No. _____

In The
Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

v.

DAVID H. BROWN,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

THIS IS A CAPITAL CASE

1. Whether the Louisiana Supreme Court erred in vacating the three death sentences imposed on the respondent when the trial court granted respondent's request to discharge his appointed attorneys after the guilt phase of a capital trial, and allowed him to represent himself during the ensuing penalty phase.

2. Whether the Louisiana Supreme Court erred in extending the rule announced by this Honorable Court in *McCoy v. Louisiana, infra*, when it concluded that said rule authorizes a client to overrule trial counsel regarding tactical decisions such as determining what witnesses to call and the arguments to advance.

3. Whether the Louisiana Supreme Court erred in determining that the trial court committed structural error in granting the defendant's request to represent himself pursuant to *Faretta v. California, infra*.

RELATED CASES

State of Louisiana v. David H. Brown, No. 520401, 17th Judicial District Court for the Parish of Lafourche, State of Louisiana. Defendant convicted October 30, 2016, capital sentence recommended November 1, 2016, death penalty imposed June 22, 2018.

State of Louisiana v. David H. Brown, No. 2018-KA-1999, Louisiana Supreme Court. Judgment entered September 30, 2021.

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The undersigned Assistant District Attorney, on behalf of the State of Louisiana, respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court in this case.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court (App., *infra*, 1) is reported at 2021 La. LEXIS 1714 *, 2020-01999 (La. 09/30/21) and 2021 WL 4473001.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on September 30, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a) as it involves the respondent's right to self-representation in a capital trial claimed under the Sixth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment to the United States Constitution, the text of which reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

Following a jury trial in the 17th Judicial District Court for the Parish of Lafourche, State of Louisiana,

David H. Brown was convicted of the first degree murders of Jacquelin Nieves, who was six days short of her thirtieth birthday when she was killed, and her two children, Gabriela Nieves, age seven, and Izabela Nieves, who was only eighteen months old. The same jury thereafter recommended that the death penalty be imposed on all three counts.

On the morning of Sunday, November 4, 2012, at 5:25 a.m., the Lockport Fire Department was dispatched to an apartment fire in progress. After initially being repelled by the smoke and fire, first responders were eventually able to make it to the second floor bedroom where three female victims were located. All three were already deceased and each body bore signs of apparent stab wounds.

As firefighters removed the victims from the burning bedroom, it was noticed that Izabela, the youngest of the three victims, was wearing only a diaper. Gabriela, seven years old at the time, was found with her legs "wide open" and was naked from the waist down. Their mother, Jacqueline, was also naked from the waist down, and was found "with her legs open and her arms wide open." Because of the apparent injuries to the victims, the apartment and surrounding courtyard areas were designated as a homicide crime scene, and the perimeter promptly secured.

In constructing a timeline of the events leading up to the fire, investigators learned that a number of people had watched the LSU-Alabama football game at the victims' apartment complex the night before the

killings. Detectives ultimately learned that the defendant was one of the persons present.

During the Saturday afternoon prior to the killings, the defendant told Carlos Nieves, the husband of Jacquelin, that he was going to have sex with her, although Brown then attempted to downplay the comment as a joke. The defendant was further drawn to the attention of detectives when Nanette Barrios, a neighbor of the Nieves', informed them that after going to bed on the Saturday night before the killings, she was awakened by the defendant, who had entered her room without permission and began touching her. Barrios began hollering at the defendant, who promptly fled.

Investigators canvased the area surrounding the crime scene and located several surveillance videos which were ultimately introduced at trial. Video images of a white male matching the description of Brown were identified as relevant to the LPSO investigation and taken into evidence. These images were used by investigators to compile a timeline of the events beginning around noon the day before the killing.

At the time of the murders, the defendant was residing at a work release facility and was employed by a local shipyard. Brown was ultimately located at the bunkhouse where he had been staying. Investigators transported the defendant to the LPSO office in Lockport, where the defendant was first Mirandized before he agreed to make a statement. During questioning,

investigators asked the defendant to pull up his long sleeves and noticed Band-Aids on his arm, which were covering a fresh cut. At trial, the State played the audio of the defendant's statement with investigators to the jury, which the defendant terminated when the subject turned to a shirt found at the murder scene that matched the description of the shirt he was wearing before the killings.

