana Supreme Court recognized that if this was error, it was structural.

I. THE BIO DOES NOT DISPUTE THAT PETITIONER WAIVED HIS RIGHT TO COUNSEL AS A RESULT OF A DISPUTE OVER THE OBJECTIVES OF HIS REPRESENTATION WHILE HE WAS NEVER INFORMED OF HIS RIGHT UNDER *MCCOY V. LOUISIANA*, TO CONTROL THE OBJECTIVES OF HIS DEFENSE

In one respect, the State is accurate when it asserts "*McCoy*[2] is Distinguishable from Clark's Case." BIO at 13. When faced with a disagreement between client and counsel, Mr. Clark represented himself whereas Mr. McCoy declined to do so. But in both instances the exact same legal mistake was made: the defendant was essentially informed that the objectives of representation were his counsel's. How do we know this to be the case? First, because this was what the law was in Louisiana at the time of the *Faretta*[3] colloquy. Whatever herculean efforts the BIO makes to run from this essential similarity, the law in Louisiana at the time of the colloquies is inescapable:

> 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)…; *State v. Holmes*, 95-0208, pp. 7-8 (La. App. 4 Cir. 2/29/96), 670 So.2d 573, 577-78. *See also State v. McCoy*, 218 So. 3d 535, 2016 WL 6506004 (La. 10/19/16).

State v. Clark, 2012-0508 (La. 12/19/16), 220 So. 3d 583, 637 (Clark I).

Second, the Louisiana Supreme Court and the BIO did not identify any language suggesting Mr. Clark was informed that he had the right to control the objectives of his defense. Neither the Louisiana Supreme Court below, nor the BIO

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[2] *McCoy v. Louisiana*, 548 U.S. __ (2018).

[3] *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975).

here, pointed to a single sentence in the colloquy where the district court informed Mr. Clark that he had the autonomy to decide the objectives of the defense. And it is clear from the colloquy that Mr. Clark, the trial court and defense counsel were operating under the legal standard that was in effect at the time of the trial.

Third, everything in the colloquy demonstrated Mr. Clark's concern that he and his lawyers had different objectives. 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).

Petitioner does not suggest that the *Boykin* colloquy in every case be changed to ensure that each defendant understands that he has the autonomy to control the goals of the representation. Rather, 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 that the defendant and not the lawyer set the objectives of his own defense.

The BIO spends many pages describing the similarities and differences of the defenses that Mr. Clark and his counsel pursued – but these are not dispositive of the

critical feature: which is the goals of the representation. In this, counsel and Mr. Clark's goals were diametrically opposed.

The legal question in this case is clear: when there is a dispute between client and counsel regarding the defense, should the client be informed that it is his right decide what his counsel concedes before waiving counsel? In Louisiana, at the time of Mr. Clark's trial, the rule was that the strategic choice of whether to concede guilt was counsel's and not the client's. The BIO frankly acknowledges that:

> 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.

State's BIO at 6. Regardless of how "extensive" the "Faretta" colloquy was, or the exact defenses defense counsel and Mr. Clark were contemplating, Mr. Clark was never informed that he could limit his counsel's decision to concede his guilt, or as Mr. Clark explained "I call it throwing me under the bus". R. vol. II-sealed, p. 29.

II. THE BIO ACKNOWLEGES THE MERITS LEGAL QUESTION WHETHER THE FIFTH AND SIXTH AMENDMENT REQUIRE THE JURY TO MAKE THE MORAL DETERMINATIONS THAT INCREASED PETITIONER'S PUNISHMENT BEYOND A REASONABLE DOUBT

There is no question that this issue is ripe for this Court's review. The BIO argues: "Louisiana's sentencing scheme does not require juries to make moral determinations beyond a reasonable doubt." BIO at 25. See also *id* at 24 ("Louisiana distinguishes between "findings" and "determinations.").

But this is the very legal question that the petition places before the Court – whether the State can describe one set of jury decisions as "findings" and another set of jury decisions as "determinations" and thereby eliminate the Sixth Amendment's application to the latter. Could Louisiana ask the jury to make the "factual finding" beyond a reasonable doubt that a defendant possessed a firearm for an unlawful purpose, and then allow a judge or jury to make the "moral determination" based upon a preponderance of the evidence concerning the character of the defendant and the victim, that a higher sentence was required?

As this Court has explained, the jury plays an essential check on the state's ability to punish. *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) ("Consistent with these understandings, juries in our constitutional order exercise supervisory authority over the judicial function by limiting the judge's power to punish. A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct.").