The bodies of the three victims were transported to the Jefferson Parish Sheriff's Office Crime Laboratory, and autopsies were conducted the same day. It was determined that the mother, Jacquelin, had been exposed to fire, as her body showed evidence of blistering, as well as soot and smoke. The victim had numerous knife wounds, the lethal one being a stab wound to her right collarbone area which went through her trachea, resulting in her aspirating on blood in both of her lungs. The victim also exhibited what the coroner termed as injuries "characteristic of defense wounds." Garcia also testified that the victim had a "sharp force injury" between the vaginal introitus and anal orifice. Additionally, Jacquelin had injuries to her vaginal area and into the anal mucosa, which Garcia opined were consistent with a blunt trauma.

Gabriela's autopsy likewise showed exposure to heat, as evidenced by skin slippage on her arms, and in her particular case she also had soot and smoke deposits at her nose and nostrils. Like her mother, Gabriela's body also exhibited wounds of a defensive characteristic. Gabriela suffered numerous stab wounds, one of which penetrated her skull and went into her

brain. Garcia testified that such a wound could have been fatal had Gabriela lived long enough, but she in fact succumbed as a result of smoke inhalation. Additionally, the autopsy showed that Gabriella had contusions or bruising in the area of her vagina and anus, as well as a small laceration of the skin in that area. Garcia testified that her findings, which included observations of bleeding in the area, were consistent with blunt trauma.

Finally, the autopsy of Izabela, the toddler, showed that she had numerous stab wounds as well. Two of the wounds were considered fatal, which caused her to bleed to death internally. Izabela also had blood on her feet, indicating that she may have been walking through the crime scene after the carnage began.

The evidence presented by the State at trial also included expert DNA testimony, which linked David Brown to the blood evidence found at the scene of the crime, including samples taken from the walls, a striped shirt he was alleged to have been wearing before the killings which was left at the crime scene, as well as a blood-stained knife found on a mattress in the bedroom. The State's forensic DNA expert also testified as to his findings and conclusions after analyzing rape kits collected from Gabriela Nieves and Jacquelin Nieves. While spermatozoa were not detected in either rape kit, Cox testified that acid phosphatase, a substance used to indicate the possible presence of seminal fluid, was detected on the oral swab taken from Gabriela. The anal swab taken from Gabriela tested positive for acid phosphatase and prostate-specific

antigen (PSA), a protein found in very high amounts in seminal fluid.

Likewise, acid phosphatase was found on the oral swab taken from Jacqueline. Cox further testified that a Y-STR haplotype obtained from that swab was consistent with the Y-STR haplotype obtained from the reference swab of the defendant. The rectal swab of the victim also contained acid phosphatase and PSA, while her vaginal swab contained acid phosphatase. Y-STR testing of that swab was also consistent with the defendant's reference sample.

These findings, when coupled with the observations made by Dr. Garcia regarding the trauma to the genital areas of both Jacquelin and Gabriela, as well as the victims' state of undress and positioning when found by first responders, provided sufficient proof that the defendant was engaged in the perpetration or attempted perpetration of an aggravated rape of these two victims.

The State also introduced forensic testimony demonstrating that the killings were committed during the commission of an aggravated arson. Capt. Brian Tauzin with the State Fire Marshal's Office testified that the fire which damaged the apartment had characteristics of what he termed a "liquid pour pattern" and it appeared that there was an ignitable liquid poured in the bedroom and out into the stairwell. Tauzin concluded that the fire was ignited at the top of the stairwell with an open flame, and was intentionally set. Tauzin also related that at the time he examined

the crime scene, "(t)he entire second story smelled of an obvious odor of gasoline."

Also found at the scene was a red-colored fuel can. Samples taken from that can were positive for gasoline. At trial, Claiborne Chauvin, Jr., who lived near the crime scene, testified that the gas can introduced into evidence was his, which he had noticed was missing from his mud boat at around 11 a.m. on the day following the killings. Chauvin's testimony thus placed into context evidence from the surveillance videos, which showed a white male fitting the defendant's description moving away from the murder scene in the direction of the boat, and then moving back towards the murder scene, shortly before the fire was detected.

The defendant was arrested on November 4, 2012, and charged with the first degree murders of Jacquelin, Gabriela and Izabela Nieves on the same date. He was initially indicted on January 30, 2013. Subsequently, however, the State received DNA reports from the Louisiana State Police Crime Laboratory which indicated that Jacquelin and Gabriela Nieves had been raped by the defendant. Accordingly, the case was re-presented to the grand jury, resulting in a superseding indictment for three counts of first degree murder on May 17, 2013 for the purpose of adding aggravated rape as an aggravating factor.

The selection of the jury in this matter commenced on September 12, 2016, with the trial court conducting a bifurcated process which first determined prospective jurors' views on pretrial publicity, sequestration

and the death penalty. Opening statements were made in the guilt phase of the defendant's capital trial on October 24, 2016, and the trial continued until October 30, when the jury returned verdicts of guilty as charged on all three counts of the indictment.

On October 31, during the mandatory delay before the start of the penalty phase, defense counsel informed the trial court that the defendant wished to discharge them and represent himself during the penalty phase. The trial court at that time questioned the defendant on the record about the reasons for his decision to discharge his trial attorneys and represent himself during the penalty phase. On November 1, the trial court engaged in a formal colloquy with the defendant pursuant to *Faretta v. California*, 422 U.S. 806 (1975), and determined that the defendant's choice to represent himself was informed and voluntary. Accordingly, the trial court granted the defendant's request. The sentencing hearing began thereafter and was concluded the same day. During the sentencing hearing, with the blessing of the trial court, the defendant's trial attorneys, Cuccia and Dwight Doskey, sat with the defendant at counsel table. After deliberation, the jury recommended the death penalty on all three counts of the indictment.

On April 5, 2018, a hearing was held on the defendant's motion for a new trial, which was denied. On June 22, the trial court formally sentenced the defendant to death on all three counts for which he was convicted. The defendant thereafter filed a motion to reconsider sentence, which was denied by written

order dated August 31, 2018. On September 20, the defendant filed his motion for direct appeal to the Louisiana Supreme Court.

On September 30, 2021, the Louisiana Supreme Court affirmed the defendant's convictions on all three counts, but vacated the death penalty recommended by the jury and imposed by the trial court. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The Louisiana Supreme Court erred when it vacated the three death penalties imposed on the defendant and remanded the matter for a new sentencing hearing

The factual basis on which the Louisiana Supreme Court relied in granting relief is not in dispute

In vacating the three death penalties unanimously recommended by the jury in this matter, the Louisiana Supreme Court relied on a very basic set of facts established during the course of two hearings held on October 31 and November 1, 2016. None of these facts are in dispute. Accordingly, it is not necessary for this Honorable Court to either re-weigh or resolve conflicts in testimony, nor to evaluate the credibility of witnesses when determining whether to grant relief as prayed for herein.

The issue of the defendant's desire to represent himself at the penalty phase did not arise until after the completion of the guilt phase of trial. At that point, and before the start of the penalty phase, the defendant's appointed trial counsel first informed the court of a dispute between the defense attorneys and their client, in which he expressed his desire to keep both his mother, Judy Corteau, and his uncle off of the stand during the penalty phase. Defense counsel articulated the scope of the dispute as follows:

> Well, I think it comes, properly, from the Defense, Your Honor. The issue, Your Honor, is that we have discussed, with the defendant, what we plan on doing in the penalty phase. That includes questioning of his mother and about his mother, of some other relatives and about – of other relatives about his mother. A lot of it will center on his mother.
>
> The defendant does not want us to go through those questions either about his mother or by calling his mother to the stand.

Counsel then informed the court that he told his client that the choices were "either to let me go ahead and handle the penalty phase the way that I think I am ethically obligated to do and in the best opportunity, which is by talking about his mother and calling his mother to the stand." Defense counsel explained that the only way for the defendant to prevent that was to discharge them and represent himself during the penalty phase. The defendant himself thereafter informed the court of his concerns:

> I'm not going to allow my mother to get on the stand and be portrayed as a whore, as a slut, as a rape victim from her father, from her brothers. I will not do it.

This was the full extent of the alleged dispute between the defendant and his trial attorneys. At no point during the colloquy on October 31 nor the next day did the defendant expand on his complaint regarding the proposed penalty-phase defense. During the *Faretta* hearing held on November 1, the defendant reiterated the source of his disagreement with trial counsel, again noting the limited scope of the dispute. When the colloquy turned to the issue of the witnesses subpoenaed for the mitigation defense, the following transpired:

> Q. Okay. And as I appreciate the discussion, yesterday, from Mr. Doskey, it's his intention to call them all.
>
> A. Yes, sir. That's his intention.
>
> Q. Now, –
>
> A. The disagreement comes just with my mother and my Uncle Calvin.
>
> Q. Okay.
>
> A. Because there's some – there's stuff that's in the past that I believe should stay in the past. And it took my mother many, many years to get over this. And to be drug back out, put in the newspaper – like I told you, I'm willing to accept death before I let my mother get on the stand. So if y'all agree, I agree –

Q. Mr. Brown –

A. – we're done.

Throughout the *Faretta* hearing, the defendant consistently limited his dispute with trial counsel to their intent to call his mother and uncle to the stand, as he later reiterated:

> Well, that was the conflict. You see, I was willing – if he was willing to not put my mother and Uncle Calvin, we could of (sic) called anybody that he wanted besides that. But he's unwilling to do that, so this is the step that I have to take to protect my mother.