The State's invocation to *McKinney v. Arizona*, 140 S. Ct. 702, 707-708 (2020) bolsters the reason to grant certiorari rather than defeats it. As this Court explained:

> The hurdle is that McKinney's case became final on direct review in 1996, long before *Ring* and *Hurst*. *Ring* and *Hurst* do not apply retroactively on collateral review. See *Schriro v. Summerlin*, 542 U. S. 348, 358, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). Because this case comes to us on state collateral review, *Ring* and *Hurst* do not apply.

McKinney v. Arizona, 140 S. Ct. 702, 708 (2020). Nor could the Court for the first time habeas consider whether *Clemons v. Mississippi*[4] remained good law.

In Louisiana, before a defendant is sentenced to death, the 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 Legislature has provided 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. Petitioner acknowledges that a state could write a statute differently. For instance, under the Sixth Amendment, the Legislature could require the jury to make an initial finding of eligibility and then give a judge the authority to

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[4] *Clemons v. Mississippi*, 494 U.S. 738 (1990).

decide the punishment. But what it cannot do is shroud the finding in the veneer of the jury's authority, and then reduce the state's burden of proof. *United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) ("under our Constitution, when "a finding of fact alters the legally prescribed punishment so as to aggravate it" that finding must be made by a jury of the defendant's peers beyond a reasonable doubt.").

While the BIO cites *Kansas v. Carr*, for the proposition that the moral determination need not be made beyond a reasonable doubt, in Kansas, the jury was required to find both the existence of any aggravating circumstance, and that the aggravating circumstances outweighed mitigating circumstances *beyond a reasonable doubt*: "The instruction makes clear that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt." *Kansas v. Carr*, 136 S. Ct. 633, 643 (2016). What *Carr* declined to do was require, under the Eighth Amendment, a district court judge to "affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt." *Id* at 642. Or to instruct the jury's determination of mercy must be made beyond a reasonable doubt.

It is not too confusing to require that, under the Sixth Amendment, any finding by the jury that increases the punishment, whatever it is named, must be made beyond a reasonable doubt; while still allowing, under the Eighth Amendment, a jury to consider mitigating circumstances or decide to give mercy under a lesser burden of proof or for no reason at all. Indeed, this is our constitutional system. Nor does the

BIO's rendition of the history from the Founding era accurately captures the role of juries. On the merits, the BIO argues:

> 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 and Stuart Banner, 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.

BIO at 27. Counsel suggests that addressing this is a question best reserved for merits briefing, but notes that Professor Langbein specifically observes: "The judges developed the exclusionary rules of evidence, especially the corroboration and confession rules, and the beyond-reasonable-doubt standard of proof, rules whose breadth assured that not only some innocent defendants would be spared but also many culpable ones." John H. Langbein, The Origins Of The Adversary Criminal Trial (2003) at 336. This standard was incorporated into the jury trial right at the time of the founding because the essence of the jury's job involved the "power to mitigate sanctions, … Only a small fraction of eighteenth century criminal trials were genuinely contested inquiries into guilt or innocence. In many cases, perhaps most, the accused had been caught in the act or with the stolen goods or otherwise had no credible defense. To the extent that trial had a function in such cases beyond formalizing the inevitable conclusion of guilt it was to decide the sanction."

John Langbein, The Origins of Adversary Criminal Trial, at 59. *See also id* at 335 (discussing ways in which judges connived with juries to avoid death sentences); *Haymond*, 139 S. Ct. at 2384 ("In what now seems a prescient passage, Blackstone warned that the true threat to trial by jury would come less from "open attacks,"

which "none will be so hardy as to make," as from subtle "machinations, which may sap and undermine i[t] by introducing new and arbitrary methods." 4 Blackstone 343[5]. This Court has repeatedly sought to guard the historic role of the jury against such incursions. For "however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters."").

From even before the founding, it was understood that the jury's finding served as a limitation on the government's ability to punish. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 2012 (2005). In homicide cases, English juries determined whether defendants would live or die by making determinations relating to 'malice,' the element that distinguished the crime of murder, which was punished by mandatory death, and manslaughter, which was not. *Id.* at 2013. As a practical matter, "the murkiness of the required factual determinations inevitably vested the jury with considerable discretion." Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L. Rev. 1, 8 (1989). Research by Professor Thomas A. Green indicates that English juries exercised this discretion frequently. *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, 126 (1985) ("The emergence of the distinction between culpable-but-sudden homicide and slaying

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[5] 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769).

through malice aforethought simultaneously reduced the number of cases involving judge-jury tension and built into the fact-finding process more room for the kind of discretion juries had always exercised.").

The State of Louisiana has reduced the burden of proof with respect to jury's finding of moral culpability. The BIO makes the argument that this is permissible. Petitioner suggests that this is not. This is a merits question deserving this Court's review.

CONCLUSION

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

Respectfully submitted,

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