The State of Louisiana respectfully submits that the foregoing illustrates the limited, yet finite, scope of the dispute between the defendant and his trial counsel. Additionally, it also establishes that in all other respects both client and counsel agreed on the ultimate goals of the mitigation defense – i.e., that trial counsel would otherwise be allowed to present the case it prepared for the purpose of convincing the jury that the defendant's life should be spared. During the *Faretta* colloquy, the defendant indicated that he had no problem calling seven of the nine witnesses his attorneys had under subpoena for the penalty phase, including two mitigation experts.

That both the defendant and his trial counsel shared the same overall objective in the penalty phase was reinforced in the defendant's brief to the Louisiana Supreme Court. The defendant's appellate counsel unreservedly asserted that "Mr. Brown made explicitly

clear that he assented to continued representation by counsel, *including the presentation of mitigation evidence to the jury*. *His only objection was to certain facts* – his mother's history of sexual abuse – *being elicited through certain witnesses*." (Emphasis added.)

The State respectfully submits that the dispute in this matter should be understood exactly as it was stated by the defendant on appeal – that while Brown and his trial counsel both agreed to present a defense which sought to avoid the death penalty, there was a limited dispute over calling two witnesses, and the arguments trial counsel would be allowed to make to the jury as a result of their anticipated testimony. This dispute did not involve the objectives of the defense, which was apparently the view of the Louisiana Supreme Court. As set forth below, the facts of this case did not warrant the relief granted by the Court below pursuant to *McCoy v. Louisiana, infra.*

The trial court erred in vacating the death sentences imposed in this matter by extending the holding of *McCoy v. Louisiana* beyond its proper scope

In vacating the defendant's death sentences, the Louisiana Supreme Court relied predominantly on this Court's holding in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). The State respectfully submits that in doing so, it extended the *McCoy* rationale beyond its proper scope, to the point that it stands in conflict with

prior jurisprudence of the United States Supreme Court.

Taking the opinion as a whole, it appears that the court below assumed as a given that the factual disputes involved in the instant case and the *McCoy* decision were the same, or at least so similar that there was no need to resolve any differences between the two. However, the scope of the dispute in this case is significantly different from that presented in *McCoy*. In that case, the defendant and his trial counsel fundamentally disagreed about the objective of the anticipated defense – whether to concede guilt at the outset of trial. In the case at bar, no such dispute existed, as both David Brown and his trial counsel agreed on the objective in the penalty phase. But for one contested issue, both wished to present the mitigation evidence prepared by counsel in the hopes of convincing the jury to spare the defendant's life.

That one issue arose from defense counsels' insistence, over Brown's objection, that the defendant's mother and uncle take the stand during the penalty phase, presumably for the purpose of eliciting evidence concerning his mother's abusive childhood. The defendant further objected to the anticipated arguments from his trial attorneys which would flow from such testimony. The State submits that these objections do not establish a dispute between the defendant and his trial attorneys regarding the objectives of the penalty phase defense. It is merely a dispute over strategic choices made for the purpose of establishing that defense.

Prior to *McCoy*, this Court had consistently held that giving an attorney control of trial management matters was a practical necessity, noting that "(t)he adversary process could not function effectively if every tactical decision required client approval." *Gonzalez v. United* States, 553 U.S. 242, 249 (2008), citing *Taylor v. Illinois*, 484 U.S. 400, 418 (1988). The Louisiana Supreme Court, in *State v. McCoy*, 218 So.3d 535, 566 (La. 2016) applied this rationale in concluding that, as a tactical matter, "(c)onceding guilt, in the hope of saving a defendant's life at the penalty phase, is a reasonable course of action in a case in which evidence of guilt is overwhelming."

In reversing that decision, this Honorable Court held that such concessions "are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *McCoy*, 138 S.Ct. at 1508, emphasis in original. Yet even as it granted relief, the court left undisturbed the fundamental principle that "(t)rial management is the lawyer's province. . . ." As the majority opinion notes:

> Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles. See *Gonzalez*, 553 U.S., at 249, 128 S.Ct. 1765, 170 L.Ed.2d 616 ("[n]umerous choices affecting conduct of the trial" *do not require client consent, including "the objections to make, the witnesses to call, and the arguments to advance*"); cf. post, at ___-___, 200 L.Ed.2d, at 839-840. Counsel, in any case, must still develop a trial

> strategy and discuss it with her client, see *Nixon*, 543 U.S., at 178, 125 S.Ct. 551, 160 L. Ed. 2d 565, explaining why, in her view, conceding guilt would be the best option. (*Id.*, at 1509, emphasis added.)

This delineation of roles simply recognized a long line of prior Supreme Court rulings which provided lower courts with clear guidance in resolving disputes such as the one faced by the trial court in this matter. See *Gonzalez, supra*, and *Taylor, supra*. In *New York v. Hill*, 528 U.S. 110 (2000), this Court held that a lawyer must have full authority to manage the conduct of trial, concluding "(a)bsent a demonstration of ineffectiveness, counsel's word on such matters is the last." *New York v. Hill*, 528 U.S. at 115. In *Hill*, this court distinguished those trial decisions (in that case, regarding waivers) which required a defendant's consent from those which an attorney had the unilateral authority to make, even when binding on the client. As this Court noted:

> "Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has – and must have – full authority to manage the conduct of the trial." *Hill*, *supra* at ___, quoting *Taylor v. Illinois*, 484 U.S. 400, 417-418, 98 L.Ed.2d 798, 108 S.Ct. 646 (1988).

McCoy maintained the distinction between the objectives of a defense which were the clients to decide, and matters of trial strategy which an attorney was

authorized to exercise without a client's consent. Yet in this case, the Louisiana Supreme Court concluded that decisions regarding the witnesses to call and the arguments to advance were no longer trial strategy but rather concerned the objectives of the defense.

The State and the Louisiana Supreme Court thus disagree as to what is meant when *McCoy* speaks of the "objectives" of a defense. The State respectfully submits that this refers to the broad decisions that are fundamental to a defendant's right to the assistance of counsel and due process, decisions such as whether to plead guilty, waive the right to trial by jury, testify in one's own behalf, or forego an appeal. *McCoy, supra*, citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The error in the lower court's ruling is that it extends this right to strategic decisions which had always been within the exclusive authority of trial counsel to decide, and which remained so even in the wake of *McCoy, supra*. Under the Louisiana Supreme Court's broad application of *McCoy*, literally every tactical decision a defense attorney can make may now require the consent of the client, thus leading to the problems contemplated in *Gonzalez, supra.*

A trial court should not have the authority to tell a trained and qualified capital defense attorney how to manage mitigation evidence that the court took no part in preparing. In essence the Louisiana Supreme Court attempts to give the defendant the best of both worlds – the autonomy that comes with self-representation, but without the risk of harm that is

the natural byproduct thereof. As this Court noted in *Indiana v. Edwards*, 554 U.S. 164, 183-184 (2008):

> When a defendant appreciates the risks of foregoing counsel and chooses to do so voluntarily, the Constitution protects his ability to present his own defense even when that harms his case. In fact waiving counsel "usually" does so. *McKaskle v. Wiggins*, 465 U.S. 168, 177, n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); see also *Faretta*, 422 U.S., at 834, 95 S.Ct. 2525, 45 L.Ed.2d 562. We have nonetheless said that the defendant's "choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " *Ibid.* What the Constitution requires is not that a State's case be subject to the most rigorous adversarial testing possible – after all, it permits a defendant to eliminate all adversarial testing by pleading guilty. What the Constitution requires is that a defendant be given the right to challenge the State's case against him using the arguments he sees fit.

In the case below, the Louisiana Supreme Court relied on a number of authorities from other jurisdictions in determining that the defendant's Sixth Amendment rights were violated. However, all of those cases stand for the same proposition – that it is not error for either a trial court or defense counsel to acquiesce to a defendant's demands when a dispute arises over some facet of the defense. But these cases merely beg the question the court below was asked to resolve – what if counsel refuses to abide by a client's wishes?

The State suggests that this Court's prior jurisprudence, up to and including *McCoy*, allow an attorney to properly overrule a client's objections regarding trial strategy. The cases cited by the Louisiana Supreme Court as persuasive authority do not contradict this premise, but only clarify that if an attorney choses to accommodate a client's objections, it is neither error nor ineffective assistance of counsel, in light of the fact that it is the client who has to bear the consequences of the defense.

The Louisiana Supreme Court also looked to its prior holdings in attempting to resolve the issue, but again the authorities cited do not fit the facts as presented in the instant matter. The State further submits that Louisiana law does not provide broader relief than that afforded under the Sixth Amendment or United States Supreme Court jurisprudence. None of the Louisiana cases cited below fit the factual situation faced by the trial court, nor do they answer the specific question now presented.

In *State v. Horn*, 251 So.3d 1069 (La. 2018), one of the Louisiana Supreme Court decisions cited below, the defendant's attorney conceded guilt over the objections of the defendant, and thus that case fits squarely within the authority of *McCoy*, and fails to address the specific question presented. In *State v. Felde*, 422 So.2d 370 (La. 1982), the Louisiana Supreme Court held that a defendant charged with first degree murder had a constitutional right to impose a condition of employment on his counsel. That condition was that defense counsel would not attempt to obtain any verdict other

than not guilty by reason of insanity or guilty of first degree murder with capital punishment. This latter condition prevented trial counsel from asking the jury for life imprisonment in the event that the defendant was convicted of capital murder. The issue addressed by the Louisiana Supreme Court was whether it was error to abide by that agreement.

In determining that it was not error, the court noted that Felde was mentally competent and enrolled as co-counsel, and had a constitutional right to impose a condition of employment on his attorney. But each of the imposed objectives of litigation in *Felde* dealt with the ultimate goals of the proposed defense – the guilt of the accused and the subsequent penalty to be imposed. None of these conditions of employment affected the tactical decisions made by counsel which were designed to accomplish the defendant's objectives. Accordingly, *Felde* should not have been considered binding precedent in the Louisiana Supreme Court on the specific issue presented for review.

Likewise, in *State v. Bordelon*, 33 So.3d 842 (La. 2009), the court dealt with a situation where defense counsel informed the trial court at the start of a capital sentencing hearing that the defendant had instructed him not to present a case in mitigation. After an extensive colloquy with the defendant, the trial court made a determination that the defendant had knowingly and intelligently waived his right to present mitigation evidence. It does not present a factual situation similar to the case at bar, in that there was no disagreement

between the defendant and his counsel regarding the objectives of the defense.

As with those cases from other jurisdictions considered by the court below, *Felde* and *Bordelon* stand only for the proposition that it is not error for an attorney to abide by conditions imposed by the client, even when those conditions presumably conflict with an attorney's obligation to provide effective representation. Again, these opinions beg the question actually presented in the case below.

The State respectfully submits that these cases merely reflect the principle that a defendant's autonomy interests under the Sixth Amendment are obviously so strong that the ultimate decisions in a criminal prosecution must remain with the client alone. However, those interests also permit counsel to defer to a client's wishes even when the dispute arises within an area in which counsel has the authority to act without the client's consent, such as determining which witnesses to call and which arguments to advance. If the purpose of the Sixth Amendment is to provide a defendant with effective representation, and not merely counsel for the sake of having counsel, then a defendant may have to accept some unpleasant concessions to accomplish the overall objectives of his defense.

Based on the foregoing, the State of Louisiana respectfully submits that the trial court did not misinform the defendant as to his Sixth Amendment right to limit the mitigation evidence presented during the

penalty phase. To the contrary, the ruling of the trial court correctly recognized that the decisions to call certain witnesses and advance certain arguments belonged to trial counsel alone, and did not require the consent of the defendant. Accordingly, the defendant's *Faretta* waiver in this matter was in fact free and voluntary, contrary to the ruling of the Louisiana Supreme Court.

The ruling of the Louisiana Supreme Court in this matter will now require trial courts to improperly intervene in attorney-client relationships and even overrule trained capital litigators

As a consequence of the ruling below, the State fears that trial courts will now be required to intervene in attorney-client disputes in Louisiana, even when the dispute does not concern the ultimate objective of a defense. If a defendant can overrule his own attorney regarding the witnesses to call and the arguments to advance, then any decision previously within the sole authority of an attorney is now subject to control by the client.

Even if a trial court decides not to expressly dictate trial strategy to trial counsel, the alternative is to provide the type of legal education to a defendant that this Court has not heretofore contemplated. A relevant discussion of this issue was made by this Court in *Gonzalez v. United States*, *supra*, and bears repeating in full:

Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. *These matters can be difficult to explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote.* In exercising professional judgment, moreover, the attorney draws upon the expertise and experience that members of the bar should bring to the trial process. In most instances the attorney will have a better understanding of the procedural choices than the client; or at least the law should so assume. See *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); see also *Tollett v. Henderson*, 411 U.S. 258, 267-268, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); cf. ABA Standards, *supra*, at 202 ("Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge's charge while the client 'plucks at the attorney's sleeve' offering gratuitous suggestions"). To hold that every instance of waiver requires the personal consent of the

client himself or herself would be impractical.[1]

This analysis has a particular relevance to the mitigation case prepared by the defense team in this matter, as revealed through the exchange of expert witness reports prior to trial. The defense team, composed of experienced death penalty lawyers certified under Louisiana's capital defense certification guidelines, had prepared a mitigation case built in no small part on the defendant's personal history. The source of that information was Judy Corteau, the defendant's mother.

Keeping this witness off of the stand would therefore raise another pertinent issue – what if a defendant's refusal to allow one witness to testify renders other parts of his case-in-chief (to which he has no objection) inadmissible? That very scenario would potentially have played out if the trial court had taken the Louisiana Supreme Court's preferred course of action, and mandated that defense counsel abide by the defendant's wishes and not put the defendant's mother on the stand.

While the defendant ultimately chose not to present any mitigation evidence, the State did have the benefit of reviewing the expert mitigation reports

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[1] In a sense, the foregoing considerations from *Gonzalez* are reflected in the holdings in *Faretta* and its progeny, insofar as this Court does not require a defendant to demonstrate any level of legal proficiency before he can be allowed to knowingly forgo the assistance of counsel and represent himself.

prepared by Drs. Melissa Piasecki and Mark D. Cunningham, whom the defense had intended to call during the penalty phase. Accordingly, the State was anticipating opinion testimony about the defendant's culpability and potential for rehabilitation which was based on the defendant's personal medical history and family background. Yet those reports, particularly Cunningham's, did not reference actual medical records as the foundation for those opinions, but rather a patient history of the defendant provided by his mother. Without the defendant's mother taking the stand and laying a foundation for the experts to follow, the State respectfully submits that any opinion testimony based on that medical history would have been severely undermined, if not outright inadmissible.[2]

The State respectfully submits that it would not be realistic to expect the trial court to educate a defendant on the domino effect his request would have on the admissibility of his overall mitigation defense, to the point that his subsequent waiver of counsel would be considered knowing. Yet to accept the rationale of the court below, no defendant could knowingly waive counsel unless he had a sufficient legal grounding in procedural rules so as to recognize how his decisions would play out in a trial setting.

It is not the role of a trial judge to manage a capital defense. As the record in this matter demonstrates,

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[2] Pursuant to La.C.E. art. 705(B).

the defendant's legal team was comprised of experienced death penalty litigators who were properly certified under Louisiana's capital defense guidelines. Conversely, this was the first capital trial for the presiding judge. Yet the Louisiana Supreme Court ruling now faults the trial judge for not striking certain witnesses from defense counsel's case-in-chief merely at the request of the defendant, without any regard for the impact it would have on what remained of the defense.

The Louisiana Supreme Court was properly concerned with guarding this capital defendant's constitutional right to the assistance of counsel. But the ruling, even if unintentionally, actually undermines that right. Strategic decisions which are required to build an effective mediation defense, particularly those involving the witnesses to call, no longer belong exclusively to trained capital defense counsel. According to the court below, the final authority on such decisions now rests with the client. This has the potential to weaken the Sixth Amendment protections afforded to a capital defendant, who may not (and probably won't) understand how his subjective desires conflict with the foundations of an effective mediation defense. The remedy for this problem, the State would respectfully suggest, is already found in this Court's authorities culminating in *McCoy* – to leave the management of trial strategy to the trial attorney.

Any alleged error in the trial court's ruling which granted the defendant's *Faretta* request was not structural

The Louisiana Supreme Court characterized the trial court's error as structural because it allowed defense counsel "to usurp control of an issue within (defendant's) sole prerogative," citing *Sullivan v. Louisiana* 508 U.S. 275 (1993). However, unlike a decision to plead guilty, confess guilt or testify in one's own defense, the decision to call David Brown's mother to the stand was not within the defendant's sole prerogative. In fact, that decision was not even solely under the control of the defense team as a whole. The State could have called the defendant's mother as a witness, especially if the mitigation case prepared by defense counsel played out as expected. Because Corteau was practically the only source of the defendant's family and medical information relied on by the mitigation experts, the State would have had an interest in testing the veracity of her information under cross examination.

The defendant's subjective concerns in this matter are different from decisions regarding whether to confess guilt, plead guilty, waive a jury or testify in one's defense. In those matters, the defendant truly has the last say. This case presents a fundamentally different situation, for even if keeping his mother off of the witness stand could be characterized as an objective of the defense, it was not one either he or his defense attorneys could actually enforce.

The State respectfully submits that the defendant's stated concerns about his mother are not the sort of objective that a trial attorney must honor, but only an incidental consequence of the proposed mitigation defense. The Sixth Amendment exists to protect a defendant's rights, not the reputation of non-parties to a prosecution. What the public would think of Judy Corteau if she testified was completely irrelevant to the proceedings in this matter, and the trial judge was completely within his rights to discount such considerations. But if the Sixth Amendment analysis now shifts to a defendant's purely subjective aspirations, which is what the Louisiana Supreme Court has done in this matter, then there is a strong possibility that the adversarial process will cease to function effectively anytime a defendant and counsel don't see eye to eye.

In this light, even if it was error for defense counsel to insist on calling Corteau and the judge sanctioning that decision, that error can only be described as trial and not structural. Trial errors, so-called because the errors occurred during the presentation of a case to the jury, are those whose effects may "be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 307-308 (1991). These include "most constitutional errors." *Id.*, at 306. In contrast, structural errors "defy analysis by 'harmless-error' standards" because they affect "the framework within

which the trial proceeds," and are not "simply an error in the trial process itself." *Id.*, at 309-310.

As this Court first recognized in *Chapman v. California*, 386 U.S. 18 (1967) and later elaborated on in *Fulminante*, 499 U.S. at 306, a constitutional error does not automatically require reversal of a conviction, and under that general rule the court has applied harmless-error analysis to a wide range of errors, recognizing that most constitutional errors can be harmless.

The record demonstrates that in this case, the defendant did not experience the total deprivation of the right to counsel at trial, the structural error identified in *Gideon v. Wainwright*, 372 U.S. 335 (1963). To the contrary, the defendant not only enjoyed the assistance of capital trial counsel throughout the guilt phase, but also during the entire preparation of his penalty-phase defense. Thus, even though the defendant represented himself during the single day of the penalty hearing, he nonetheless enjoyed the assistance of counsel in the investigation and development of his mitigation evidence, the procuring of two expert witnesses on mitigation, and in the exercise of the compulsory process of the court to obtain the presence of all defenses witnesses needed for trial.

The State also submits that the defendant enjoyed the actual assistance of counsel when evidence of the aggravating factors supporting the death penalty was introduced, since this occurred entirely during the guilt phase. The prosecution's witnesses were each

subjected to vigorous cross examination by the defendant's capital trial counsel. During the penalty phase, the State simply reintroduced the evidence and testimony submitted during the guilt phase *in globo*, and thus there was neither opportunity nor need for the defendant to re-exercise his right to confront those witnesses, since he had already done so.[3]

Accordingly, the State respectfully submits that any error in the trial judge's ruling should be considered trial error as opposed to structural, since the effect of the allegedly erroneous ruling may be quantitatively assessed in the context of the other evidence presented at trial, in order to determine whether it was harmless beyond a reasonable doubt. But for the limited testimony of two victim impact witnesses, the State's entire case justifying the imposition of the death penalty was introduced while the defendant was still represented by counsel. A reviewing court may therefore look at the overwhelming evidence supporting the imposition of the death penalties which was introduced while the defendant was represented by counsel and determine whether the sentences recommended by the jury were surely unattributable to the trial court's alleged error.

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[3] The only witnesses added during the penalty phase were two relatives of the victims, who offered only victim impact testimony.

The questions presented warrant review

A jury of the defendant's peers, recognizing the heinousness of his crimes, recommended three death sentences for the defendant. The victims, the prosecution, the trial court and the potential jurors on remand should not have to bear the burden of retrying the defendant for the purpose of reinstating the capital sentences the original jury unanimously imposed. Retrial is particularly burdensome since the defendant knowingly and intelligently, and without being misinformed, waived his right to counsel on the eve of the penalty phase of his capital trial. Retrying the sentencing hearing would pose a particular burden on the family members of the victims. As one of the concurring opinions rendered below notes:

> Worse yet, the family and friends of the victims are now subjected to uncertainty as to whether appropriate punishment will be meted out to one who appears so deserving of the maximum sanction that can be provided under the criminal law of the state. They also will undoubtedly have further anxiety attendant to the prospect of enduring another trial on the penalty phase in this case. (McCallum, J., concurring.)

Granting the petition for certiorari would give this Honorable Court the opportunity to redress this grievance, rectify the alleged error of the court below and properly apply the Sixth Amendment principles reflected in *McCoy v. Louisiana, supra.* Both litigators and trial judges in Louisiana have an interest in

knowing what sort of trial strategy decisions have been affected by the Louisiana Supreme Court's interpretation of *McCoy*. This Court should accordingly grant the petition for a writ of certiorari to reverse the Louisiana Supreme Court's erroneous decision.

CONCLUSION

The State of Louisiana respectfully submits that the petition for a writ of certiorari be granted.

Respectfully submitted,

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